Inc. v. Brown, 132 S. Ct. 1201, 1202 (Feb. 21, 2012). The Supreme Court held that "*[s]tate* and federal courts must enforce the [FAA], with respect to all arbitration agreements covered by that statute." *Id.* (emphasis added). The Court found that West Virginia's "public policy" against and "categorical rule prohibiting arbitration of a particular type of claim" failed under *AT&T Mobility*, which the Court held applies in state court: "When state law prohibits outright the arbitration of a particular claim, the analysis is straightforward: the conflicting rule is displaced by the FAA." *Id.* at 1203-4 (citing *AT&T Mobility*, 131 S. Ct. at 1747).

Indeed, this was made clear years earlier in *Southland*, where the Court held that "[t]o confine the scope of the [FAA] to arbitrations sought to be enforced in federal courts would frustrate what [the Court] believe Congress intended. . . ." *Id.* at 14. The result has been that "[t]he FAA *even applies* in state court litigation where a state judge considers a state cause of action." *M&L Power Serv., Inc., v. Am. Networks Int'l*, 44 F. Supp.2d 134, 139 (D.R.I. 1999) (citing *Allied-Bruce Terminix Cas.*, 513 U.S. at 271 and *Southland*, 465 U.S. at 15-16) (emphasis added). In short, there is no question that the FAA and Section 2 apply in state court.

Here, the FAA applies because the relationship between Citibank (and Midland) and the Plaintiff involves commerce. *See* 9 U.S.C. § 2. Plaintiff is a resident of Alaska. Citibank is a national bank with a principal place of business in North Dakota. Midland is a Delaware company whose home office is in California. Plaintiff is the owner of a Citibank credit card account. Citibank extended credit to Plaintiff under the terms and

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conditions governing her account. Plaintiff's account has been active through at least May 2009, when she made her last regular payment. In January 2010, Citibank sold Plaintiff's account to Midland. Both Plaintiff's transactions with Citibank and Citibank's transaction with Midland involved interstate commerce. Moreover, the Arbitration Agreement explicitly states that "[t]his arbitration provision is governed by the [FAA]." (*See* Card Agreement at 14.) It is thus clear that the FAA applies to this transaction.

B. The Arbitration Agreement is Enforceable, And Plaintiff's Claims Fall Within the Scope Of The Arbitration Agreement.

Arbitration must be compelled in this case because a valid, enforceable agreement to arbitrate exists, and because the claims at issue fall within the scope of that agreement. *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

1. South Dakota Law Governs Whether The Card Agreement Is Enforceable.

The Card Agreement provides that "[f]ederal law and the law of South Dakota, where [Citibank] are located, govern the terms and enforcement of this Agreement." (Card Agreement at 16.) Under Alaska's choice of law rules:

> A choice of law clause in a contract will generally be given effect unless (i) the chosen state has no substantial relationship with the transaction or there is no other reasonable basis for the parties' choice, or (ii) the application of the law of the chosen state would be contrary to a fundamental public policy of a state that has a materially greater interest in the issue and would otherwise provide the governing law.

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Peterson v. Ek, 93 P.3d 458, 465 n.11 (Alaska 2004) (citing Restatement (Second) Of Conflict Of Laws § 187 (1971)). The South Dakota choice-of-law in the Card Agreement is enforceable for the following reasons.

First, South Dakota had a substantial relationship to the transaction. Citibank's principal place of business is in South Dakota. Indeed, preemptive federal law expressly authorizes Citibank, a national bank, to apply the law of its home state, South Dakota, to the key price terms of the Card Agreement. *See Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978); *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 164 (1995), *aff'd*, 517 U.S. 735 (1996). South Dakota also has a compelling interest in applying its law to businesses operating within its borders and ensuring that a common set of laws applies to the national businesses that operate in the state. *See Hershler v. Citibank (South Dakota), N.A.*, No. 2:08-cv-06363-R(JWJx), slip. op. at 6-7 (C.D. Cal. Dec. 19, 2008)[3] ("South Dakota, where Citibank is located, has a compelling interest in applying its laws to regulate businesses operating within its borders, while the bank has an equally compelling need to ensure that its transactions are governed by a common set of laws.").

Indeed, South Dakota law explicitly requires that "[a] revolving loan account arrangement between a bank located in the state of South Dakota and a debtor shall be governed by the laws of the state of South Dakota." S.D. Codified Laws § 51A-12-12. Congress also has *explicitly* recognized that a national bank's home state has a unique,

[3] A courtesy copy of *Hershler* is attached to this Memorandum as Ex. 3.

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special interest in applying its own laws to its own banks, and not the law of the states where its customers reside. *See* 12 C.F.R. § 7.4008 (setting forth preemption standards for non-real estate lending activities).

Second, South Dakota law is not contrary to any fundamental public policy of Alaska nor does Alaska have a "materially greater interest" in this dispute. *See Yonis Yaqub v. Experian Info. Solutions, Inc., et al.*, No. CV11-2190-VBF (FFMx), slip. op. at 3-4 (C.D. Cal. Jun. 10, 2011)[4] ("The South Dakota choice-of-law provision is enforceable . . . ."); *see also Hershler*, No. 2:08-cv-06363-R-JWJ, slip. op. at 5-8 (applying *Nedlloyd* test to uphold South Dakota choice-of-law provision). Rather, both Alaska and South Dakota strongly endorse arbitration. In Alaska, "the common law and statutes [of the state] 'evince a strong public policy in favor of arbitration.'" *See Dep't of Pub. Safety v. Pub. Safety Emp. Ass'n*, 732 P.2d 1090, 1093 (Alaska 1987) (citation omitted). Alaska's public policy of favoring arbitration traces back to the United States Supreme Court:

> We have also endorsed the United States Supreme Court's standard that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute. Doubts should be resolved in favor of coverage." As we summed up the presumption in *Ahtna, Inc. v. Ebasco Constructors, Inc.*, "[a]ny ambiguity with regard to arbitrability is to be construed in favor of arbitration."

