UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 8:18-cv-00718-JSM-CPT

LISA GARZON, individually and on
Behalf of all others similarly situated,

Plaintiff,

vs.

FIRSTSOURCE ADVANTAGE, LLC
a New York limited liability company,

Defendant.
_____/

MOTION OF AMERICAN EXPRESS NATIONAL BANK TO INTERVENE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24

Pursuant to Federal Rule of Civil Procedure 24(a)(2), American Express National Bank ("American Express") moves to intervene and states:

I. INTRODUCTION

In this action, plaintiff Lisa Garzon ("Plaintiff") asserts various claims against defendant Firstsource Advantage, LLC ("Firstsource"), arising from a letter American Express, not Firstsource, sent Plaintiff to settle her delinquent American Express credit card account (the "Account"). Plaintiff, however, erroneously contends that it was Firstsource who sent Plaintiff the settlement offer letter, yet on American Express letterhead, without disclosing that the letter was from Firstsource, thereby violating the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (the "FDCPA"). According to Plaintiff, Firstsource

used the American Express logo to "instill" in Plaintiff that American Express actually sent the letter when it did not.

While not named as a defendant in this action, American Express disputes the validity of Plaintiff's claims and maintains that its own letter properly identified itself as the sender. Indeed, it was American Express's direct offer to Plaintiff to settle her American Express credit card account for less that the full balance Plaintiff owed. Regardless, Plaintiff indisputably agreed to arbitrate all claims related to her American Express account, including those asserted against Firstsource, pursuant to the arbitration provision (the "Arbitration Agreement") in her American Express Cardmember Agreement. Plaintiff's challenge to American Express's settlement offer letter on her American Express account plainly is within the broad scope of the Arbitration Agreement.

By this motion, American Express seeks an order allowing it to intervene so that the dispute among Plaintiff, American Express and Firstsource may be resolved by binding arbitration, pursuant to the express terms of the Arbitration Agreement.[1] American Express may intervene as of right because this Motion is timely, American Express has a significant

[1] Pursuant to Rule 24(c), American Express attaches as Exhibit 1 its Motion to Compel Arbitration. District courts conclude that attaching a motion to compel arbitration to a motion to intervene is sufficient to satisfy the Rule 24(c) pleading requirement. See U.S. ex rel. Frank M. Sheesley Co. v. St. Paul Fire & Marine Ins. Co., 239 F.R.D. 404, 413 (W.D. Pa. 2006) ("The Court thus finds that it has the authority to employ its discretion and consider a motion to intervene that contains no pleading, but instead includes a motion to compel arbitration and stay the proceedings."); Pro Lawns, Inc. v. Fidelity & Deposit Co. of Md., No. 3:14-cv-408-WKW, 2015 WL 350637, at *3 (M.D. Ala. Jan. 23, 2015) (finding motion to compel acceptable because it was "apparent that [the proposed intervenor] intends to intervene in order to compel arbitration" and was therefore "excused from attach[ing] a ['true'] pleading to its motion to intervene").

protectable interest in the matter that may be impaired by disposition of the action in American Express's absence and its interests are not adequately represented by Firstsource.

Accordingly, American Express respectfully requests that the Court enter an order allowing it to intervene in this action.

II. BACKGROUND

Plaintiff filed her Complaint against Firstsource on March 26, 2018 (ECF No. 1), and filed her Amended Complaint on May 23, 2018 (ECF No. 10). Plaintiff alleges that she received a collection letter dated March 2, 2018, on American Express letterhead, offering to settle her American Express Account for 45% of the balance owed (the "Letter"). (Am. Compl. ¶ 28 & Ex. A.) Plaintiff asserts that, as of the date that she received the Letter, Plaintiff "bore no legal responsibility to pay the debt and could face no legal exposure by not paying." (Id. ¶ 29.) Notwithstanding that the letter is on American Express letterhead, contains the American Express logo and indicates it is from American Express's Global Collections department, Plaintiff alleges that it was actually sent by Firstsource. (Id. ¶ 42 & Ex. A.) Plaintiff claims that, by improperly using American Express's letterhead, Firstsource "meant to instill in the recipient that the letter was actually sent by [American Express]" and sends such letters which appear to be from American Express "in order to avoid compliance with Federal and State consumer protection laws." (Id. ¶¶ 41, 42.) On this basis, Plaintiff asserts claims against Firstsource for violation of the FDCPA. Firstsource filed its answer and affirmative defenses on June 13, 2018. (ECF No. 17.)

