[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12037
Non-Argument Calendar

D.C. Docket No. 6:19-cv-01723-WWB-GJK

JESSICA GRAULAU,

Plaintiff-Appellant,

versus

CREDIT ONE BANK, N.A.,
a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(May 6, 2021)

Before LAGOA, BRASHER, and EDMONDSON, Circuit Judges.

PER CURIAM:

Plaintiff Jessica Graulau, proceeding pro se,[1] appeals the district court's order (1) dismissing Plaintiff's civil action against Defendant Credit One Bank, N.A. ("Credit One") and (2) referring Plaintiff's case to arbitration. In her complaint, Plaintiff asserted against Credit One violations of the Telephone Consumer Protection Act, 47 U.S.C. § 277 ("TCPA"), and of the Florida Consumer Collection Practices Act, Fla. § 559.72 ("FCCPA"). No reversible error has been shown; we affirm.

This appeal arises from alleged attempts by Credit One to collect Plaintiff's consumer debt. Plaintiff says she -- over a period of fifteen months -- received thousands of robocalls from Credit One, despite having instructed Credit One's agents to stop calling her.

In January 2018, Plaintiff filed a counseled complaint against Credit One, asserting violations of the TCPA and the FCCPA ("Graulau I"). The parties later filed a "Joint Stipulation Dismissing and Referring Case to Arbitration." In pertinent part, the joint stipulation provided that "Plaintiff, through counsel, . . . agrees this case is subject to arbitration pursuant to the cardholder agreement."

[1] We read liberally briefs filed by pro se litigants. See Timson v. Sampson, 518 F.3d 870, 874 (11th Cir. 2008).

The parties requested that the district court dismiss the case and refer the matter to binding arbitration. On 10 April 2018, the district court entered an order referring Graulau I to arbitration and dismissing the case.

Then, in September 2019, Plaintiff filed pro se the civil action underlying this appeal. Plaintiff again asserted against Credit One claims for violation of the TCPA and the FCCPA based on the same factual allegations asserted in Graulau I. Plaintiff alleged that she had been unable to file an arbitration demand due to a lack of financial resources.

Credit One moved to dismiss Plaintiff's complaint and to enforce the 10 April 2018 order entered in Graulau I.

A magistrate judge issued a report and recommendation ("R&R"), recommending that the district court grant Credit One's motion, refer Plaintiff's claims to arbitration, and dismiss the case. The magistrate judge noted the parties' joint stipulation in Graulau I that Plaintiff's claims against Credit One were subject to binding arbitration. The magistrate judge then determined that Plaintiff had failed to show that arbitration would be prohibitively expensive or that enforcement of the arbitration agreement would preclude Plaintiff from effectively vindicating her rights. Plaintiff filed no timely objections to the R&R.[2]

[2] Generally speaking, a party that fails to object to the magistrate judge's R&R waives the right to challenge on appeal a district court's order based on the unobjected-to factual and legal

The district court adopted the R&R, granted Credit One's motion, ordered Plaintiff to "submit to arbitration in accordance with the Joint Stipulation," and dismissed the case.

We review de novo a district court's order compelling arbitration. See Emp'rs Ins. of Wausau v. Bright Metal Specialties, Inc., 251 F.3d 1316, 1321 (11th Cir. 2001).

Through the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), Congress "declare[d] a national policy favoring arbitration of claims that parties contract to settle in that manner." See Burch v. P.J. Cheese, 861 F.3d 1338, 1345 (11th Cir. 2017) (quotation omitted). We have said that this "strong federal preference for arbitration of disputes . . . must be enforced where possible." See Musnick v. King Motor Co., 325 F.3d 1255, 1258 (11th Cir. 2003). Among other things, the FAA authorizes a district court "to issue an order compelling arbitration if there has been a failure, neglect, or refusal to comply with an arbitration agreement." Id. (citing 9 U.S.C. § 4).

In ruling on a motion to compel arbitration pursuant to section 4 of the FAA, a district court follows a two-step inquiry. Klay v. PacifiCare Health Sys., Inc.,

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conclusions. See 11th Cir. R. 3-1. That waiver rule does not apply in this case, however, because the R&R never informed Plaintiff about the time for objecting and about the consequences on appeal for failing to object. See id.

389 F.3d 1191, 1200 (11th Cir. 2004). First, the district court must "determine whether the parties agreed to arbitrate the dispute." Id. If so, the district court must then determine "whether 'legal constraints external to the parties' agreement foreclosed arbitration.'" Id.

About the first step, that Plaintiff and Capital One agreed to arbitrate the matters at issue in this case is clear. In Graulau I, the parties stipulated that Plaintiff's claims -- claims identical to those asserted in this case -- were subject to binding arbitration under the applicable cardholder agreement.

Nevertheless, Plaintiff now contends that the arbitration agreement is unenforceable for these reasons: (1) Credit One waived its right to arbitration; (2) Plaintiff lacks the financial resources to pay the costs of arbitration; and (3) Plaintiff's claims are exempt from arbitration under 28 U.S.C. § 654(a) and Middle District of Florida Local Rule 8.02(a). We are unpersuaded.

First, nothing evidences that Credit One waived its right to arbitration. To establish waiver, a party must show two things: "(1) the party seeking arbitration substantially participated in litigation to a point inconsistent with an intent to arbitrate; and (2) that this participation resulted in prejudice to the opposing party." Burch, 861 F.3d at 1350. Never has Credit One engaged in substantial participation in this litigation. To the contrary -- in both this case and in Graulau I

-- Credit One's conduct consisted only of efforts to enforce the arbitration agreement.

Plaintiff's argument about the cost of arbitration also fails. An arbitration agreement may be rendered unenforceable when arbitration would be prohibitively expensive. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000). The party seeking to avoid arbitration based on cost bears the "burden of establishing that enforcement of the agreement would preclude him from effectively vindicating his federal statutory right in the arbitral forum." Musnick, 325 F.3d at 1259 (quotations and alterations omitted). To satisfy this burden, a party "has an obligation to offer evidence of the amount of fees he is likely to incur, as well as of his inability to pay those fees." Id. at 1260.

Here, Plaintiff offered no specific evidence about the costs she might incur in arbitration. Plaintiff's mere conclusory assertion that she lacks the financial resources to pay for arbitration is not enough to invalidate the arbitration agreement. See Musnick, 325 F.3d at 1260 (in deciding the enforceability of an arbitration agreement's fee-shifting provision, concluding a statement that plaintiff would "be unable to pay" a potential award of attorney's fees was speculative and "wholly inadequate to establish that the arbitration would result in prohibitive costs that force him to relinquish his claim under Title VII.").

We also reject Plaintiff's arguments under 28 U.S.C. § 654 and the Middle District of Florida's local rules: provisions that are inapplicable to the FAA-based arbitration agreement at issue in this case. See 28 U.S.C. § 651(e) (the statutory provisions in 28 U.S.C. §§ 651 et seq. "shall not affect title 9, United States Code."); M.D. Fla. Local Rule 8.01(a) (repealed 1 February 2021) (implementing rules in accord with 28 U.S.C. §§ 651-58).

Plaintiff has failed to show that the parties' arbitration agreement is invalid or unenforceable. We affirm the district court's order dismissing the case and referring the case to arbitration.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 20-12037

District Court Docket No.
6:19-cv-01723-WWB-GJK

JESSICA GRAULAU,

Plaintiff - Appellant,

versus

CREDIT ONE BANK, N.A.,
a foreign corporation,

Defendant - Appellee

Appeal from the United States District Court for the
Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: May 06, 2021
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna H. Clark

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JESSICA GRAULAU,

Plaintiff,

v. Case No: 6:19-cv-1723-Orl-78GJK

CREDIT ONE BANK, N.A.,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion to Dismiss and Enforce Order Dismissing and Referring Case to Arbitration (Doc. 9). United States Magistrate Judge David A. Baker issued a Report and Recommendation (Doc. 15), in which he recommends that the Motion be granted.

After a de novo review of the record, and noting that no objections[1] were timely filed, the Court agrees entirely with the analysis in the Report and Recommendation.

Therefore, it is **ORDERED** and **ADJUDGED** as follows:

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[1] In lieu of an objection, Plaintiff filed a Notice of Appeal (Doc. 16), which purports to appeal the Report and Recommendation to the Eleventh Circuit. However, it is well-settled that a Report and Recommendation is not a final and appealable order. *See Perez-Priego v. Alachua Cty. Clerk of Court*, 148 F.3d 1272, 1273 (11th Cir. 1998). Therefore, this Court retains jurisdiction over the matter. *See Brown v. Glob. Emp't Sols., Inc.*, 236 F. Supp. 3d 1299, 1300 n.1 (N.D. Ga. 2017) ("[T]he filing of an appeal from a nonappealable order does not deprive [the district] court of jurisdiction.").

On May 22, 2020, Plaintiff also filed a Motion Directed to Assigned District Judge to Request Vacant of Magistrate Judge (Doc. 26), wherein she asks this Court to reject the Report and Recommendation. To the extent that Plaintiff intended the motion to act as an objection to the Report and Recommendation, it was not timely. *See* 28 U.S.C. § 636(b).

1. The Report and Recommendation (Doc. 15), is **ADOPTED** and **CONFIRMED** and made a part of this Order.
2. Defendant's Motion to Dismiss and Enforce Order Dismissing and Referring Case to Arbitration (Doc. 9) is **GRANTED**. Plaintiff shall submit to arbitration in accordance with the Joint Stipulation.
3. The Clerk is directed to terminate all pending motions and close this case.

DONE AND ORDERED in Orlando, Florida on May 28, 2020.

WENDY W. BERGER
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JESSICA GRAULAU,

Plaintiff,

v.

Case No: 6:19-cv-1723-Orl-78GJK

CREDIT ONE BANK, N.A.,

Defendant.

REPORT AND RECOMMENDATION[1]

This cause came on for consideration without oral argument on the following motion:

MOTION: DEFENDANT, CREDIT ONE BANK, N.A.'S MOTION TO DISMISS AND ENFORCE ORDER DISMISSING AND REFERRING CASE TO ARBITRATION AND INCORPORATED MEMORANDUM OF LAW (Doc. No. 9)

FILED: November 5, 2019

THEREON it is RECOMMENDED that the Motion be GRANTED.

I. BACKGROUND.

On September 5, 2019, Plaintiff filed a Complaint against Defendant for violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* and Florida Consumer Collection Practices Act, Fla. Stat. § 559.72. Doc. No. 1. In her Complaint, Plaintiff references a related civil action in the Middle District of Florida, Orlando Division: 6:18-cv-106-Orl-ACC-DCI. *Id.* at 3. The Complaint alleges Plaintiff signed an account agreement for a credit card with Defendant, that the account agreement Plaintiff entered with Defendant incorporated an arbitration agreement and

[1] Magistrate Judge David A. Baker substituting for Magistrate Judge Gregory J. Kelly.

that Plaintiff sent a notice via email in May 2013 "refusing arbitration for Account agreement." *Id.* at 5. Plaintiff alleges that between May 7, 2013 and January 31, 2017, she received several thousand phone calls from an automatic dialing system utilized by Defendant to collect on Plaintiff's account. *Id.* at 6. Plaintiff alleges that after filing the previous action in this Court, the parties entered a joint stipulation for voluntary dismissal without prejudice and referral to arbitration. *Id.* at 9. At the time, Plaintiff was represented by counsel. *Id.* On April 10, 2018, an order was entered dismissing the case and referring it to arbitration. *Id.* Plaintiff alleges she has been unable to file an arbitration demand due to lack of financial resources and Defendant has not taken any action to comply with the Court's referral to arbitration. *Id.* at 10.

On November 5, 2019, Defendant filed a Motion to Dismiss and Enforce Order Dismissing and Referring Case to Arbitration and Incorporated Memorandum of Law ("Motion to Dismiss"). Doc. No. 9. Essentially, Defendant argues that Plaintiff is bound by her previous stipulation that this matter is subject to arbitration and the Court no longer has jurisdiction to adjudicate it on that basis. *Id.* at 2-3. Defendant asks that this matter be dismissed and the parties' stipulation and the Court's earlier order enforced. *Id.*

On November 12, 2019, Plaintiff filed a Motion to Strike Defendant's Motion to Dismiss (the "Response").[2] Doc. No. 10. Plaintiff acknowledges the stipulation but maintains she is entitled to pursue this cause of action in spite of the Court's previous order referring this claim to arbitration. Doc. No. 10 at 3-4.

II. APPLICABLE LAW.

The Federal Arbitration Act ("FAA") provides that a written arbitration agreement in any contract involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds

[2] The Court treats the Motion to Strike as a response to the Motion to Dismiss. Doc. No. 13.

as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The existence of a valid arbitration agreement is a threshold issue for determining the propriety of a motion to compel arbitration. *Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir. 2004). If the Court finds that no arbitration agreement exists, the Court "cannot compel the parties to settle their dispute in an arbitral forum." *Id.* Thus, when a party moves to compel arbitration, the FAA states that "[t]he court shall hear the parties, *and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue* ... shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (emphasis added). However, "[i]f the making of the arbitration agreement ... be in issue, the court shall proceed summarily to the trial thereof." *Id.* Furthermore, if the party seeking to avoid arbitration has not requested a jury trial as to the issue of whether an arbitration agreement has been made, "the court shall hear and determine such issue." *Id.*

A motion to compel arbitration is generally treated as a motion to dismiss for subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). *Owings v. T-Mobile USA, Inc.*, 978 F. Supp. 2d 1215, 1222 (M.D. Fla. 2013). Motions to dismiss based on subject matter jurisdiction come in two forms, facial attacks and factual attacks. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990). A facial attack looks to the four corners of the complaint to consider whether subject matter jurisdiction is sufficiently alleged. *Id.* at 1529. The allegations of the Complaint are accepted as true for purposes of the motion to dismiss. *Id.* A factual attack relies on matters outside the pleadings, such as testimony or affidavits. *Id.* When a factual attack is employed, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court for evaluating for itself the merits of jurisdictional claims." *Id.* (quoting *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir.), *cert.*

denied, 454 U.S. 897 (1981)). Generally, motions to compel arbitration are treated as a factual attack because they require reliance on an extrinsic document which deprives the court of its power to adjudicate a plaintiff's claim. *Mason v. Coastal Credit, LLC*, No. 3:18-cv-835, 2018 WL 6620684, at *5 (M.D. Fla. Nov. 16, 2018).

III. ANALYSIS.

Defendant seeks to have this matter referred to arbitration again based on the parties' Joint Stipulation in the earlier litigation and the Court's previous order referring the matter to arbitration. The Joint Stipulation, filed with the Court, provides that: "Plaintiff, through counsel, . . . agrees this case is subject to arbitration pursuant to the cardholder agreement. . . . The parties, therefore, stipulate to allow the Court to dismiss this case in its entirety and refer the entire matter to binding arbitration." *Jessica Graulau v. Credit One Bank, N.A.*, No. 6:18-cv-106, Doc. Nos. 11 (Apr. 9, 2018).

Despite having previously stipulated to binding arbitration and the dismissal of her case, Plaintiff now claims she cannot afford arbitration and should be permitted to maintain her case in ~~federal court~~. Doc. No. 10 at 3. Plaintiff alleges in her Complaint that the American Arbitration Association does not waive fees and costs for indigent claimants but, in her response to the Motion, Plaintiff fails to provide any detail as to the expenses she may incur or to make any substantive showing that arbitration is prohibitively expensive in this case. *Hudson v. P.I.P., Inc.*, No. 19-11004, 2019 U.S. App. LEXIS 34843, at *5 (11th Cir. Nov. 22, 2019) ("A party seeking to avoid arbitration . . . has the burden of establishing that enforcement of the agreement would preclude him from effectively vindicating his federal statutory right in the arbitral forum.") (internal citations omitted); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000); *see Anders v. Hometown Mortg. Servs.*, 346 F.3d 1024, 1028 (11th Cir. 2003) (party bears the burden of

showing the likelihood of incurring such costs and the inability to pay to such costs); *Musnick v. King Motor Co.*, 325 F.3d 1255, 1260 (11th Cir. 2003) (party has obligation to offer evidence of the amount of fees he is likely to incur, as well as of his inability to pay those fees). Plaintiff has not demonstrated that the enforcement of the agreement would preclude her from effectively vindicating her rights, it is even unclear which party is responsible for the costs of arbitration under the agreement as Plaintiff has failed to include the entire arbitration agreement. Doc. No. 1-1 at 1.

The Court finds that Plaintiff, with the assistance of counsel, stipulated that this claim should be referred to binding arbitration and the Court ordered the matter referred to arbitration. Plaintiff has failed to demonstrate there is any reason not to enforce the earlier stipulation and Court order. The Court recommends that the Motion be granted, that Plaintiff's claim be referred to arbitration, that this case be dismissed, and that this matter be closed on the Court's docket.

Accordingly, it is **RECOMMENDED** that the Motion (Doc. No. 9) be **GRANTED as follows:**

1. The case be **REFERRED** to arbitration;
2. The case be **DISMISSED**; and
3. The Clerk be directed to **CLOSE** the file.

RECOMMENDED in Orlando, Florida, on February 5, 2020.

David A. Baker

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12037-J

JESSICA GRAULAU,

Plaintiff-Appellant,

versus

CREDIT ONE BANK, N.A.,
a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Jessica Graulau seeks leave to proceed in forma pauperis ("IFP") to appeal the District Court's dismissal of her pro se complaint for lack of subject matter jurisdiction.

In 2018, Ms. Graulau filed a counseled civil complaint in the Middle District of Florida against Credit One Bank ("Credit One"), alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 et seq., and the Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. Ann. § 559.55 et

seq. Ms. Graulau's complaint alleged that: (1) she signed an account agreement for a credit card with Credit One, which incorporated an arbitration agreement; and (2) between May 2013 and January 2017, she received several thousand phone calls from an automatic dialing system utilized by Credit One to collect on her account, in violation of the TCPA and FCCPA. In April 2018, the parties entered into a joint stipulation, in which Ms. Graulau agreed that the case was "subject to arbitration pursuant to the cardholder agreement," and both parties stipulated to allowing the court to "dismiss the case in its entirety and refer the entire matter to binding arbitration." Pursuant to the joint stipulation, the District Court entered an order dismissing the case and referring the matter to arbitration.

In September 2019, Ms. Graulau filed a pro se complaint against Capital One, reiterating the same TCPA and FCCPA claims as her previous complaint. Ms. Graulau noted that she previously filed a similar action, which had been dismissed without prejudice after the parties entered into the joint stipulation. However, she alleged that she had been unable to file an arbitration demand due to lack of financial resources, and that Credit One had not taken any action to comply with the District Court's arbitration referral.

Capital One filed a motion to dismiss Ms. Graulau's 2019 complaint, arguing that it sought to sidestep the court's order from the previous action referring this matter to arbitration. Capital One requested that the District Court dismiss the

complaint and enforce the joint stipulation compelling arbitration. Ms. Graulau filed a response, asserting that she had made reasonable efforts to arbitrate her claim, but was unable to find new legal representation and lacked the financial resources to pay the arbitration fees.

A magistrate judge entered a report and recommendation ("R&R"), recommending that Capital One's dismissal motion be granted. The R&R noted that, in the joint stipulation, Ms. Graulau agreed, through her counsel, to dismiss the case in its entirety and refer it to arbitration. The R&R concluded that Ms. Graulau failed to allege or show that arbitration would be prohibitively expensive, or that there was any reason not to enforce the joint stipulation.

In lieu of filing objections to the R&R, Ms. Graulau filed a notice of appeal, which purported to appeal the R&R. After the time to file objections expired, the District Court entered an order adopting the R&R, granting Capital One's dismissal motion, and dismissing Ms. Graulau's instant complaint.