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[4] A courtesy copy of *Yaqub* is attached to this Memorandum as Ex. 4.

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Classified Emp's Ass'n v. Matanuska-Susitna Borough Sch. Dist., 204 P.3d 347, 353 (Alaska 2009) (reciting the standard for arbitrability) (internal citations omitted).[5]

And in South Dakota, "if there is doubt whether a case should be resolved by traditional judicial means or by arbitration, arbitration will prevail." *Rossi Fine Jewelers, Inc. v. Gunderson*, 648 N.W.2d 812, 814 (S.D. 2002) ("We have consistently favored the resolution of disputes by arbitration. . . . There is an overriding policy favoring arbitration when a contract provides for it."); *Dinsmore*, 593 N.W.2d at 44-45, 47 (enforcing arbitration agreement in preprinted securities account agreement). This "overriding" public policy also is confirmed in a South Dakota Attorney General Opinion, which is consistent with the recent decision in *AT&T Mobility*:

> "The purpose of arbitration is to permit a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings." *Tjeerdsma v. Global Steel Bldgs., Inc.*, 466 N.W.2d 643 (S.D. 1991), quoting *L.R. Foy Constr. Co. v. Spearfish School District*, 341 N.W.2d 383, 388 (S.D. 1983) (Henderson, J., specially concurring) (citations omitted). South Dakota law, like federal law and the law of most states, encourages private parties to resolve both existing and future disputes by extra-judicial means such as arbitration. "A strong policy exists favoring the arbitration of disputes where the parties have

[5] Insofar as the Plaintiff maintains that the UTPA declares agreements to arbitrate UTPA claims as being against Alaska public policy and therefore unenforceable, the statute is clearly preempted by the FAA. *See, e.g., Kilgore v. KeyBank, Nat. Ass'n*, --- F.3d ---, 2012 WL 718344, at *6 (9th Cir. Mar. 7, 2012) ("If the state law is such an obstacle [to the accomplishment of the FAA's objectives, which are principally to ensure that private arbitration agreements are enforced according to their terms], it is preempted." (quotations omitted).) Plaintiff obviously cannot rely on an illegal public policy as a basis for arguing that Alaska law should apply.

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> bargained for this procedure." *City of Hot Springs v. Gunderson's, Inc.*, 322 N.W.2d 8 (S.D. 1982).

(Letter Opinion dated May 7, 2002 from Harold H. Deering, Jr., South Dakota Assistant Attorney General, to Richard R. Duncan, South Dakota Director of Banking (citing former S.D. Codified Laws A 54-11-10).)[6]

For all of these reasons, South Dakota law must be applied and enforced here. *See, e.g., Lowman v. Citibank (South Dakota), N.A.*, 2006 WL 6108680, at *3-4 (C.D. Cal. Mar. 24, 2006) (applying South Dakota law to Citibank's Arbitration Agreement); *Egerton v. Citibank, N.A.*, 2004 WL 1057739, at *2 (C.D. Cal. Feb. 18, 2004) (same).

2. The Card Agreement Is Enforceable Under South Dakota Law.

South Dakota law expressly allowed Citibank to replace or otherwise change the terms of a credit card agreement by sending out a notice to the card member, as follows:

> Upon written notice, a credit card issuer may change the terms of any credit card agreement, if such right of amendment has been reserved, *regardless of whether the card holder can use the card for new purchases*. However, the following changes to the credit card agreement, effective as to existing balances, do not become binding on the parties if the card holder, within twenty-five days of the effective date of the change, furnishes written notice to the issuer, at the address designated by the issuer, that the card holder does not agree to abide by such changes:
>
> (1) Modifying the circumstances under which a finance charge will be imposed;
>
> (2) Altering the method used to calculate finance charges;
>
> (3) Increasing finance charges, fees, and other costs; or

[6] A courtesy copy of the 2002 Opinion is attached to this Memorandum as Ex. 5.

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(4) Increasing the required minimum payment.

Any other change to the credit card agreement modifying the manner in which the issuer and card holder resolve disputes arising out of their relationship do not become binding on the parties if the card holder, within twenty-five days of the effective date of the change, furnishes written notice to the issuer, at the address designated by the issuer, that the card holder does not agree to abide by such changes.

See former S.D. Codified Laws § 54-11-10 (enacted March 2008) (emphasis added).[7] Indeed, the Attorney General of South Dakota issued an opinion expressly finding that this procedure under South Dakota law is a valid means to change and replace a credit card agreement. (*See* May 7, 2002 Letter Opinion attached as Ex. 5 citing former S.D. Codified Laws § 54-11-10 .)