III. ARGUMENT

Federal Rule of Civil Procedure 24 provides for intervention as of right as follows:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Eleventh Circuit instructs parties seeking to intervene pursuant to Rule 24(a)(2) to show that: (1) their application to intervene is timely; (2) they have an interest relating to the property or transaction that is the subject of the action; (3) they are so situated that disposition of the action, as a practical matter, may impede or impair their ability to protect that interest; and (4) their interest is represented inadequately by the existing parties to the suit. Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship, 874 F.3d 692, 695-696 (11th Cir. 2017). The Eleventh Circuit further instructs that "[a]ny doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993). "Once a party establishes all prerequisites to intervention, the trial court has no discretion to deny the intervention." Loyd v. Alabama Dept. of Corrections, 176 F.3d 1336, 1340-41 (11th Cir. 1999) (citations omitted). American Express satisfies all prerequisites to intervention and, accordingly, American Express must be permitted to intervene here.

A. American Express's Motion To Intervene Is Timely.

When assessing timeliness under FRCP 24(a), the court considers: (1) the length of time during which the would-be intervenor knew or reasonably should have known of his

interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his motion is denied; and (4) the existence of any unusual circumstances militating either for or against a determination that the application is timely. Howard v. McLucas, 782 F.2d 956, 959 (11th Cir. 1986) (citing U.S. v. Jefferson Cty., 720 F.2d 1511, 1516 (11th Cir. 1983)).

The instant Motion is filed shortly after commencement of this Action. Plaintiff filed her Complaint on March 26, 2018, and only filed her Amended Complaint on May 23, 2018, and Firstsource only answered the Amended Complaint on June 13, 2018. The parties submitted their Case Management Report on June 12, 2018 (ECF No. 13), and the Court entered its Case Management and Scheduling Order on June 13, 2018 (ECF No. 15). Notably, this Motion is filed long before the September 28, 2018 deadline to join additional parties. Moreover, no party has yet responded to discovery, nor have any depositions been taken. This very early stage of the proceedings strongly supports a finding of timeliness. Indeed, courts have found longer periods timely, including where the proceedings were much further advanced. See, e.g., Nat'l Parks Conservation Ass'n v. U.S. Dept. of Interior, No. 2:12-cv-579-FtM-29SPC, 2012 WL 1432479, at *2 (M.D. Fla. April 25, 2012) ("[a] motion to intervene within seven months of the original complaint's filing is timely"); SEC v. Founding Partners Capital Mgmt. Co., No. 2:09-cv-229-FtM-29DNF, 2009 WL 10671823, at *1 (M.D. Fla. Aug. 28, 2009) (finding a motion to intervene submitted four months after complaint was filed was timely); Georgia v. U.S. Army Corps of Eng'r, 302 F.3d 1242,

1259-60 (11th Cir. 2002) (finding motion to intervene timely when filed six months after learning of the case, discovery was largely complete and the parties had agreed upon a schedule for briefing of the case).

Plaintiff also will not suffer any prejudice through American Express's intervention because no issues have yet been adjudicated. See Danner Constr. Co., Inc. v. Hillsborough Cty., No. 809-CV-650-T-17TBM, 2009 WL 2525486, at *3 (M.D. Fla. Aug. 17, 2009) (finding no prejudice to plaintiff where motion to intervene was filed at the "early stages of the lawsuit"). American Express, on the other hand, will suffer prejudice if the Motion is denied, as set forth below. Accordingly, the Court should deem the Motion timely.

B. American Express Has A Protectable Interest Relating To The Transaction At Issue.

"[A] party is entitled to intervention as a matter of right if the party's interest in the subject matter of the litigation is direct, substantial and legally protectable." Georgia, 302 F.3d at 1249. To determine whether a proposed intervenor possesses the requisite interest for intervention, courts look to the subject matter of the litigation. Id. at 1249. The proposed intervenor's interests, however, need not be of a legal nature identical to that of the claims asserted in the main action. Id.

American Express's interest in the subject matter of the litigation is clear on the face of Plaintiff's Amended Complaint and the Exhibit attached thereto. American Express contends that there is no merit to Plaintiff's claims; however, there can be no doubt that even the allegation that a vendor, like Firstsource, improperly used American Express's tradename is of substantial interest to American Express.