Ms. Graulau filed a notice of appeal, listing the District Court's order adopting the R&R and dismissing her pro se complaint. She then filed a motion in the District Court for leave to proceed in forma pauperis ("IFP") on appeal, which the District Court denied. Ms. Graulau now moves this Court for leave to proceed IFP on appeal.

* * *

Ms. Graulau has submitted an amended affidavit alleging poverty, which is accepted as true. See Martinez v. Kristi Kleaners, Inc., 364 F.3d 1305, 1307 (11th Cir. 2004). Because she seeks leave to proceed IFP, the appeal is subject to a frivolity determination. "[A]n action is frivolous if it is without arguable merit either in law or fact." Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir. 2002) (quotation omitted).

Ms. Graulau's appeal is not frivolous. Her complaint alleged that arbitration was prohibitively expensive for her because she was indigent. She attached an affidavit from a Credit One employee stating that Ms. Graulau would be responsible for paying "all charges incurred in accordance with . . . the Arbitration Agreement." She also submitted an affidavit showing that she had no assets and her sole source of income was disability benefits.

When "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92, 121 S. Ct. 513, 522 (2000). This Court has held that the invalidation of an arbitration agreement as prohibitively expensive must be assessed on a "case-by-case" basis. Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1259 (11th Cir. 2003).

Liberally construing Ms. Graulau's pro se filings, she has a non-frivolous argument that her arbitration agreement is unenforceable because arbitration would be prohibitively expensive for her.

Ms. Graulau's motion for leave to proceed IFP is thus GRANTED.

UNITED STATES CIRCUIT JUDGE

General Docket
United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 20-12037
Nature of Suit: 3890 Other Statutory Actions
Jessica Graulau v. Credit One Bank, N.A.
Appeal From: Middle District of Florida
Fee Status: IFP Granted

Docketed: 06/03/2020
Termed: 05/06/2021

Case Type Information:
1) Private Civil
2) Federal Question
3) -

Originating Court Information:
District: 113A-6 : 6:19-cv-01723-WWB-GJK
Civil Proceeding: Wendy W. Berger, U.S. District Judge
Secondary Judge: David A. Baker, U.S. Magistrate Judge
Date Filed: 09/05/2019
Date NOA Filed:
06/02/2020

Prior Cases:
None

Current Cases:
None

JESSICA GRAULAU	Plaintiff - Appellant	Jessica Graulau Direct: 407-721-6303 [NTC Pro Se] PO BOX 721037 ORLANDO, FL 32872
versus		
CREDIT ONE BANK, N.A., a foreign corporation	Defendant - Appellee	Michael Schuette Direct: 813-890-2472 [COR LD NTC Retained] Sessions Israel & Shartle, LLC Firm: 813-890-2460 3350 BUSCHWOOD PARK DR STE 195 TAMPA, FL 33618 Dayle Marie Van Hoose Direct: 813-890-2463 [COR LD NTC Retained] Sessions Israel & Shartle, LLC Firm: 813-890-2460 3350 BUSCHWOOD PARK DR STE 195 TAMPA, FL 33618

JESSICA GRAULAU,

Plaintiff - Appellant,

versus

CREDIT ONE BANK, N.A.,
a foreign corporation,

Defendant - Appellee

06/03/2020	6 pg, 312.57 KB	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Jessica Graulau on 06/02/2020. Fee Status: IFP Pending. USDC motion pending: MOTION to Appeal In Forma Pauperis. No hearings to be transcribed. Awaiting Appellant's Certificate of Interested Persons due on or before 06/17/2020 as to Appellant Jessica Graulau. Awaiting Appellee's Certificate of Interested Persons due on or before 07/01/2020 as to Appellee Credit One Bank, N.A. [Entered: 06/04/2020 09:52 AM]
06/04/2020	7 pg, 1.39 MB	USDC MOTION for leave to proceed in forma pauperis as to Appellant Jessica Graulau was filed on 06/02/2020. Docket Entry 29. [Entered: 06/04/2020 09:56 AM]
06/04/2020	2 pg, 693.54 KB	TRANSCRIPT INFORMATION form filed by Party Jessica Graulau. No hearings. [Entered: 06/04/2020 09:56 AM]
06/05/2020	4 pg, 620.71 KB	TRANSCRIPT INFORMATION form filed by Party Jessica Graulau. No hearings. [Entered: 06/09/2020 08:35 AM]
06/17/2020	1 pg, 65.19 KB	APPEARANCE of Counsel Form filed by Dayle Marie Van Hoose for Credit One Bank, N.A.. [20-12037] (ECF: Dayle Van Hoose) [Entered: 06/17/2020 03:21 PM]
06/17/2020	1 pg, 65.91 KB	APPEARANCE of Counsel Form filed by Michael Schuette for Credit One Bank, N.A.. [20-12037] (ECF: Michael Schuette) [Entered: 06/17/2020 03:25 PM]
06/17/2020	3 pg, 101.3 KB	Certificate of Interested Persons and Corporate Disclosure Statement filed by Attorney Michael Schuette for Appellee Credit One Bank, N.A.. On the same day the CIP is served, the party filing it must also complete the court's web-based stock ticker symbol certificate at the link here http://www.ca11.uscourts.gov/web-based-cip or on the court's website. See 11th Cir. R. 26.1-2(b). [20-12037] (ECF: Michael Schuette) [Entered: 06/17/2020 03:29 PM]
06/17/2020	11 pg, 1.22 MB	Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellant Jessica Graulau. [Entered: 06/18/2020 02:14 PM]
06/18/2020	1 pg, 14.56 KB	NOTICE OF CIP FILING DEFICIENCY to Jessica Graulau. You are receiving this notice because you have not completed the Certificate of Interested Persons (CIP). Failure to comply with 11th Cir. Rules 26.1-1 through 26.1-4 may result in dismissal of the case or appeal under 11th Cir. R. 42-1(b), return of deficient documents without action, or other sanctions on counsel, the party, or both. [Entered: 06/18/2020 08:52 AM]
07/09/2020	3 pg, 48.66 KB	USDC order denying IFP as to Appellant Jessica Graulau was filed on 07/08/2020. Docket Entry 33. [Entered: 07/09/2020 11:03 AM]
07/20/2020	12 pg, 2.9 MB	*MOTION to proceed IFP filed by Appellant Jessica Graulau. Opposition to Motion is Unknown [9143810-1]* [Entered: 07/22/2020 04:27 PM]
08/25/2020	5 pg, 284.37 KB	ORDER: Motion to proceed in forma pauperis filed by Appellant Jessica Graulau is GRANTED. [9143810-2] BBM [Entered: 08/25/2020 04:42 PM]
08/25/2020	2 pg, 16.54 KB	Briefing Notice issued to Appellant Jessica Graulau. The appellant's brief is due on or before 10/05/2020. The appendix is due no later than 7 days from the filing of the appellant's brief. [Entered: 08/25/2020 04:44 PM]
08/26/2020	2 pg, 312.41 KB	***Docketing error****MOTION Allows the Appellant's Appeal be heard on the original record and dispense with the appendix due to Appellant is a pro se proceedings as pauper. filed by Jessica Graulau. Opposition to Motion is Unknown. [9172982-1]* [20-12037]--[Edited 08/26/2020 by JC] (ECF: Jessica Graulau) [Entered: 08/26/2020 03:14 PM]
08/26/2020	3 pg, 683.89 KB	*MOTION Appeal from original record and dispense with the appendix. filed by Jessica Graulau. Opposition to Motion is Unknown. [9173044-1]* [20-12037] (ECF: Jessica Graulau) [Entered: 08/26/2020 03:30 PM]
09/17/2020	1 pg, 51.19 KB	ORDER: Appellant's "Motion to Appeal from Original Record and Dispense with the Appendix" is GRANTED. [9173044-2] CRW [Entered: 09/17/2020 10:03 AM]
10/01/2020	23 pg, 354.98 KB	Appellant's brief filed by Jessica Graulau. [20-12037] (ECF: Jessica Graulau) [Entered: 10/01/2020 03:10 PM]
10/02/2020		Received paper copies of EBrief filed by Appellant Jessica Graulau. [Entered: 10/06/2020 12:38 PM]
10/05/2020		Received THREE ADDITIONAL paper copies of EBrief filed by Appellant Jessica Graulau. [Entered: 10/09/2020 12:44 PM]
10/23/2020		Over the phone extension granted by clerk as to Attorney Michael Schuette for Appellee Credit One Bank, N.A.. Appellee's Brief due on 11/30/2020 as to Appellee Credit One Bank, N.A... [Entered: 10/23/2020 10:28 AM]
11/04/2020	2 pg, 16.97 KB	ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R. 42-2(c), this appeal is DISMISSED for want of prosecution because the appellant Jessica Graulau failed to file an appendix within the time fixed by the rules [Entered: 11/04/2020 03:29 PM]

11/05/2020	☐ 1 pg, 14.26 KB	Appeal clerically reinstated as to Appellant Jessica Graulau because appeal was erroneously dismissed on 11/04/2020. [Entered: 11/05/2020 10:19 AM]
11/05/2020	☐ 2 pg, 16.85 KB	Briefing Notice issued to Appellee Credit One Bank, N.A.. Appellee's brief is due on or before 12/07/2020, with the supplemental appendix, if any, due 7 days later. [Entered: 11/05/2020 10:30 AM]
11/10/2020	☐ 8 pg, 353.38 KB	*MOTION to vacate extension of time to file answer brief filed by Jessica Graulau. Opposition to Motion is Unknown. [9235123-1]* [20-12037] (ECF: Jessica Graulau) [Entered: 11/10/2020 05:40 PM]
12/07/2020	☐ 21 pg, 245.61 KB	Appellee's Brief filed by Appellee Credit One Bank, N.A.. [20-12037] (ECF: Michael Schuette) [Entered: 12/07/2020 10:51 AM]
12/07/2020	☐	Received paper copies of EBrief filed by Appellee Credit One Bank, N.A.. [Entered: 12/11/2020 12:17 PM]
12/10/2020	☐ 1 pg, 61.24 KB	ORDER: Appellant's "Motion Directed to the Court Requesting Vacate Extension of Time to File Answer Brief" is DENIED AS MOOT. Appellant's reply brief is due by January 11, 2021. [9235123-2] RJL (See attached order for complete text) [Entered: 12/10/2020 11:14 AM]
12/14/2020	☐ 103 pg, 8.16 MB	Supplemental Appendix [1 VOLUMES] filed by Appellee Credit One Bank, N.A.. [20-12037] (ECF: Michael Schuette) [Entered: 12/14/2020 12:25 PM]
12/14/2020	☐	Received paper copies of EAppendix filed by Appellee Credit One Bank, N.A.. 1 VOLUMES - 2 COPIES [Entered: 12/18/2020 09:28 AM]
12/18/2020	☐ 8 pg, 285.57 KB	*MOTION to strike Appellee's Appendix filed by Jessica Graulau. Opposition to Motion is Unknown. [9264547-1]* [20-12037] (ECF: Jessica Graulau) [Entered: 12/18/2020 03:01 PM]
12/23/2020	☐	Over the phone extension granted by clerk as to Attorney Michael Schuette for Appellee Credit One Bank, N.A.. Updated Awaiting Response to Motion. Due on 01/08/2021 as to Appellee Credit One Bank, N.A.. [Entered: 12/23/2020 08:35 AM]
12/31/2020	☐ 31 pg, 413.83 KB	Reply Brief filed by Appellant Jessica Graulau. [20-12037] (ECF: Jessica Graulau) [Entered: 12/31/2020 07:14 AM]
01/06/2021	☐	Received paper copies of EBrief filed by Appellant Jessica Graulau. [Entered: 01/08/2021 11:17 AM]
01/08/2021	☐ 5 pg, 113.52 KB	RESPONSE to Motion filed by Appellant Jessica Graulau [9264547-2] filed by Attorney Michael Schuette for Appellee Credit One Bank, N.A.. [20-12037] (ECF: Michael Schuette) [Entered: 01/08/2021 11:32 AM]
01/19/2021	☐ 1 pg, 131.74 KB	ORDER: Appellant's "Motion Directed to the Court to Strike Appendix of Appellee" is DENIED. [9264547-2] AJ (See attached order for complete text) [Entered: 01/19/2021 02:13 PM]
05/06/2021	☐ 1 pg, 81.92 KB	Judgment entered as to Appellant Jessica Graulau. [Entered: 05/06/2021 12:01 PM]
05/06/2021	☐ 9 pg, 177.65 KB	Opinion issued by court as to Appellant Jessica Graulau. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions. [Entered: 05/06/2021 12:04 PM]
06/04/2021	☐ 2 pg, 722.94 KB	Mandate issued as to Appellant Jessica Graulau. [Entered: 06/04/2021 11:10 AM]

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U.S. District Court
Middle District of Florida (Orlando)
CIVIL DOCKET FOR CASE #: 6:19-cv-01723-WWB-GJK

Graulau v. Credit One Bank, N.A.
Assigned to: Judge Wendy W. Berger
Referred to: Magistrate Judge Gregory J. Kelly
Case in other court: 11th Circuit, 20-12037
Cause: Restrictions on Use of Telephone Equipment

Date Filed: 09/05/2019
Date Terminated: 05/29/2020
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Plaintiff

Jessica Graulau

represented by **Jessica Graulau**
P.O. Box 721037
Orlando, FL 32872
407/721-6303
PRO SE

V.

Defendant

Credit One Bank, N.A.
a foreign corporation

represented by **Dayle Marie Van Hoose**
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LEAD ATTORNEY
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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/05/2019	1	COMPLAINT against Credit One Bank, N.A. with Jury Demand filed by Jessica Graulau. (Attachments: # 1 Exhibits)(MAA) (Entered: 09/06/2019)
09/05/2019	2	MOTION for Leave to Proceed in forma pauperis by Jessica Graulau. (Attachments: # 1 Application)(MAA) Motions referred to Magistrate Judge Gregory J. Kelly. (Entered:

		09/06/2019)
09/09/2019	3	**ORDER denying 2 Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Gregory J. Kelly on 9/9/2019. (MB)** (Entered: 09/09/2019)
09/13/2019	4	**RELATED CASE ORDER AND NOTICE of designation under Local Rule 3.05 - track 2. Notice of pendency of other actions due by 9/27/2019. Signed by Deputy Clerk on 9/13/2019. (copy mailed)(AKC)** (Entered: 09/13/2019)
09/13/2019	5	**INTERESTED PERSONS ORDER. Certificate of interested persons and corporate disclosure statement due by 9/27/2019. Signed by Judge Wendy W. Berger on 9/13/2019. (copy mailed)(AKC)** (Entered: 09/13/2019)
09/20/2019		FILING FEES paid by Jessica Graulau (Filing fee $400.00 receipt number ORL085619) (DMA) (Entered: 09/20/2019)
09/20/2019	6	SUMMONS issued as to Credit One Bank, N.A. (BIA) (Entered: 09/20/2019)
10/09/2019	7	CERTIFICATE of interested persons and corporate disclosure statement re 5 Interested persons order by Jessica Graulau. (BIA) (Entered: 10/10/2019)
10/09/2019	8	NOTICE of pendency of related cases re 4 Related case order and track 2 notice per Local Rule 1.04(d) by Jessica Graulau. Related case(s): yes (BIA) (Entered: 10/10/2019)
11/05/2019	9	MOTION to Dismiss Complaint filed by plaintiff and Enforce Court Order Dismissing and Referring Claims to Arbitration by Credit One Bank, N.A.. (Schuette, Michael) (Entered: 11/05/2019)
11/12/2019	10	(treat as a response) MOTION to Strike 9 Defendant's MOTION to Dismiss Complaint filed by Jessica Graulau. (BIA) Motions referred to Magistrate Judge Gregory J. Kelly. Modified on 11/13/2019 (MEJ). Modified on 12/10/2019 (LAK). (Entered: 11/12/2019)
11/22/2019	11	RETURN of service executed on 10/17/2019 by Jessica Graulau as to Credit One Bank, N.A. (BIA) (Entered: 11/25/2019)
11/26/2019	12	RESPONSE in Opposition re 10 MOTION to Strike Motion to Dismiss Complaint filed by Credit One Bank, N.A. (Schuette, Michael) Modified on 11/27/2019 (MEJ). (Entered: 11/26/2019)
12/10/2019	13	**ORDER terminating 10 Motion to Strike. The motion will be treated as a response to 9 MOTION to Dismiss. Signed by Magistrate Judge David A Baker on 12/9/2019. (LAK)** (Entered: 12/10/2019)
01/24/2020	14	**INTERESTED PERSONS ORDER. Defendant Credit One Bank, N.A. shall file a Certificate of interested persons and corporate disclosure statement due by 2/7/2020. Signed by Judge Wendy W. Berger on 1/24/2020. (RMF)(ctp).** (Entered: 01/24/2020)
02/05/2020	15	**REPORT AND RECOMMENDATIONS that 9 MOTION to dismiss complaint and refer case to arbitration be granted, that the case be dismissed, and that the case be closed. Signed by Magistrate Judge David A Baker on 2/5/2020. (LAK)** (Entered: 02/05/2020)
02/12/2020	16	OBJECTION to 15 Report and Recommendations by Jessica Graulau. (LDJ) (Entered: 02/13/2020)
02/12/2020	17	MOTION for Leave to Proceed on Appeal in forma pauperis by Jessica Graulau. (LDJ) Motions referred to Magistrate Judge Gregory J. Kelly. (Entered: 02/13/2020)
02/18/2020	18	**ORDER to show cause. Plaintiff is hereby ORDERED TO SHOW CAUSE by a written response filed on or before February 28, 2020. Signed by Judge Wendy W. Berger on 2/18/2020. (RMF)ctp** (Entered: 02/18/2020)

02/24/2020	19	RESPONSE TO ORDER TO SHOW CAUSE re 18 Order to show cause filed by Jessica Graulau. (LDJ) (Entered: 02/24/2020)
02/24/2020	20	CERTIFICATE of interested persons and corporate disclosure statement re 14 Interested persons order by Credit One Bank, N.A. identifying Corporate Parent Credit One Financial for Credit One Bank, N.A. (Schuette, Michael) (Entered: 02/24/2020)
02/24/2020	21	NOTICE of pendency of related cases re 4 Related case order and track 2 notice per Local Rule 1.04(d) by Credit One Bank, N.A. Related case(s): yes (Schuette, Michael) (Entered: 02/24/2020)
02/26/2020	22	RESPONSE re 16 Objection to Report and Recommendations *(Plaintiff's Notice of Appeal)* filed by Credit One Bank, N.A.. (Schuette, Michael) (Entered: 02/26/2020)
04/07/2020	23	**ORDER denying without prejudice 17 Motion to Proceed on appeal in forma pauperis. Signed by Magistrate Judge David A Baker on 4/7/2020. (LAK)** (Entered: 04/07/2020)
05/22/2020	24	Amended CERTIFICATE of interested persons and corporate disclosure statement re 5 Interested persons order by Jessica Graulau. (ARJ) (Entered: 05/22/2020)
05/22/2020	25	MOTION directed to the Assigned District Judge Regarding the Proceedings by Jessica Graulau. (ARJ) Motions referred to Magistrate Judge Gregory J. Kelly. (Entered: 05/22/2020)
05/22/2020	26	MOTION directed to Assigned District Judge to Request Vacant of Magistrate Judge by Jessica Graulau. (ARJ) Motions referred to Magistrate Judge Gregory J. Kelly. (Entered: 05/22/2020)
05/28/2020	27	**ORDER: The Report and Recommendation 15, is ADOPTED and CONFIRMED and made a part of this Order. Defendant's Motion to Dismiss and Enforce Order Dismissing and Referring Case to Arbitration 9 is GRANTED. Plaintiff shall submit to arbitration in accordance with the Joint Stipulation. The Clerk is directed to terminate all pending motions and close this case. Signed by Judge Wendy W. Berger on 5/28/2020. (RMF)ctp** (Entered: 05/28/2020)
06/02/2020	28	NOTICE OF APPEAL as to 27 Order on Motion to Dismiss, Order on Report and Recommendations by Jessica Graulau. Filing fee not paid. (Attachments: # 1 Order)(KNC) (Entered: 06/03/2020)
06/02/2020	29	MOTION to Appeal In Forma Pauperis / Affidavit of Indigency by Jessica Graulau. (KNC) (Entered: 06/03/2020)
06/02/2020	30	TRANSCRIPT information form filed by Jessica Graulau re 28 Notice of Appeal. USCA number: TBD. (KNC) (Entered: 06/03/2020)
06/03/2020	31	TRANSMITTAL of initial appeal package to USCA consisting of copies of notice of appeal, docket sheet, order/judgment being appealed, and motion, if applicable to USCA re 28 Notice of Appeal. (KNC) (Entered: 06/03/2020)
06/12/2020	32	DESIGNATION of Record on Appeal by Jessica Graulau re 28 Notice of Appeal (LDJ) (Entered: 06/12/2020)
07/08/2020	33	**ORDER denying 29 Motion for Leave to Appeal In Forma Pauperis. Signed by Judge Wendy W. Berger on 7/8/2020. (RMF)ctp** (Entered: 07/08/2020)
10/05/2020		Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Middle District of Florida certifies that the record is complete for the purposes of this appeal re: 28 Notice of Appeal.