Here, consistent with South Dakota law and the terms of her Card Agreement, Citibank notified Plaintiff in January 2009 that the Card Agreement would take effect on February 3, 2009, but afforded Plaintiff the opportunity to opt out. (*See* Plaintiff's January 2009 Account Statement at MID0093-95.) Plaintiff did not exercise her rights to reject the Card Agreement containing the Arbitration Agreement. Instead, she kept her account active and continued to make payments on her account, thereby preserving her right to use her credit card by paying down her balance. (*See* Plaintiff's February-May 2009 Account Statements at MID0096-107.) By not opting out, Plaintiff accepted the Card Agreement.

[7] The current S.D. Codified Laws § 54-11-10 (enacted March 2010) still authorizes changing the terms of credit card agreements, including with respect to dispute resolution terms.

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This method of adopting contract terms—including arbitration terms—has been routinely upheld by the courts. *See, e.g., Lowman*, 2006 WL 6108680, at *3; *Hershler*, No. 2:08-cv-06363-R-JWJ, slip. op. at 5 (stating that "Plaintiff had a meaningful choice to opt out of the Arbitration Agreement. He, however, chose not to do so, thus defeating any claim of procedural unconscionability."); *Eaves-Leonos*, 2008 WL 80173, at *2-6; *Dumanis*, 2007 WL 3253975, at *2-3; *Stiles v. Home Cable Concepts*, 994 F. Supp. 1410, 1416 (M.D. Ala. 1998) (enforcing an arbitration provision contained in amendment to a credit card agreement because the plaintiff maintained his account after the effective date of the arbitration clause).[8]

3. As The Assignee Of Plaintiff's Arbitration Agreement, Midland May Enforce The Arbitration Provision.

It is well-accepted that agreements to arbitrate are assignable and an assignee "steps into the shoes" of the assignor. *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550-51 (1964) (successor employer bound to arbitrate under predecessor's agreement); *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 382 (5th Cir. 2008) (under broad language of arbitration provision, non-signatory assignee to underlying agreement may compel arbitration); *Koch v. Compucredit*, 543 F.3d 460, 466 (8th Cir. 2008) (arbitration agreement assignable under Arkansas law); *Bellows v. Midland Credit Mgmt.*, 2011 WL 1691323, at *2 (S.D. Cal. May 4, 2011) (assignee of credit card agreement may enforce arbitration agreement); *Galbraith v. Resurgent Capital Serv.*,

[8] As noted above in footnote 1, Plaintiff's prior card agreements with Sears also contained an arbitration provision.

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2006 WL 2990163, at *3 (E.D. Cal. Oct. 19, 2006) (assignee of consumer account entitled to invoke arbitration clause in contract between consumer and assignor); *Tickanen v. Harris*, 461 F. Supp.2d 863, 870 (E.D. Wisc. 2006) (non-signatory of card agreement may enforce arbitration on signatory); *Webb v. MBNA Am. Bank*, 2006 WL 618186, at *2 (E.D. Ark. 2006) (same). Indeed, "[t]he Supreme Court has been somewhat lenient in deciding which parties will be required to arbitrate." *United States Postal Serv. v. Am. Postal Workers Union*, 893 F.2d 1117, 1120 (9th Cir. 1990).

Citibank assigned its right to enforce the arbitration provision to Midland when Midland purchased Plaintiff's account in January 2010. (Hannan Aff. ¶3 & Ex. A.) The Card Agreement specifically permits such an assignment: "[Citibank] may assign any or all of our rights and obligations under this Agreement to a third party." (Card Agreement at 16 (MID0066).) The Arbitration Agreement in the Card Agreement specifically states that the arbitration provision "shall survive . . . any transfer, sale or assignment of your account, or any amounts owed on your account, to any other person or entity." (*Id.*) The Bill of Sale from Citibank to Midland provides that Citibank "does hereby transfer, sell, assign, convey, grant, bargain, set over and deliver to [Midland], and to [Midland's] successors and assigns, all of [Citibank's] right, title and interest in and to the Accounts described in Exhibit 1 and the Final Data File delivered on or about January 20, 2010." (Hannan Aff. ¶ 3; *see also* Ex. A.) Accordingly, the Arbitration Agreement in the Card Agreement is valid and enforceable between Plaintiff and Midland.

4. Plaintiff's Claims Fall Squarely Within The Scope Of The Arbitration Agreement.

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1 "It is well established 'that where the contract contains an arbitration clause, there
2 is a presumption of arbitrability.'" *Comedy Club, Inc. v. Improv West Associates*, 514
3 F.3d 833, 842 (9th Cir. 2007) (quoting *AT&T Techs., Inc. v. Comm'ns Workers of Am.*,
4 475 U.S. 643, 650 (1986)). And an "order to arbitrate the particular grievance should not
5 be denied unless it may be said with positive assurance that the arbitration clause is not
6 susceptible of an interpretation that covers the asserted dispute." *Id.*; *see also Three*
7 *Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139 (9th Cir. 1991)
8 (Under the FAA, "any doubts concerning the scope of arbitrable issues should be
9 resolved in favor of arbitration"); *McDonnell Douglas Fin. Corp. v. Pa. Power & Light*
10 *Co.*, 858 F.2d 825, 832 (2d Cir. 1988) (noting the distinction between "broad" clauses
11 that purport to refer to arbitration of all disputes arising out of a contract and "narrow"
12 clauses that limit arbitration to specific types of disputes).
13
14
15
16 Where the clause is broad, there is a heightened presumption of arbitrability such
17 that "'[in] the absence of any express provision excluding a particular grievance from
18 arbitration, we think only the most forceful evidence of a purpose to exclude the claim
19 from arbitration can prevail.'" *AT&T Tech.*, 475 U.S. at 650; *accord Fleet Tire Serv. v.*
20 *Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997); *Collins & Aikman Products Co. v.*
21 *Building Systems, Inc.*, 58 F.3d 16, 20 (2d Cir. 1995) (holding that, where the clause is
22 broad, "then there is a presumption that the claims are arbitrable"). Arbitration should be
23 compelled when no claims are exempt from arbitration and the language chosen by the
24 parties is broadly stated and encompasses the claims in the complaint. *Chiron Corp. v.*
25
26
27