Additionally, American Express has a significantly protectable interest in requiring the arbitration of claims asserted against third-party vendors such as Firstsource. Plaintiff expressly agreed to arbitrate claims against third-party vendors, including the claims at issue here. By asserting claims against Firstsource in litigation rather than in arbitration, Plaintiff is significantly interfering with American Express's right to have those claims arbitrated. American Express therefore should be permitted to intervene and enforce its contractual right to have Plaintiff's claims arbitrated. Thus, American Express has a significantly protectable interest in this action.

C. American Express's Ability To Protect Its Interests May Be Impeded Or Impaired By Disposition Of This Action.

The Court must next consider whether allowing the action to proceed without American Express would impair American Express's ability to protect its interests. In this regard, "[a]ll that is required under Rule 24(a)(2) is that the would-be intervenor be practically disadvantaged by his exclusion from the proceedings." Omni Healthcare, Inc., et al. v. Health First, Inc., et al., No. 6:13-cv-1509-Orl-37DCI, 2017 WL 9398638, at *7 (M.D. Fla. July 28, 2017) (citing Huff v. Comm'r of IRS, 743 F.3d 790, 800 (11th Cir. 2014)).

An adverse decision on the merits in this action could substantially impair American Express's interests because American Express has a direct interest in Plaintiff's American Express account, in collecting on that account and in establishing that American Express properly communicated in its own name with Plaintiff. An adverse decision on Plaintiff's claims against Firstsource under the FDCPA would potentially impact American Express's ability to settle Plaintiff's and other cardmembers' American Express card accounts and impact American Express's business and contractual relationships with its third-party

vendors, including Firstsource. These practical considerations are essential to the Court's inquiry on this element.

Further, American Express's interest in requiring arbitration of claims asserted against its third-party vendors such as Firstsource would be impaired absent intervention. As discussed above, Plaintiff expressly agreed to arbitrate claims that in any way relate to her American Express account, including those against third-party vendors, like those she asserts against Firstsource. Allowing Plaintiff to assert claims against Firstsource in litigation rather than in arbitration would impair American Express's right to have those claims arbitrated.

D. American Express's Interest Is Not Adequately Represented By The Parties To This Action.

The final criterion -- that a prospective intervenor's interest will not be adequately represented by the existing parties -- also is readily satisfied. Trbovich v. U.S. Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972) (citations omitted); see also Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1255-56 (11th Cir. 2002) ("The proposed intervenor has the burden of showing that the existing parties cannot adequately represent its interest, but this burden is 'treated as minimal.'" (citations omitted)). The inadequate representation requirement is satisfied so long as the intervenor has a distinguishable interest in the matter, even if the interest is related to interests shared by other parties in the action. Trbovich, 404 U.S. at 538-39. Here, Firstsource does not adequately represent American Express's interests.

First, American Express has an interest in preserving its right to communicate and settle its accounts with its cardmembers. Firstsource has an interest in collecting debts and providing services to American Express in compliance with the FDCPA, but these are

different interests. Likewise, American Express's interest in obtaining settlements with its cardmembers obviously differs from, as Plaintiff alleges, Firstsource's supposed interest in sending letters on American Express letterhead in an effort to deceive cardmembers into believing that American Express was attempting to collect its own debts and to purportedly avoid compliance with Federal and state laws.

Second, American Express has an interest in requiring arbitration of claims related to its accounts, including those asserted against third-party vendors such as Firstsource. In Atlantic Refinishing & Restoration, Inc. v. Travelers Cas. and Sur. Co. of Am., 272 F.R.D. 26 (D.D.C. 2010), a subcontractor on a government-funded restoration project brought an action against the general contractor's surety, alleging it did not receive full compensation under its subcontract with the general contractor. See id. at 27-28. The general contractor moved to intervene, arguing that its interests were not adequately represented by the defendant surety because the subcontract, to which the surety was not a party, contained a mandatory arbitration clause. Id. at 28. The court agreed intervention of right was appropriate: "special circumstances exist here due to the [general contractor's] intention to enforce the subcontract's arbitration clause. The [general contractor] has been candid about its intention, if allowed to intervene, to move this court to require the plaintiff to arbitrate this suit as purportedly required by their subcontract." Id. at 30.

