against "anyone connected with [Citibank] . . . such as . . [an] affiliated company." The Arbitration Agreement also contains terms excluding small claims court actions and allowing for the reimbursement and/or advancement of arbitration fees.

III. Analysis

A. Formation And Scope Of Arbitration Agreement

"A party aggrieved by the alleged . . . refusal of another to arbitrate under a written agreement for arbitration may petition [a] United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. "The 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, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.*

"The court's role under the Act is . . . limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). "If the response is affirmative on both counts, then the Act requires the court to enforce the arbitration agreement in accordance with its terms." *Id.*

The Court finds that a valid arbitration agreement exists that covers the claims in this action. *See* Moilanen Decl. ¶¶ 4-6, Exs. A-B. Plaintiff's Card Agreement, which contains the Arbitration Agreement, is expressly governed by a South Dakota choice-of-law provision. Moilanen Decl., Ex. B at p. 8 ("Federal law and the law of South Dakota, where we are located, govern the terms and enforcement of this Agreement."). The South Dakota choice-of-law provision is enforceable because (i) Defendants have shown that South Dakota has a substantial relationship to the parties and the transaction (i.e., Citibank is located in South Dakota); and (ii) Plaintiff has failed to show that South Dakota law is contrary to any fundamental public policy of California.[1] *See Washington Mut. Bank, FA v. Sup. Ct.*, 24 Cal. 4th 906, 914-917. Applying South Dakota law, Plaintiff entered into the Arbitration Agreement when he used the credit card. *See* S.D. Codified Laws § 54-11-9. The Arbitration

[1]Plaintiff's Opposition does not address the South Dakota choice-of-law provision.

Agreement covers the claims in this action because the claims arise out of the Account and the claims are against Citibank and a party connected to Citibank.

Indeed, Plaintiff does not deny that he received the Card Agreement, that it contained the Arbitration Agreement, and that he used the Account following receipt of the Card Agreement. Plaintiff also does not deny that his claims against Citibank and Home Depot fall within the scope of the Arbitration Agreement. Instead, Plaintiff contends that the Arbitration Agreement is unenforceable for a number of reasons.

B. Enforceability Of Arbitration Agreement

A party resisting arbitration on the grounds that the arbitration agreement is unconscionable, that arbitration is prohibitively expensive, or that certain statutory claims are not arbitrable bears the burden of showing that the arbitration agreement is invalid. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1158 (9th Cir. 2008). Plaintiff fails to meet his burden to show that the Arbitration Agreement is invalid for these reasons.

1. Arbitratability Of Statutory Claims

Plaintiff contends that claims under FCRA, RFDCPA, and CCRAA are not subject to arbitration because each of the acts provides that an action may be brought in a "court of competent jurisdiction." Plaintiff also contends that further references in the statutes to bringing "actions" in "court" should be regarded as preserving the right of a plaintiff to bring an action in court. Further, Plaintiff notes that the RFDCPA and CCRA prevent waivers of their provisions.

As Defendants contend, the Federal Arbitration Act ("FAA") preempts any state laws prohibiting arbitration of a particular type of claim. *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1747 (2011) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflict rule is displaced by the FAA."). With respect to the FCRA, Plaintiff does not show how the statutory text providing that "[a]n action to enforce any liability created under this subchpater may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction . . ." (15 U.S.C. § 1681p) requires that claims can only be resolved in a court rather than through arbitration. Plaintiff cites to insufficient authority that this type of language, which permits an action in court but does not say anything one

way or the other about arbitration, should be interpreted to preclude the arbitration of a claim. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 24 (1983) (noting "liberal federal policy favoring arbitration agreements."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.").

In sum, Plaintiff fails to show that the claims he seeks to bring in this action are outside of the claims that may be subject to contractual arbitration.

2. Unconscionability

a. Fee-Splitting

Plaintiff contends that the Arbitration Agreement is unconscionable because of the fee-splitting provision. In support, Plaintiff cites to cases decided under California law.

The fee-splitting provision in the Arbitration Agreement provides:

> "Who pays? Whoever files the arbitration pays the initial filing fee. If we file, we pay; if you file, you pay, unless you get a fee waiver under the applicable rules of the arbitration firm. If you have paid the initial filing fee and you prevail, we will reimburse you for that fee. If there is a hearing, we will pay any fees of the arbitrator and arbitration firm for the first day of that hearing. All other fees will be allocated as provided by the rules of the arbitration firm and applicable law. However, we will advance or reimburse your fees if the arbitration firm or arbitrator determines there is a good reason for requiring us to do so, or if you ask us and we determine there is a good reason 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, but a party may recover any and all expenses from another party if the arbitrator, applying applicable law, so determines."

Moilanen Decl. Ex. B, p. 7.

As a preliminary matter, Plaintiff fails provide any authorities showing that the Arbitration Agreement is unconscionable under South Dakota law, which is the law applicable to the Arbitration Agreement. *See* Section III.A. Thus, Plaintiff does not carry his burden to show

that the Arbitration Agreement is unenforceable due to the fee-splitting clause.

Even if the Court were to apply California law, Plaintiff has not shown that the Arbitration Agreement is unconscionable. *See Green Tree Fin. Corp.-Ala.*, 531 U.S. at 92 (noting that a "party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs."). Plaintiff has provided insufficient evidence to find that Plaintiff's arbitration fees, as determined in the actual fee-splitting provision at issue here, would be prohibitively expensive. Plaintiff provides no explanation or evidence whatsoever regarding his own expected fee under the Arbitration Agreement.

In addition, Defendants show that under the rules for consumer arbitrations of the American Arbitration Association, one of the arbitration firms permitted in the agreement, Plaintiff's arbitration fees would be capped at $125 for an actual damages claim not exceeding $10,000 and $375 for an actual damages claim between $10,000 and $75,000. *See* http://www.adr.org/sp.asp?id=22039 (last visited June 8, 2011). Plaintiff has not provided any evidence or authority suggesting these amounts are unfair or excessive. Further, Defendants represent that Citibank is willing to reimburse or advance Plaintiff's portion of the AAA fees (i.e., up to $375). Rep. at 8:1-5.

Plaintiff also contends that the Arbitration Agreement's requirement that each party will bear his own attorney's fees and costs contradicts the provisions of the FCRA, RFDCPA, and CCRA, which provide for fee reimbursement. However, as Defendants contend, the Arbitration Agreement does not contradict any provisions that allow for recovery of attorney's fees because the Arbitration Agreement provides that "a party may recover any and all expenses from another party if the arbitrator, applying applicable law, so determines."

b. Discovery

Plaintiff contends that the Arbitration Agreement is unenforceable because it denies him a "full right of discovery." Opp. at 14-15. However, the Arbitration Agreement does not deny all discovery, but rather provides that the arbitration will proceed in accordance with the rules of the selected arbitral forum. This fact is not sufficient to render an arbitration agreement unenforceable. *See AT&T Mobility*, 131 S.Ct. at 1747 (reasoning that a waiver of a "right to full discovery" would not render an agreement unenforceable). Plaintiff does not

sufficiently identify how the discovery provisions of the arbitral forums permitted by the agreement would be unconscionably insufficient.

c. Appeal

Plaintiff contends that because the arbitration provisions allow for an appeal before a panel of three arbitrators, it could create a very costly process if Defendants were unhappy with the result. Plaintiff also contends that the case may give rise to complex issues to which the panel of three arbitrators may not give a sufficiently thorough treatment.