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Ortho Diagnostic Systems, Inc., 207 F.3d 1126, 1131 (9th Cir. 2000) (where claim would require Court to conduct an "analysis of the specific provisions of the [a]greement" then claims arose out of and "related" to agreement; arbitration compelled).

Statutory claims are no different. "It is by now clear that statutory claims may be the subject of an arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). In agreeing to arbitrate a statutory claim, a party "does not forgo the substantive rights afforded by the statute [but] submits to their resolution in an arbitral . . . forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The FAA "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." *See Lozano v. AT&T Wireless Srvs., Inc.*, 504 F.3d 718, 725 (9th Cir. 2007) (citation omitted). Importantly, the "duty [of the courts] to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/Am. Express*, 482 U.S. at 226. Even if this court finds the Arbitration Agreement ambiguous with respect to the arbitrability of Plaintiff's claims (which it is not), arbitration should *still* be compelled. *Comedy Club*, 514 F.3d at 843-44 ("Under the federal presumption in favor of arbitration, because the arbitration agreement is ambiguous, it should be interpreted as granting arbitration coverage over 'all disputes' arising from the [parties'] Agreement.")

Plaintiff's Arbitration Agreement is broad and extends to "[a]ll Claims relating to your account or a prior related account, or our relationship are subject to arbitration . . . ."

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(*See* Card Agreement at 13 (MID0063) (**"What Claims are subject to arbitration?"**).) It expressly covers "Claims made by or against anyone connected with us or you," as well as "Claims arising in the past, present or future . . . ." (*Id.* at 13-14 (**"Whose Claims are subject to arbitration?"** and **"What time frame applies to Claims subject to arbitration?"**).) The agreement also survives termination of her account or Plaintiff's relationship with Citibank. (*Id.* at 16 (**"Survival and Severability of Terms"**).)

The express language of the Arbitration Agreement is broad, clear, and unambiguous, and should be enforced. Plaintiff's claims in this action relate to Plaintiff's account and to Midland's enforcement of its rights under the Card Agreement. (Compl. ¶¶ 8-16.) Plaintiff is free to arbitrate her claims, including all her statutory claims, and to pursue all the same remedies (including injunctive relive) she would have in court—albeit on an individual basis. Because Plaintiff's claims are explicitly covered by the Arbitration Agreement, Plaintiff should be compelled to arbitrate.

5. Numerous Courts Have Upheld Citibank's Arbitration Agreement.

A host of courts in a variety of jurisdictions have enforced Citibank's form of Arbitration Agreement and similar consumer arbitration agreements. *Guerrero v. Equifax Credit Info. Serv., Inc.*, No. CV 11-6555 PSG (PLAx) *slip op.* (C.D. Cal. Feb. 24, 2012) (Philip Gutierrez, J.)[9] (enforcing Citibank's Arbitration Agreement); *Conroy v.*

[9] A courtesy copy of the *Guerrero* decision as attached to this Memorandum as Ex. 6.

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Citibank, N.A., No. 10-CV-04930-SVW-AJW, *slip op.* at 5-6 (Jul. 22, 2011)[10] (finding that under *AT&T Mobility* Citibank's Arbitration Agreement must be enforced as written pursuant to the FAA); *Yaqub*, No. CV11-2190-VBF (FFMx), *slip op.* at 5-6 (enforcing Citibank's Arbitration Agreement pursuant to the FAA); *see also Bellows v. Midland Credit Mgmt., Inc.*, 2011 WL 1691323, at *3 (S.D. Cal. May 4, 2011) (granting motion for arbitration on HSBC account); *Wilder v. Midland Credit Mgmt.*, 2010 WL 2499701, at *4-7 (N.D. Ga. 2010) (magistrate recommendation to compel arbitration adopted on June 14, 2010). Indeed, at least one court has granted a motion to arbitrate a Citibank card agreement that—like here—was sent to a Sears credit card account holder. *Daugherty*, Case No. C 11-01285 SBA, slip. op. at 9-12 (attached as Ex. 1.) The result should be the same here—the Arbitration Agreement should be enforced.

C. Plaintiff's Claims Must Proceed To Arbitration On An Individual Basis.

As confirmed in *AT&T Mobility*, this Court should enforce the Arbitration Agreement as written, including its clear language requiring arbitration on an individual basis. The "'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility*, 131 S. Ct. at 1748 (citations omitted). Thus, "parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes." *Id.*, 131 S. Ct. at 1748-49 (emphasis added) (citations omitted); *Stolt-Nielsen*,

[10] A courtesy copy of the *Conway* decision is attached to this Memorandum as Ex. 7.

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130 S. Ct. at 1774 ("Underscoring the consensual nature of private dispute resolution . . . parties are 'generally free to structure their arbitration agreements as they see fit.'") (citations omitted). "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *AT&T Mobility*, 131 S. Ct. at 1752.