		All documents are imaged and available for the USCA to retrieve electronically. USCA number: 20-12037 (ALL) (Entered: 10/05/2020)
11/04/2020	34	MANDATE of USCA as to 28 Notice of Appeal filed by Jessica Graulau Issued as Mandate: 11/04/2020 USCA number: 20-12037. DISMISSED. (ALL) (Entered: 11/09/2020)
11/05/2020	35	USCA Letter as to 28 Notice of Appeal filed by Jessica Graulau. EOD: 11/05/2020; USCA number: 20-12037. Appeal is clerically REINSTATED. (ALL) (Entered: 11/09/2020)
12/08/2020		Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Middle District of Florida certifies that the record is complete for the purposes of this appeal re: 28 Notice of Appeal. All documents are imaged and available for the USCA to retrieve electronically. USCA number: 20-12037 (ALL) (Entered: 12/08/2020)
05/06/2021	36	OPINION of USCA as to 28 Notice of Appeal filed by Jessica Graulau. EOD: 5/6/2021; Mandate to issue at a later date. USCA number: 20-12037. AFFIRMED. (TNP) (Entered: 05/06/2021)
06/04/2021	37	MANDATE of USCA as to 28 Notice of Appeal filed by Jessica Graulau. Issued as Mandate: 06/04/2021 USCA number: 20-12037. AFFIRMED. (ALL) (Entered: 06/07/2021)

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A.D. v. Credit One Bank, N.A.

Decided Aug 19, 2016

Case No. 14 C 10106

08-19-2016

A.D., by and through her guardian ad litem Judith Serrano, on behalf of herself and all others similarly situated, Plaintiff, v. CREDIT ONE BANK, N.A., Defendant.

MATTHEW F. KENNELLY, District Judge

MEMORANDUM OPINION AND ORDER :

A.D., a minor acting through her guardian *ad litem* Judith Serrano, has sued Credit One Bank, N.A., under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, on behalf of herself and others similarly situated. A.D. alleges that Credit One violated the TCPA by repeatedly calling her on her cellular phone without her consent, using an automated dialer, ostensibly to collect on a debt she did not owe. Credit One has moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) on the basis that A.D. and members of the putative class lack standing to sue. Credit One has also moved to compel arbitration based on an arbitration agreement it had with A.D.'s guardian *ad litem*. A.D. opposes both motions and has moved for class certification under Rule 23(b)(3). For the reasons stated below, the Court denies A.D.'s motion for class certification, denies Credit One's motion to dismiss, and grants Credit One's motion
2 to compel arbitration and stay *2 proceedings.

Background

Credit One is a national bank that provides banking services and credit cards throughout the United States. Judith Serrano, the plaintiff's mother, has been one of its customers since about 2003, when she opened a credit card account with Credit One and began using the card for everyday purchases. A.D., Serrano's daughter, is not an account holder and is not named on her mother's account.

In order to open her account, Serrano signed a standard "Visa / Mastercard Cardholder Agreement, Disclosure Statement and Arbitration Agreement." The agreement provided, among other things, that Serrano consented to receive communications from Credit One:

> **COMMUNICATIONS:** You are providing express written permission authorizing Credit One Bank or its agents to contact you at any phone number (including mobile, cellular / wireless, or similar devices) or email address you provide at anytime [sic], for any lawful purpose. The ways in which we may contact you include live operator, automatic telephone dialing systems (auto-dialer), prerecorded message, text message or email. Phone numbers and email addresses you provide include those you give to us, those from which you contact us or which we obtain through other means. Such lawful purposes include, but are not limited to . . . collection on the Account . . . .

Pl.'s Ex. 2, dkt. no. 78-3, at 6. The agreement also included an arbitration provision, which stated:

> **Agreement to Arbitrate:** You and we agree that either you or we may, without the other's consent, require that any controversy or dispute between you and us (all of which are called "Claims"), be submitted to mandatory, binding arbitration. This arbitration provision is made pursuant to a transaction involving interstate commerce, and shall be governed by, and enforceable under, the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 et seq., and (to the extent State law is applicable), the State law governing this Agreement.
>
> 3 *3
>
> **Claims Covered:** Claims subject to arbitration include, but are not limited to, disputes relating to the establishment, terms, treatment, operation, handling, limitations on or termination of your account . . . billing, billing errors, credit reporting, the posting of transactions, payment or credits, or collections matters relating to your account.

Id. at 8. The agreement further provided:

> Claims subject to arbitration include not only Claims made directly by you, but also Claims made by anyone connected with you or claiming through you, such as a co-applicant or authorized user of your account, your agent, representative or heirs, or a trustee in bankruptcy.

Id. The Cardholder Agreement defined "authorized user" as anyone the cardholder allows to use her account. *See id.* at 4.

A.D. filed this suit against Credit One in December 2014 after receiving "at least twelve calls at different times" from Credit One to her cellular phone. Compl., dkt. no. 1, ¶ 9. She alleged that these calls were made "using an automatic telephone dialing system," and that she never gave consent to receive such calls. *Id.* ¶ 8. A.D. also alleged that "[a]t no time did [she] engage in any transaction with [Credit One] or do business with Credit One in any way." *Id.* "Based on the content of the messages left and the conversations with [Credit One's] agents who spoke on the phone," A.D. alleged that "[Credit One] was seeking to collect on a consumer loan extended to another person." *Id.* ¶ 9. A.D. did not identify who she thought that other person might have been.

Credit One answered A.D.'s complaint in February 2015. In its answer, it asserted an affirmative defense in which it "reserve[d] its right to compel arbitration." Answer, dkt. no. 17, at 14 ¶ 4. It provided no further explanation. Credit One moved to stay proceedings in April 2015 to await an anticipated FCC ruling, moved for leave to file a third-party complaint against Serrano in May 4 2015, and moved to transfer venue in *4 August 2015. The Court denied each of these motions, none of which was based upon the asserted affirmative defense that this dispute was subject to arbitration.

During discovery, Credit One reviewed its records and learned that it acquired A.D.'s telephone number when it received a call from that number on November 10, 2010. The person who called Credit One from that telephone number accessed Serrano's account by giving Serrano's account number and confirming the last four digits of her social security number. During her deposition in April 2016, A.D. testified that her telephone number is on her mother's family phone service plan and that her mother pays its bills. She also testified that although her mother has used the phone, the phone belongs to A.D. alone. According to A.D., the only two people who have ever had access to the phone are she and her mother, but only Serrano knows the last four digits of Serrano's social security number. Based on this testimony, the only explanation for Credit One acquiring A.D.'s telephone number and determining that it was associated with Serrano's account was that Serrano called Credit One and accessed her account using A.D.'s telephone.

Credit One also learned in A.D.'s and Serrano's depositions in April 2016 that prior to the telephone calls A.D. allegedly received, A.D. enjoyed some benefits of her mother's Credit One account holder status. Serrano testified that she regularly used the card to purchase food and drink for herself and her daughter. Serrano also testified that on at least one occasion in early 2014, she preordered drinks from an eatery in her local mall and sent A.D. in with Serrano's Credit One credit card to pay for the drinks.

A.D. and Serrano testified in April 2016, shortly after the close of the first phase of discovery. A.D. moved for class certification in May 2016, and
5 Credit One responded *5 and filed motions to dismiss and compel arbitration shortly thereafter.

Discussion

Credit One moves to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, asserting that A.D. and the members of the putative class did not suffer a justiciable injury-in-fact sufficient to confer standing to sue as required by Article III of the Constitution. Credit One also moves to compel arbitration and stay or dismiss this case pursuant to the arbitration agreement in the Cardholder Agreement applicable to Serrano's Credit One account. A.D. opposes both motions and moves to certify a class of similarly situated persons who also received autodialed telephone calls without first giving Credit One consent to call them.

A. Subject matter jurisdiction

"Article III of the Constitution limits federal judicial power to certain 'cases' and 'controversies,' and the 'irreducible constitutional minimum' of standing contains three elements." *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-60 (1992)). The first of these three elements is that the plaintiff must have suffered an "'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The injury must also be "fairly traceable to the challenged action of the defendant" and redressable through judicial action. *Id.*

In May 2016, the Supreme Court decided *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). In *Spokeo*, the Court vacated and remanded a Ninth Circuit decision finding that a plaintiff asserted a concrete
6 and particularized injury sufficient to confer *6 constitutional standing where he sued based on a defendant's violation of a consumer protection statute. Credit One, relying on *Spokeo*, has now moved to dismiss for lack of subject matter jurisdiction on the basis that A.D. has failed to allege a concrete and particularized injury-in-fact. Pointing out that A.D. seeks only statutory damages and is not seeking any actual damages, Credit One argues that "statutory damage does not, by itself, meet the standing requirements to invoke jurisdiction of the federal courts." Def.'s Mem., dkt. no. 103, at 7. Under Credit One's reading, "it is the awarding of statutory damages 'without more' which is now barred by *Spokeo*." *Id.*

In *Spokeo*, the Supreme Court considered a case in which a plaintiff brought suit to enforce the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681e(b), a consumer protection statute intended to ensure "fair and accurate credit reporting," *id.* § 1681(a)(1). The defendant, Spokeo Inc., was alleged to be a consumer reporting agency that operated a website through which users could search for information about a person by inputting that person's name, e-mail address, or telephone number. In response to an online inquiry, Spokeo would search its databases and provide information to the searcher about the search subject, such as his or her address, telephone number, marital status, age, occupation, finances, and education. The plaintiff, Thomas Robins, sued Spokeo when he learned that the company incorrectly reported that he was married with children, in his fifties, gainfully employed,

affluent, and highly educated. This, Robins claimed, violated the FCRA, which provides that consumer reporting agencies must "follow reasonable procedures to assure maximum possible accuracy" of consumer reports. 15 U.S.C. § 1681e(b).

The district court dismissed Robins's complaint
7 for lack of subject matter *7 jurisdiction based on the absence of an injury-in-fact sufficient to confer constitutional standing under Article III, but the Ninth Circuit reversed. The court first observed that under Ninth Circuit precedent, "the violation of a statutory right is usually a sufficient injury in fact to confer standing." *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014). It then found that Robins had standing to sue because his asserted injury was concrete and particularized, traceable to Spokeo's conduct, and redressable through litigation. Specifically, the appellate court found that Robins's injury was sufficiently concrete and particularized because he alleged that Spokeo "violated *his* statutory rights, not just the statutory rights of other people," and his personal interests in the handling of his credit information [were] individualized rather than collective." *Id.* at 413.

The Supreme Court disapproved of the Ninth Circuit's reasoning. It explained that "concreteness" and "particularization" are distinct concepts and that both most exist for a plaintiff to have standing. The Court observed that the two reasons the Ninth Circuit gave for finding Robins had suffered an injury-in-fact—that his, not just other people's, rights were violated, and that his interests in the handling of his credit information were individualized—demonstrated only that the harm he alleged was particularized. They did not, however, demonstrate that his injury was concrete. The Court explained that "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist. When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Spokeo*, 136 S. Ct. at 1548. Because the Ninth Circuit did not consider the extent to which Robins alleged more than a "bare procedural violation," *id.* at 1549, the Court vacated the appellate court's judgment and
8 remanded the case for further proceedings. *8

Spokeo was not the first case to set forth that an injury must be both concrete and particularized to suffice as an injury-in-fact for the purposes of constitutional standing. (That said, it may have been the first case in which the Court opined on the distinction between the two concepts. *See Spokeo*, 136 S. Ct. at 1555 (Ginsburg, J., dissenting) ("The Court's opinion observes that time and again, our decisions have coupled the words 'concrete *and* particularized.' True, but true too, in the four cases cited by the Court, and many others, opinions do not discuss the separate offices of the terms 'concrete' and 'particularized.'") (internal citations omitted)). Indeed, concreteness and particularity have been the twin pillars of a justiciable injury-in-fact for at least forty years. *See, e.g., Duke Power Co. v. Car. Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978) ("Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met."). The Court in *Spokeo* also explained that a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo*, 136 S. Ct. at 1549. But this too was well-settled law. *See, e.g., Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *Lujan*, 504 U.S. at 572.

More importantly, the Court did not find that Robins's asserted injury was not concrete. Rather, the Court simply observed that the Ninth Circuit failed to consider the question adequately. The Supreme Court did not reverse the Ninth Circuit outright; instead, it vacated the appellate court's

judgment and remanded the case so the court could more carefully examine whether Robins's
9 asserted harms were concrete. *9

The Supreme Court in *Spokeo* did, however, set forth a blueprint for evaluating whether an alleged injury is sufficiently concrete to qualify for purposes of the standing inquiry. The Court implied that tangible harms are generally sufficient to constitute a concrete injury, but a justiciable case or controversy can still exist even when the harms the plaintiff alleges are intangible. It cautioned courts that "concrete" is not a synonym for "tangible," for "we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete." *Spokeo*, 136 S. Ct. at 1549 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Church of Lukumi Bablu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)).

To identify whether an intangible injury is concrete, "both history and the judgment of Congress play important roles." *Spokeo*, 136 S. Ct. at 1549. The Court observed that because the case-or-controversy requirement at the heart of the standing inquiry "is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 1549 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000)). The Court also encouraged courts to defer to some extent to Congress's judgment, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements." *Spokeo*, 136 S. Ct. at 1549. This is why the Court has recognized Congress's power to "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law" and to "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* (internal citations and quotation marks omitted).

10 But, the Court *10 cautioned, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.*

A handful of district courts have, since *Spokeo*, conducted this analysis in similar cases and determined that plaintiffs like Robins lack standing to sue because they do not allege concrete injuries. For example, in *Smith v. Ohio State University*, plaintiffs applying to work for the defendant alleged that the defendant requested consent to pull their credit reports during the hiring process, providing a disclosure and authorization that included extraneous information. *See Smith v. Ohio State Univ.*, No. 2:15 C 3030, 2016 WL 3182675, at *1 (S.D. Ohio June 8, 2016). Plaintiffs sued the defendant under the FCRA, which provides that "a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer unless . . . the consumer has authorized in writing . . . the procurement of the report by that person." 15 U.S.C. § 1681b(b)(2)(A)(ii). The court found that the plaintiffs lacked standing to sue because they had not identified a concrete and particularized injury-in-fact. It noted the Supreme Court's observation in *Spokeo* that "[a] violation of one of the FCRA's procedural requirements may result in no harm," *Spokeo*, 136 S. Ct. at 1540, and it found that this was precisely what had occurred, because the plaintiffs "admitted that they did not suffer a concrete consequential damage as a result of OSU's alleged breach of the FCRA." *Smith*, 2016 WL 3182675, at *4. Likewise, in *Gubala v. Time Warner Cable, Inc.* (cited by Credit One), another district court found that a plaintiff failed to allege
11 a concrete injury where his suit was *11 based on the defendant's failure to abide by the Cable Communications Policy Act, 47 U.S.C. § 551(e), which required it to destroy records containing his

personal information. *See Gubala v. Time Warner Cable, Inc.*, No. 15 C 1078, 2016 WL 3390415, at *1 (E.D. Wis. June 17, 2016).

Like the statute allegedly violated in *Spokeo*, the statutes at issue in these cases imposed record-keeping and procedural obligations on the defendants. The Supreme Court noted in *Spokeo* that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Spokeo*, 136 S. Ct. at 1549 (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20-25 (1998), and *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989)). But in other circumstances, a plaintiff would need to show more than the mere violation of a procedural right. Section 1681e(b) of the FCRA, the Court explained, was in the latter group of cases. "[N]ot all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Spokeo*, 136 S. Ct. at 1550.

The Supreme Court's point in *Spokeo* was not that a statutory violation cannot constitute a concrete injury, but rather that where the bare violation of a statute conferring a procedural right could cause a congressionally identified harm or material risk of harm and just as easily could not, it is not sufficient simply to allege that the statute at issue was violated. Failure to ensure the accuracy of a consumer report may result in a harm or material risk of harm the FCRA was intended to curb—loss
12 of *12 employment opportunities, for example, or a decrease in the consumer's creditworthiness. But it may also fail to cause any harm or material risk of harm at all. Put differently, the procedural rights imposed through section 1681e(b) are attenuated enough from the interests Congress identified and sought to protect through the FCRA that charging a defendant with violating them is not necessarily the same as charging the defendant with causing a congressionally-identified concrete injury that gives rise to standing to sue.

The same cannot be said of the TCPA claims asserted in this case. Unlike the statute at issue in *Spokeo* (and those at issue in *Smith* and *Gubala)*, the TCPA section at issue does not require the adoption of procedures to decrease congressionally-identified risks. Rather, section 227 of the TCPA prohibits making certain kinds of telephonic contact with consumers without first obtaining their consent. It directly forbids activities that by their nature infringe the privacy-related interests that Congress sought to protect by enacting the TCPA. There is no gap—there are not some kinds of violations of section 227 that do not result in the harm Congress intended to curb, namely, the receipt of unsolicited telemarketing calls that by their nature invade the privacy and disturb the solitude of their recipients.

In any event, section 227 establishes substantive, not procedural, rights to be free from telemarketing calls consumers have not consented to receive. Both history and the judgment of Congress suggest that violation of this substantive right is sufficient to constitute a concrete, *de facto* injury. As other courts have observed, American and English courts have long heard cases in which plaintiffs alleged that defendants affirmatively directed their conduct at plaintiffs to invade their
13 privacy and disturb their *13 solitude. *See, e.g., Mey v. Got Warranty, Inc.*, No. 5:15 C 101, 2016 WL 3645195, at *3 (N.D.W.V. June 30, 2016) ("[T]he TCPA can be seen as merely liberalizing and codifying the application of [a] common law tort to a particularly intrusive type of unwanted telephone call."); *Caudill v. Wells Fargo Home Mort., Inc.*, No. 5:16-066-DCR, 2016 WL 3820195, at *2 (E.D. Ky. July 11, 2016) ("[The] alleged harms, such as invasion of privacy, have traditionally been regarded as providing a basis for a lawsuit in the United States."). And Congress enacted the TCPA to protect consumers from the annoyance, irritation, and unwanted nuisance of

telemarketing phone calls, granting protection to consumers' identifiable concrete interests in preserving their rights to privacy and seclusion.