However, as Defendants contend, Plaintiff provides insufficient evidence that a potential appeal by Defendants would be unreasonably costly to Plaintiff. Plaintiff also provides no explanation regarding how the issues in this action are "complex," and provides no evidence that a panel of three arbitrators would not give the issues a sufficiently thorough treatment. Thus, the appeal provision does not provide a basis to void the Arbitration Agreement.

d. Repeat Player Effect

Plaintiff contends that the "repeat player effect" due to Defendants' size would disadvantage Plaintiff and thus render the Arbitration Agreement unconscionable. However, Plaintiff's statement is not supported by any evidence, and repeated arbitration does not, without more, call into question the potential for arbitration to be neutral. *See Mercuro v. Sup. Ct.*, 96 Cal. App. 4th 167, 178 (2002).

e. Prohibition On Class Actions

Plaintiff contends that the prohibition of class actions in the Arbitration Agreement render it unconscionable. This contention is unpersuasive.

First, the inclusion of the class action waiver is not relevant because Plaintiff does not assert class claims here. Second, the Supreme Court has held that a class action waiver does not render an Arbitration Agreement unconscionable. *See AT&T Mobility*, 131 S.Ct. at 1748. Plaintiff's attempts to distinguish this case due to other purportedly unconscionable features in the Arbitration Agreement are unavailing, and in any event, Plaintiff does not show how the cumulative effect of all the Arbitration Agreement provisions renders it unconscionable.

f. Lack Of Alternative

Plaintiff contends that the Arbitration Agreement is voidable because he was given the contract on a take it or leave it basis. However, this is not a basis for a finding of unconscionability. *See AT&T Mobility*, 131 S.Ct. at 1750 (acknowledging that "the times in which consumer contracts were anything other than adhesive are long past" and finding arbitration provision enforceable); *Rozenboom v. Northwestern Bell Telephone Co.*, 358 N.W. 2d 241, 245 (S.D. 1984) ("We do not suggest that simply because this contract is standardized and preprinted, ipso facto, it is unenforceable as a contract of adhesion."). Here, Plaintiff provides no evidence establishing any coercive pressure to accept the Arbitration Agreement or lack of a meaningful choice.

g. Summary

In sum, Plaintiff does not provide sufficient evidence or authorities to find that the Arbitration Agreement is void after considering the provisions individually or together as a whole.

3. Practicality

Plaintiff contends that attempting to segregate out the claims against Home Depot and Citibank from the claims against the other defendants would create cumbersome logistics and may lead to inconsistent results since Plaintiff's credit standing was affected by all defendants. Thus, Plaintiff contends, the Court should not stay the action against Home Depot and Citibank because it would be impractical.

These contentions are not sufficient to deny the Motion. First, Plaintiff relies on authorities interpreting § 1281.2(c) of the California Code of Civil Procedure, not the Federal Arbitration Act. Plaintiff does not sufficiently show how Section 1281.2(c) would apply to the instant Arbitration Agreement, which is governed by South Dakota law. *See Stone & Webster, Inc. v. Baker Process, Inc.*, 210 F. Supp. 2d 1177, 1188 (S.D. Cal. 2002) (finding that Section 1281.2(c) does not apply where it was not incorporated into contract). Second, Plaintiff does not show how the cases against the various, unrelated defendants are so intertwined that a stay is impractical. Plaintiff challenges the handling and reporting of two separate accounts - an HSBC account and the Citibank Home Depot account. *See* Compl. ¶¶ 8-12.

4. Waiver And Delay

Plaintiff contends that Defendants waived their right for arbitration because they engaged in debt collection activities prior to this action being filed by Plaintiff, and never advised Plaintiff of his

right to arbitration. Plaintiff also asserts that compelling arbitration would cause an unnecessary delay. However, Plaintiff cites to no evidence in support of these assertions, and provides no authority in support of these arguments. The Court finds that these contentions do not provide sufficient grounds to find the Arbitration Agreement unenforceable.

5. Summary

In sum, Defendants have sufficiently shown the existence of an arbitration agreement that encompasses the claims at issue. Plaintiff has failed to show that the Arbitration Agreement is unenforceable. Thus, the Court will enforce the Arbitration Agreement. *See Chiron Corp.*, 207 F.3d 1126 at 1130.

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May 7, 2002

Richard R. Duncan
Director of Banking
State of South Dakota
217 1/2 West Missouri Avenue
Pierre, SD 57501-4590

Re: Arbitration Clause/Credit Cards

Dear Mr. Duncan:

Your request for an opinion from this Office concerning the following facts has been referred to me for response:

FACTS:

Over the last several years credit card issuers across the country have begun to amend the agreements they have with their cardholders to permit or require certain disputes to be resolved by binding arbitration. Arbitration offers a quick and inexpensive way to resolve disputes without clogging the already overburdened court systems with unnecessary litigation.

South Dakota has two statutes that clearly enunciate this state's policy in this area. First, SDCL 54-11-10 explicitly authorizes credit card issuers to change the terms of their existing credit card agreements by the simple practice of sending notices of the changed terms to cardholders. Second, SDCL 21-25A-1 expresses the state's policy in favor of arbitration; it states that arbitration agreements are "valid, enforceable and irrevocable" in South Dakota.

South Dakota law thus encourages the use of arbitration to resolve disputes, and it permits credit card issuers to add arbitration clauses to their contracts by sending written

notices to their cardholders. Various lenders have asked me whether they may rely on these statutes to validate arbitration clauses that they may decide to add to their agreements.

In order to assure that authoritative advice is provided to these lenders, I would appreciate it if your office could prepare an opinion responding to the following question:

QUESTIONS:

1. May a credit card issuer rely on SDCL 54-11-10 to add a provision to its existing agreements that requires or permits disputes between the issuer and its cardholders to be resolved by binding arbitration?

2. If the answer is "Yes," please identify any special procedures that should be followed by card issuers and any limitations on the issuer's rights to require or permit arbitration.

IN RE QUESTION No. 1:

"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." Heerdsma v. Global Steel Bldgs, Inc., 466 NW2d 643 (S.D. 1991), quoting L.R. Fov Const. Co. v. Spearfish School District., 341 NW2d 383, 388 (S.D. 1983) (Henderson, J., specially concurring) (citations omitted). South Dakota law, like federal law and the law of most other 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 bargained for this procedure." City of Hot Springs v. Gunderson's, Inc., 322 NW2d 8 (SD 1982.

Thus, while the general rule is that contracts seeking to restrain legal proceedings are void under SDCL 53-9-6, the Legislature has created an exception for agreements to submit controversies to arbitration. SDCL 53-9-6 provides in pertinent part:

> Every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals, or limiting his time to do so, is void.

> However, agreements to submit controversies to arbitration, as authorized by the Uniform Arbitration Act, are valid and enforceable . . . .

Likewise, SDCL 21-25A-1 provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This chapter also applies to arbitration agreements between employers and employees or between their respective representatives.