Plaintiff chose not to opt out, kept her account active, and made payments on her account, and thus agreed to the terms of the Card Agreement. Included within those terms was the following provision: "Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis." (Card Agreement at 13 (MID0063).) The Arbitration Agreement confers on the arbitrator the authority to only decide individual claims, and not to make any award, or consider any claims, by or relating to any other person. This language unequivocally demonstrates the parties' intent to arbitrate claims only on an individual basis and "*the FAA requires courts to honor parties' expectations*." *AT&T Mobility*, 131 S. Ct. at 1752 (emphasis added); *Stolt-Nielsen*, 130 S. Ct. at 1776 (holding that the FAA requires that class arbitration may only be ordered when the parties *expressly agree* to class arbitration).

Since *AT&T Mobility*, courts across the country have repeatedly confirmed that under the FAA, state law challenges to arbitration agreements that contain class action waivers are not viable. *See, e.g.*, *Bellows*, 2011 WL 1691323, at *3 (compelling arbitration because *AT&T Mobility* "mak[es] clear the agreement to arbitrate is not

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substantively unconscionable merely because it includes a class action waiver."); *Cruz*, 648 F. 3d at 1207 ("hold[ing] that, in light of [*AT&T Mobility*], the class action waiver in the Plaintiffs' arbitration agreements is enforceable under the FAA."); *Conroy*, No. 10-CV-04930-SVW-AJW, slip op. at 5-8 (enforcing Citibank's Arbitration Agreement as written pursuant to the FAA and *AT&T Mobility*); *Estrella v. Freedom Fin.*, 2011 WL 2633643, at *6 (N.D. Cal. Jul. 5, 2011) (granting motion and compelling arbitration of putative class claims); *In re Cal. Title Ins. Antitrust Litig.*, 2011 WL 2566449, at *2 (N.D. Cal. June 27, 2011) (compelling arbitration and noting that post-*AT&T Mobility* "courts must compel arbitration even in the absence of the opportunity for plaintiffs to bring their claims as a class action"); *Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1288 (D. Colo. June 6, 2011) (enforcing arbitration agreement under Colorado law based on *AT&T Mobility*); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712, at *2-3 (N.D. Cal. May 16, 2011) (compelling arbitration of class UCL and CLRA claims under *AT&T Mobility* and the FAA). The result should be the same here, and the Court should direct Plaintiff to proceed in arbitration on an individual basis.

D. This Action Must Be Stayed.

Section 3 of the FAA expressly provides that, where a valid arbitration agreement requires a dispute to be submitted to binding arbitration, the trial court must stay the action "until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3; *see also Collins v. Burlington N. R. Co.*, 867 F.2d 542, 545 (9th Cir. 1989) (remanding case where district court failed to consider whether a stay was

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appropriate as a result of binding arbitration agreement). Accordingly, Midland requests that this Court stay the action pending completion of arbitration pursuant to the express terms of the Arbitration Agreement.

IV. CONCLUSION

Midland respectfully requests that the Court grant this Motion and compel arbitration of Plaintiff's claims in accordance with the express terms of the Arbitration Agreement governing Plaintiff's account. In addition, Midland respectfully requests that the Court stay this action pending completion of the arbitration proceedings.

DATED this day of April, 2012.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Midland Funding, LLC

By: ______________________
Jon S. Dawson
Alaska Bar No. 8406022

Certificate of Service

On the 9th day of April, 2012, a true and correct copy of the foregoing document was sent by U.S. Mail, postage paid, to the following parties:

James J. Davis, Jr.
Northern Justice Project, LLC
310 K St., Suite 200
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Marc Wilhelm
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By: Karina Chambers
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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BYRON D. DAUGHERTY, Plaintiff, vs. EXPERIAN INFORMATION SOLUTIONS, INC.; TRANS UNION LLC; EQUIFAX INFORMATION SERVICES LLC; CITIBANK (SOUTH DAKOTA), N.A.; and DOES 1 through 30, inclusive, Defendants.	Case No: C 11-01285 SBA **ORDER GRANTING MOTION TO COMPEL ARBITRATION AND STAY ACTION** Docket 23.

The parties are presently before the Court on Defendant Citibank, N.A.'s ("Defendant")[1] motion to compel arbitration and stay action. Dkt. 23. Plaintiff Byron Daugherty ("Plaintiff") opposes the motion. Dkt. 37. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby GRANTS the motion to compel arbitration and stay action. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed.R.Civ.P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

///

///

[1] Citibank, N.A. is the successor in interest to the named Defendant Citibank (South Dakota), N.A.

1 I. BACKGROUND

2 **A. Factual Summary**

3 In 1998, Plaintiff opened a credit card account with Sears National Bank ("Sears").
4 Pl.'s Decl. ¶ 2, Dkt. 37-1. Plaintiff's credit card account was subject to a written credit card
5 agreement, which included provisions that permitted Sears to change the terms of
6 Plaintiff's account and to assign Plaintiff's account to another creditor. Pogwist Decl. ¶ 6,
7 Exh. 1, Dkt. 44-2. The agreement, however, did not include an arbitration provision. Id.,
8 Exh. 1. In 1999, 2001, 2002, and 2003, Sears changed the terms of Plaintiff's credit card
9 account by mailing him new credit card agreements. Id. ¶ 7, Exhs. 2-5. Each of these
10 agreements contained a change of terms provision, an arbitration provision, and an
11 assignment provision. Id., Exhs. 2-5.