Similarly, American Express's contractual right to compel Plaintiff to arbitrate her claims is not adequately represented by Firstsource, a non-party to the Arbitration Agreement.

COMPLIANCE WITH LOCAL RULE 3.01(G)

Pursuant to Local Rule 3.01(g), undersigned counsel certifies that on August 6, 2018, she conferred with Plaintiff's counsel regarding the relief sought in this Motion, and that Plaintiff opposes the requested relief.

IV. CONCLUSION

For the foregoing reasons, American Express respectfully requests that the Court grant this Motion and enter an order allowing American Express to intervene as a defendant in this action.

Dated: August 7, 2018.

Respectfully submitted,

By: /s/ *Alisa M. Taormina*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Court's CM/ECF system on the following counsel of record on August 7, 2018, to the following:

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EXHIBIT “1”

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 8:18-cv-00718-JSM-CPT

LISA GARZON, individually and on behalf of all others similarly situated,

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FIRSTSOURCE ADVANTAGE, LLC a New York limited liability company,

Defendant.
_____/

MOTION OF AMERICAN EXPRESS NATIONAL BANK TO COMPEL ARBITRATION

Pursuant to section 4 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the "FAA"), American Express National Bank ("American Express"), by and through undersigned counsel, hereby moves this Court for an order directing plaintiff Lisa Garzon ("Plaintiff") to arbitrate this dispute on an individual basis and staying the action pending completion of arbitration[1] and, in support, states:

I. INTRODUCTION

Plaintiff asserts various claims against defendant Firstsource Advantage, LLC ("Firstsource"),[2] arising from alleged collection activity on Plaintiff's delinquent American Express credit card account ending in 92003 (the "Account"). In brief, Plaintiff contends that Firstsource violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (the

[1] This Motion is submitted concurrently with American Express's Motion to Intervene.

[2] Firstsource does not oppose this Motion.

"FDCPA"), by sending her a settlement offer from American Express on American Express letterhead that did not indicate that Firstsource supposedly mailed the letters.

While not originally named as a defendant in the action, American Express disputes the validity of Plaintiff's claims and maintains that it sent the letter attached to Plaintiff's First Amended Complaint, not Firstsource. By this Motion, American Express respectfully seeks an order requiring Plaintiff to arbitrate the foregoing controversy pursuant to the arbitration provision (the "Arbitration Agreement") in Plaintiff's American Express Cardmember Agreement.

By its terms, the Arbitration Agreement broadly encompasses any claim, dispute or controversy relating to the Account, including any claim against a third party using or providing any product, service or benefit in connection with the Account. The controversy relating to collection activity on the Account, and the manner in which American Express communicates with its Cardmembers regarding their delinquent accounts, plainly is within the broad scope of the Arbitration Agreement. By the express terms of the Arbitration Agreement, that controversy must be resolved in arbitration rather than in proceedings before this Court.

Under the FAA, agreements to arbitrate are presumed to be valid and enforceable according to their terms. Indeed, in a series of recent decisions, the United States Supreme Court has repeatedly reaffirmed that the FAA strongly favors the validity and enforceability of arbitration agreements and that the terms of such agreements must be vigorously enforced. See Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532 (2012); CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336 (2011). This line of

precedent makes clear that arbitration agreements, like the Arbitration Agreement here, must be enforced as written.

Accordingly, American Express respectfully requests that the Court enter an order: (1) directing Plaintiff to arbitrate all disputes related to any collection activity on the Account, regardless of who is responsible, pursuant to the terms of the Arbitration Agreement; and (2) staying this action until it has been resolved through arbitration.

II. FACTUAL BACKGROUND

A. Plaintiff's American Express Account And The Arbitration Agreement

American Express opened the Account on May 29, 2005. (Declaration of Keith Herr ("Herr Decl.") ¶ 3.)[3] At that time, American Express mailed Plaintiff her credit card together with a copy of her Cardmember Agreement (the "Cardmember Agreement"). (Id. ¶ 4 & Ex. A.) The Cardmember Agreement states that when Plaintiff used the Account, she agreed its terms. (Id.) After receiving the Cardmember Agreement, Plaintiff made charges to the Account. (Id. ¶ 5 & Ex. B.) The Cardmember Agreement provides, in pertinent part:

> **Arbitration**
>
> *Purpose:* This Arbitration provision sets forth the circumstances and procedures under which claims may be arbitrated instead of litigated in court.
>
> *Definitions:* As used in this Arbitration provision, the term "Claim" means any claim, dispute or controversy between you and us arising from or relating to your Account, this Agreement, the Electronic Funds Transfer Services Agreement, and any other related or prior agreement that you may have had with us, or the relationships resulting from any of the above agreements ("Agreements"), including the validity, enforceability or scope of this Arbitration Provision or the Agreements. For purposes of this Arbitration Provision, "you" and "us" also includes any corporate parent, or wholly or majority owned subsidiaries, affiliates, any licensees, predecessors, successors, assigns, any purchaser of any accounts, all agents, employees, directors and representatives of any of the foregoing, and other persons referred to below in the definition of "Claims." "Claim" includes claims of every kind and nature, including but not limited to,

[3] The Herr Declaration is attached hereto as Exhibit "A."

> initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, fraud and other intentional torts, statutes, regulations, common law and equity. "Claim" also includes claims by or against any third party using or providing any product, service or benefit in connection with any account (including, but not limited to, credit bureaus, third parties who accept the Card, third parties who use, provide or participate in fee-based or free benefit programs, enrollment services and rewards programs, credit insurance companies, debt collectors and all of their agents, employees, directors and representatives) if and only if, such third party is named as a co-party with you or us (or files a Claim with or against you or us) in connection with a Claim asserted by you or us against the other. The term "Claim" is to be given the broadest possible meaning that will be enforced and includes, by way of example and without limitation, any claim, dispute or controversy that arises from or relates to (a) any of the accounts created under any of the Agreements, or any balances on any such accounts, (b) advertisements, promotions or oral or written statements related to any such accounts, goods or services financed under any of the accounts or the terms of financing, (c) the benefits and services related to Cardmembership (including fee-based or free benefit programs, enrollment services and rewards programs), and (d) your application for any account.

(Id. Ex. A.)

B. Allegations Of The Amended Complaint

Plaintiff filed this action against Firstsource on March 26, 2018. (ECF No. 1.) Plaintiff filed an Amended Complaint on May 23, 2017. (ECF No. 10.) In the Amended Complaint, Plaintiff alleges that Firstsource violated the FDCPA by sending her a letter dated March 2, 2018, in which American Express offered to settle Plaintiff's delinquent Account for 45% of the balance owed (the "Letter"). (Am. Compl. ¶ 28 & Ex. A.) Plaintiff alleges, among other things, that the Letter violates various provisions of the FDCPA, including: 15 U.S.C. § 1692e (making any "false, deceptive, or misleading representation"); 15 U.S.C. § 1692e(10) ("use of any false representation or deceptive means to collect or attempt to collect any debt"); 15 U.S.C. § 1692e(11) ("failing to disclose that the form collection letters sent to Plaintiff, and members of the Class, where [sic] from a debt collector"); 15 U.S.C. § 1692e(14) ("use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization"); and 15 U.S.C. § 1692f ("using unfair or unconscionable means to

collect or attempt to collect consumer debts"). (Am. Compl. ¶¶ 58, 63, 68, 71, 74.) Plaintiff purports to assert her claims on her own behalf and on behalf of a putative class of Florida residents who received the same or similar letters or other written communications. (Id. ¶ 47.)

III. ARGUMENT

A. The Court Should Issue An Order Compelling Arbitration Pursuant To The FAA.

The FAA provides that "[a] party aggrieved by the alleged failure . . . of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Section 2 of the FAA mandates that binding arbitration agreements in contracts "evidencing a transaction involving commerce . . . 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. This provision "reflect[s] both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract,'" such that "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." AT&T Mobility, 131 S. Ct. at 1745 (internal citations omitted); see also Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) ("Section 2 [of the FAA] embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts.").[4] "[Q]uestions of arbitrability

[4] The Supreme Court has made clear that the FAA is extremely broad and applies to any transaction directly or indirectly affecting interstate commerce. See, e.g., Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003); Allied-Bruce Terminix Cos. Inc. v. Dobson, 513 U.S. 265, 277 (1995). There is no question that the activities at issue here involve interstate commerce. Plaintiff is a Florida resident (Am. Comp. ¶ 6), while Firstsource has its principal place of business in New York (id. ¶¶ 8) and American Express is located in Utah (Herr Decl. ¶ 1). Moreover, the FDCPA itself confirms that debt collection conduct governed thereunder almost universally constitutes interstate commerce. See 15 U.S.C. § 1692(d) ("[D]ebt collection

must be addressed with a healthy regard for the federal policy favoring arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); see also Perry v. Thomas, 482 U.S. 483, 490 (1987) (stating that arbitration agreements falling within the scope of the FAA "must be 'rigorously enforce[d]'" (citations omitted)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp., 460 U.S. at 24-25; see also Perry, 482 U.S. at 490 (stating that arbitration agreements falling within the scope of the FAA "must be 'rigorously enforce[d]'") (citations omitted).