Federal law is similar. "Section 2 of the Federal Arbitration Act provides that written arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for revocation of any contract. 9 U.S.C. §2." Equipment Manufacturers Institute v. Janklow, 2001 DSD 11, ¶26, 135 F.Supp.2d 991, 1000 (D.S.D. Mar 30, 2001).

It is against this pro-arbitration backdrop that your question concerning insertion of arbitration provisions into existing credit card agreements must be examined. Under South Dakota law, the terms and conditions of a credit card plan are a matter of contract. The contract is created if the card holder uses an issued credit card, or if a credit card agreement is issued and the card holder does not cancel the card within thirty days. SDCL 54-11-9. The Legislature has, with certain exceptions not relevant here, by and large left it up to the parties to define the extent of those terms and conditions, including amendments to the credit card agreement. SDCL 54-11-10 provides:

> Upon written notice, a credit card issuer may change the terms of any credit card agreement, if such right of amendment has been reserved, including finance charges, fees and other costs, effective as to existing balances, so long as the card holder does not, within twenty-five days of the effective date of the change, furnish written notice to the issuer that he does not agree to abide by such changes. Upon receipt of such written notice by the issuer, the card holder shall have the remainder of the time under the existing terms in which to pay all sums owed to the issuer or

creditor. Use of the card after the effective date of the change of terms, including a change in interest rates, is deemed to be an acceptance of the new terms, even though the twenty-five days have not expired.

Thus a credit card issuer who has reserved the right to amend the credit card agreement may change the terms and conditions of a credit card contract simply by sending notice to the card holder that it is doing so. If the card holder does not object in writing within 25 days, the change is agreed to. If the card holder uses the card after notice of the change, the change is agreed to. If the cardholder does not agree with the change, he can send written notice to the issuer, pay off the outstanding amount, and in effect, cancel the card. In light of the clear state and federal policies favoring arbitration, I see no reason why an arbitration clause consistent with state and federal law cannot be included in a credit card agreement pursuant to SDCL 54-11-9.

Assuming the credit card issuer has reserved the right to amend a credit card agreement, I find nothing in the statutory scheme that limits the use of the procedure set forth in SDCL 54-11-10 to add an arbitration provision to existing agreements The card holder, of course, has the right to accept or reject such an amendment as set forth in that statute. My answer to your first question is "Yes."

IN RE QUESTION NO. 2:

Your second question seeks our advice in identifying any special procedures that need to be followed by card issuers in making these amendments and any limitations on the issuer's rights to require or permit arbitration. It seems to me that these matters, like other amendments to credit card agreements implemented through SDCL 54-11-10, are most appropriately left to the credit card issuers and their attorneys. Therefore, your request for this Office to opine on this second question is respectfully declined.

Respectfully submitted,

Harold H. Deering, Jr.
Assistant Attorney General

HHD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

#11

CIVIL MINUTES - GENERAL

Case No.	CV 11-6555 PSG (PLAx)	Date	February 24, 2012
Title	Guerrero v. Equifax Credit Info. Services, Inc., *et al.*		

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy K. Hernandez	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings: (In Chambers) Order Compelling Arbitration

Before the Court is Defendants Citibank, N.A., as successor in interest to Citibank (South Dakota), N.A., Citigroup Inc., Citicorp and Citicorp Credit Services, Inc.'s, (collectively, "Defendants" or "Citibank") motion to compel arbitration. The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the moving and opposing papers, the Court GRANTS the motion.

I. Background

In November 2005, *pro se* Plaintiff David Andrew Guerrero, M.D., became aware of unauthorized items on his credit report. *See Compl.* ¶ 6. Plaintiff disputed and investigated the unauthorized activity, requested that a "security freeze" be placed on his account, *see Compl.* ¶ 9, and, in 2007, ultimately was declared a victim of identity theft by a Los Angeles Superior Court. *See Compl.* ¶ 14. In February 2008, Plaintiff made a significant balance transfer to his Citibank credit card account to take advantage of a low promotional interest rate. Plaintiff alleges he made a payment on his Citibank credit card in April 2008, however, in May, Citibank sent Plaintiff a notice that it had not received the April payment, and that, as a result, Plaintiff had been assessed a late-payment charge and his interest rate had been increased from 4.99% to 25.99%. *See Compl.* ¶¶ 16, 17. Plaintiff disputed the late-payment charge and his failure to make the April payment, and submitted documentation of the funds being paid out of his bank account to Citibank in April. *See Compl.* ¶¶ 18-20.

Plaintiff subsequently received a notice from Citibank that his credit limit had been reduced in light of negative credit information reported to Defendant Equifax. *Id.* ¶¶ 20-21.

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Plaintiff was instructed to contact Equifax to dispute the inaccurate information, which Plaintiff did. *See id.* When Plaintiff contacted Equifax, Equifax requested certain information to verify Plaintiff's identity, including a 10-digit security pin, his social security number, and his date of birth. *Id.* ¶ 22. Plaintiff supplied this information accurately, however, Equifax informed him that his date of birth did not match the date of birth on file for his account. *Id.* Plaintiff explained that he had been a victim of identity theft, but was informed that Equifax could not help him without his "correct" birth date. *See id.* ¶¶ 23-24. In August 2009, Citibank contacted Plaintiff and informed him that as they had not received the requested documentation, their investigation into Plaintiff's dispute would be closed. *Id.* ¶ 32. Citibank continued to demand payment of the late charges and interest at the increased rate. *Id.* As a result of the negative impact to Plaintiff's credit history, Plaintiff alleges he was denied approval for a home refinance.

On June 15, 2011, Plaintiff filed suit against all Defendants for violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*, negligence, defamation, and violation of California's Consumer Credit Reporting Agencies Act, Cal. Civ. Code § 1785 *et seq.* Defendants removed the action to federal court on August 10, 2011. *See Dkt.* # 1. On November 15, 2011, the Citibank Defendants moved to compel arbitration pursuant to the binding arbitration clause included in Plaintiff's credit card agreement.

II. Legal Standard

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). Section 2, the "primary substantive provision of the Act," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, (1983), provides, in relevant part:

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

9 U.S.C. § 2.

The Supreme Court has described this provision as reflecting both a "liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract." *Concepcion*, 131 S. Ct. at 1745. "Because the FAA mandates that district courts shall

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direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed, the FAA limits courts' involvement to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir.2008) (emphasis in original, quotation omitted). The saving clause in section 2 permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *See Concepcion*, 131 S. Ct. at 1746.

III. Discussion

In moving to compel arbitration, Defendants originally relied on a revised cardholder agreement sent to Plaintiff in July 2008. Plaintiff argued in opposition that the terms of this agreement, including the arbitration provision, did not apply to his account because Plaintiff cut up his card and did not make any new purchases after receipt of the 2008 agreement. Therefore, Plaintiff claims he did not agree to the modifications, including the arbitration provision, and instead attaches a 1994 card agreement that does not include an arbitration clause. *See Guerrero Decl.*, Ex. A.

Citibank disputes that non-use of the card for new purchases was alone sufficient to reject the 2008 modification, but maintains that, in any event, the 1994 cardmember agreement was superseded and Plaintiff's account rendered subject to arbitration over a decade ago. Citibank submits cardholder agreements implemented in 2001 and 2005, respectively, both of which contain arbitration provisions. Because Plaintiff cannot dispute that he has used his account since 2001, Citibank contends that Plaintiff's account has been subject to arbitration for over a decade, irrespective of whether Plaintiff accepted the 2008 agreement.