12 In November 2003, Citibank USA, N.A. acquired the credit card accounts issued by
13 Sears, including Plaintiff's account. Barnette Supp. Decl. ¶ 4, Dkt. 44-1. Citibank USA,
14 N.A. subsequently merged into Citibank (South Dakota), N.A., which then merged into
15 Citibank, N.A., i.e., Defendant. Id. In or about November 2003, Defendant mailed
16 cardholders a written change-in-terms notice informing them of the change in ownership of
17 the Sears Credit Card program ("2003 change-in-terms notice"). Id. ¶ 5, Exh. 3. The 2003
18 change-in-terms notice informed cardholders that Defendant was making certain changes to
19 the cardholder agreement, including changes regarding binding arbitration of disputes and
20 the law governing their credit card accounts. Id., Exh. 3. The notice advised cardholders to
21 review the description of the changes and information regarding their right to reject the
22 changes. Id.

23 As relevant here, the 2003 change-in-terms notice made the following changes to
24 Plaintiff's credit card account. First, it provided that the "Governing Law" provision of the
25 cardholder agreement is amended to read that "[t]he terms and enforcement of this
26 Agreement shall be governed by federal law and the law of South Dakota, where we are
27 located.' " Barnette Supp. Decl., Exh. 3. Second, the notice provided that the cardholder
28 agreement is amended to include the following provision regarding binding arbitration:

1 ARBITRATION:

2 PLEASE READ THIS PROVISION OF THE AGREEMENT
3 CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE
RESOLVED BY BINDING ARBITRATION. ARBITRATION
4 REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE
5 RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A
CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION,
6 A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A
7 JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER
AND MORE LIMITED THAN COURT PROCEDURES.
8
Agreement to Arbitrate:
9
10 Either you or we may, without the other's consent, elect mandatory, binding
arbitration for any claim, dispute, or controversy between you and us (called
11 "Claims").

12 Claims Covered:

13
- What Claims are subject to Arbitration? All Claims relating to your
14 Account, a prior related Account, our relationship or your relationship
15 with Sears are subject to arbitration, including Claims regarding the
application, enforceability, or interpretation of this Agreement and this
16 arbitration provision. . . .

17 Id.

18 Third, the notice provided that the "Change of Terms" provision was amended to
19 read that Defendant may change the cardholder agreement at any time and such changes are
20 binding, unless the cardholder notifies Defendant in writing within 25 days after the
21 effective date of the change that the cardholder does not agree to abide by the change and
22 pays the total balance, either at once or under the terms of the unchanged agreement.
23 Barnette Supp. Decl., Exh. 3. This provision also provided that use of the card after the
24 effective date of the change shall be deemed acceptance, even if the 25 days have not
25 expired. Id. Though Plaintiff had the option to reject the changes described in the 2003
26 change-in-terms notice, he did not do so. Id. ¶¶ 6-7.

27 On September 12, 2006, Defendant notified Plaintiff by mail of changes made to the
28 terms governing his account ("2006 cardholder agreement"). Barnette Decl. ¶ 4, Exh. 1;

Barnette Supp. Decl. ¶ 8, Exh. 4. The 2006 cardholder agreement provided that the agreement is binding on a cardholder unless the cardholder cancels their account within 30 days after receiving the card and the cardholder has not used the account. Barnette Decl., Exh. 1. Notably, this agreement contains an arbitration provision that is similar to the arbitration provision contained in the 2003 change-in-terms notice. Id. It also includes a choice-of-law provision stating that the terms and enforcement of the agreement are governed by federal law and the law of South Dakota. Id.

On November 19, 2006, Defendant received a letter from Plaintiff requesting that his account be cancelled. Barnette Supp. Decl. ¶ 11. In June 2007, Plaintiff entered into a written payment plan with Defendant to make monthly payments to satisfy his delinquent account. Compl. ¶ 15, Dkt. 1.

In 2008, Plaintiff discovered that Defendant was reporting Plaintiff as delinquent to several credit reporting agencies, including Experian Information Services, Inc. ("Experian"), Trans Union LLC ("Trans Union"), and Equifax Information Services LLC ("Equifax"). Compl. ¶ 18. In 2009, Plaintiff discovered that Equifax was falsely reporting his account with Defendant as "Account Included in Bankruptcy," "Bankruptcy Chapter 7," and "Bankruptcy Discharged," when in fact the account had not been discharged in bankruptcy. Id. ¶ 19. On numerous occasions in 2008, 2009, and 2010, Plaintiff disputed the accuracy of the credit reporting with Experian, Trans Union, and Equifax, but they failed to conduct the investigations and make corrections as required by law. Id. ¶¶ 20-21. Plaintiff claims that Defendant received his disputes from the credit reporting agencies, but failed to conduct investigations and make corrections required by law. Id. ¶ 22. Plaintiff also claims that he notified Defendant on numerous occasions that Defendant was inaccurately reporting his account, but Defendant failed to conduct a proper investigation as required by law. Id. ¶ 23. According to Plaintiff, as a result of the inaccurate reporting of his accounts and failed reinvestigations, he has been denied credit, obtained credit at a higher cost, and has abstained from applying for credit. Id. ¶ 25.