Credit One argues that "statutory damage does not, by itself, meet the standing requirements to invoke jurisdiction of the federal courts" and "it is the awarding of statutory damages 'without more' which is now barred by *Spokeo*." Def.'s Mem., dkt. no. 103, at 7. This argument confuses "damage" with "harm" or "injury." Damages are legal remedies for harms or injuries suffered, they are not the harms or injuries themselves. *Spokeo* does not stand for the proposition that a plaintiff lacks standing to sue if she foregoes her right to seek actual damages and seeks only statutory damages. Rather, it stands for the proposition that a plaintiff lacks standing to sue if she has not suffered a factual, real-world *injury* in the form of a concrete and particularized harm. Congress has recognized that although it might be difficult to monetize, a consumer suffers a concrete though intangible injury when she is subjected to an autodialed non-emergency phone call without having given prior express consent. The consumer can quantify the extent of her injury by seeking
14 actual damages, or she can simply request *14 damages in the set amount provided by Congress in the TCPA. A.D. has chosen the latter route; doing so does not divest her of standing to sue.

Credit One cites a recent decision by a judge in the Eastern District of Louisiana who found no concrete injury where the named plaintiff alleged he received unsolicited fax advertisements from the defendants in violation of section 227. *See Sartin v. EKF Diagnostics, Inc.*, No. 16 C 1816, 2016 WL 3598297, at *3-4 (E.D. La. July 5, 2016). There, the court found that the plaintiff failed to allege a concrete injury-in-fact where he alleged only that he and the class he purported to represent "sustain[ed] statutory damages, in addition to actual damages, including but not limited to those contemplated by Congress and the Federal Communications Commission." *Id.* at *3 (internal quotation marks omitted). The plaintiff responded to the defendants' motion to dismiss by stating that he was injured by having to waste valuable time as a result of the fax, but the court refused to acknowledge the plaintiff's argument because that injury was not stated in the complaint. Because "[t]he well-pleaded factual allegations in the complaint establish nothing more than a bare violation of the TCPA, divorced from any concrete harm to [the plaintiff]," the court found he "failed to demonstrate a judicially-cognizable injury in fact" and dismissed his case for lack of subject matter jurisdiction. *Id.* at *4.

The Court respectfully disagrees with the reasoning of the judge in *Sartin*. In contrast to statutes that impose obligations regarding how one manages data, keeps records, or verifies information, section 227 of the TCPA directly prohibits a person from taking actions directed at consumers who will be touched by that person's conduct. It does not matter whether a plaintiff lacks additional tangible harms like wasted time, actual annoyance, and financial losses. Congress
15 has identified that unsolicited *15 telephonic contact constitutes an intangible, concrete harm, and A.D. has alleged such concrete harms that she herself suffered. It would be redundant to require a plaintiff to allege that her privacy and solitude were breached by a defendant's violation of section 227, because Congress has provided legislatively that a violation of section 227 is an invasion of the call recipient's privacy.

Finally, Credit One argues on reply that A.D. lacks standing because she has not adduced evidence of injuries she suffered and because she did not discuss the traceability element of constitutional standing in her response brief. The Court notes that A.D. has no responsibility to adduce evidence to prove her claims in response to a motion to dismiss and that the subject of Credit One's three-and-a-half page argument in its motion to dismiss was whether A.D. alleged a concrete injury, not whether the injury was traceable to Credit One's conduct. In any event, the Court disagrees with Credit One's argument that evidence shows that it

was Serrano's act of calling Credit One on her daughter's phone that caused the injury alleged. A.D. alleges that she received an autodialed debt collection call from Credit One without giving consent. Whether or not her mother did something to authorize Credit One to make the call, the injury that A.D. alleges is directly traceable to Credit One's act of calling (or having a call made on its behalf to) A.D.'s phone.

In sum, A.D. has identified a concrete injury-in-fact that she herself suffered, and she has alleged that the injury is fairly traceable to Credit One's conduct and is judicially redressable. For these reasons, A.D. has standing, and the Court may exercise subject matter jurisdiction over her case. The Court therefore denies Credit One's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). *16

16

B. Motion to compel arbitration

Credit One has also moved to compel arbitration and stay or dismiss this action based on the arbitration clause in Serrano's Cardholder Agreement. A.D. argues that Credit One's motion is untimely. As noted above, A.D. filed this lawsuit in December 2014. Credit One answered the complaint, moved to stay the case pending an FCC ruling that would allegedly impact this dispute, and moved to transfer venue, but it did not move to compel arbitration until June 2016. A.D. argues that Credit One has no plausible explanation for the eighteen-month delay between the date the complaint was filed and the date Credit One sought to compel arbitration, and that the Court should therefore deny the motion and allow her case to proceed.

As an initial matter, Credit One argues that because "Ms. Serrano's Cardholder Agreement provides that Nevada law applies," Nevada's waiver rules govern this case. Def.'s Mem., dkt. no. 106, at 7. But the Cardholder Agreement does not so provide. In truth, the agreement states that it "is made pursuant to a transaction involving interstate commerce, and shall be governed by, and enforceable under, the Federal Arbitration Act (the 'FAA'), 9 U.S.C. § 1 et seq., and (to the extent State law is applicable), the State law governing this Agreement." Pl.'s Ex. 2, dkt. no. 78-3, at 8. Credit One offers no authority for the proposition that Nevada law should govern the particular question of whether the contractual right to arbitrate has been waived, and the Court sees no reason it should not rely on federal rules of decision on this issue, especially in light of the "long line of cases show[ing] that the FAA preempts inconsistent state law." *Renard v. Ameriprise Fin. Servs., Inc.*, 778 F.3d 563, 566-67 (7th Cir. 2015).

"A party may waive a contractual right to arbitrate expressly or implicitly." *Halim* *17 *v. Great Gatsby's Auction Gallery*, 516 F.3d 557, 562 (7th Cir. 2008) (citation omitted). A court seeking to determine whether a party has waived arbitration must "examine the totality of the circumstances and determine whether . . . the party . . . has acted inconsistently with the right to arbitrate." *Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 726 (7th Cir. 2004) (citation omitted). "Although several factors may be considered in determining waiver, diligence or the lack thereof should weigh heavily in the decision—did that party do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration?" *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 756 (7th Cir. 2002) (emphasis and internal quotation marks omitted).

17

A.D. contends that Credit One waived its right to arbitrate because it filed "substantive" motions prior to moving to compel arbitration. As A.D. points out, "a litigant cannot attempt to prevail in court, then seek arbitration only as a fallback." *Cent. Ill. Carpenters Health & Welfare Trust Fund v. Con-Tech Carpentry, LLC*, 806 F.3d 935, 937 (7th Cir. 2015). There is some truth to A.D.'s contention. Credit One's request to stay the case pending an anticipated FCC ruling on a contested legal issue and its request to transfer the case to

another federal district both implied that it was looking for a judicial decision in the case rather than a decision by an arbitrator

The record reflects, however, that Credit One did not have a viable basis to seek arbitration of A.D.'s claims until quite recently. Of course, "lengthy delay" itself "can lead to an implicit waiver of arbitration." *See Welborn Clinic v. Medquist, Inc.*, 301 F.3d 634, 637 (7th Cir. 2002). This is especially true where the delay was due purely to the defendant's lack of diligence. *Ernst & Young*, 304 F.3d at 756. A.D. argues that the *18 docket is replete with evidence of Credit One's delinquency in determining whether it had a contractual right to arbitrate. She points out that Credit One knew at least as early as February 2015 that it might have a right to arbitrate, as evidenced by the fact that it asserted in its answer to the complaint a reservation of the potential right to seek an order compelling arbitration. A.D. contends that this fact undermines Credit One's assertion that it did not know it had a right to arbitrate until recently. She also argues that even if Credit One indeed did not know it had the right to arbitrate until recently, there is no reason it should have taken this long. A.D. points out that Credit One's investigation of its records took minimal time and effort, but did not even begin until over a year after her lawsuit was filed. She also points out that it is implausible that Credit One could not have foreseen that depositions would reveal that a mother and her minor daughter sometimes use the same phone and sometimes enjoy goods and services purchased by use of the mother's credit card.

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These arguments are not persuasive, at least not on the record before the Court. First, the mere inclusion of a reservation of the right to seek arbitration in Credit One's answer is not an indication that it long ago knew or should have known that it had a contractual right to arbitrate claims by A.D., a non-cardholder. Aside from the caption and introduction, which stated that A.D. was bringing suit "by and through her guardian *ad litem* Judith Serrano," Compl., dkt. no. 1, at 1, A.D.'s complaint nowhere referenced the fact that she had used a Credit One credit card or had allowed her mother to use her cellular phone to make a call concerning the account; in fact, A.D. indicated she had done no business whatsoever with Credit One. All told, the complaint contained nothing that would have given Credit One a basis to demand arbitration. Its reservation of the *19 right to seek arbitration later does not signal that it knew it had viable grounds to do so at the time.

19

Second, Credit One's investigation into its records could have been conducted earlier, but it would have revealed only that Credit One obtained A.D.'s number when the phone was used to call the company to check Serrano's account. It would not have revealed whether A.D. had ever used the credit card, whether it was A.D. or her mother who called, or whether the company could otherwise demonstrate that A.D. should be bound to the terms of the arbitration agreement her mother signed. Credit One did not learn what it needed to know to support its motion to compel arbitration until it took A.D. and Serrano's depositions in April 2016 and learned the extent to which A.D. was connected to her mother's Credit One account. Credit One filed its motion promptly after taking those depositions. On the record before the Court, Credit One was reasonably diligent and has not waived its right to arbitrate.

A.D. does not appear to dispute that had Serrano sued Credit One under the TCPA for autodialing her to collect on a debt without prior express consent, her claim would be subject to arbitration. The arbitration clause contained in the Cardholder Agreement is extremely broad and expressly covers all claims concerning "collections matters" and "communications relating to [the cardholder's] account." But Serrano has not brought suit—A.D. has. Credit One acknowledges that A.D. is not a cardholder or a named account holder with Credit One and that A.D. has never signed any agreement to do business with Credit One, much less an agreement that includes an arbitration provision. It argues, however, that A.D. must arbitrate her

TCPA claims because A.D. is an "authorized user" of her mother's credit card who should be bound to
20 the terms of the *20 contract Serrano signed.

Generally speaking, a non-party to an arbitration agreement cannot be forced to arbitrate, for "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). The Seventh Circuit has long recognized, however, that "there are five doctrines through which a non-signatory can be bound by arbitration agreements entered into by others: (1) assumption; (2) agency; (3) estoppel; (4) veil piercing; and (5) incorporation by reference." *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 687 (7th Cir. 2005) (citing *Fyrnetics (H.K.) Ltd. v. Quantum Group, Inc.*, 293 F.3d 1023, 1029 (7th Cir. 2002)).

Credit One contends that the doctrine of estoppel applies in this case. Under this doctrine, "a nonsignatory party is estopped from avoiding arbitration if it knowingly seeks the benefits of the contract containing the arbitration clause." *Zurich Am.*, 417 F.3d at 688. Credit One points out that during their depositions, A.D. and Serrano revealed that A.D. used her mother's credit card on at least one occasion and allowed her mother to use her cell phone to call Credit One to make an inquiry about her account. Credit One argues that this makes A.D. an "Authorized User" under the Cardholder Agreement and a direct beneficiary of the contract. It contends that she is essentially seeking to enjoy the benefits of her mother's contract (by using the card and allowing the cardholder to inquire about the account using her telephone) but avoid the same contract's arbitration provision.

A.D. disagrees. She contends that she cannot be considered a beneficiary of the contract or an "Authorized User" because she never "used" the
21 credit card or sought to *21 enjoy the benefits of the contract in question. She does not deny that she brought the credit card into an eatery and made a purchase with the card on at least one occasion, nor does she deny that she allowed Serrano to use her phone to call Credit One about the card's account. She contends, however, that paying for food or drink for herself and her mother with her mother's card does not make her a "user" of the card and does not amount to invoking the Cardholder Agreement's benefits. A.D. says that this is "exactly what happens at a restaurant when a diner pays using a card. The card is handed to the server, who takes the card to the point of sale device and runs the charge, returning with the card and a receipt for signature." Pl.'s Resp., dkt. no. 113, at 9. She argues that she merely "transported the card" to the eatery's "point of sale device" and returned with pre-ordered beverages. "If [A.D.] is an authorized user," she says, "then so is each and every waiter, cashier, toll booth attendant, and department store clerk in the United States who handle[s] countless cards for customers on a daily basis and physically process[es] financial transactions." *Id.*

This argument is utterly lacking in merit. A.D. is nothing like a waiter, cashier, attendant, or department store clerk. A cashier who is handed a credit card to pay for a purchase acts as an agent of the payee. The cashier in no way represents that he or she is authorized to pay for goods or services with the card. Conversely, when A.D. walked into an eatery with a credit card to pay for a purchase, she represented to the payee that she was authorized to use the card she handed them. There is a fundamental and material difference between a person who acts on behalf of a payee to run a credit card and demand payment from the credit card company for a purchase and a payor who represents that the credit card company will pay
22 for a purchase on the *22 payor's behalf.

When a consumer hands a credit card to a vendor (or a vendor's cashier), she is in effect representing to the vendor that the credit card company is contractually obligated to transfer funds to the vendor to cover the cost of the goods sold or services rendered. A. D. did exactly that: she

asked a vendor to provide her with goods without requiring her to tender payment, based on her representation that Credit One was contractually obligated to tender payment on her behalf. The only reason she was able to do this was that the Cardholder Agreement Serrano signed permits her to authorize her daughter to use the card. A.D. therefore derived benefit from the contract containing the arbitration agreement.

The doctrine of estoppel exists in this context "to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision." *Gersten v. Intrinsic Techs., LLP*, 442 F. Supp. 2d 573, 579 (N.D. Ill. 2006) (citing *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 352 (2d Cir. 1999)). That is precisely what A.D. is attempting to do. The Cardholder Agreement allowed her to represent that Credit One would pay for a purchase she made. It also requires the cardholder and any authorized user to arbitrate any claims arising out of communications Credit One makes and collections activities it engages in concerning the account. A.D. is bound to the terms of the Cardholder Agreement, and Credit One has a contractual right to arbitrate this dispute. The Court therefore grants Credit One's motion to compel arbitration. Rather than dismiss the case, the Court will stay proceedings and compel
23 arbitration. *See Halim*, 516 F.3d at 561. *23

The arbitration agreement applicable to this dispute also provides that "[i]f you or we require arbitration of a particular Claim, neither you, we, nor any other person may pursue the Claim in litigation, whether as a class action, private attorney general action, other representative action or otherwise." Pl.'s Ex. 2, dkt. no. 78-3, at 8. It further provides that "no class action, private attorney general action or other representative action may be pursued in arbitration, nor may such action be pursued in court if any party has elected arbitration." *Id.* at 9. In light of these provisions, the Court denies A.D.'s motion for class certification.

Conclusion

For the foregoing reasons, the Court denies Credit One's motion to dismiss for lack of subject matter jurisdiction [dkt. no. 102] but grants its motion to compel arbitration [dkt. no. 105]. In light of the class action waiver contained in the user agreement that binds A.D., the Court denies A.D.'s motion for class certification [dkt. no. 78]. This case is accordingly stayed pending the outcome of arbitration, and the case will be administratively terminated in the interim. A joint status report regarding the status of arbitration proceedings is to be filed as of February 28, 2017.

/s/

MATTHEW F. KENNELLY

United States District Judge Date: August 19, 2016

In the

United States Court of Appeals

For the Seventh Circuit

No. 17-1486

A.D., a minor, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

CREDIT ONE BANK, N.A.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:14-cv-10106 — **Matthew F. Kennelly**, *Judge.*

ARGUED NOVEMBER 29, 2017 — DECIDED MARCH 22, 2018

Before WOOD, *Chief Judge*, and RIPPLE and KANNE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* A.D., by and through her mother, Judith Serrano, brought this putative class action under the Telephone Consumer Protection Act. She seeks compensation for telephone calls placed by Credit One Bank, N.A. ("Credit One") to her telephone number in an effort to collect a debt that she did not owe. After discovery, Credit One

moved to compel arbitration and to defeat A.D.'s motion for class certification based on a cardholder agreement between Credit One and Ms. Serrano. The district court granted Credit One's motion to compel arbitration but certified for interlocutory appeal the question whether A.D. is bound by the cardholder agreement.[1] We granted A.D.'s request for permission to appeal. *See* 28 U.S.C. § 1292(b).[2] We now reverse the district court's grant of Credit One's motion to compel arbitration and remand for further proceedings consistent with this opinion. A.D. is not bound by the terms of the cardholder agreement to arbitrate with Credit One, and she has not directly benefited from the cardholder agreement such that equitable principles convince us to apply the arbitration clause against her.

I

BACKGROUND

A.

In 1991, Congress amended the Communications Act of 1934 to address "the advent of automated devices that dial up to 1,000 phone numbers an hour and play prerecorded sales pitches." *Moser v. FCC*, 46 F.3d 970, 972 (9th Cir. 1995). The amending statute, the Telephone Consumer Protection Act ("TCPA"), makes it unlawful to use an "automatic telephone dialing system or an artificial or prerecorded voice" to call a cell phone without "the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). An individual who provides

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[1] The district court also denied A.D.'s motion for class certification.

[2] The district court had jurisdiction under 28 U.S.C. § 1331.

her cell phone number to a creditor through a credit application "reasonably evidences prior express consent ... to be contacted at that number regarding the debt." *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559, 564 (FCC 2008). A creditor relying on the "prior express consent" exception to the TCPA has the burden of showing that "it obtained the necessary prior express consent." *Id.* at 565.

The TCPA provides a private right of action for individuals to claim that their rights under the TCPA have been violated. *See* 47 U.S.C. § 227(b)(3). Successful plaintiffs may recover the greater of the amount of (1) actual damages or (2) $500 for each violation, meaning each phone call. *Id.*

B.

Ms. Serrano opened a credit card account with Credit One in 2003. In 2010, she used A.D.'s cell phone to access her Credit One account by calling Credit One and providing her account number and the last four digits of her social security number. Using caller ID capture software, Credit One attached A.D.'s cell phone number to Ms. Serrano's account.

Ms. Serrano later fell behind on her credit card payments, and Credit One began calling the telephone numbers previously stored with her account in an attempt to collect the debt. In her complaint, A.D. alleges that, in the course of this collection process, Credit One repeatedly called her about her mother's debt. Specifically, A.D. alleges that she received a good number of calls from Credit One in October and November 2014.

Upon opening her account with Credit One, Ms. Serrano had signed a standard cardholder agreement. This agreement included, among other terms, an arbitration clause and class action waiver, which stated:

> **Agreement to Arbitrate:**
>
> You and we agree that either you or we may, without the other's consent, require that any controversy or dispute between you and us (all of which are called "Claims"), be submitted to mandatory, binding arbitration. This arbitration provision is made pursuant to a transaction involving interstate commerce, and shall be governed by, and enforceable under, the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 et seq., and (to the extent State law is applicable), the State law governing this Agreement.
>
> ...
>
> Claims subject to arbitration include not only Claims made directly by you, but also Claims made by anyone connected with you or claiming through you, such as a co-applicant or authorized user of your account, your agent, representative or heirs, or a trustee in bankruptcy.
>
> ...
>
> If you or we require arbitration of a particular Claim, neither you, we, nor any other person may pursue the Claim in any litigation, whether

> as a class action, private attorney general action, other representative action or otherwise.[3]

When A.D. first filed this action, Credit One was not aware that it had a cardholder agreement with her mother. A.D. did not state in her complaint that her mother was the probable target of Credit One's phone calls (although she was listed as A.D.'s guardian *ad litem* in the complaint). After eighteen months of discovery, and after reviewing its own records, Credit One finally realized that its caller ID capture system had added A.D.'s phone number to its database when Ms. Serrano used A.D.'s phone to access her account. At that point, Credit One sought to compel arbitration with A.D. based on the arbitration clause in Ms. Serrano's cardholder agreement.[4]

The only evidence that A.D. ever used Ms. Serrano's Credit One credit card was Ms. Serrano's deposition testimony that, on at least one occasion, Ms. Serrano had preordered smoothie drinks for her daughter and herself from a stand in the local mall and had sent A.D. to pick them up. She had instructed A.D. to pay for the smoothies with her Credit One card. This transaction occurred in 2014, when A.D. was fourteen years old.