The Court finds that a valid arbitration agreement exists covering the claims in this action. Plaintiff admits that, at one point, the 1994 agreement governed his account with Citibank. *See Guerrero Decl.*, Ex. A. The 1994 agreement contains a choice-of-law provision stating that federal law and the law of South Dakota control the terms and enforcement of the agreement. *See id.* at 7. Federal courts sitting in diversity look to the law of the forum state when making choice of law determinations. *See Hoffman v. Citibank (South Dakota), N.A.*, 546 F.3d 1078, 1082 (9th Cir. 2008). In this case, Plaintiff sued in California.

"When an agreement contains a choice of law provision, California courts apply the parties' choice of law unless the analytical approach articulated in § 187(2) of the Restatement

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(Second) of Conflict of Laws ("§ 187(2)") dictates a different result." *Hoffman*, 546 F.3d at 1082. The California Supreme Court has held that under California's choice of law analysis, a court must determine whether (i) the chosen state has a substantial relationship to the parties or their transaction, and (ii) whether the chosen state's law is contrary to a fundamental policy of California. *Id.* (citing *Nedlloyd Lines B.V. v. Superior* Court, 3 Cal. 4th 459, 11 Cal. Rptr. 2d 330, 834 P.2d 1148, 1152 (1992)). "If such a conflict with California law is found, 'the court must then determine whether California has a materially greater interest than the chosen state in the determination of the particular issue.'" *Id.*

The choice-of-law provision is enforceable because Citibank has shown that South Dakota has a substantial relationship to the parties and the transaction in that Citibank is located in South Dakota, and, as explained below, the application of South Dakota law is not contrary to any fundamental public policy of California. *See Washington Mut. Bank, FA v. Sup. Ct.*, 24 Cal. 4th 906, 914-17 (2001); *Yaqub v. Experian Information Solutions, Inc.*, No. CV11-2190-VBF (FFMx), slip op. at *3-4 (C.D. Cal., June 10, 2011). Plaintiff does not argue that application of South Dakota law would contravene public policy in California, but merely states that the choice-of-law question is "irrelevant" because Plaintiff did not enter into the 2008 agreement. However, as each of the preceding cardmember agreements, including the 1994 iteration, contain the same South Dakota choice-of-law provision, the question is relevant to the determination of whether the 2001 Change-in-Terms notice incorporated arbitration into Plaintiff's account agreement.

In October 2001, Citibank mailed its cardmembers, including Plaintiff, a "notice of Change in Terms regarding Binding Arbitration to Your Citibank Card Agreement" (the "2001 Change-in-Terms"). *See Supp. Barnette Decl.*, ¶¶ 7-8. The 2001 Change-in-Terms was mailed to Plaintiff with his October 2001 billing statement, along with an express directive to "please see the enclosed change in terms notice for important information about the binding arbitration provision we are adding to you Citibank card agreement." *See id.* ¶¶ 8, 10, Exs. 3, 4. A second notice was printed in Plaintiff's November 2001 billing statement, alerting him that he "should have received an important notice about adding binding arbitration to your Citibank card agreement," and advising Plaintiff to contact customer service if he would like another copy. *See id.*, ¶¶ 8, 9, Ex. 5. The 2001 Change-in-Terms gave Plaintiff the opportunity to opt out of the Arbitration Agreement, *see id.*, Ex. 3, and provided that it would become effective on the day after the Statement/Closing date indicated on the November 2001 billing statement. Plaintiff did not opt out. *See Barnette Decl.*, ¶ 12. Therefore, as the November statement closed on November 29, the changes came into effect on November 30, 2001. *See id.*

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Moreover, the arbitration agreement was amended in February 2005 pursuant to the same protocol, and Plaintiff again had the opportunity to opt out of the changes to the arbitration provision, although not to the arbitration provision itself. *See id.*, Exs. 8, 9. Once again, Plaintiff did not do so.

As discussed in detail below, the arbitration provision and its method of adoption are in accordance with South Dakota law. Accordingly, unless Citibank's "bill stuffer" amendment and corresponding "opt-out" provision are unconscionable and therefore contrary to a fundamental public policy of California, South Dakota law governs under the choice-of-law-provision.

Of particular relevance here is the Supreme Court's recent decision in *AT & T v. Concepcion*, 131 S. Ct. 1740 (2011), in which the Supreme Court overruled a line of California Supreme Court authority holding class arbitration waivers unconscionable when contained in adhesion contracts. In *Concepcion*, as here, "the agreement authorized [Defendant] to make unilateral amendments, which it did to the arbitration provision on several occasions." *See id.* at 1744. The Supreme Court found that the rule, commonly referred to as the "*Discover Bank*" rule,[1] stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in encouraging the enforcement of arbitration agreements, and therefore was preempted by the FAA. *See id.* at 1753. However, the Court also noted in a footnote that "[o]f course, States remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action-waiver provisions to be highlighted," provided that such steps did not "conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *See id.*, 131 S. Ct. at 1750 fn. 6.

The Court finds that the arbitration provision is not unconscionable under California law. "Under California law, courts may refuse to enforce any contract found to have been

[1] In *Discover Bank*, the California Supreme Court held that when a class-action waiver in an arbitration agreement is "found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then...the waiver becomes in practice the exemption of the party 'from the responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *See* 36 Cal. 4th 148, 162-63, 30 Cal. Rptr. 3d 76 (2005) (quoting Cal. Civ. Code § 1668).

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unconscionable at the time it was made, or may limit the application of any unconscionable clause." *Concepcion*, 131 S. Ct. at 1746 (citing Cal. Civ.Code Ann. § 1670.5(a) (West 1985)) (quotations omitted). A finding of unconscionability requires "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Id.* (citing *Armendariz v. Foundation Health Psychcare Servs.*, Inc., 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745 (2000); *Discover Bank v. Sup. Ct.*, 36 Cal.4th 148, 159-161, 30 Cal.Rptr.3d 76 (2005)).

The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, in which the party with superior bargaining strength "relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Gentry v. Sup. Ct.*, 42 Cal. 4th 443, 469, 165 P.3d 556 (2007), abrogated on other grounds by *Concepcion*, 131 S. Ct. 1740. Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided." *Id.* (citing *Discover Bank*, 36 Cal. 4th at 160).

"The prevailing view is that procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." *Id.* (quotations and punctuation omitted). Both need not be present in the same degree, such that a "sliding scale is invoked which disregards the regularity of the procedural process of the contact formation, that created the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." *See id.*

As both the elements of both procedural and substantive unconscionability are minimal in this case, application of the "sliding scale" precludes a finding of unconscionability. While the "bill stuffer" process by which the terms of the arbitration agreement were conveyed "contain[s] a degree of procedural unconscionability," there is no indication of any "sharp practices" or "surprise". *See Gentry*, 42 Cal. 4th at 469. The arbitration provision begins with a bold-faced, large-size heading that reads **"NOTICE OF CHANGE IN TERMS REGARDING BINDING ARBITRRATION TO YOUR CITIBANK CARD AGREEMENT."** *See Supp. Barnette Decl.*, Ex. 3. It apprises cardholders who "do not wish to accept the binding arbitration provision [to] please see the NON-ACCEPTANCE INSTRUCTIONS on panel 5 of this notice," and contains the following all-caps and bold-faced explanatory provision:

> **ARBITRATION:**
> **PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING**

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ARBITRATTION. 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 AN ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.