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1 **B. Procedural History**

2 On March 16, 2011, Plaintiff filed the instant action against Experian, Trans Union,
3 Equifax, and Defendant. See id. Through this action, Plaintiff seeks actual, statutory, and
4 punitive damages, costs and attorney's fees pursuant to the Federal Fair Credit Reporting
5 Act, 15 U.S.C. § 1681 et seq., and the California State Consumer Credit Reporting
6 Agencies Act, Cal. Civ. Code §§ 1785.1-1785.36. Id. ¶ 3. Plaintiff generally alleges that
7 Experian, Trans Union, and Equifax willfully and negligently failed to establish or follow
8 reasonable procedures to ensure accuracy in the preparation of credit reports and credit files
9 they published and maintained concerning Plaintiff, and to conduct a reasonable
10 investigation into Plaintiff's disputes regarding Defendant's credit reporting. See id. ¶¶ 26-
11 41. Plaintiff further alleges that Defendant failed to properly investigate Plaintiff's dispute
12 with respect to his account, to delete, modify or block information disputed by Plaintiff, to
13 correctly report the results of an accurate investigation to credit reporting agencies, to
14 refrain from publishing disputed account information, and to conform to a standard of
15 conduct in assembling, evaluating, and disbursing consumer credit information about
16 Plaintiff to third parties. See id. ¶¶ 42-58.

17 On August 19, 2011, Defendant moved to compel arbitration on the ground that
18 Plaintiff is bound by the arbitration provision contained in the 2006 cardholder agreement.
19 Def.'s Mtn. at 8-12, Dkt. 23. Additionally, Defendant requests that this Court stay the
20 instant action pending the outcome of the arbitration proceedings. Id. at 12. On October
21 14, 2011, Plaintiff filed an opposition. A reply was filed on December 2, 2011. Dkt. 44.

22 II. DISCUSSION

23 **A. Judicial Notice**

24 In connection with its motion to compel arbitration and stay action, Defendant
25 submitted a Request for Judicial Notice, asking the Court to take judicial notice of two
26 California district court cases and an opinion letter from the South Dakota Attorney
27 General's Office. Def.'s Request for Judicial Notice, Dkt. 24. A court may judicially
28 notice a fact that is not subject to reasonable dispute because it: (1) is generally known

1 within the trial court's territorial jurisdiction; or (2) can be accurately and readily
2 determined from sources whose accuracy cannot reasonably be questioned. Fed.R.Civ.P.
3 201(b).

4 Because the Court may consider the district court cases without taking judicial
5 notice of them, the Court DENIES Defendant's request to take judicial notice of these
6 cases. See Taylor v. Pinnacle Credit Serv's. LLC, 2011 WL 1303430, at *5 n. 3 (N.D. Cal.
7 2011). The Court, however, GRANTS Defendant's request to take judicial notice of a
8 document entitled "Opinion of Attorney General" dated May 7, 2002. The opinions of
9 State Attorney Generals are judicially noticeable. Central Delta Water Agency v. U.S. Fish
10 and Wildlife Service, 653 F.Supp.2d 1066, 1079 (E.D. Cal. 2009).

11 B. Federal Arbitration Act

12 Under the Federal Arbitration Act ("FAA"), any party bound by an arbitration
13 agreement that falls within the scope of the FAA may bring a petition in federal district
14 court to compel arbitration in the manner provided for in the agreement. 9 U.S.C. § 4.
15 When faced with a petition to compel arbitration, the district court's role is a discrete and
16 narrow one. "By its terms, the [FAA] 'leaves no place for the exercise of discretion by a
17 district court, but instead mandates that district courts shall direct the parties to proceed to
18 arbitration on issues as to which an arbitration agreement has been signed.' " Chiron Corp.
19 v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000) (quoting Dean Witter
20 Reynolds Inc. v. Byrd, 470 U.S. 213, 218 (1985)) (emphasis added). "The court's role
21 under the Act is therefore limited to determining (1) whether a valid agreement to arbitrate
22 exists and, if it does, (2) whether the agreement encompasses the dispute at issue. If the
23 response is affirmative on both counts, then the Act requires the court to enforce the
24 arbitration agreement in accordance with its terms." Chiron, 207 F.3d at 1130 (citations
25 omitted).

26 An arbitration agreement governed by the FAA is presumed to be valid and
27 enforceable. See Shearson/Am. Exp.. Inc. v. McMahon, 482 U.S. 220, 226-227, (1987).
28 The party resisting arbitration bears the burden of showing that the arbitration agreement is

1 invalid or does not encompass the claims at issue. See Green Tree Fin. Corp.-Ala. v.
2 Randolph, 531 U.S. 79, 92 (2000).

3 C. **Motion to Compel Arbitration**

4 Defendant moves to compel arbitration based on the arbitration provision contained
5 in the 2006 cardholder agreement. Because Plaintiff does not dispute Defendant's
6 contention that the arbitration provision contained in this agreement encompasses the
7 claims pled in the complaint,[2] the central question before the Court under Chiron is whether
8 the arbitration clause is valid. To determine whether a valid arbitration clause exists, it is
9 first necessary to determine the substantive law that applies.

10 1. **Choice-of-Law**

11 As an initial matter, the Court must decide whether South Dakota is the applicable
12 substantive law. Defendant contends that South Dakota law applies based on the
13 application of California's choice-of-law rules. Plaintiff does not dispute Defendant's
14 contention.

