UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ANTHONY TUCCI,

Plaintiff,

v. **Case No: 6:19-cv-880-Orl-41EJK**

BRIGHT HOUSE NETWORKS, LLC,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Opposed Motion to Compel Arbitration and to Stay Plaintiff's Case ("Motion to Compel," Doc. 15) and Defendant's Memorandum in Support of Motion to Stay Proceedings ("Motion to Stay," Doc. 16), which is a motion to stay the case pending resolution of the Motion to Compel. Plaintiff filed a Response in Opposition to each (Doc. Nos. 18, 19) and Defendant was permitted a Reply (Doc. 29). For the reasons stated herein, the Motion to Compel will be granted and the Motion to Stay will be denied as moot.

I. BACKGROUND

On March 14, 2018, Plaintiff entered into an agreement with Defendant to receive residential services ("Residential Services Agreement" or "Agreement," Doc. 15-2). (Pieper Decl., Doc. 15-1, ¶¶ 6–7; *see also* Work Order Doc. 20-1, at 2 (exhibiting Plaintiff's signature on March 14, 2018, on work order issued by Defendant)). Plaintiff alleges that Defendant intentionally harassed and abused him by calling him on his cell phone many times using an automatic telephone dialing system, also known of as robocalling. (Compl., Doc. 1, ¶¶ 6, 22, 25, 32–42). Accordingly, Plaintiff filed the Complaint alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.*, the Florida Consumer Collection Practices Act ("FCCPA"),

Section 559.72, Florida Statutes, and a claim for Invasion of Privacy–Intrusion Upon Seclusion. (*See generally* Doc. 1).

Defendant has moved to stay this case and to compel arbitration under the Residential Services Agreement between Defendant and Plaintiff. (Doc. 15-2 at 1, 10; Doc. 20-1 at 2). Defendant submitted a signed declaration under penalty of perjury stating that Plaintiff did sign the Residential Service Agreement. (Doc. 15-1 ¶ 7). And, Plaintiff did electronically sign what appears to be a work order containing a mandatory arbitration agreement and an agreement "to comply with the terms and conditions of the applicable Spectrum service to which I am subscribing." (Doc. 20-1 at 2). The Agreement states "You . . . agree to be bound by the terms of service applicable to the residential Spectrum service(s) to which You subscribe . . . . For purposes of these Terms of Service, all references to 'Spectrum' mean Charter Communications Operating, LLC . . . including third parties Spectrum may retain to provide the Services." (Doc. 15-2 at 1). The first page of the Agreement also contains an all-capital, bold font, notice that the terms contain a binding arbitration provision. (*Id.*). The Arbitration portion of the Agreement states "[t]hese General Terms require the use of arbitration to resolve disputes" and contains three exceptions to arbitration which involve disputes regarding: small claims, intellectual property rights, and unauthorized use or receipt of service. (*Id.* ¶ 28, at 10–12).

II. LEGAL STANDARD

In general, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, governs the enforceability of arbitration provisions in contracts involving transactions in interstate commerce. *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005). "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . 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 FAA embodies a 'liberal federal policy favoring arbitration agreements.'" *Hill*, 398 F.3d at 1288 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). However, it is well-settled that "arbitration 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." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (quotation omitted).

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any 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. In determining whether to compel arbitration, courts do not weigh the merits of the parties' claims. *AT&T Techs.*, 475 U.S. at 649. Rather, courts must limit their review to three factors: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitrate was waived." *Senti v. Sanger Works Factory, Inc.*, No. 6:06-cv-1903-Orl-22DAB, 2007 WL 1174076, at *2 (M.D. Fla. Apr. 18, 2007).