Id.

The accompanying October and November billing statements directed Plaintiff's attention to the Change-in-Terms notice, and apprised Plaintiff that the notice related to "IMPORTANT INFORMATION ABOUT THE BINDING ARBITRATION PROVISION WE ARE ADDING TO YOUR CITIBANK CARD AGREEMENT." *See id.*, Exs. 4, 5 (informing Plaintiff that he "SHOULD HAVE RECEIVED AN IMPORTANT NOTICE ABOUT ADDING BINDING ARBITRATION TO [HIS] CITIBANK CARD AGREEMENT" and advising him that if he "WOULD LIKE ANOTHER COPY PLEASE CALL THE CUSTOMER SERVICE NUMBER LISTED ABOVE").

Moreover, Plaintiff was given a meaningful opportunity to opt-out of the arbitration provision. The "freedom to choose whether or not to enter a contract of adhesion is a factor weighing against a finding of procedural unconscionability." *Gentry*, 42 Cal. 4th at 470. Plaintiff was given 26 days after the "Statement/Closing date indicated on [his] November 2001 billing statement" to notify Citibank in writing that he did not wish to accept the changes. By opting out of the amendment, Plaintiff would have been permitted to use his card until it expired, at which time he would have been able to pay off his balance under the existing terms. Notably, he was not required to pay off his balance within the 26-day window in order to opt out, and therefore this case does not present the same take it or leave it scenario found to be procedurally unconscionable in *Discover Bank*. And while the arbitration provision may not have explained the downsides to arbitration particular to the claims asserted here, it did apprise Plaintiff that he would be foregoing the right to go to court and to a trial by a jury, and that arbitration procedures were more limited than court procedures. Moreover, in light of the fact that Plaintiff was not required to pay off his balance immediately in order to opt-out, there is no indication that Plaintiff or other cardmembers felt pressure not to opt out of the arbitration agreement. *Compare Gentry*, 42 Cal. 4th at 470.

Accordingly, although the Change-in-Terms may not have been entirely free from elements of procedural unconscionability, "the times in which consumer contracts were anything

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other than adhesive are long past." *See Concepcion*, 131 S. Ct. at 1750. Because Plaintiff was given a meaningful opportunity to avoid adding arbitration to his account, the arbitration agreement will not be held unconscionable absent a strong showing that its terms are "so one-sided or oppressive as to be substantively unconscionable." *See Gentry*, 42 Cal. 4th at 472; *Quevedo v. Macy's Inc.*, 798 F. Supp. 2d 1122, 1137 (C.D. Cal. 2011) (where "the degree of procedural unconscionability is relatively low, a greater showing of substantive unconscionability will be required to render the agreement unenforceable").

Much of the Court's analysis in this regard is controlled by the Supreme Court's recent holding in *Concepcion*. After *Concepcion*, Citibank's arbitration provision may not be found unconscionable merely because it prohibits participation in class proceedings, even where it was conveyed in a contract of adhesion. Although not as consumer friendly as the arbitration provision addressed in *Concepcion*, the clause at issue here is not substantively unconscionable. Rather, it provides that, in the event there is a hearing, Citibank will pay any fees of the arbitrator and arbitration firm for the first day of the hearing; that each party will bear their own expenses, regardless of who prevails, except that the arbitrator may award expenses "if the arbitrator, applying applicable law, so determines"; and that the "arbitrator will apply applicable substantive law consistent with the FAA and applicable statutes of limitations, will honor claims of privilege recognized at law, and will have the power to award to a party any damages or other relief provided for under applicable law." These terms assure sufficient fairness to the customer and do not render the arbitration agreement exculpatory for Defendants or unconscionable. *See Conroy v. Citibank, N.A.*, CV 10-04930 SVW (AJWx), slip op. at 7 (C.D. Cal., July 22, 2011). The 2005 modification followed the same process and made no substantive changes beyond removing JAMS as a potential arbitration firm and providing that the parties must choose either the American Arbitration Association or the National Arbitration Forum. Therefore, it, too, was not unconscionable.

Because the terms of the arbitration agreement and its method of adoption were not unconscionable under California law, application of South Dakota law is not contrary to a fundamental public policy of California and the choice of law provision is enforceable. *See Hoffman*, 546 F.3d at 1085.

Applying South Dakota law, the Court finds that Plaintiff entered into the arbitration agreement when he was mailed the 2001 Change-in-Terms, failed to take advantage of the opt-out provision, and continued to use the card. At that time, South Dakota law provided that "a credit card issuer may change the terms of any credit card agreement, if such right of amendment has been reserved...so long as the card holder does not, within twenty-five days of the effective

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date of the change, furnish written notice to the issuer that he does not agree to abide by such changes...[u]se of the card after the effective date of the change of terms...is deemed to be an acceptance of the new terms...." S.D. Codified Laws § 54-11-10.

The 1994 agreement expressly reserved Citibank's right of amendment, providing that Citibank "can change this Agreement, including all fees and the annual percentage rate, at any time" and that if a cardholder did not agree to the change, the cardholder was required to notify Citibank "in writing within 25 days after the effective date of the change and pay [Citibank] the balance, either at once or under the terms of the unchanged Agreement," and that "[u]se of the card after the effective date of the change shall be deemed acceptance of the new terms, even if the 25 days have not expired." *See Guerrero Decl.*, Ex. A. Defendants followed the procedure outlined above, and Plaintiff did not opt out and continued to use his accounts.

The Attorney General of South Dakota and numerous courts in this district have upheld this method of adopting an arbitration agreement pursuant to South Dakota law. *See, e.g., RJN*, Ex. 4 (opinion issued by the Attorney General concluding that "[a]ssuming the credit card issuer has reserved the right to amend a credit card agreement, I find nothing in the statutory scheme that limits the use of the procedure set forth in SDCL 54-11-10 to add an arbitration provision to existing agreements."); *Lowman v. Citibank (South Dakota), N.A.*, No. CV-05-8097 RGK, 2006 WL 6108680, at *3-4 (C.D. Cal. Mar. 24, 2006); *Egerton v. Citibank, N.A.*, No. CV-036907 DSF (PLAx), 2004 WL 1057739, at *3 (C.D. Cal. Feb. 18, 2004). Therefore, as Plaintiff does not dispute that his account was in use after November 2001 and February 2005, under the terms of the card agreement and South Dakota law Plaintiff agreed to the 2001 arbitration provision and the 2005 modifications. *See Yaqub*, No. CV11-2190-VBF-(FFMx), slip op. at *3 ("Applying South Dakota law, Plaintiff entered into the Arbitration Agreement when he used the credit card."); *Lowman*, 2006 WL 618680, at *3 (finding an arbitration agreement binding, enforceable, and not unconscionable under South Dakota law where Citibank followed these same procedures).