Pursuant to the FAA, arbitration must be compelled where, as here: (1) a valid agreement to arbitrate exists; and (2) the arbitration agreement encompasses the claims at issue. See Hilinski v. Gordon Terminal Serv. Co. of N.J., Inc., 265 F. App'x 66, 68 (3d Cir. 2008); Adkins v. Labor Ready, Inc., 303 F.3d 496, 500 (4th Cir. 2002). The party seeking to evade arbitration bears the burden of showing that the arbitration provision is invalid or does not encompass the claims at issue. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000).

This Court should issue an order compelling arbitration because: (1) the Arbitration Agreement is a valid, enforceable agreement between American Express and Plaintiff to submit disputes to binding arbitration; and (2) through the pending action, a controversy exists among Plaintiff, Firstsource and American Express that is subject to the Arbitration Agreement.

1. Plaintiff's Claims Are Subject to Binding Arbitration Pursuant To The Valid Arbitration Agreement Between Plaintiff And American Express.

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practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where . . . debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.").

An arbitration agreement governed by the FAA, like the Arbitration Agreement here, is presumed to be valid and enforceable. See Shearson/Am. Express v. McMahon, 482 U.S. 220, 226 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-27 (1985). The Arbitration Agreement at issue here is valid under applicable law and, thus, must be enforced as written.

The Cardmember Agreement between Plaintiff and American Express, which includes the Arbitration Agreement, expressly is governed by Utah law. (Herr Decl., Ex. A.) Thus, while the FAA governs the enforceability of the Arbitration Agreement, Utah law governs the determination of whether a valid agreement to arbitrate exists. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."); Trippe Mfg. Co. v. Niles Audio Corp., 401 F.3d 529, 532 (3d Cir. 2005) (courts "refer to principles of applicable state law when determining the existence and scope of an agreement to arbitrate").

There is no question that the Cardmember Agreement, including the Arbitration Agreement, is valid under Utah law. Indeed, Utah law provides:

> A credit agreement is binding and enforceable . . . if: (i) the debtor is provided with a written copy of the terms of the agreement; (ii) the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and (iii) after the debtor receives the agreement, the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered.

Utah Code Ann. § 25-5-4(2)(e). Further, Utah law expressly permits parties to include arbitration provisions in open-end credit agreements. See Utah Code Ann. §§ 70C-4-102(b) ("[a] creditor may change an open-end consumer credit contract in accordance with this section to include arbitration or other alternative dispute resolution mechanism"), 70C-4-105 ("a creditor

may contract with the debtor of an open-end consumer credit contract for a waiver by the debtor of the right to initiate or participate in a class action related to the open-end consumer credit contract").

Consistent with Utah law, American Express provided Plaintiff with her Cardmember Agreement along with her American Express credit card when it opened Plaintiff's Account. (Herr Decl. ¶ 4 & Ex. A.) The Cardmember Agreement states: "When you keep, sign or use the Card issued to you (including any renewal or replacement Cards), or you use the account associated with this Agreement (your "Account"), you agree to the terms of this Agreement." (Id., Ex. A.) Plaintiff thereafter used the Account, thereby accepting the terms of the Cardmember Agreement, including the Arbitration Agreement. (Id. ¶ 5.) Thus, as other courts have confirmed, the Arbitration Agreement is a valid and enforceable agreement to arbitrate under Utah law. See, e.g., Aneke v. Am. Express Travel Related Services, Inc., 841 F. Supp. 2d 368, 376, 378 (D.D.C. 2012) (holding that arbitration agreement is "valid and enforceable under Utah law, which is the relevant state law in this case" and rejecting plaintiffs' "policy argument about the limits of arbitration and the prejudicial impact it has on their statutory claims"); Khanna v. Am. Express Co., No. 11 Civ. 6245 (JSR), 2011 WL 6382603, at *3-4 (S.D.N.Y. Dec. 14, 2011) (finding that arbitration agreement is "binding and enforceable" under Utah law where cardmember agreement provided that use of the card constituted assent to the agreement's terms and plaintiff used the card); Wynne v. Am. Express Co., No. 2:09-CV-00260-TJW, 2010 WL 3860362, at *7 (E.D. Tex. Sept. 30, 2010) (enforcing Utah choice-of-law provision and finding that arbitration provision is not unconscionable under Utah or Texas law); Spann v. Am. Express Travel Related Servs. Co., Inc., 224 S.W.3d 698, 718 (Tenn. Ct. App. 2006) (upholding American Express's Arbitration Provision under Utah law against an unconscionability