III. ANALYSIS

A. Existence of a Valid Agreement to Arbitrate

Plaintiff disputes the existence of a written agreement to arbitrate and argues that Defendant has presented no evidence that Plaintiff agreed to or executed any agreement with an arbitration clause.[1] "The threshold question of whether an arbitration agreement exists at all is 'simply a matter of contract.'" *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1329 (11th Cir. 2016) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)). "'[S]tate

[1] Plaintiff does not dispute that any arbitration clause, if it exists, would be governed by the FAA.

law generally governs whether an enforceable contract or agreement to arbitrate exists.'" *Id.* at 1329 (quoting *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368 (11th Cir. 2005) (emphasis omitted)). The contract was formed to provide services in Florida, so this Court will apply Florida law. "In Florida, 'a party has a duty to learn and know the contents of a proposed contract before he signs and delivers it and is presumed to know and understand its contents, terms and conditions.'" *Williams v. Eddie Acardi Motor Co.*, No. 3:07-cv-782-J32JRK, 2008 WL 686222, at *4 (M.D. Fla. Mar. 10, 2008) (quoting *Patricoff v. Home Team Pest Def., LLC*, No. 6:05-cv-1769-Orl-31KRS, 2006 WL 890094, at *2 (M.D. Fla. Apr. 3, 2006) (alterations incorporated)).

Defendant produced a signed declaration under penalty of perjury stating that Plaintiff did sign the Residential Services Agreement.[2] (Doc. 15-1 ¶ 7). The declaration also stated that it was in the ordinary course of business pursuant to Defendant's policies to provide Plaintiff with a copy of the Residential Services Agreement and/or to tell Plaintiff where to find the Agreement at installation of services. (*Id.*). And, Defendant also produced a work order[3] signed by Plaintiff that states "I . . . agree to comply with the terms and conditions of the applicable Spectrum service to which I am subscribing, ... These terms include a mandatory arbitration requirement with respect to **all** disputes." (Doc. 20-1 at 2) (emphasis added). The work order also directed Plaintiff to Defendant's website where copies of the terms and conditions could be found. (*Id.*). Accordingly, Defendant has submitted proof not only that Plaintiff signed the Residential Services Agreement but also that Plaintiff signed the work order which contained an arbitration clause for all disputes

[2] It is undisputed that the Residential Services Agreement contains an arbitration clause. The only dispute is whether Plaintiff executed this or any agreement.

[3] Defendant cited to the work order in its Motion to Compel but inadvertently forgot to attach it. It corrected this error via supplemental filing. (*See* Doc. Nos. 20, 20-1).

and incorporated the general residential service terms—the Residential Service Agreement. Plaintiff is charged with knowledge of those terms. Plaintiff has put forth no argument "concerning the validity, revocability, and enforceability" of the Residential Services Agreement or the work order generally. *Herrera Cedeno v. Morgan Stanley Smith Barney, LLC*, 154 F. Supp. 3d 1318, 1326 (S.D. Fla. 2016) (finding that state law contract defenses apply to arbitration agreements). Thus, because the Court finds that these agreements exist and that Plaintiff has not put forth any defenses to enforcement, there is a valid agreement to arbitrate.

B. Existence of Arbitrable Issue within the Agreement to Arbitrate

Defendant has established the existence of an arbitrable issue. The Complaint (Doc. 1) asserts claims for violation of the TCPA, the FCCPA, and for intrusion upon seclusion. "Courts have consistently found that claims arising under federal statutes may be the subject of arbitration agreements and are enforceable under the FAA." *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1313 (11th Cir. 2002). As a general matter, claims under both the TCPA and FCCPA are arbitrable. *See Owings v. T-Mobile USA, Inc.*, 978 F. Supp. 2d 1215, 1224–25 (M.D. Fla. 2013) (compelling arbitration of TCPA and FCCPA claims); *Keith v. Wells Fargo Fin. Am., Inc.*, No. 8:10-cv-1588-T-33EAJ, 2010 WL 4647227, at *4 (M.D. Fla. Nov. 9, 2010) (compelling arbitration of FCCPA claims); *see also Ramos v. PH Homestead, LLC*, 358 F. Supp. 3d 1355, 1363 (S.D. Fla. 2019) (comparing TCPA and intrusion upon seclusion and not compelling arbitration in this instance but stating that the claims "closely mirro[r]" one another and that intrusion upon seclusion is "precisely the kin[d] of harm the TCPA aims to prevent.").