15 Although the general rule is "that a federal court sitting in diversity applies the
16 conflict-of-law rules of the state in which it sits," Schoenberg v. Exportadora de Sal, S.A.
17 de C.V., 930 F.2d 777, 782 (9th Cir. 1991), jurisdiction in this case is based on federal
18 question,[3] not diversity. Therefore, federal common law applies to the choice-of-law rule
19 determination. See id.; Huynh v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th Cir.
20 2006) (where jurisdiction is not based on diversity of citizenship, federal common law

21

22 [2] Although Plaintiff does not challenge Defendant's contention that the arbitration provision in the 2006 cardholder agreement encompasses Plaintiff's claims, the Court
23 nonetheless finds that the dispute between Plaintiff and Defendant falls within the scope of the parties' agreement to arbitrate. The parties' arbitration provision contains broad
24 language: "All Claims relating to your account, a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, enforceability, or
25 interpretation of this Agreement and this arbitration provision." Barnette Decl., Exh. 1. In general, Plaintiff's claims against Defendant arises out of credit reporting related to
26 Plaintiff's credit card account. Thus, it is clear that the parties' dispute "relates" to Plaintiff's account with Defendant.

27

28 [3] The Complaint alleges that jurisdiction is conferred by the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq. See Compl. ¶¶ 1, 3.

1 choice-of-law rules apply). Federal common law follows the approach of the Restatement
2 (Second) of Conflict of Laws. Huynh, 465 F.3d at 997.
3 Under the Restatement, the parties' choice-of-law "to govern their contractual rights
4 and duties will be applied if the particular issue is one which the parties could have
5 resolved by an explicit provision in their agreement directed to that issue." Restatement
6 (Second) of Conflicts of Laws § 187(1) (1988). Even if the parties could not have directed
7 a contractual provision to the issue, courts should honor their choice unless "the chosen
8 state has no substantial relationship to the parties or the transaction and there is no other
9 reasonable basis for the parties' choice" or "application of the law of the chosen state
10 would be contrary to a fundamental policy of a state which has a materially greater interest
11 than the chosen state in the determination of the particular issue" and that state would be
12 the state of the applicable law in the absence of an effective choice-of-law by the parties.
13 Id. at § 187(2).
14 Here, the parties specifically agreed that disputes would be governed by federal law
15 and the law of South Dakota. The 2003 change-in-terms notice and the 2006 cardholder
16 agreement both contain a choice-of-law provision stating: "[t]he terms and enforcement of
17 this Agreement shall be governed by federal law and the law of South Dakota." Barnette
18 Decl., Exh. 1. Further, as Defendant is located in South Dakota, South Dakota has a
19 "substantial relationship" with Defendant, justifying the choice of South Dakota law. See
20 Nedlloyd Lines B.V. v. Superior Court, 3 Cal.4th 459, 467 (1992) (a substantial
21 relationship is present when one of the parties is domiciled in the chosen state).[4] Plaintiff
22 has not argued, let alone established that South Dakota law is contrary to a fundamental
23 policy of a state (e.g., California) that would be the state of the applicable law in the
24 absence of an effective choice-of-law by the parties. Accordingly, the Court will apply
25 South Dakota law to resolve the question of whether the arbitration provision is valid.
26
27 [4] In determining the enforceability of contractual choice-of-law provisions, California courts apply the principles set forth in Restatement (Second) Conflict of Laws §
28 187. Nedlloyd, 3 Cal.4th at 464-465.

1 **2. Validity of the Arbitration Agreement**

2 Plaintiff contends that the motion to compel arbitration should be denied because a
3 valid agreement to arbitrate does not exist. Specifically, Plaintiff argues that his claims are
4 not subject to binding arbitration for two reasons: (1) Defendant's amendment of terms
5 through the mailing of the 2006 cardholder agreement was ineffective because Defendant
6 has not proffered adequate evidence that it had the right to unilaterally amend the terms of
7 the credit card agreement in effect at the time of the purported amendment; and (2) Plaintiff
8 rejected the 2006 cardholder agreement, including the arbitration provision contained
9 therein, by cancelling his account before the agreement became effective. Pl.'s Opp. at 4-6.
10 Plaintiff does not otherwise challenge the validity of the arbitration clause. The Court will
11 address Plaintiff's arguments in turn.

12 **a. Defendant's Right to Amend the Terms of Plaintiff's Credit**
13 **Card Account**

14 In support of his argument that his claims are not subject to binding arbitration
15 because Defendant did not reserve the right to amend the terms of his credit card account to
16 include the arbitration provision, Plaintiff cites South Dakota Codified Laws § 54-11-10.
17 This statute provides, in relevant part:

18 Upon written notice, a credit card issuer may change the terms of any credit card
19 agreement, if such right of amendment has been reserved, regardless of whether the card holder can use the card for new purchases.

20 S.D. Codified Laws § 54-11-10.

21 Here, contrary to Plaintiff's contention, Defendant expressly reserved its right to
22 change the terms of the credit card agreement. The evidence in the record demonstrates
23 that the cardholder agreements governing Plaintiff's credit card account since 1998 have all
24 contained a change of terms provision. As relevant here, the 2003 change-in-terms notice
25 expressly reserved the right of amendment. The notice states, in relevant part, that
26 Defendant may change the cardholder agreement at any time and the changes are binding,
27 unless the cardholder notifies Defendant in writing within 25 days after the effective date of
28 the change that the cardholder does not agree to abide by the changes. Barnette Supp.