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[3] R.78-3 at 8.

[4] In response to Credit One's motion to compel arbitration, A.D. urged that Credit One had waived its right to arbitrate by waiting too long and by filing other substantive motions in the district court before moving to compel arbitration. The district court concluded that even if Credit One could have checked its databases for A.D.'s phone number earlier, Credit One did not have a factual basis for invoking its right to arbitration until Ms. Serrano's deposition, when it "learned the extent to which A.D. was connected to her mother's Credit One account." R.118 at 19.

The district court ruled with Credit One that A.D. was bound by the cardholder agreement's arbitration clause. In its view, even though A.D. had not signed the cardholder agreement, she must be considered an "Authorized User" under its terms. Therefore, continued the court, she is bound by the arbitration clause under the "direct benefits estoppel" theory. Under this theory, explained the court, a person should not receive a benefit under a contract while, at the same time, repudiating a disadvantage under the contract. The court then reasoned that the cardholder agreement had allowed A.D., when picking up the drinks ordered by her mother, to represent to the store that Credit One would pay for the purchase. She therefore had benefited from the cardholder agreement between her mother and Credit One. Having accepted a benefit under the contract, the district court concluded, she must accept the burden of the arbitration clause.

Because it concluded that the arbitration clause in the cardholder agreement was applicable, the court stayed the case pending the outcome of arbitration. A.D. filed a motion to reconsider, or, in the alternative, to certify the arbitration question for interlocutory appeal under 28 U.S.C. § 1292(b). The district court denied the motion to reconsider but granted the motion to certify the ruling for interlocutory appeal. In certifying the question for interlocutory appeal, the court noted that "[t]here is a substantial ground for difference of opinion because the contours of the arbitration-by-estoppel doctrine in the Seventh Circuit are unclear."[5] We later granted a petition for certification.

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[5] R.126 at 2.

II

DISCUSSION

We review a district court's ruling on a motion to compel arbitration de novo. *Scheurer v. Fromm Family Foods LLC*, 863 F.3d 748, 751 (7th Cir. 2017). Any findings of fact underlying that decision are reviewed for clear error. *Id.* As we noted in *Scheurer*, "arbitrability may depend on equitable doctrines such as waiver and estoppel, which may require a court to resolve issues such as prejudice and reliance." *Id.* at 752 n.2. We review a district court's decision to apply an equitable doctrine for an abuse of discretion, and "nothing about arbitration would seem to call for a different approach." *Id.*

A.

Our case law establishes three bedrock principles about the enforcement of arbitration agreements. First, the Federal Arbitration Act evinces a "national policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). Second, an arbitration agreement generally cannot bind a non-signatory. *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 687 (7th Cir. 2005). Finally, arbitration agreements generally are enforceable against non-signatories only in a handful of limited circumstances, depending on the applicable state law. These limited exceptions are: (1) assumption, (2) agency, (3) estoppel, (4) veil piercing, and (5) incorporation by reference. *Id.*

These bedrock principles allow us to set forth, in more detailed fashion, particular considerations that must guide our resolution of the present controversy. Section 2 of the Federal

Arbitration Act "reflect[s] both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract.'" *Concepcion*, 563 U.S. at 339 (citation omitted) (first quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); then quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010)). It requires federal courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Id.* (citation omitted). We will compel arbitration under the Federal Arbitration Act "if three elements are present: (1) an enforceable written agreement to arbitrate, (2) a dispute within the scope of the arbitration agreement, and (3) a refusal to arbitrate." *Scheurer*, 863 F.3d at 752.

However, because arbitration agreements are contracts, a "party 'cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Id.* (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). Therefore, the general rule is that non-signatories are not bound to arbitration agreements. *See Zurich*, 417 F.3d at 687. We will enforce an arbitration agreement against a non-signatory if the party seeking to compel arbitration can show that an exception to this general rule applies. *Id.*

The direct benefits estoppel doctrine applied by the district court is one such exception. *See id.* To determine whether an exception applies to make "a contract, including an arbitration agreement, ... enforceable by or against a non-party," we look to "traditional principles of state law." *Scheurer*, 863 F.3d at 752 (quoting *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009)); *see also Warciak v. Subway Rests., Inc.*, 880 F.3d

870, 872 (7th Cir. 2018). Here, the cardholder agreement specifies that Nevada law applies to disputes arising under the contract, and the parties have not suggested that any other law is applicable.[6]

From these observations, the analytical framework that we must follow in our resolution of this matter becomes evident. We first must determine whether A.D. is bound by the arbitration clause. If she is not, we must determine whether Nevada law nevertheless would bind her under the direct benefits estoppel theory.

B.

We first examine whether, under ordinary principles of contract law, A.D. is bound by the arbitration clause.

Credit One submits that A.D. is bound by the cardholder agreement as an Authorized User. The cardholder agreement provides a mechanism for cardholders to designate other individuals as Authorized Users of their accounts:

> 3. **AUTHORIZED USER:** At your request, we may, at our discretion, issue an additional card in the name of an Authorized User with your credit card account number. If you allow someone to use your Account, that person will be an Authorized User. By designating an Authorized

[6] Specifically, the cardholder agreement reads: "**GOVERNING LAW:** This Agreement is governed by and interpreted in accordance with the laws applicable to national banks, and, where no such laws apply, by the laws of the State of Nevada, excluding the conflicts of law provisions thereof, regardless of your state of residence." R.78-3 at 7.

> User who is at least fifteen years of age, you understand that: 1) you will be solely responsible for the use of your Account and each card issued on your Account including all charges and transactions made by the Authorized User and any fees resulting from their actions to the extent of the credit limit established for the Account; 2) the Authorized User will have access to certain account information including balance, available credit and payment information. ... ; 3) we reserve the right to terminate the Card Account privileges of an Authorized User by closing your Account and issuing you a new account number; 4) the Account may appear on the credit report of the Authorized User. ... ; 5) the Authorized User can make payments, report the card lost or stolen and remove him or herself from the Account; 6) you can request the removal of the Authorized User from your Account via mail or telephone.
>
> **Authorized User Annual Participation Fee:** An Authorized User Annual Participation Fee of $19.00 will be imposed for issuing a card in the Authorized User's name. This Fee will be assessed annually in the month the Authorized User was added to the account.[7]

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[7] *Id.* at 4.

Notably, by its terms, the arbitration clause specifically applies to claims "made by anyone connected with" the account holder, "such as a co-applicant or authorized user" of the account.[8]

The district court held that because Ms. Serrano told A.D. to use the credit card to pick up the smoothies, Ms. Serrano had made her an authorized user of the account. The court seemingly relied on the language from the cardholder agreement that "[i]f you allow someone to use your Account, that person will be an Authorized User."[9]

In our view, the district court's analysis is difficult to square with the overall language of the cardholder agreement.

The cardholder agreement sets forth a *specific* procedure that an account holder must follow to add an authorized user to her account. This provision makes it clear that an individual does not become an Authorized User simply by *using* the credit card to complete the cardholder's transaction. Rather, the term clearly foresees an Authorized User as playing a far more durable role in the account.

In order to designate a person as an Authorized User, an account holder must notify Credit One that she wishes to add an Authorized User to the account, so that Credit One can issue a card in the Authorized User's name. The Authorized User has many of the same rights under the cardholder agreement as the account holder and can use the card to complete her own transactions, not just those of the account holder. The

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[8] *Id.* at 8.

[9] *Id.* at 4.

durability of the arrangement is also made clear by the nineteen-dollar fee imposed on the account holder for adding an Authorized User. Furthermore, and most importantly for A.D.'s case, the Authorized User must be at least fifteen years old.

It is undisputed that neither Ms. Serrano nor Credit One followed any step of this process. Ms. Serrano did not request that Credit One add A.D. as an Authorized User. Credit One did not send A.D. a card with her name on it (and in fact, Credit One was unaware of A.D.'s relationship to Ms. Serrano until eighteen months after A.D. filed this action). A.D. did not have any rights under the cardholder agreement that the contract gives to true Authorized Users. Credit One never assessed Ms. Serrano the nineteen-dollar annual fee for adding an Authorized User. Indeed, A.D. was fourteen years old at the time of the smoothie transaction and, therefore, not even eligible to become an Authorized User under the cardholder agreement.

Although this analysis seems straightforward, we turn to examine two possible arguments to the contrary. First, the arbitration clause of the cardholder agreement does not capitalize "authorized user." This style might suggest that a different meaning should be attributed to the term in the arbitration clause from the one prescribed for the rest of the contract. Secondly, Credit One submits that the Authorized User clause creates more than one category of Authorized User: those who are Authorized Users because the account holder "allow[s] [them] to use [the] Account," and those who are "at least fifteen years of age" and subject to all of the rights and responsibilities identified in the Authorized User provision.

Neither the contract language read as a whole nor the governing law supports these arguments. Even if we were to accept, for the sake of argument, that the contract creates multiple categories of Authorized Users (or "authorized users," as the arbitration clause reads), and even if someone can become one kind of authorized user just by using the credit card, Credit One's position cannot surmount two major stumbling blocks. First, as we have noted earlier, it is a fundamental principle of arbitration law that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). A.D. simply did not consent to arbitrate with Credit One. More fundamentally, A.D. did not have legal capacity to enter into a contractual relationship with Credit One. A.D. was a minor at the time of the smoothie transaction. Under applicable state law, minors lack capacity to enter into contracts and can disaffirm their obligations under contracts formed before they reach the age of eighteen.[10] Moreover, A.D. certainly engaged in an act of disaffirmation by filing this lawsuit and asserting her status as a minor.[11] Assuming, for the sake of argument, that A.D.

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[10] This is true under the laws of both Nevada (the law governing the cardholder agreement) and California (the law of A.D.'s residence). *See* Cal. Family Code § 6710; Nev. Rev. Stat. § 129.010. *See generally* Restatement (Second) of Conflict of Laws § 198 (Am. Law Inst. 1971).

[11] *Berg v. Traylor*, 56 Cal. Rptr. 3d 140, 148 (Cal. Ct. App. 2007) ("No specific language is required to communicate an intent to disaffirm. 'A contract (or conveyance) of a minor may be avoided by any act or declaration disclosing an unequivocal intent to repudiate its binding force and effect.' Express notice to the other party is unnecessary." (citation omitted) (quoting *Spencer v. Collins*, 104 P. 320, 322 (Cal. 1909))); *W.M. Barnett Bank v.*

formed *any* kind of contractual relationship with Credit One before she reached the age of majority, she has disaffirmed any obligation under that contractual relationship that she might have had.

Credit One also argues that A.D. has waived any argument that she does not qualify as an Authorized User under the terms of the agreement or that, as a minor, she has a right to disaffirm the contract. It is true that, at the district court level, A.D. did not make any specific arguments about the scope of the authorized user provision of the cardholder agreement. However, as the party seeking to compel arbitration, Credit One had the burden of showing that A.D. was bound by the cardholder agreement as an authorized user. *See Zurich*, 466 F.3d at 580 (setting forth elements that a party seeking to compel arbitration must prove). Credit One only obliquely made such an argument at the district court through the conclusory statement in its motion to compel arbitration that because "Ms. Serrano permitted Plaintiff A.D. to use the card on Plaintiff's behalf. ... Plaintiff became an

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Chiatovich, 232 P. 206, 214 (Nev. 1925). In *Chiatovich*, the Supreme Court of Nevada held that a defendant had waived the defense of infancy by not pleading it. "The plea of infancy," the court held, "is a personal defense, which, after coming of age, one may or may not interpose. The general doctrine is that the note of an infant is voidable, not void, and may be ratified after he comes of age." *Chiatovich*, 232 P. at 214. "If the defendant were of age when sued, his failure to plead his infancy at the time of the contract would clearly be a waiver and implied ratification." *Id.* (internal quotation marks omitted). Notably, A.D. was still a minor at the time she filed the lawsuit. This is clear on the face of the complaint. *See* R.1 at 1 ("Plaintiff A.D., is a minor, age 15 at the time of filing ... .").

'Authorized User.'"[12] Credit One cannot rely on waiver when it was Credit One's burden to show that A.D. had become an Authorized User under the cardholder agreement and was therefore subject to the arbitration clause.[13]

C.

Having concluded that the terms of the cardholder agreement do not bind A.D., we turn to the issue upon which our colleague in the district court believed that there was some uncertainty: whether principles of equity and fairness nonetheless require A.D. to arbitrate with Credit One. Nevada has a strong preference for honoring arbitration agreements, but it will not enforce an arbitration clause against a non-signatory *unless* other principles of contract law make it appropriate to do so. *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 189 P.3d 656, 659–60 (Nev. 2008).[14] Nevada courts have adopted five

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[12] R.91 at 10.

[13] Finally, we note that our conclusion that the arbitration clause is not enforceable against A.D. is consistent with the "equal-treatment principle that applies to arbitration agreements." *Hunt v. Moore Bros., Inc.*, 861 F.3d 655, 659 (7th Cir. 2017); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Under that principle, when parties have formed an agreement to arbitrate, we must place that arbitration agreement on equal footing with other contracts. For the reasons we have discussed, however, A.D. does not have a contractual relationship of any kind with Credit One.

[14] As we have discussed, under the cardholder agreement's choice-of-law clause, Nevada law governs the interpretation of the cardholder agreement. Credit One maintains that the choice-of-law clause also governs the direct benefits estoppel analysis. *See* Appellee's Br. 16. The district court applied federal law to the estoppel analysis. As we recently clarified in

"theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Id.* at 660 (quoting *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)). Credit One urges that principles of equitable estoppel require that A.D. be bound to this arbitration agreement despite her age.

Scheirer v. Fromm Family Foods LLC, the question whether a party is equitably estopped from denying the application of an arbitration clause is a question of state contract law. 863 F.3d 748, 752–53 (7th Cir. 2017). We already have concluded that A.D. is not a party to the cardholder agreement, and generally, choice-of-law clauses in contracts do not apply to non-parties. *Cf. Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 933 (7th Cir. 1996) (stating that "[e]ven the strongest language choosing [another state's] law for purposes of interpreting the subcontracts would not necessarily bind" non-parties to the contract because "*they* did not sign the contracts"). Notably, "A.D. does not concede that Nevada law applies, because only if there is a valid contract can the choice of law provision in the agreement become effective." Reply Br. 7–8. However, A.D. does not otherwise meaningfully challenge the application of Nevada law in her reply to Credit One's contention; she does not offer another state's law as a viable option; and she does not propose that we engage in a choice-of-law analysis to determine which state's law to apply. Therefore, we consider her to have waived the issue and will apply Nevada law. *Cf. LAK, Inc. v. Deer Creek Enters.*, 976 F.2d 328, 331 (7th Cir. 1992) ("While we are not bound by the parties' choice of law, no party has challenged the application of Florida's substantive law. Thus, we proceed accordingly."). In any event, as we note in the text, Nevada has followed general common law principles of equitable estoppel.

1.

Estoppel is an equitable doctrine that prevents a non-signatory "from refusing to comply with an arbitration clause 'when it receives a "direct benefit" from a contract containing an arbitration clause.'" *Id.* at 661 (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)). Credit One maintains that A.D. *directly* benefited under the cardholder agreement because Ms. Serrano asked her to make purchases with the card. According to Credit One, "A.D. obtained the same type of contractual benefit as Serrano," which is the ability to use the credit card to make purchases.[15] But any "benefit" that A.D. received with respect to the credit card was limited to following her mother's directions to pick up the smoothies that her mother had ordered previously. This limited direction derived from the mother-daughter relationship. A.D. had no relationship, contractual or otherwise, with Credit One. She derived no direct benefit from the cardholder agreement. Her mother, not A.D., benefited from the agreement, which allowed her, not A.D., to buy the smoothies. Credit One's position that A.D. directly benefited under the cardholder agreement and is therefore estopped from denying the application of the arbitration clause simply misapprehends the purpose and scope of the direct benefits estoppel remedy.

2.

An estoppel theory also can be premised on the character of the non-signatory's claim. When a non-signatory plaintiff's

[15] Appellee's Br. 18.

"case center[s] on its asserted rights under the ... contract" containing the arbitration clause, the non-signatory is bound by the arbitration clause. *Id.* at 661; *see also Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 (4th Cir. 2000) ("In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.").

Credit One attempts to characterize A.D.'s straightforward TCPA claim as a claim seeking benefits under the cardholder agreement. Its argument is a convoluted and unpersuasive one. It points out that the TCPA does not apply to autodialed phone calls that are made with the called party's "prior express consent." 47 U.S.C. § 227(b)(1)(A). Whether A.D. consented to the calls, Credit One continues, depends on the terms of the cardholder agreement. Therefore, according to Credit One, because it has raised consent as an affirmative defense to A.D.'s TCPA claims, A.D.'s suit is one brought under the cardholder agreement.

The mere statement of this argument reveals its lack of cogency. As a party to the cardholder agreement, *Ms. Serrano* consented to phone calls from Credit One. Credit One's affirmative defense thus depends on whether Ms. Serrano's consent under the cardholder agreement can be imputed to A.D. According to Credit One, this question of contract interpretation transforms A.D.'s TCPA claim into one that relies on the cardholder agreement such that A.D. should be estopped from denying the application of the arbitration clause in her TCPA claim.

Consent is an affirmative defense under the TCPA, an affirmative defense that Credit One must establish. *Blow v. Bijora, Inc.*, 855 F.3d 793, 803 (7th Cir. 2017). It is not part of A.D.'s case. A.D. does not have to prove that she did not consent to the calls in order to succeed on her TCPA claims. Credit One's argument is entirely without merit.[16]

In her underlying TCPA action, A.D. has asserted no right under the cardholder agreement. Her action is under a completely separate statute protecting her from harassing phone calls. This is the "core" of her case. *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 201 (3d Cir. 2001). In no way can her cause of action be considered premised on the cardholder agreement. If we were to hold A.D. amenable to the cardholder agreement arbitration clause simply because, as a matter of affirmative defense in the present action, Credit One might argue that Ms. Serrano consented to the calls when she signed that agreement, we would "threaten to overwhelm the fundamental premise that a party cannot be compelled to arbitrate a matter without its agreement." *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003).

[16] This appeal does not give us an occasion to address the merits of the underlying case.

Conclusion

For the reasons set forth in the foregoing opinion, we reverse the judgment of the district court and remand for further proceedings.[17] A.D. may recover the costs of this appeal.

REVERSED and REMANDED

[17] Because we conclude that the arbitration clause, including its class action waiver, does not apply to A.D., our remand permits the district court to reconsider its denial of A.D.'s motion for class certification.

RULE 1.03 DOCKETING AND ASSIGNMENT OF CASES

(a) Upon the filing of the initial paper or pleading in any case the Clerk shall docket the proceeding as a civil, criminal or miscellaneous action. Each case or proceeding shall be given a six-part docket number, which includes: (1) the one-digit number indicating the division of the Court; (2) the two-digit number indicating the year in which the proceeding is initiated; (3) the code indicating the docket to which the case is assigned; (4) the sequence number of the case or proceeding; (5) a designation consisting of a letter or series of letters disclosing the division in which the proceeding is pending; and (6) the code indicating the judge to whom the case is assigned (the code shall conform to the code assigned by the Administrative Office of the United States Courts) followed by the initials of the magistrate judge to whom the case is assigned.

(b) Each case, upon the filing of the initial paper or pleading, shall be assigned by the Clerk to an individual judge of the Court who shall thereafter be the presiding judge with respect to that cause. Individual assignment of cases within each Division shall be made at random or by lot in such proportions as the judges of the Court from time to time direct. Neither the Clerk nor any member of his staff shall have any power or discretion in determining the judge to whom any case is assigned. The method of assignment shall be designed to prevent anyone from choosing the judge to whom a case is to be assigned, and all persons shall conscientiously refrain from attempting to circumvent this rule.