Finally, the Court notes that Plaintiff's supplemental declaration, in which he summarily denies having received the 2001 and 2005 Change-in-Terms notices, is alone insufficient to raise a triable issue as to receipt, and therefore as to formation. *See Guerrero Supp. Decl.* ¶¶ 3, 6. Under the FAA, "[i]f the making of the arbitration agreement ... be in issue, the [district] court shall proceed summarily to the trial thereof." 9 U.S.C. § 4. However, "to put such matters in issue, it is not sufficient for the party opposing arbitration to utter general denials of the facts on which the right to arbitration depends. If the party seeking arbitration has substantiated the entitlement by a showing of evidentiary facts, the party opposing may not rest on a denial but

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must submit evidentiary facts showing that there is a dispute of fact to be tried." *Oppenheimer & Co., Inc. v. Neidhardt*, 56 F.3d 352, 358 (2d Cir.1995) (citations omitted).

Here, Citibank offers convincing evidence that Plaintiff received the Change-in-Terms notices. Citibank submits that the 2001 arbitration Change-in-Terms was mailed with Plaintiff's October 2001 periodic statement, and attaches copies of each. *See Barnett Supp. Decl.* ¶ 8, Ex. 3, 4. Citibank recorded the mailing of the arbitration Change-in-Terms to Plaintiff in its records, a copy of which is provided to the Court. *See id.* ¶ 10, Ex. 6. There is no record of Plaintiff's mail ever having been returned as undeliverable, despite Citibank's regular practice of including a note in a cardmembers' account records when billing statements, inserts or notices are returned as undeliverable. *See id.* ¶ 11. Citibank also furnishes copies of the October 2001, November 2001, and February 2005 statements, all of which were delivered to Plaintiff and all of which reference the Change-in-Terms notices. *See id.*, Exs. 4,5, 9.

Notably, Plaintiff does not deny having received the October 2001 and February 2005 billing statements, in which the Change-in-Terms notices were included, or the November 2001 billing statement advising him that he should have received the Change-in-Terms notice. *See Guerrero Supp. Decl.* ¶¶ 4,5,7. In light of this showing, the Court finds Plaintiff's summary denial that the arbitration notices were not received, unaccompanied by any supporting evidentiary facts, insufficient to raise a triable issue regarding receipt. *See Murphy v. DIRECTV, Inc.*, No. 2:07-CV-06465-JHN, 2011 WL 3319574, at *2 (C.D. Cal., Aug. 2, 2011) (finding that despite Plaintiffs' protestations that none of them "saw, let alone signed the Customer Agreement that contain[ed] the Arbitration Provision," defendants had submitted sufficient evidence of receipt where defendants explained that when the Customer Agreement was updated, the updated agreement was mailed "to each of its customers along with his or her next billing statement"); *Walters v. Chase Manhattan Bank*, No. CV-07-0037-FVS, 2008 WL 3200739, at *3 (E.D. Wash. 2008); *Daniel v. Chase Bank USA, N.A.*, 650 F. Supp. 2d 1275, 1289-90 (N.D. Ga., 2009) (noting that "[b]ecause it [was] undisputed that the notices were sent to plaintiff [and Plaintiff] continued to make charges on the Account without opting-out, plaintiff's mere denial of receipt of the amendments is insufficient to create a genuine issue of material fact to defeat summary judgment").

Having determined that a valid arbitration agreement exists, the Court next addresses whether the agreement covers the dispute at issue. By its terms, the arbitration clause applies to "any claim, dispute, or controversy between you and us." *See Barnett Supp. Decl.*, Ex. 3. The agreement further provides that "[a]ny question about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow

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it to be enforced." *Id.* Furthermore, Plaintiff does not dispute that his claims fall within the scope of the Citibank Card Agreement. As such, the Court finds that the dispute falls within the scope of the arbitration clause. Because a valid arbitration agreement has existed since 2001 and was properly amended in 2005, and because the arbitration agreement covers the issues in dispute, the Court directs Plaintiff and the Citibank Defendants to arbitration in accordance with the 2001 arbitration agreement, as modified by the 2005 change-in-terms.

IV. Conclusion

In conclusion, the Court finds that a valid agreement to submit to arbitration exists between Plaintiff and the Citibank Defendants. Plaintiffs and the Citibank Defendants are directed to arbitration in accordance with the 2001 arbitration agreement, as modified by the 2005 Change-in-Terms. And as Section 3 of the FAA mandates courts to stay an action involving arbitrable issues upon application by one of the parties, the Court stays the present action as to the Citibank Defendants. *See* 9 U.S.C. § 3.

IT IS SO ORDERED.

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Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER Granting Defendants' Motion to Compel Arbitration [9]

I. Introduction

This is a putative class action filed by Devavani Conroy ("Plaintiff") against Citibank, N.A. and Citibank (South Dakota), N.A. (collectively, "Defendants"). The Court issued an Order temporarily staying this case on November 18, 2010 pending the Supreme Court's ruling in AT&T Mobility, LLC v. Concepcion, __ U.S. __, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011). The Supreme Court having ruled on that case, Defendants' Motion to Compel Arbitration is now ripe for decision. For the reasons stated, the Motion is GRANTED.

II. Background

A. Plaintiff's Complaint

The Complaint, filed on July 2, 2010, alleges violations of California Business & Professions Code §§ 17200 *et seq.*, Unfair Competition Law ("UCL"), violations of Cal. Civ. Code §§ 1750 *et seq.*, Consumer Legal Remedies Act ("CLRA") and seeks remedies for unjust enrichment. The putative class is composed of California residents who (1) were marketed by Citibank to purchase and maintain "Credit Protector" coverage for their credit card account balances and (2) paid for Citibank "Credit Protector" coverage. (Compl. ¶ 1). Defendants are headquartered in South Dakota, and as such, the Court has diversity jurisdiction.

The Complaint alleges that Citibank's Credit Protector coverage, which was marketed as providing benefits to credit card holders in the event of unemployment or disability, was marketed through misrepresentations and targeted cardholders who were in the "subprime" category. (Compl. ¶¶ 2-3). When a claim is made, Credit Protector coverage acts to cancel the cardholder's balance in the event of death or long-term disability as well as providing various other benefits. (Compl. ¶ 20). In exchange for the coverage, Citibank charged cardholders $.85 for every $100 in card balances every month. (Compl. ¶ 30). Plaintiff essentially alleges that Citibank's marketing materials failed to disclose material information to customers, that these materials did in fact deceive the putative class, and that

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Citibank unfairly engaged in "post claims underwriting," effectively misleading customers by imposing bureaucratic hurdles to recovery under the coverage. (Compl. ¶¶ 35-40). Further, Plaintiff alleges that the fees charged for the program were "unconscionable." (Compl. ¶¶ 44-48).

B. Agreements at Issue

Credit Protector coverage is only available for Citibank credit card customers. After a customer signs up for a Citibank credit card, Citibank provides cardholders with a credit card agreement ("the Card Agreement"). The Card Agreement contains an arbitration clause and a waiver of class-wide arbitration. It also contains a choice of law provision, stating expressly that South Dakota laws apply.