challenge); see also Miller v. Corinthian Colls., Inc., 769 F. Supp. 2d 1336, 1348-49 (D. Utah 2011) (holding that arbitration provision is not substantively or procedurally unconscionable under Utah law); Smith v. ComputerTraining.com Inc., 772 F. Supp. 2d 850, 856-57 (E.D. Mich. 2011) (enforcing Utah choice-of-law provision and finding that arbitration provision is not unconscionable under Utah law), aff'd, 531 F. App'x 713 (6th Cir. 2013).[5]

This Court should likewise enforce the Arbitration Agreement between American Express and Plaintiff here.

2. Plaintiff's Claims Falls Squarely Within The Scope Of The Arbitration Agreement.

Where the parties have entered into a valid arbitration agreement, an "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 of an interpretation that covers the asserted dispute." AT&T Tech., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Mitsubishi Motors, 473 U.S. at 626. Where the arbitration clause is broad, there is a heightened presumption of arbitrability, such that, "'[in] the absence of any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'" AT&T Tech., 475 U.S. at 650 (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).

[5] The conclusion would be the same under Florida law. The Florida Supreme Court has recognized "a policy favoring the termination of disputes with an arbitration decision and limited review by the courts." Moser v. Barron Chase Sec., Inc., 783 So.2d 231, 235 (Fla. 2001). Thus, this Court routinely enforces arbitration agreements. See, e.g., Rimel v. Uber Tech., Inc., 246 F. Supp. 3d 1317 (M.D. Fla. 2017); Global Retail Enter., Inc. v. Personalized Prod., LLC, No. 2:06-cv-463-FtM-34DNF, 2008 WL 879313 (M.D. Fla. Mar. 28, 2008).

Plaintiff and American Express's Arbitration Agreement broadly encompasses "any claim, dispute or controversy that arises from or relates to (a) any of the accounts created under any of the Agreements, or any balances on any such accounts," including "claims by or against any third party using or providing any product, service or benefit in connection with any account." (Herr Decl., Ex. A.) This language is broad enough to cover the disputes at issue here because Plaintiff's claims and the parties' dispute over potential liability under the FDCPA relate to Plaintiff's Account. Id. Further, the Arbitration Agreement expressly extends to claims "against any third party . . . providing any . . . service . . . in connection with [Plaintiff's] account," which would include Plaintiff's claims against Firstsource for purportedly sending a letter on American Express's letterhead (which it did not do). Id. Indeed, under similar circumstances, courts often hold that consumers must arbitrate their FDCPA claims against debt collectors pursuant to arbitration agreements with their creditors. See Hornicek v. Cardworks Servicing, LLC, CIV.A. 10-3631, 2011 WL 2623274, at *3-4 (E.D. Pa. June 29, 2011) (holding that plaintiff's FDCPA claim against a debt collector "falls squarely within the terms of the arbitration provision," which applied to claims against "any other third party that has been involved with . . . any . . . servicing . . . activity relating to [the] account"); Sherer v. Green Tree Servicing LLC, 548 F.3d 379, 382 (5th Cir. 2008) (holding that where plaintiff entered into loan agreement agreeing to arbitrate claims arising from "the relationships which result from th[e] [a]greement," the debt collector, who was not a signatory to the loan agreement, could compel arbitration of plaintiff's FDCPA claim); Fedotov v. Peter T. Roach and Assoc., P.C., No. 03 Civ. 8823(CSH), 2006 WL 692002, at *2 (S.D.N.Y. Mar. 16, 2006) (finding that broad arbitration clause in a credit card agreement covering claims "by or against anyone connected with [the

bank] or [the cardholder],' including an 'agent' or 'representative,'" encompassed plaintiff's FDCPA claim against the bank's debt collector).