(c) No application for any order of court shall be made until the case or controversy in which the matter arises has been docketed and assigned by the Clerk as prescribed by subsection (b) of this rule, and then only to the judge to whom the case has been assigned; provided, however:

(1) When no case has previously been initiated, docketed and assigned, emergency applications arising during days or hours that the Clerk's Office is closed may be submitted to any available judge resident in the appropriate Division, or, if no judge is available in the Division, to any other judge in the District, but the case shall then be docketed and assigned by the Clerk on the next business day and shall thereafter be conducted by the judge to whom it is assigned in accordance with subsection (b) of this rule.

(2) When the judge to whom a case has been assigned is temporarily unavailable due to illness, absence or prolonged engagement in other judicial business, emergency applications arising in the case may be made to the other resident judge in the Division or, if more than one, to the judge who is junior in commission in that Division. If no other judge is available in the Division such applications may be made to any other available judge in the District.

(d) The judge to whom any case is assigned may, at any time, reassign the case to any other consenting judge for any limited purpose or for all further purposes.

(e) The Clerk shall accept for filing all prisoner cases filed with or without the required filing fee or application to proceed in forma pauperis. However, a prisoner case will be subject to dismissal by the Court, sua sponte, if the filing fee is not paid or if the application is not filed within 30 days of the commencement of the action.

RULE 1.04 SIMILAR OR SUCCESSIVE CASES; DUTY OF COUNSEL

(a) Whenever a case, once docketed and assigned, is terminated by any means and is thereafter refiled without substantial change in issues or parties, it shall be assigned, or reassigned if need be, to the judge to whom the original case was assigned. Whenever a second or subsequent case seeking post conviction or other relief by petition for writ of habeas corpus is filed by the same petitioner involving the same conviction, it shall be assigned, or reassigned if need be, to the same judge to whom the original case was assigned. All motions under 28 U.S.C. Section 2255 shall be assigned to the judge to whom the original criminal case was assigned.

(b) **TRANSFER OF RELATED CASES BEFORE TWO OR MORE JUDGES.** If cases assigned to different judges are related because of either a common question of fact or any other prospective duplication in the prosecution or resolution of the cases, a party may move to transfer any related case to the judge assigned to the first-filed among the related cases. The moving party shall file a notice of filing the motion to transfer, including a copy of the motion to transfer, in each related case. The proposed transferor judge shall dispose of the motion to transfer but shall grant the motion only with the consent of the transferee judge. If the transferee judge determines that the same magistrate judge should preside in some or all respects in some or all of the related cases, the Clerk shall assign the magistrate judge assigned to the first-filed among the affected cases to preside in that respect in those cases.

(c) **CONSOLIDATION OF RELATED CASES BEFORE ONE JUDGE.** If cases assigned to a judge are related because of either a common question of law or fact or any other prospective duplication in the prosecution or resolution of the cases, a party may move to consolidate the cases for any or all purposes in accord with Rule 42.Fed.R.Civ.P., or Rule 13, Fed.R.Cr.P. The moving party shall file a notice of filing the motion to consolidate, including a copy of the motion to consolidate, in each related case. If the presiding judge determines that the same magistrate judge should preside in some or all respects in some or all of the consolidated cases, the Clerk shall assign the magistrate judge assigned to the first-filed among the affected cases to preside in that respect in those cases.

(d) All counsel of record in any case have a continuing duty promptly to inform the Court and counsel of the existence of any other case within the purview of this rule, as well as the existence of any similar or related case or proceeding pending before any other court or administrative agency. Counsel shall notify the Court by filing and serving a **"Notice of Pendency of Related Actions"** that identifies and describes any related case.

RULE 3.08 NOTICE OF SETTLEMENTS; DISMISSAL

(a) It shall be the duty of all counsel to immediately notify the Court upon the settlement of any case.

(b) When notified that a case has been settled and for purposes of administratively closing the file, the Court may order that a case be dismissed subject to the right of any party to move the Court within sixty (60) days thereafter (or within such other period of time as the Court may specify) for the purpose of entering a stipulated form of final order or judgment; or, on good cause shown, to reopen the case for further proceedings.

CHAPTER SIX
UNITED STATES MAGISTRATE JUDGES

RULE 6.01 DUTIES OF UNITED STATES MAGISTRATE JUDGES

(a) In addition to the powers and duties set forth in 28 U.S.C. Section 636(a), the United States Magistrate Judges are hereby authorized, pursuant to 28 U.S.C. Section 636(b), to perform any and all additional duties, as may be assigned to them from time to time by any judge of this Court, which are not inconsistent with the Constitution and laws of the United States.

(b) The assignment of duties to United States Magistrate Judges by the judges of the Court may be made by standing order entered jointly by the resident judges in any Division of the Court; or by any individual judge, in any case or cases assigned to him, through written order or oral directive made or given with respect to such case or cases.

(c) The duties authorized to be performed by United States Magistrate Judges, when assigned to them pursuant to subsection (b) of this rule, shall include, but are not limited to:

(1) Issuance of search warrants upon a determination that probable cause exists, pursuant to Rule 41, Fed.R.Cr.P., and issuance of administrative search warrants upon proper application meeting the requirements of applicable law.

(2) Processing of complaints and issuing appropriate summonses or arrest warrants for the named defendants. (Rule 4, Fed.R.Cr.P.)

(3) Conduct of initial appearance proceedings for defendants, informing them of their rights, admitting them to bail and imposing conditions of release. (Rule 5, Fed.R.Cr.P. and 18 U.S.C. Section 3146)

(4) Appointment of counsel for indigent persons and administration of the Court's Criminal Justice Act Plan, including maintenance of a register of eligible attorneys and the approval of attorneys' compensation and expense vouchers. (18 U.S.C. Section 3006A; Rule 44, Fed.R.Cr.P.; and Rule 4.13(a) of these rules)

(5) Conduct of full preliminary examinations. (Rule 5.1, Fed.R.Cr.P. and 18 U.S.C. Section 3060)

(6) Conduct of removal hearings for defendants charged in other districts, including the issuance of warrants of removal. (Rule 40, Fed.R.Cr.P.)

(7) Issuance of writs of habeas corpus *ad testificandum* and habeas corpus *ad prosequendum*. (28 U.S.C. Section 2241(c)(5))

(8) Setting of bail for material witnesses and holding others to security of the peace and for good behavior. (18 U.S.C. Section 3149 and 18 U.S.C. Section 3043)

(9) Issuance of warrants and conduct of extradition proceedings pursuant to 18 U.S.C. Section 3184.

(10) The discharge of indigent prisoners or persons imprisoned for debt under process or execution issued by a federal court. (18 U.S.C. Section 3569 and 28 U.S.C. Section 2007)

(11) Issuance of an attachment or other orders to enforce obedience to an Internal Revenue Service summons to produce records or give testimony. (26 U.S.C. Section 7604(a) and (b))

(12) Conduct of post-indictment arraignments, acceptance of not guilty pleas, acceptance of guilty pleas in felony cases with the consent of the Defendant, and the ordering of a presentence investigation report concerning any defendant who signifies the desire to plead guilty. (Rules 10, 11(a) and 32(c), Fed.R.Cr.P.)

(13) Acceptance of the return of an indictment by the grand jury, issuance of process thereon and, on motion of the United States, ordering dismissal of an indictment or any separate count thereof. (Rules 6(f) and 48(a), Fed.R.Cr.P.)

(14) Supervision and determination of all pretrial proceedings and motions made in criminal cases through the Court's Omnibus Hearing procedure or otherwise including, without limitation, motions and orders made pursuant to Rules 12, 12.2(c), 15, 16, 17, 17.1 and 28, Fed.R.Cr.P., 18 U.S.C. Section 4244, orders determining excludable time under 18 U.S.C. Section 3161, and orders dismissing a complaint without prejudice for failure to return a timely indictment under 18 U.S.C. Section 3162; except that a magistrate judge shall not grant a motion to dismiss or quash an indictment or information made by the defendant, or a motion to suppress evidence, but may make recommendations to the Court concerning them.

(15) Conduct of hearings and issuance of orders upon motions arising out of grand jury proceedings including orders entered pursuant to 18 U.S.C. Section 6003, and orders involving enforcement or modification of subpoenas, directing or regulating lineups, photographs, handwriting exemplars, fingerprinting, palm printing, voice identification, medical examinations, and the taking of blood, urine, fingernail, hair and bodily secretion samples (with appropriate medical safeguards).

(16) Conduct of preliminary and final hearings in all probation revocation proceedings, and the preparation of a report and recommendation to the Court as to whether the petition should be granted or denied. (Rule 32.1, Fed.R.Cr.P. and 18 U.S.C. Section 3653.)

(17) Processing and review of habeas corpus petitions filed pursuant to 28 U.S.C. Section 2241, *et seq.*, those filed by state prisoners pursuant to 28 U.S.C. Section 2254, or by federal prisoners pursuant to 28 U.S.C. Section 2255, and civil suits filed by state prisoners under 42 U.S.C. Section 1983, with authority to require responses, issue orders to show cause and such other orders as are necessary to develop a complete record, including the conduct of evidentiary hearings, and the preparation of a report and recommendation to the Court as to appropriate disposition of the petition or claim.

(18) Supervision and determination of all pretrial proceedings and motions made in civil cases including, without limitation, rulings upon all procedural and discovery motions, and conducting pretrial conferences; except that a magistrate judge (absent a stipulation entered into by all affected parties) shall not appoint a receiver, issue an injunctive order pursuant to Rule 65, Fed.R.Civ.P., enter an order dismissing or permitting maintenance of a class action pursuant to Rule 23, Fed.R.Civ.P., enter any order granting judgment on the pleadings or summary judgment in whole or in part pursuant to Rules 12(c) or 56, Fed.R.Civ.P., enter an order of involuntary dismissal pursuant to Rule 41(b) or (c), Fed.R.Civ.P., or enter any other final order or judgment that would be appealable if entered by a judge of the Court, but may make recommendations to the Court concerning them.

(19) Conduct of all proceedings in civil suits, before or after judgment, incident to the issuance of writs of replevin, garnishment, attachment or execution pursuant to governing state or federal law, and the conduct of all proceedings and the entry of all necessary orders in aid of execution pursuant to Rule 69, Fed.R.Civ.P.

(20) Conduct or preside over the voir dire examination and empanelment of trial juries in civil and criminal cases.

(21) Processing and review of all suits instituted under any law of the United States providing for judicial review of final decisions of administrative officers or agencies on the basis of the record of administrative proceedings, and the preparation of a report and recommendation to the Court concerning the disposition of the case.

(22) Serving as a master for the taking of testimony and evidence and the preparation of a report and recommendation for the assessment of damages in admiralty cases, non-jury proceedings under Rule 55(b)(2), Fed.R.Civ.P., or in any other case in which a special reference is made pursuant to Rule 53, Fed.R.Civ.P.

(23) In admiralty cases, entering orders (i) appointing substitute custodians of vessels or property seized *in rem*; (ii) fixing the amount of security, pursuant to Rule E(5), Supplemental Rules for Certain Admiralty and Maritime Claims, which must be posted by the claimant of a vessel or property seized *in rem*; (iii) in limitation of liability proceedings, for monition and restraining order including approval of the *ad interim* stipulation filed with the complaint, establishment of the means of notice to potential claimants and a deadline for the filing of claims; and (iv) to restrain further proceedings against the plaintiff in limitation except by means of the filing of a claim in the limitation proceeding.

(24) Appointing persons to serve process pursuant to Rule 4(c), Fed.R.Civ.P., except that, as to *in rem* process, such appointments shall be made only when the Marshal has no deputy immediately available to execute the same and the individual appointed has been approved by the Marshal for such purpose.

(25) Processing and review of petitions in civil commitment proceedings under the Narcotic Addict Rehabilitation Act, and the preparation of a report and recommendation concerning the disposition of the petition.

(26) Conduct of proceedings and imposition of civil fines and penalties under the Federal Boat Safety Act. (46 U.S.C. Section 1484(d)).

RULE 6.02 REVIEW OF MAGISTRATE JUDGES' REPORTS AND RECOMMENDATIONS

(a) In any case in which the magistrate judge is not authorized to enter an operative order pursuant to Rule 6.01, 28 U.S.C. Section 636 or any standing or special order of the Court entered thereunder, but is authorized or directed to file a report or recommendation to the District Judge to whom the case has been assigned, a copy of such report and recommendation shall be furnished, upon filing, to the District Judge and to all parties. Within fourteen (14) days after such service, any party may file and serve written objections thereto; and any party desiring to oppose such objections shall have fourteen (14) days thereafter within which to file and serve a written response. The District Judge may accept, reject, or modify in whole or in part, the report and recommendation of the magistrate judge or may receive further evidence or recommit the matter to the magistrate judge with instructions.

RULE 6.03 MISDEMEANOR AND PETTY OFFENSES

(a) Pursuant to 18 U.S.C. Section 3401, any full time United States Magistrate Judge of this District, sitting with or without a jury, shall have jurisdiction to try persons accused of, and sentence persons convicted of, petty offenses. With consent of the parties, any full time United States Magistrate Judge of this District, sitting with or without a jury, shall have jurisdiction to try persons accused of, and sentence persons convicted of a Class A misdemeanor committed within the District whether originating under an applicable Federal statute or regulation or a state statute or regulation made applicable by 18 U.S.C. Section 13. Cases of misdemeanors may, upon transfer into this District under Rule 20, Fed.R.Cr.P., be referred to a full time United States Magistrate Judge of this District for plea and sentence, upon defendant's consent. In a petty offense case involving a juvenile, any full time United States Magistrate Judge of this District may exercise all powers granted to the District Court under Chapter 403 of Title 18 of the United States Code. In cases of any misdemeanor, other than a petty offense involving a juvenile, in which consent to trial before a Magistrate Judge has been filed, a Magistrate Judge may exercise all powers granted to the District Court under Chapter 403 of Title 18 of the United States Code.

(b) Any person charged with a petty offense as defined in 18 U.S.C. Section 19 may, in lieu of appearance post collateral in the amount indicated for the offense, waive appearance before a magistrate judge, and consent to forfeiture of the collateral. The offenses for which collateral may be posted and forfeited in lieu of appearance by the person charged, together with the amounts of collateral to be posted, shall be specified in standing orders of the Court, in each Division of the Court, copies of which shall be maintained in the offices of the Clerk and the magistrate judges, respectively. For all petty offenses not specified in such standing orders, the person charged must appear before a magistrate judge; and further, nothing contained in this rule shall prohibit a law enforcement officer from arresting a person for the commission of any offense, including those for which collateral may be posted and forfeited, and requiring the person charged to appear before a magistrate judge or, upon arrest, taking him immediately before a magistrate judge.

(c) In the trial of all cases pursuant to this rule, Rule 58, Federal Rules of Criminal Procedure, governs practice and procedure.

RULE 6.04 RESERVED

RULE 6.05 TRIAL OF CIVIL CASES

(a) Pursuant to 28 U.S.C. Section 636(c)(1), and subject to the provisions of this rule, all full time United States Magistrate Judges in the District are hereby specially designated to conduct any or all proceedings in any jury or nonjury civil matter and order the entry of judgment in the case.

(b) Upon the filing of any civil case the Clerk shall deliver to the Plaintiff(s) written notice of the right of the parties to consent to disposition of the case by a United States Magistrate Judge pursuant to 28 U.S.C. Section 636(c) and the provisions of this rule. The Clerk shall also issue or supply at that time, for each Defendant in the case, copies of such notice which shall be attached to the summons and thereafter served upon the Defendant(s) in the manner provided by Rule 4, Fed.R.Civ.P.; provided, however, that a failure to serve a copy of such notice upon any Defendant shall not affect the validity of the service of process or the jurisdiction of the Court to proceed. If, after the initial filing of a civil case, new or additional parties enter or join in the action pursuant to the operation of any statute, rule or order of the Court, the Clerk shall immediately mail or otherwise deliver a copy of such notice to each such party.

(c) The written notice contemplated by subsection (b) of this rule shall be in such form as the judges of the Court from time to time direct. In addition, the Clerk shall maintain on hand, in a form or forms to be approved by the judges of the Court, written consent agreements for the use of the parties in communicating to the Clerk their unanimous and voluntary consent, upon entry of an order of reference by the presiding district judge, to have all further proceedings in the case, including trial with or without a jury, and the entry of judgment, conducted by a United States Magistrate Judge. One form of such consent agreements shall provide for appeal to the United States Court of Appeals (28 U.S.C. Section 636(c)(3)), and another shall provide for appeal to the presiding district judge (28 U.S.C. Section 636(c)(4)).

(d) If the parties in any civil case unanimously consent to disposition of the case by a United States Magistrate Judge pursuant to 28 U.S.C. Section 636(c) and this rule, such consent must be communicated to the Clerk on an appropriate form (provided by the Clerk in accordance with subsection (c) of this rule). The Clerk shall not accept or file any consent except in the form and manner, and within the time, prescribed by this rule.

(e) In the event the parties file a unanimous consent pursuant to subsection (d) of this rule, the Clerk shall immediately notify the presiding district judge who will promptly (1) enter an order of reference to a United States magistrate judge, or (2) enter an order declining to do so; provided, however, the judges of the Court shall not decline to make an order or orders of reference for the purpose of limiting the types of cases to be tried by the United States magistrate judges pursuant to this rule. In making or in declining to make an order of reference the presiding judge may consider, among other things, the current allocation of pending judicial business between the judges of the Court and the magistrate judges; the judicial economy, if any, to be gained by the reference as measured in part by the extent of prior judicial labor expended and familiarity accumulated in the case by the judge or the magistrate judge, as the case might be; the extent to which the magistrate judge(s) may have time available to devote to the case giving due regard to the necessity of diligent performance of other judicial duties regularly assigned to the magistrate judges; and any other features peculiar to the individual case which suggest, in the interest of justice or judicial economy, that a reference should or should not be made.

(f) In any case in which an order of reference has been made, the presiding judge may, for cause shown on his own motion, or under extraordinary circumstances shown by any party, vacate the order of reference and restore the case to the calendar of the presiding judge.

(g) In all cases in which an order of reference has been made on the basis of a consent agreement providing for appeal to the presiding judge of the District Court pursuant to 28 U.S.C. Section 636(c)(4), any such appeal shall be governed by the applicable Federal Rules of Appellate Procedure relating to appeals in civil cases from the District Court to the Court of Appeals, except that Rules 30, 31(b), and 32, Fed.R.App.P., shall not apply.

(h) Nothing in this rule shall be construed to limit or affect the right of any judge or judges of the Court to assign judicial duties or responsibilities to a United States magistrate judge or magistrate judges pursuant to Rule 6.01, or any standing order entered under that rule, with or without the consent of the parties.

CHAPTER EIGHT
COURT ANNEXED ARBITRATION

RULE 8.01 ARBITRATION

(a) It is the purpose of the Court, through adoption and implementation of this rule, to provide an alternative mechanism for the resolution of civil disputes in accord with 28 U.S.C. Sections 651-658.

(b) The Chief Judge shall certify those persons who are eligible and qualified to serve as arbitrators under this rule. An individual may be certified to serve as an arbitrator under this rule if admitted to The Florida Bar for at least five (5) years, admitted to practice before this Court, and determined by the Chief Judge competent to perform the duties of an arbitrator.

An advisory committee or committees comprised of members of the bar in each Division of the Court, respectively, may be constituted to assist the Chief Judge in screening applicants and aiding in the formulation and application of standards for selecting arbitrators.