And, despite Plaintiff's argument to the contrary, it cannot be seriously disputed that Plaintiff's claims fall within the arbitration provision. The Arbitration section in the Residential Services Agreement states "[t]hese General Terms require the use of arbitration to resolve disputes

and . . . Spectrum and Subscriber agree to arbitrate disputes and claims arising out of or relating to these General Terms [and] the Services . . . ." (Doc. 15-2 at 10). The Agreement defines General Terms as "these Residential General Terms and Conditions of Service." (*Id.* at 1). So, if the dispute arises out of the Residential Services Agreement,[4] it falls under the arbitration agreement. Plaintiff's claims relate to robocalls that Plaintiff's Complaint contends were made without express consent and for the purpose of harassment. But, the Residential Service Agreement contains an explicit provision giving consent to phone calls—including robocalls. (*See id.* at 5). Therefore, Plaintiff's claims clearly arise out of the Residential Service Agreement and are subject to the arbitration agreement.

Plaintiff relies on the case *Gamble v. New England Auto Fin., Inc.*, 735 F. App'x 664 (11th Cir. 2018) to argue that the claim is not arbitrable because for TPCA claims, communication sent by a service provider does not always relate to the agreement between the parties. *Gamble* is distinguishable. In *Gamble*, the Court found that two distinct contracts existed and that the one under which the plaintiff brought her TCPA claim and that governed communications was not signed by the plaintiff. (*See id.* at 666–67). Thus, the Court found that the arbitration provision in the other, signed contract did not apply to the plaintiff's dispute. This is not the case here, where as the Court discussed above, Plaintiff explicitly consented to robocalls by signing the Residential Services Agreement or at the very least by signing the work order which incorporated those terms. *See also Fialek v. I.C. Sys., Inc.*, 3:18-cv-136-J-39MCR, 2019 WL 660824, at *6 (M.D. Fla. Jan. 24, 2019), *report and recommendation adopted*, 3:18-cv-136-J-39MCR, 2019 WL 2206968 (M.D. Fla. Mar. 14, 2019) (holding that *Gamble* did not apply when the alleged TCPA and FCCPA claims

[4] Subject to three exceptions: actions to adjudicate small claims, intellectual property disputes, and disputes related to unauthorized use or receipt of service. (Doc. 15-2 at 11–12).

arose when defendant attempted to collect a debt that arose under the customer agreement that contained the arbitration clause).

Plaintiff also makes a cursory argument that the claims cannot be within the Agreement sufficient to be arbitrable because Defendant put forth an affirmative defense stating that Plaintiff's claims "may be attributable to third parties over whom Charter had no control or right to control . . . ." (Answer, Doc. 8, at 10).[5] However, as noted above, the Residential Services Agreement defines "Spectrum" to include "third parties Spectrum may retain to provide the Services." (Doc. 15-2 at 1). Thus, third parties making robocalls is contemplated by the Agreement, and Plaintiff's argument fails.[6]

Finally, Plaintiff argues that any robocalls made after the termination of the contract on January 31, 2019, are not subject to arbitrability. Plaintiff's Complaint provides absolutely no information about the dates of the alleged calls. And, the Residential Services Agreement states that the arbitration provision "shall survive the termination of these General Terms." (*Id.* at 12). Accordingly, this argument is also without merit, and Plaintiff's claims are arbitrable issues that arise under the arbitration agreement.

C. Waiver of Right to Arbitration

Plaintiff argues that Defendant has waived its right to arbitration by failing to move to compel arbitration until after engaging in litigation for four months by: answering the Complaint and raising affirmative defenses, agreeing to litigation deadlines in the Case Management Report

[5] The affirmative defense prior to this one is that Plaintiff's causes of action may not be allowed to proceed because Defendant may possess the contractual right to arbitration based upon the contract. (Doc. 8 at 9).

[6] And, Plaintiff does not bring claims against any third party for the robocalls, but against Defendant. At this stage in the proceeding who made the calls is inapplicable to the issue of arbitrability.