The arbitration clause begins by explaining in plain language the meaning of arbitration, in all capital letters. Next, it states that "Claims and remedies sought as part of a class action . . . are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief on an individual (non-class, non-representative) basis." (Motion at 2-3).[1] The arbitration clause can be invoked by both Defendants and customers. (Motion at 3). It encompasses "All Claims relating to [the customer's] account, a prior related account, or [Defendants' and customers'] relationship . . . All Claims are subject to arbitration, no matter what legal theory the Claims are based on or what remedy [is sought]. . . ." (Motion at 4). The arbitration clause further provides that the party seeking arbitration pays fees. (Motion at 5). The Card Agreement states that "Federal law and law of South Dakota, where we are located, govern the terms and enforcement of this Agreement." (Motion at 2).

Credit Protector is an optional program for Citibank cardholders. As such, when customers enroll in Credit Protector, they receive a new agreement ("the Credit Protector Agreement") separate from the Card Agreement.[2] The Credit Protector agreement does not itself include an arbitration clause like the one in the Card Agreement. However, the Credit Protector Agreement, in its first paragraph, states "Citibank Credit Protector is an optional program that is an addendum to and is subject to the Card Agreement for the account shown above." (Motion Exh. 3 at 13).

III. The November 18, 2010 Order

On September 13, 2010, Defendants moved to compel arbitration, arguing that the arbitration clause of the Card Agreement compels Plaintiff to pursue arbitration on an individual basis. The Court

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[1] The Court will refer to Defendants' initial motion brief as "Motion," its initial reply brief as "Reply," its supplemental brief as "Supp. Motion," and its supplemental reply brief as "Supp. Reply." The Court will refer to Plaintiff's initial opposition brief as "Opp." and its supplemental opposition brief as "Supp. Opp."

[2] In Conroy's case, she did not sign up for Credit Protector until years after she received her Card Agreement.

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first determined that the arbitration clause in Plaintiff's former Card Agreement, which did not also appear in the Credit Protector Agreement, applied. The Court next determined that California law applied to the enforceability of the arbitration clause despite the Card Agreement's South Dakota choice-of-law provision. In reaching this conclusion, the Court cited Klussman v. Cross Country Bank et al., 134 Cal.App.4th 1283, 1294 (2005) for the proposition that "the enforcement of an arbitration clause containing a waiver of class-wide arbitration would violate 'a fundamental public policy in California' in the choice-of-law context." (Nov. 18, 2010 Order at 10). The Court further found that California had a materially greater interest than South Dakota in applying its law.

The Court suggested that Discover Bank v. Superior Court, 36 Cal.4th 148 (2005) and its progeny would govern this case. In Discover Bank, the California Supreme Court declined to enforce an arbitration clause that required a waiver of class-wide arbitration because the court found the waiver unconscionable under California law, holding:

> We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Cal. Civ. Code § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Id. at 162-63. While the Court declined to reach a final determination on the issue of unconscionability, it appeared likely that the arbitration clause at bar would be unconscionable under California law.

Having reached that point, the Court determined that a stay of the case was appropriate pending the Supreme Court's ruling in AT&T, 131 S. Ct. at 1740. The Supreme Court was set to determine whether the Federal Arbitration Act ("FAA") preempts California's rules conditioning the enforcement of an arbitration agreement on the availability class-wide arbitration.

IV. The Supreme Court's AT&T Decision

In AT&T, a cellular telephone contract between AT&T and certain customers provided for arbitration of all disputes but expressly prohibited class-wide arbitration. Customers brought a class action suit alleging, *inter alia*, that AT&T had engaged in false advertising and fraud by advertising certain phones as "free" but still charging sales taxes. The district court and the Ninth Circuit denied AT&T's motion to compel arbitration, finding the class-wide arbitration prohibition to be unconscionable under California law as interpreted by Discover Bank.

The Supreme Court reviewed the purposes of the FAA and its interrelationship with state

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contract law. The Court interpreted 9 U.S.C. § 2 as reflecting both a liberal federal policy favoring arbitration and the principle that arbitration is a matter of contract such that arbitration agreements must be enforced according to their terms. AT&T, 131 S. Ct. at 1745-46 (quotations and citations omitted). However, the saving clause of 9 U.S.C. § 2 "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Id. at 1746 (quotation omitted). Thus, the Court framed the question before it as "whether § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable," which it referred to as "the Discover Bank rule." Id.

The Court determined that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." Id. at 1751. To reach this conclusion, the Court discussed the pitfalls of class-wide arbitration generally, such as the loss of arbitration informality, expediency, and confidentiality. In addition, class-wide arbitration increases risks to defendants that defendants did not contract for and "that Congress would not have intended to allow state courts to force." Id. at 1752. Most tellingly, the Court stated:

> The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.

Id. at 1753. The Court explicitly held, "California's *Discover Bank* rule is preempted by the FAA." Id.

At the end of this analysis, the Supreme Court noted that the terms of the arbitration clause were favorable to AT&T's consumers as an additional reason to deny sending the claim to class-wide arbitration. Id. at 1753 ("*Moreover*, the claim here was most unlikely to go unresolved" in bilateral arbitration.) (emphasis added).[3] Importantly, however, there is no indication that this individualized

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As recounted by the Supreme Court in the case introduction,

> The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT & T's Web site. AT & T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT & T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT & T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small

assessment of the arbitration clause was necessary to its holding.

V. DISCUSSION

A. Applicability of the Card Agreement's Arbitration Clause

For the reasons stated in the Court's November 18, 2010 Order, the Court finds that the parties did agree to arbitration as outlined in the Card Agreement.

B. Choice of Law Issues

The Card Agreement contains an express choice-of-law clause stating that South Dakota law applies. Nonetheless, the Court determined in its November 18, 2010 Order that California law should apply. In doing so, however, it relied on California case law that is no longer viable, so that section of the Court's analysis is hereby withdrawn. The Court need not address whether California law or South Dakota law applies now because any rule forcing class-wide arbitration of this action would be preempted by the FAA under AT&T.[4]

C. Application of AT&T to Class-wide Arbitration Waivers Generally

Plaintiff's primary argument in opposition to Defendants' Motion to Compel Arbitration is that the "practical effect of compelling arbitration here would be to preclude Plaintiff from bringing her damage and injunctive relief claims under the California Unfair Competition Law and California Legal Remedies Act." (Supp. Opp. at 3). This is precisely the sort of argument that the Supreme Court rejected in AT&T. Indeed, the majority rejected as irrelevant the dissent's concern that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," reasoning that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." AT&T, 131 S. Ct. at 1753.

The Supreme Court did not rest its opinion in AT&T on the unique circumstances of that case,

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> claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT & T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT & T's last written settlement offer, requires AT & T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

Id. at 1744.

[4] It bears noting that the arbitration clause would *not* be unconscionable under South Dakota law, even in the absence of AT&T. See, e.g., Lowman v. Citibank (S.D.), N.A., 2006 WL 6108680, *3 (C.D. Cal. Mar. 24, 2006); Dumanis v. Citibank (S.D.), N.A., 2007 WL 3253975, *3 (W.D.N.Y. Nov. 2, 2007); Eaves-Leonos v. Assurant, Inc., 2008 WL 80173, *7 (W.D. Ky. Jan. 8, 2008).