(c) Each individual certified as an arbitrator shall take the oath or affirmation prescribed by 28 U.S.C. Section 453 before serving as an arbitrator. Depending upon the availability of funds from the Administrative Office of the United States Courts, or other appropriate agency, arbitrators may be compensated for their services in such amounts and in such manner as the Chief Judge shall specify from time to time. No arbitrator shall charge or accept for services any fee or reimbursement from any other source. Any member of the bar who is certified and designated as an arbitrator pursuant to these rules shall not for that reason be disqualified from appearing and acting as counsel in any other case pending before the Court.

RULE 8.02 CASES FOR ARBITRATION

(a) Any civil action may be referred to arbitration in accordance with this rule if the parties consent in writing to arbitration, except that referral to arbitration may not occur if:

(1) the action is based on an alleged violation of a right secured by the Constitution of the United States:

(2) jurisdiction is based in whole or in part on 28 U.S.C. Section 1343; or

(3) the relief sought consists of money damages in an amount greater than $150,000.

(b) No party or attorney can be prejudiced for refusing to participate in arbitration by consent.

RULE 8.03 REFERRAL TO ARBITRATION

Within twenty-one (21) days after referral to arbitration, the Court shall select three (3) certified arbitrators to conduct the arbitration proceedings. Not more than one member or associate of a firm or association of attorneys shall be appointed to the same panel of arbitrators. Any person selected as an arbitrator may be disqualified for bias or prejudice as provided in 28 U.S.C. Section 144, and shall disqualify himself in any action in which he would be required to do so if he were a justice, judge, or magistrate judge governed by 28 U.S.C. Section 455.

RULE 8.04 ARBITRATION HEARING

(a) Immediately upon selection and designation of the arbitrators pursuant to Rule 8.03, the Clerk shall communicate with the parties and the arbitrators in an effort to ascertain a mutually convenient date for a hearing, and shall then schedule and give notice of the date and time of the arbitration hearing which may be held in space provided in the United States Courthouse. The hearing shall be scheduled within ninety (90) days from the date of the selection and designation of the arbitrators on at least twenty-one (21) days notice to the parties. Any continuance of the hearing beyond that ninety (90) day period may be allowed only by order of the Court for good cause shown.

(b) At least fourteen (14) days prior to the arbitration hearing each party shall furnish to every other party a list of witnesses, if any, and copies (or photographs) of all exhibits to be offered at the hearing. The arbitrators may refuse to consider any witness or exhibit which has not been so disclosed.

(c) Individual parties or authorized representatives of corporate parties shall attend the arbitration hearing unless excused in advance by the arbitrators for good cause shown. The hearing shall be conducted informally; the Federal Rules of Evidence shall be a guide, but shall not be binding. It is contemplated by the Court that the presentation of testimony shall be kept to a minimum, and that cases shall be presented to the arbitrators primarily through the statements and arguments of counsel.

(d) Any party may have a recording and transcript made of the arbitration hearing at the party's expense.

RULE 8.05 ARBITRATION AWARD AND JUDGMENT

(a) The award of the arbitrators shall be filed with the Clerk within fourteen (14) days following the hearing, and the Clerk shall give immediate notice to the parties. The award shall state the result reached by the arbitrators without necessity of factual findings or legal conclusions. A majority determination shall control the award.

(b) At the end of thirty (30) days after the filing of the arbitrator's award the Clerk shall enter judgment on the award if no timely demand for trial *de novo* has been made. If the parties have previously stipulated in writing that the award shall be final and binding, the Clerk shall enter judgment on the award when filed.

(c) Pursuant to 28 U.S.C. Section 657(b), the contents of any arbitration award shall be sealed and shall remain unknown to any judge assigned to the case --

(1) Except as necessary for the Court to determine whether to assess costs or attorney fees under 28 U.S.C. Section 655 or

(2) Until the District Court has entered final judgment in the action or the action has been otherwise terminated, at which time the award shall be unsealed.

RULE 8.06 TRIAL DE NOVO

(a) Within thirty (30) days after the filing of the arbitration award with the Clerk, any party may demand a trial *de novo* in the District Court. Written notification of such a demand shall be filed with the Clerk and a copy shall be served by the moving party upon all other parties.

(b) Upon a demand for a trial *de novo* the action shall be placed on the calendar of the Court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury shall be preserved inviolate.

(c) At the trial *de novo* the Court shall not admit evidence that there has been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, except that testimony given at an arbitration hearing may be used for any purpose otherwise permitted by the Federal Rules of Evidence, or the Federal Rules of Civil Procedure.

(d) No penalty for demanding a trial *de novo* shall be assessed by the Court.

M-105827

CreditOne® BANK

Interest Rates and Interest Charges	
ANNUAL PERCENTAGE RATE (APR) for Purchases and Cash Advances	**23.90%** This APR will vary with the market based on the Prime Rate.
Paying Interest	We will begin charging interest on purchases and cash advances on the posting date.
Minimum Interest Charge	If you are charged interest, the minimum Interest Charge will be no less than $1.00 for any billing cycle in which an Interest Charge is due. Credit lines less than $400 will not receive a minimum Interest Charge in the first year (Introductory period).
For Credit Card Tips from the Consumer Financial Protection Bureau	To learn more about factors to consider when applying for or using a credit card, visit the website of the Consumer Financial Protection Bureau at https:/www.consumerfinance.gov/learnmore.
Fees	
Set-up and Maintenance Fees	Notice: The Annual Membership Fee will be billed to your account when it is opened and will reduce the amount of your initial available credit. If your account is established with a $300 credit line, your initial available credit will be $225. You may still reject this plan, provided that you have not yet used the account or paid a fee after receiving a billing statement. If you do reject the plan, you are not responsible for any fees or charges.
· Annual Membership Fee	**$75** First year (Introductory period). **$99** thereafter, billed monthly at $8.25.
· Authorized User Participation Fee	**$19** annually (if applicable).
Transaction Fees · Cash Advance	**$0** First year (Introductory period). Thereafter, either **$5** or **8%** of the amount of each advance, whichever is greater.
Penalty Fees · Late Payment	Up to **$35**
· Returned Payment	Up to **$35**

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)". See your Cardholder Agreement, Disclosure Statement and Arbitration Agreement ("Agreement") for more details.

Billing Rights: Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

Appendix K, Pett.App. 79a

VISA/MASTERCARD CARDHOLDER AGREEMENT, DISCLOSURE STATEMENT AND ARBITRATION AGREEMENT

This Agreement, together with the application you previously signed and the enclosed Arbitration Agreement, governs the use of your VISA® or Mastercard® Account issued by Credit One Bank, N.A. (the "Account," "Card" or "Card Account"). The words "you," "your" and "Cardholder(s)" refer to all persons, jointly and severally, authorized to use the Card Account; and "we," "us," "our," and "Credit One Bank" refer to Credit One Bank, N.A., its successors or assigns. By requesting and receiving, signing or using your Card, you agree as follows:

IMPORTANT NOTICE: Please read the Arbitration Agreement portion of this document for important information about your and our legal rights under this Agreement.

1. CHANGES IN AGREEMENT TERMS: We can change any term of this Agreement, including the rate of the finance charge or the manner in which the finance charges are calculated, or add new terms to this Agreement, at any time upon such notice to you as is required by law. As permitted by law, any change will apply to your new activity and, in certain circumstances, to your outstanding balance when the change is effective. If you do not wish to be subject to the change, you must notify Credit One Bank by calling our toll-free number at 866-515-5721 or you may write to us at Bank Card Center, P.O. Box 95516, Las Vegas, NV 89193-5516 prior to the effective date of the change, and close your Account.

2. JOINT ACCOUNTS: If the application was for more than one person, or if an application was made and accepted by Credit One Bank to add a new Cardholder to an existing Account, this is a "Joint Account." Each of you individually may use the Account to the extent of the credit limit established for the Account, and each of you is jointly and severally liable for the full outstanding balance, including, but not limited to, charges made by any Cardholder. Each of you shall also be jointly and severally liable for any charges made by any person given permission to use the Account by any Cardholder. You agree that Credit One Bank is authorized to act on the instructions of any Cardholder. Instructions from any one of you will constitute instructions from all of you. Requests from a Cardholder to terminate the privileges of another Cardholder on the Account will be deemed a request for termination of the Account.

3. AUTHORIZED USER: At your request, we may, at our discretion, issue an additional card in the name of an Authorized User with your credit card account number. If you allow someone to use your Account, that person will be an Authorized User. By designating an Authorized User who is at least fifteen years of age, you understand that: 1) you will be solely responsible for the use of your Account and each card issued on your Account including all charges and transactions made by the Authorized User and any fees resulting from their actions to the extent of the credit limit established for the Account; 2) the Authorized User will have access to certain account information including balance, available credit and payment information. If you provide an Authorized User with any information that enables him/her to access or use your Account, you agree to be liable for the Authorized User's use of that information, and we will have no responsibility or liability for any of the Authorized User's actions; 3) we reserve the right to terminate the Card Account privileges of an Authorized User by closing your Account and issuing you a new account number; 4) the Account may appear on the credit report of the Authorized User. If you advise us that the Authorized User is your spouse, information regarding the Account will be provided to consumer reporting agencies in your name as well as in the name of the Authorized User; 5) the Authorized User can make payments, report the card lost or stolen and remove him or herself from the Account; 6) you can request the removal of the Authorized User from your Account via mail or telephone.
Authorized User Annual Participation Fee: An Authorized User Annual Participation Fee of $19.00 will be imposed for issuing a card in the Authorized User's name. This Fee will be assessed annually in the month the Authorized User was added to the Account.

4. CONFLICTS BETWEEN CARDHOLDERS: In the event Credit One Bank receives conflicting instructions from one or more of you, or if Credit One Bank has reason to believe there is a dispute between the Cardholders, Credit One Bank may, at its sole discretion, take one or more of the following actions: (1) refuse to act on any conflicting instructions; (2) restrict the Account and deny access to all Cardholders until the dispute is resolved; or (3) terminate the Account. In no event will Credit One Bank be liable for any delay or refusal to honor a request for an advance or any other request with respect to your Account, or for restricting or terminating the Account as provided in this section.

5. YOUR CREDIT LIMIT: Your Credit Limit will be established by Credit One Bank and will be disclosed to you when your Card is issued. It also will be shown on each of your billing statements. We reserve the right to modify your Credit Limit from time to time, and if we do so, we will notify you. You agree not to engage in any Card transaction that would cause your outstanding balance to exceed your Credit Limit. Credit One Bank may, but is not obligated to, extend credit to you from your Account if you are already up to your Credit Limit or if the borrowing would take you over your Credit Limit at any time. You must pay us on demand any amount by which your Account's balance exceeds your Credit Limit. If we extend credit over your Credit Limit, we will not be obligated to do so again, and such extension will not result in any waiver of our rights under this paragraph.

6. USING YOUR CARD: You and any Joint Cardholder or Authorized User may use your Cards: (1) to make purchases of goods or services at merchant establishments where the Card is accepted, and (2) to obtain cash advances (i.e., loans of money) at participating financial institutions. Each purchase and cash advance obtained will reduce the available credit under your credit limit until it is repaid. Cash advances are limited to 25% of your assigned credit limit. Cash advances cannot exceed two transactions or more than $200.00 per day, as applicable. You promise to pay us, when due, the total amount of all purchases and cash advances, as well as all finance charges, and other fees and charges billed to your Card Account. You may not use your Card for any illegal purpose. You further acknowledge that the Card Account will be for personal use and may not be used for business purposes.

7. AUTHORIZATION: Merchants or banks may contact us on your behalf to obtain authorization for Card purchases or cash advances. You agree that we shall have no liability if: (a) any merchant or bank refuses to honor any Card issued to access the Account, (b) operational difficulties prevent authorization of a transaction, (c) authorization is declined because your Account is overlimit or delinquent, or (d) credit has been restricted pursuant to any term of this Agreement.

8. YOUR MONTHLY STATEMENT: Your Account will be on a monthly billing cycle. We will send you a statement each month that there is activity or an outstanding balance on your Account. The statement itemizes your Account activity, including purchases, cash advances, fees, finance charges, other charges, and payments and credits posted during the billing period. The payment coupon portion of the statement will serve as your bill. When making payment, write your Account number on your check or money order and return the coupon with your payment. You should retain the remaining portion of your statement for your records. If the Bank offers, and you elect to receive, your monthly statement electronically, paper statements will not be mailed to you. You will be responsible for making your payments by the due date, either through the Bank's website or telephone, for which a fee may apply, or by mailing your payment to the appropriate address designated for receipt of payments by mail. Credit One Bank will not be responsible for processing delays or failure to process the payment to your Account if a payment sent by mail does not contain your Account number or is not accompanied by your payment coupon. Your payment will be credited to your Account, as of the date of receipt, if the payment is received by 5:00 p.m. Pacific Time ("PT").

9. ANNUAL MEMBERSHIP FEE: The Annual Membership Fee for your Account in year one is $75.00 (Introductory period) and will be billed to your Account when it is opened. The Annual Membership Fee for your Account beginning in year two is $99.00 and will be billed to your Account in monthly installments of $8.25 per month.

The Annual Membership Fee will be billed to your Account as long as it remains open or, if your Account is closed by you or us, the Annual Membership Fee will continue to be charged until you pay your outstanding balance in full. The Annual Membership Fee is refundable as long as you cancel your Account and have not used your card for any Purchases or Cash Advances and you have not made a payment. An Annual Membership Fee Notice, as required by regulation, will be provided to you at least once every 12 months. The Annual Membership Fee is imposed for providing services related to your Account, including but not limited to: the opportunity to use your card with participating merchants, providing renewal cards, providing availability of customer service representatives for assistance, providing credit information to credit reporting agencies, and providing the opportunity for additional credit.

10. FINANCE CHARGES: Your Card Account is subject to finance charges and the total Finance Charges in your monthly billing cycle are the sum of the Periodic Finance Charges, Transaction Finance Charges, and Credit Limit Increase Fees which are calculated as follows:
(a) Periodic Finance Charges: For purchases and cash advances, Credit Limit Increase Fees, Annual Membership Fees, Late Payment Fees and other fees and charges to your Account, the Periodic Finance Charge is calculated as follows: The **Annual Percentage Rate ("APR")** for Purchases and Cash Advances may vary and will be determined by adding **20.65%** to the U.S. Prime Rate appearing in the "Money Rates" section of any edition of *The Wall Street Journal* published on the 25th day of each month. If the *Journal* is not published on that day, then the Prime Rate on the next business day will be used. If the Prime Rate changes, the new rate will take effect on the first day of the following month. The new rate will be applied to all balances on the Account. The estimated **APR** for all balances is 3.25% plus 20.65%, currently **23.90%** (corresponding monthly periodic rate of 1.9916%). The **APR** will never be greater than **29.90%** (corresponding monthly periodic rate of 2.4916%). The most recent Annual Percentage Rate was disclosed to you when you received your credit card. There is a **Minimum Interest Charge** if you are charged interest; the minimum Interest Charge will be no less than **$1.00** for any billing cycle in which an Interest Charge is due. Credit lines less than $400 will not receive a minimum Interest Charge in the first year (Introductory period). Periodic Finance Charges will be assessed from the date the purchase, cash advance, fee or charge is posted to your Account until the date it is paid in full, and will be calculated by applying the monthly periodic rate to the "average daily balance" of your Account. To get the "average daily balance," we take the beginning balance of your Account each day, add any new purchases, cash advances, fees and charges, and subtract any payments or credits and unpaid periodic Finance Charges. This gives us the daily balance. Then we add up all the daily balances for the billing cycle, and divide the total by the number of days in the billing cycle. This gives us the "average daily balance." Periodic Finance Charges will be assessed on all "average daily balances" until paid in full. All purchases, cash advances, fees or charges accrue finance charges starting on the date of posting, even if the new balance from your previous statement was paid in full or even if that new balance was zero.
(b) Cash Advance Transaction Finance Charges: The Cash Advance Transaction Fee for the first year is $0 (Introductory period). After the first year, each time you obtain a new cash advance, we will impose a Transaction Fee **Finance Charge** of **8%** of the amount advanced or **$5.00**, whichever is greater.
(c) Credit Limit Increase Finance Charges: A fee may be imposed for Credit Limit increases, as described under the "Credit Limit Increase Requests" section of this Agreement.
(d) Foreign Transaction Finance Charges: Each time you make a foreign transaction, we may impose a Transaction Fee **Finance Charge** of **3%** of the amount charged or **$1.00**, whichever is greater. For additional information, see the "Foreign Transaction" section of this Agreement.
(e) Fees Treated as Principal: For purposes of Finance Charge calculation, Credit Limit Increase Fees, Annual Membership Fees, Late Payment Charges, and other charges, except cash advance fees, will be treated like purchase transactions, posted as principal, and accrue Finance Charges like purchases.
(f) Periodic Statement Annual Percentage Rate: If a finance charge imposed is required to be included in calculating the Annual Percentage Rate under the Federal Truth-in-Lending Act, the Annual Percentage Rate disclosed on your statement may exceed the corresponding Annual Percentage Rate disclosed in this Agreement for any billing period in which such finance charge is posted to your Account.

11. LATE PAYMENT CHARGES: If at least the Amount Due This Period (less any Late Payment Fee for the current billing cycle) and Amount Past Due are not received by 5:00 p.m. PT on the Payment Due Date shown on your statement, a Late Payment Fee of up to $35.00 will be charged to your Account.

12. OTHER CHARGES: In addition to the fees and charges described above, other charges that may be imposed on your Account include the following: (1) Returned Payment Fee: If a payment is returned for any reason, a Returned Payment Fee of up to $35.00 will be charged to your Account; (2) Duplicate Statement Fee: If you request a duplicate copy of a monthly statement, you will be charged a fee of up to $10.00 for each statement copy requested; (3) Sales Slip Request Fee: If you request a copy of a sales slip, for any purpose other than to resolve a dispute about the charges on your Account, you will be charged a fee of $6.00 for each sales slip copy requested; (4) Co-applicant Fee: To add an additional Cardholder to the Account after it is opened, an application must be submitted to Credit One Bank. The co-applicant fee in effect at the time of such application will be required; and (5) Replacement Card Fee: If you request a replacement card, a Replacement Card Fee of $25.00 may be charged to your Account.

13. MINIMUM PAYMENTS: (a) You agree to pay either the entire outstanding balance or the Minimum Payment Due, as shown on your monthly statement. The Minimum Payment Due is 5% of your outstanding balance, rounded up to the next whole dollar, or $25.00, whichever is greater, plus any Late Payment Fee for the current billing cycle, and any Past Due Amount. For your Account to be considered current and to avoid a Late Payment Fee, you must pay at least the Amount Due This Period (less any Late Payment Fee for the current billing cycle) and the Past Due Amount by the Payment Due Date shown on your statement. (b) Certain other service fees may be added to your minimum payment amount. When you sign up for such services, you will be notified if a fee for the service will be imposed and if it is required to be added to your minimum payment.

14. SMALL BALANCES: As it is uneconomical for both you and us to process payments or maintain credits that are $1.00 or less in amount, you agree as follows: (1) In any billing cycle in which you have had no transactions and your New Balance on the billing date is $1.00 or less, the balance will be rounded to zero and you will not receive a bill for this amount. (2) In the event that you have a credit balance of $1.00 or less for two consecutive billing cycles, the balance will be rounded to zero and you will not receive a refund of this amount.

15. MAKING PAYMENTS: Your payments must be made in US currency only, drawn on a bank domiciled in the US, through paper or electronic format not to include wire transfer or electronic transactions via Credit One Bank's account at the Federal Reserve Bank. Do not send cash through the mail, as Credit One Bank cannot be responsible for cash lost in the mailing process. To the extent that a payment reduces the principal amount outstanding on your Card Account, new credit will be available (subject to your credit limit), but only after 12 calendar days after our receipt of the payment. To insure prompt posting of payments sent through the mail, your payments must be sent to the address indicated on your statement and must be received by 5:00 p.m. PT. There will be a delay in posting payments to your Account for payments not sent to the address shown on your statement. You agree that we may process any item delivered to us for payment on the day it is received, and that we are not required to honor special instructions or restrictive endorsements. As described above, if any payment is received that does not contain your Account number or is not accompanied by your payment coupon, Credit One Bank will not be liable for processing delays or failure to process the payment to your Account. Crediting of such payments may be delayed up to five business days of receipt.