In light of the foregoing, there is no question that Plaintiff's claims fall squarely within the Arbitration Agreement.

B. Plaintiff Must Arbitrate On An Individual, Non-Representative Basis.

As confirmed in Concepcion and its progeny, this Court must 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.'" Concepcion, 563 U.S. at 344 (quoting Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)). 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." Concepcion, 563 U.S. at 344 (italics in original) (citations omitted). "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." Id. at 351; see also Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (quoting United Steelworkers, 363 U.S. at 582)); E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement.").

The Arbitration Agreement here requires arbitration to take place on an individual, non-class basis, providing:

> Restrictions on Arbitration: If either party elects to resolve a Claim by arbitration, that Claim shall be arbitrated on an individual basis. *There shall be no right or authority for any Claims to be arbitrated on a class action basis or on bases involving Claims brought in a purported representative capacity on behalf of the general public, other Cardmembers or other persons similarly situated.*

(Herr Decl., Ex. A (italics in original).)

Accordingly, the Court should order Plaintiff to arbitrate her claims on an individual basis.

C. The Action Must Be Stayed Pending Arbitration.

Section 3 of the FAA expressly provides that, where a valid arbitration agreement requires a dispute to be submitted to binding arbitration, the district court "shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. Because Plaintiff must be compelled to arbitrate her claims, the action should be stayed pending completion of arbitration.

IV. CONCLUSION

For the foregoing reasons, American Express respectfully requests that the Court grant this Motion and enter an order directing Plaintiff to arbitrate her dispute on an individual basis and staying the action pending completion of arbitration.

Dated: August 2, 2018

Respectfully submitted,

By: /s/ *Alisa M. Taormina*

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Firstsource Advantage, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Court's CM/ECF system on the following counsel of record on August 2, 2018, to the following:

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/s/ Alisa M. Taormina
Alisa M. Taormina

EXHIBIT “A”

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 8:18-cv-00718-JSM-CPT

LISA GARZON, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

FIRSTSOURCE ADVANTAGE, LLC a New York limited liability company,

Defendant.
_____/

DECLARATION OF KEITH HERR IN SUPPORT OF MOTION OF AMERICAN EXPRESS NATIONAL BANK TO COMPEL ARBITRATION

I, Keith Herr, hereby declare and state as follows:

1. I am an Assistant Custodian of Records for American Express Company ("AEC") and its affiliates and subsidiaries, including American Express National Bank ("AENB"), successor by merger to American Express Bank, FSB ("AEFSB") (together, "American Express"). AENB is a national bank with its main office in Utah. Except where based on my review of records and documents regularly maintained in the ordinary course of business, all of the matters set forth below are within my personal knowledge and, if called as a witness, I could competently testify thereto.

2. In connection with my duties as Assistant Custodian of Records for American Express, I have access to and am generally familiar with the cardmember account records maintained by American Express, including statements provided to cardmembers and the governing Cardmember Agreements. The account records and exhibits referred to herein were

created and kept in the ordinary course of business by American Express and were created at or near the time of the occurrence of the matters set forth by those records and/or were created based upon information transmitted by a person with knowledge of the matters set forth in those records.

3. I have reviewed American Express's records concerning the American Express credit card account of plaintiff Lisa Garzon ("Plaintiff") ending in 92003 (the "Account"), which American Express's records reflect was opened on May 29, 2005.

4. Pursuant to American Express's standard business practices, the Cardmember Agreement for Plaintiff's Account would have been mailed to Plaintiff, along with Plaintiff's card, in connection with the opening of the Account. Attached hereto as Exhibit A is a true and correct copy of the Cardmember Agreement that was mailed to Plaintiff when she opened her Account.

5. American Express mails monthly billing statements to cardmembers who carry a balance or are otherwise required to receive a monthly statement. Attached hereto as Exhibit B is a true and correct redacted copy of a duplicate of Plaintiff's June 2010 billing statement, which reflects an account balance of $1,972.15 and a purchase transaction on May 29, 2010.

I declare under penalty of perjury under the laws of the United States that the foregoing statements are true and correct.

Dated: July 31st, 2018

Keith Herr