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but rather on the liberal federal policy favoring arbitration and enforcing the terms of arbitration agreements. The Supreme Court noted that prohibiting class-wide arbitration waivers would be unfair to contracting defendants and would counteract the FAA's goals of resolving disputes informally, expediently, and (when so desired) confidentially. Those policies are of equal weight in this case. After listing those policies, the Court determined that "what the parties in the aforementioned examples would have agreed to [class-wide treatment] is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." AT&T, 131 S. Ct. at 1753. The Court had not examined the individual contract at issue in the case before reaching this decision. Thus, the Court's additional statements as to the favoribility of the arbitration agreement in that case is best read as *dicta* merely included in response to the dissents claims that FAA preemption would be unfair to the plaintiffs. Plaintiff's contention otherwise would render the majority of AT&T's opinion meaningless.

In any event, while not as customer friendly a the arbitration agreement upheld in AT&T, the arbitration agreement in this case is sufficiently favorable to the customer such that it cannot be deemed unconscionable. The arbitration clause reads:

> Who pays? Whoever files the arbitration pays the initial filing fee. If we file, we pay; if you file, you pay, unless you get a fee waiver under the applicable rules of the arbitration firm. If you have paid the initial filing fee and you prevail, we will reimburse you for that fee. If there is a hearing, we will pay any fees of the arbitrator and arbitration firm for the first day of that hearing. All other fees will be allocated as provided by the rules of the arbitration firm and applicable law. However, we will advance or reimburse your fees if the arbitration firm or arbitrator determines there is good reason for requiring us to do so, or if you ask us and we determine there is good reason 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, but a party may recover any or all expenses from another party if the arbitrator, applying applicable law, so determines.

(Walters Decl. Exh. 1 at 9). The arbitration agreement further provides: "The arbitrator will apply applicable substantive law consistent with the FAA and applicable statutes of limitations, will honor claims of privilege recognized at law, and will have the power to award to a party any damages or other relief provided for under applicable law." These terms assure sufficient fairness to the customer and do not render the arbitration agreement exculpatory for Defendants or unconscionable.

Plaintiff contends that, unlike in AT&T, the cost of arbitration here is prohibitively expensive to her given the level of possible individual recovery. This argument is not supported by the record. Where 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 (2000).

First, Defendants are responsible for the fees for the first full day of arbitration, and there is

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-04930 SVW (AJWx) Date July 22, 2011

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nothing in the record to indicate that the arbitration will last longer than one day. Plaintiff contends that she must pay a $3,350 administrative fee because her claim is non-monetary. (Supp. Opp. at 4). This argument is misleading, because Plaintiff's claim is not non-monetary. She primarily seeks restitution and disgorgement of amounts paid to Defendants, which are monetary in nature. That she also requested injunctive relief is of no event. Plaintiff cites nothing in the American Arbitration Association ("AAA") rules suggesting that by seeking both non-monetary and monetary remedies, a consumer is subject to additional administrative fees.[5] Rather, it appears that Plaintiff will be responsible only for a $125 filing fee under the AAA rules. (Supp. Reply at 14). In addition, the AAA rules permit it to defer or reduce Plaintiff's fees in the case of hardship. There is no indication that Plaintiff ever requested or even inquired about such a waiver. Application for a fee waiver is an "important step that must be taken before an unconscionability determination can be made." Dobbins v. Hawk's Enterprises, 198 F.3d 715, 717 (8th Cir. 1999); James v. McDonald's Corp., 417 F.3d 672, 679-80 (7th Cir. 2005).

The agreement also provides that Defendants will pay Plaintiff's arbitration fees if either the arbitrator or the arbitration firm deems that good cause exists to do so. Thus, even if the arbitration lasts more than one day or the filing fee is larger than anticipated, Plaintiff still might not have to pay. Further, if Plaintiff is meritorious, the arbitrator is authorized to award her expenses (including attorney, expert and witness expenses) under applicable law, which are generally available for her UCL and CLRA claims. See Cappuccitti v. DirecTV, Inc., 623 F.3d 1118, 1127 (11th Cir. 2010) (upholding an arbitration agreement that permitted the plaintiffs to recover attorneys' fees if allowed by applicable law). Nor will the arbitration process hamstring Plaintiff's her desired relief, as the arbitrator is authorized to award any relief provided for under the law.

Finally, Defendants themselves are authorized under the contract to pay Plaintiff's fees upon request. Plaintiff has never so requested. Her failure to do so is similar to a failure to seek a fee waiver from the AAA and militates against a finding of unconscionability. Indeed, Defendants have represented that they "will agree to advance Conroy's portion of the arbitration fees for an arbitration before the AAA." (Supp. Reply at 15). The Court accepts this representation, which largely moots Plaintiff's concerns as to arbitration expense. See, e.g., Yaqub v. Experian Information Solutions, Inc., et al., No. CV 11-2190 VBF (FFMx) (C.D. Cal. Jun. 10, 2011); Large v. Conseco Fin. Servicing Corp., 292 F.3d 49, 56-57 (1st Cir. 2002); Nelson v. Insignia/ESG, Inc., 215 F. Supp. 2d 143, 157 (D.D.C. 2002).

D. The Availability of the Designated Arbitrators

Plaintiff's final argument is that the arbitration provision is unenforceable because of the potential unavailability of the arbitrators designated in the agreement. The Card Agreement provides that the National Arbitration Forum ("NAF") and the AAA as the exclusive arbitrators for disputes. On July 20, 2009, the NAF announced that it had settled a lawsuit with the Minnesota Attorney General and

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[5] It is also doubtful that Plaintiff has standing to seek injunctive relief because she is no longer enrolled in Credit Protector and her account has been closed, so there is no possibility of her suffering future harm.

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agreed to "get out of the business of arbitrating credit card and other consumer disputes." (Godino Decl. to Supp. Opp. Exh. 2). One week later the AAA announced a moratorium on the arbitration of consumer debt collection cases until "the AAA determines that adequate and broadly accepted due process protocols" are established. (Godino Decl. to Supp. Opp. Exh. 3). Plaintiff contends that those forums are thus unavailable, requiring the court to deny the Motion to Compel Arbitration because "the choice of forum is integral" to the clause. (Supp. Opp. at 14, quoting Reddam v. KPMG LLP, 457 F.3d 1054, 1059 (9th Cir. 2006)).

Plaintiffs are incorrect. The AAA's press release clearly states that "AAA will continue to administer all demands for arbitration filed by consumers." AAA Press Release, AAA Announces Moratorium on Consumer Debt Collection Arbitration Cases, available at http://www.adr.org/sp.asp?id=36432. Courts have consistently rejected Plaintiff's argument that the AAA is unavailable to hear these sorts of actions. See, e.g., Smith v. ComputerTraining.com Inc., __ F.Supp. 2d __, 2011 WL 692972, *11-12 (E.D. Mich. Feb. 18, 2011); Estep v. World Fin. Corp. of Ill., 735 F. Supp. 2d 1028, 1033-34 (C. Ill. 2010); Phifer v. Mich. Sporting Goods Distribs., Inc., 2010 WL 3609376, *8 (W.D. Mich. July 28, 2010). No additional discovery is required.

VI. CONCLUSION

For the reasons stated, the Court GRANTS the Motion to Compel Arbitration. All of the claims between Plaintiff and Defendants are ordered to be arbitrated on an individual basis consistent with the parties' written agreement to arbitrate. This case is STAYED pending completion of the arbitration, and the Court hereby moves the case to the inactive calendar.

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