16. POSTDATED CHECKS: You agree that we need not examine any payment check to confirm that it is not postdated, and that we may deposit any postdated check for payment to us on the day we receive it.

17. IRREGULAR PAYMENTS: Any payment submitted in offer of settlement of a disputed debt, including any check containing a notation such as "paid in full," must be sent to the following address: Credit One Bank, P.O. Box 95516, Las Vegas, NV 89193-5516. If you do not forward any check or other payment marked "paid in full" to

the above address, we can accept late payments or partial payments, or checks or other payments marked with similar notations, without losing any of our rights under this Agreement, including our right to seek payment of the full balance of your Account.

18. VERIFICATION OF INFORMATION: (a) Credit Information: You authorize us to obtain and/or use information about you from third parties and credit reporting agencies to: 1) verify your identity and/or conduct investigative inquiries; 2) determine your income and credit eligibility; 3) review your Account and provide renewal of credit; 4) verify your current credit standing in order to present future credit line increases or decreases; 5) qualify you for and present additional lines of credit or other offers; and 6) collect amounts owing on your Account. California residents, you agree to waive your right to keep confidential information under Section 1808.21 of the California Vehicle Code from us. **(b) Reporting Information:** We may furnish information concerning your Account or credit file to consumer reporting agencies and others who may properly receive that information. However, we are not obligated to release such information to anyone unless we are required to do so by law or a proper Power of Attorney is provided. **(c) Telephone Monitoring:** To be sure that your inquiries are handled properly, courteously and accurately, some of the telephone calls between our employees and our customers are monitored by supervisory or management personnel. Recordings may be made of such calls for your protection.

19. COMMUNICATIONS: You are providing express written permission authorizing Credit One Bank or its agents to contact you at any phone number (including mobile, cellular/wireless, or similar devices) or email address you provide at anytime, for any lawful purpose. The ways in which we may contact you include live operator, automatic telephone dialing systems (auto-dialer), prerecorded message, text message or email. Phone numbers and email addresses you provide include those you give to us, those from which you contact us or which we obtain through other means. Such lawful purposes include, but are not limited to: obtaining information; activation of the card for verification and identification purposes; account transactions or servicing related matters; suspected fraud or identity theft; collection on the Account; and providing information about special products and services. You agree to pay any fee(s) or charge(s) that you may incur for incoming communications from us or outgoing communications to us, to or from any such number or email address, without reimbursement from us.

20. DEFAULT: You will be in default under this Agreement if any of the following events occur: (1) you exceed your assigned credit limit; (2) you fail to make any required payment when due; (3) you die, become insolvent, file a petition in bankruptcy or similar proceeding, or are adjudged bankrupt; (4) you provide any false or misleading financial or biographical information to Credit One Bank; (5) any representation or warranty you make to Credit One Bank is false or breached; (6) a guardian, conservator, receiver, custodian or trustee is appointed for you; (7) you are generally not paying your debts as they become due; (8) the Bank reasonably believes there has been a material adverse change in your financial condition; or (9) you violate any term of this Agreement. Upon your default, Credit One Bank can close or refuse to renew your Account, demand the return of your card(s), declare your entire balance immediately due and payable, and initiate collection activity, all without prior notice or demand. You promise to pay any collection costs and attorneys' fees, including our in-house attorneys' costs, that Credit One Bank incurs as a result of your default.

21. TERMINATION OF ACCOUNT: This Account may be terminated by you at any time by giving notice in writing to Credit One Bank. Credit One Bank may terminate the Account and demand payment in full if you are in default under any of the terms and conditions of this Agreement, or if there is a dispute between the Cardholders as described elsewhere in this Agreement, or if a Cardholder requests termination of the Account privileges of any other Cardholder, or without cause if Credit One Bank deems termination of the Account to be in its best interests. In the event of voluntary or involuntary Account termination, all credit privileges under the Account and Credit One Bank membership will be terminated immediately. Once we receive your final payment in full, processing of Account closure may be delayed up to 45 days, in order to ensure that all outstanding credit card charges have been received from merchants. No later than the end of the delay period Credit One Bank will send you a check for the credit balance remaining on the Card Account, if any. Credit One Bank may require the return of any Credit Cards before issuing a refund check. However, when your Account is closed, if there is: (1) a debit balance of $1.00 or less, that balance will be rounded to zero and you will not be required to pay this amount; or (2) a credit balance of $1.00 or less, that balance will be rounded to zero and this amount will not be refunded to you. The rounding to zero may occur after your closing statement cycles, and you may not receive a statement reflecting the rounding.

22. SECURITY: This is an unsecured Account, and Credit One Bank retains no security interest in your real or personal property to secure payment of your Card Account.

23. CARD OWNERSHIP AND ACCEPTANCE: Any credit card or other credit instrument issued to you remains the property of Credit One Bank and must be surrendered to Credit One Bank or its agent on demand. We are not liable for the refusal of Credit One Bank or any other party to honor your Card for any reason. All Cards have an expiration date. We have the right not to renew your Card for any reason.

24. FOREIGN TRANSACTIONS: If you make a transaction at a merchant that settles in a currency other than U.S. dollars, MasterCard Worldwide or Visa Inc. will convert that charge into a U.S. Dollar amount. That conversion will be done at a rate selected by MasterCard or Visa from the range of rates available in wholesale currency markets for the applicable central processing date, which rate may vary from the rate MasterCard or Visa itself receives, or the government-mandated rate in effect for the applicable central processing date. The currency conversion rate used on the processing date may differ from the rate that would have been used on the purchase date or on the date the transaction is posted to your Account. You agree to pay the converted amount, including any charges for the conversion that may be imposed as described above. A fee may be imposed for foreign transactions as described under the Finance Charge section of this Agreement.

25. LOST OR STOLEN CARDS: You may be liable for unauthorized use of your Card. If your Card is lost or stolen or you suspect that someone is using your Card without your permission, you should immediately notify Credit One Bank's Bank Card Center. You can call **(877) 825-3242**. You can also notify us in writing at **Bank Card Center, P.O. Box 98872, Las Vegas, NV 89193-8872**. You will not be liable for any unauthorized use that occurs after you notify us, orally or in writing, of the loss, theft or possible unauthorized use. In any event, your liability for unauthorized use will not exceed $50. If you allow someone to use your Card to make charges to your Card Account, you can terminate this user's authority by retrieving the Card and returning it to us. Until you do, you remain liable for any use by the authorized user. You understand and agree that this Card Account may be replaced with a substitute Account if a credit card for this Account is lost or stolen, or in the event unauthorized use of the Account is reported. All terms and conditions of this Agreement and the application shall apply to any substitute Account.

26. CREDIT LIMIT INCREASE REQUESTS: Credit Limit Increase requests must be made in accordance with procedures established from time to time by Credit One Bank. A fee may be imposed for credit limit increases. The fee imposed will be a **Finance Charge** of between **$0.00** and **$49.00**, depending on how long your Account has been established and your credit history with us and others. We will advise you which fee is applicable to your Account at the time you apply for a credit limit increase. Credit limit increase requests are subject to the same credit process as your original application, including review of credit bureau information. You will be notified by mail if your request for an increase is declined. Approval will be indicated in the form of a credit limit increase on your Card Account statement. For information on Credit One Bank's procedure for applying for a credit limit increase, contact us at **(877) 825-3242**.

27. WAIVER OF RIGHTS: If we waive any of our rights under this Agreement, we will not be obligated to do so again.

28. CUSTOMER PRIVACY: The privacy policy for Credit One Bank is provided separately in accordance with applicable law.

29. GOVERNING LAW: This Agreement is governed by and interpreted in accordance with the laws applicable to national banks, and, where no such laws apply, by the laws of the State of Nevada, excluding the conflicts of law provisions thereof, regardless of your state of residence.

30. ARBITRATION AGREEMENT: The Arbitration Agreement provided to you with this Agreement governs the enforcement by you and us of your and our legal rights under this Agreement.

YOUR BILLING RIGHTS - KEEP THIS NOTICE FOR FUTURE USE

This notice tells you about your rights and our responsibilities under the Fair Credit Billing Act.

What To Do If You Find a Mistake on Your Statement

If you think there is an error on your statement, write to us at: **Bank Card Center, P.O. Box 98872, Las Vegas, NV 89193-8872.**
In your letter, give us the following information:

- *Account information:* Your name and account number.
- *Dollar amount:* The dollar amount of the suspected error.
- *Description of problem:* If you think there is an error on your bill, describe what you believe is wrong and why you believe it is a mistake.

You must contact us:

- Within 60 days after the error appeared on your statement.
- At least 3 business days before an automated payment is scheduled, if you want to stop payment on the amount you think is wrong.

You must notify us of any potential errors *in writing*. You may call us at **877-825-3242**, but if you do we are not required to investigate any potential errors and you may have to pay the amount in question.

What Will Happen After We Receive Your Letter

When we receive your letter, we must do two things:
1. Within 30 days of receiving your letter, we must tell you that we received your letter. We will also tell you if we have already corrected the error.
2. Within 90 days of receiving your letter, we must either correct the error or explain to you why we believe the bill is correct.

While we investigate whether or not there has been an error:

- We cannot try to collect the amount in question, or report you as delinquent on that amount.
- The charge in question may remain on your statement, and we may continue to charge you interest on that amount.
- While you do not have to pay the amount in question, you are responsible for the remainder of your balance.
- We can apply any unpaid amount against your credit limit.

After we finish our investigation, one of two things will happen:

- *If we made a mistake:* You will not have to pay the amount in question or any interest or other fees related to that amount.
- *If we do not believe there was a mistake:* You will have to pay the amount in question, along with applicable interest and fees. We will send you a statement of the amount you owe and the date payment is due. We may then report you as delinquent if you do not pay the amount we think you owe.

If you receive our explanation but still believe your bill is wrong, you must write to us within *10 days* telling us that you still refuse to pay. If you do so, we cannot report you as delinquent without also reporting that you are questioning your bill. We must tell you the name of anyone to whom we reported you as delinquent, and we must let those organizations know when the matter has been settled between us. If we do not follow all of the rules above, you do not have to pay the first $50 of the amount you question even if your bill is correct.

Your Rights If You Are Dissatisfied With Your Credit Card Purchases

If you are dissatisfied with the goods or services that you have purchased with your credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the purchase. To use this right, all of the following must be true:
1. The purchase must have been made in your home state or within 100 miles of your current mailing address, and the purchase price must have been more than $50 (Note: Neither of these are necessary if your purchase was based on an advertisement we mailed to you, or if we own the company that sold you the goods or services.)
2. You must have used your credit card for the purchase. Purchases made with cash advances from an ATM or with a check that accesses your credit card account do not qualify.
3. You must not yet have fully paid for the purchase. If all of the criteria above are met and you are still dissatisfied with the purchase, contact us *in writing* at: **Bank Card Center, P.O. Box 98872, Las Vegas, NV 89193-8872.**

While we investigate, the same rules apply to the disputed amount as discussed above. After we finish our investigation, we will tell you our decision. At that point, if we think you owe an amount and you do not pay, we may report you as delinquent.

ARBITRATION

PLEASE READ THIS PROVISION OF YOUR CARD AGREEMENT CAREFULLY. IT PROVIDES THAT EITHER YOU OR WE CAN REQUIRE THAT ANY CONTROVERSY OR DISPUTE BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY A NEUTRAL ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT. IN ARBITRATION, YOU MAY CHOOSE TO HAVE A HEARING AND BE REPRESENTED BY COUNSEL.

Agreement to Arbitrate:

You and we agree that either you or we may, without the other's consent, require that any controversy or dispute between you and us (all of which are called "Claims"), be submitted to mandatory, binding arbitration. This arbitration provision is made pursuant to a transaction involving interstate commerce, and shall be governed by, and enforceable under, the Federal Arbitration Act (the "FAA"), 9 U.S.C. §1 et seq., and (to the extent State law is applicable), the State law governing this Agreement.

Claims Covered:

- Claims subject to arbitration include, but are not limited to, disputes relating to the establishment, terms, treatment, operation, handling, limitations on or termination of your account; any disclosures or other documents or communications relating to your account; any transactions or attempted transactions involving your account, whether authorized or not; billing, billing errors, credit reporting, the posting of transactions, payment or credits, or collections matters relating to your account; services or benefits programs relating to your account, whether or not they are offered, introduced, sold or provided by us; advertisements, promotions, or oral or written statements related to (or preceding the opening of) your account, goods or services financed under your account, or the terms of financing; the application, enforceability or interpretation of this Agreement, including this arbitration provision; and any other matters relating to your account, a prior related account or the resulting relationships between you and us. Any questions about what Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced.
- Claims subject to arbitration include not only Claims made directly by you, but also Claims made by anyone connected with you or claiming through you, such as a co-applicant or authorized user of your account, your agent, representative or heirs, or a trustee in bankruptcy. Similarly, Claims subject to arbitration include not only Claims that relate directly to us, a parent company, affiliated company, and any predecessors and successors (and the employees, officers and directors of all of these entities), but also Claims for which we may be directly or indirectly liable, even if we are not properly named at the time the Claim is made.
- Claims subject to arbitration include Claims based on any theory of law, any contract, statute, regulation, ordinance, tort (including fraud or any intentional tort), common law, constitutional provision, respondeat superior, agency or other doctrine concerning liability for other persons, custom or course of dealing or any other

- legal or equitable ground (including any claim for injunctive or declaratory relief). Claims subject to arbitration include Claims based on any allegations of fact, including an alleged act, inaction, omission, suppression, representation, statement, obligation, duty, right, condition, status or relationship.
- Claims subject to arbitration include Claims that arose in the past, or arise in the present or future. Claims are subject to arbitration whether they are made independently or with other claims in proceedings involving you, us or others. Claims subject to arbitration include Claims that are made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise, and a party who initiates a proceeding in court may elect arbitration with respect to any Claim(s) advanced in the lawsuit by any other party or parties. Claims subject to arbitration include Claims made as part of a class action or other representative action, and the arbitration of such Claims must proceed on an individual basis.
- If you or we require arbitration of a particular Claim, neither you, we, nor any other person may pursue the Claim in any litigation, whether as a class action, private attorney general action, other representative action or otherwise.
- Claims are not subject to arbitration if they are filed by you or us in a small claims court, so long as the matter remains in such court and advances only an individual claim for relief.

Initiation of Arbitration: The party filing an arbitration must choose an arbitration administrator. Arbitration administrators are independent from us, and you must follow their rules and procedures for initiating and pursuing an arbitration. If you initiate the arbitration, you must also notify us in writing at Credit One Bank, P.O. Box 95516, Las Vegas, NV 89193-5516. If we initiate the arbitration, we will notify you in writing at your then current billing address or (if your account is closed) the last address we have on file for you. Any arbitration hearing that you attend will be held at a place chosen by the arbitrator or arbitration administrator in the same city as the U.S. District Court closest to your billing address, or at some other place to which you and we agree in writing. You may obtain copies of the current rules of the arbitration administrators, and other related materials, including forms and instructions for initiating an arbitration, by contacting the arbitration administrators as follows:

American Arbitration Association
335 Madison Avenue, Floor 10
New York, NY 10017-4605
Web Site: www.adr.org

JAMS
1920 Main Street, Suite 300
Irvine, CA 92614-7279
Web Site: www.jamsadr.com

Procedures and Law Applicable In Arbitration: A single arbitrator will resolve Claims. The arbitrator will either be a lawyer with at least ten years experience or a retired or former judge. The arbitrator will be selected in accordance with the rules of the arbitration administrator and will be neutral. The arbitration will be conducted under the applicable procedures and rules of the arbitration administrator that are in effect on the date the arbitration is filed unless this arbitration provision is inconsistent with those procedures and rules, in which case this Agreement will prevail. These procedures and rules may limit the amount of discovery available to you or us. The arbitrator will apply applicable substantive law consistent with the FAA and applicable statutes of limitations, and will honor claims of privilege recognized at law. The arbitrator will take reasonable steps to protect customer account information and other confidential information, including the use of protective orders to prohibit disclosure outside the arbitration, if requested to do so by you or us. The arbitrator will have the power to award to a party any damages or other relief provided for under applicable law, and will not have the power to award relief to, against, or for the benefit of, any person who is not a party to the proceeding. The arbitrator will make any award in writing but need not provide a statement of reasons unless requested by a party. Upon a request by you or us, the arbitrator will provide a brief statement of the reasons for the award.

Costs: If we file the arbitration, we will pay the initial filing fee. If you file the arbitration, you will pay the initial filing fee, unless you seek and qualify for a fee waiver under the applicable rules of the arbitration administrator. We will reimburse you for the initial filing fee if you paid it and you prevail. If there is a hearing, we will pay any fees of the arbitrator and arbitration administrator for the first day of that hearing. All other fees will be allocated in keeping with the rules of the arbitration administrator and applicable law. However, we will advance or reimburse filing fees and other fees if the arbitration administrator or arbitrator determines there is other good reason for requiring us to do so, or we determine there is good cause for doing so. Each party will bear the expense of that party's attorneys, experts, and witnesses, and other expenses, regardless of which party prevails, except that the arbitrator shall apply any applicable law in determining whether a party should recover any or all expenses from another party.

No Consolidation or Joinder of Parties: All parties to the arbitration must be individually named. Claims by persons other than individually named parties shall not be raised or determined. Notwithstanding anything else that may be in this arbitration provision or Agreement, no class action, private attorney general action or other representative action may be pursued in arbitration, nor may such action be pursued in court if any party has elected arbitration. Unless consented to by all parties to the arbitration, Claims of two or more persons may not be joined, consolidated or otherwise brought together in the same arbitration (unless those persons are applicants, co-applicants or authorized users on a single account and/or related accounts or parties to a single transaction or related transactions); this is so whether or not the Claims (or any interest in the Claims) may have been assigned.

Enforcement, Finality, Appeals: You or we may bring an action, including a summary or expedited motion, to compel arbitration of Claims subject to arbitration, or to stay the litigation of any Claims pending arbitration, in any court having jurisdiction. Such action may be brought at any time, even if any such Claims are part of a lawsuit, unless a trial has begun or a final judgment has been entered. Failure or forbearance to enforce this arbitration provision at any particular time, or in connection with any particular Claims, will not constitute a waiver of any rights to require arbitration at a later time or in connection with any other Claims. Any additional or different agreement between you and us regarding arbitration must be in writing. Within fifteen days after an award by the single arbitrator, any party may appeal the award by requesting in writing a new arbitration before a panel of three neutral arbitrators designated by the same arbitration administrator. The panel will consider all factual and legal issues anew, follow the same rules that apply to a proceeding using a single arbitrator, and make decisions based on the vote of the majority. Costs will be allocated in the same way they are allocated for arbitration before a single arbitrator. An award by a panel, or an award by a single arbitrator after fifteen days has passed, shall be final and binding on the parties, subject to judicial review that may be permitted under the FAA. An award in arbitration will be enforceable as provided by the FAA or other applicable law by any court having jurisdiction. An award in arbitration shall determine the rights and obligations between the named parties only, and only in respect of the Claims in arbitration, and shall not have any bearing on the rights and obligations of any other person, nor on the resolution of any other dispute or controversy.

Severability, Survival: This arbitration provision shall survive: (i) termination or changes in the Agreement, the account and the relationship between you and us concerning the account; (ii) the bankruptcy of any party; and (iii) any transfer or assignment of your account, or any amounts owed on your account, to any other person. If any portion of this arbitration provision is deemed invalid or unenforceable, the remaining portions shall nevertheless remain in force.