("CMR," Doc. 11), filing initial disclosures pursuant to Federal Rule of Civil Procedure 26, and after responding to discovery requests. "To determine whether a party has waived its contractual right to arbitrate, courts apply a two-part test: 'First, [they] decide if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right, and, second, [they] look to see whether, by doing so, that party has in some way prejudiced the other party.'" *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1200 (11th Cir. 2011) (quoting *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315 (11th Cir. 2002). Plaintiff does not argue that it has been prejudiced and the Court will not conduct an analysis on whether prejudice has occurred.

"'There is no set rule as to what constitutes a waiver of the arbitration agreement. Whether waiver has occurred depends upon the facts of each case.'" *Palmer v. Navient Sols., LLC*, 3:17-cv-657-J-39JBT, 2018 WL 1863829, at *1 (M.D. Fla. Jan. 31, 2018), *report and recommendation adopted*, No. 3:17-cv-657-J-39JBT, 2018 U.S. Dist. LEXIS 68048, at *1 (M.D. Fla. Apr. 17, 2018) (quoting *Grigsby & Assocs., Inc. v. M Sec. Inv.*, 635 F. App'x. 728, 731 (11th Cir. 2015)). "Because federal policy strongly favors arbitration, the party who argues waiver 'bears a heavy burden of proof.'" *Krinsk*, 654 F.3d at 1200 n.17 (quoting *Stone v. E.F. Hutton & Co.*, 898 F.2d 1542, 1543 (11th Cir. 1990) (per curiam)).

A party acts inconsistently with its right to arbitration when it "[s]ubstantially invok[es] the litigation machinery prior to demanding arbitration." *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). The Court does not believe that Plaintiff has met its "heavy burden of proof" to show that Defendant acted inconsistently with its right to arbitration. "[C]ourts have held that long delays in seeking to compel arbitration and participation in discovery can amount to acting inconsistently with the right to arbitrate," but those delays are typically substantially longer than four months and the activity is

substantially more than what occurred in this case. *Hauser v. Westlake Services, LLC.*, No. 3:18-cv-143-J-39JRK, 2018 WL 6983497, at *2 (M.D. Fla. Oct. 31, 2018), *report and recommendation adopted sub nom.*, No. 3:18-cv-143-J-39JRK, 2018 WL 6983486 (M.D. Fla. Dec. 3, 2018); *see, e.g., S & H Contractors*, 906 F.2d at 1514 (holding that a party substantially engaged in litigation by litigating two motions and conducting five depositions over the course of eight months); *Garcia v. Wachovia Corp.*, 699 F.3d 1273, 1277–78 (11th Cir. 2012) (holding that the defendant acted inconsistently with the right to arbitration when "the parties conducted discovery for more than a year" and conducted many depositions, "served and answered interrogatories, and produced approximately 900,000 pages of documents"); *Lawrence v. Royal Caribbean Cruises, Ltd.*, 09-20930-CIV, 2009 WL 4546633, at *3 (S.D. Fla. Nov. 30, 2009) (finding waiver after seven months when movant had already served, among other things, twenty-nine requests for production and over thirty interrogatories).

Here, Defendant submitted its Answer with affirmative defenses, including the right to arbitration; participated in the filing of the CMR; served the Rule 26 disclosures required by the CMR; and filed its Certificate of Interested Persons and Corporate Disclosure Statement as well as its Notice of Pendency of Related Cases. (*See* Doc. Nos. 8–11). No depositions have been taken, and Defendant has not filed any motions other than its Motion to Compel and Motion to Stay. Filing documents such as the Certificate of Interested Persons and the CMR in response to Court Orders does not equate to substantially invoking the machinery of litigation.

D. Stay Pending Arbitration

As set forth above, a valid arbitration agreement covering this dispute exists between Plaintiff and Defendant, and therefore, this Court will compel arbitration. Defendant requests the Court stay this case pending arbitration. Plaintiff makes no substantive response in opposition to

this request other than to argue that the case should not be stayed pending the resolution of the Motion to Compel.

The FAA provides that the 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. Therefore, the Court will stay this case pending the completion of arbitration.

E. Request for Additional Discovery

Plaintiff, in the conclusion of his Response, requests he "be allowed to conduct arbitration related discovery into Defendant's claim that they were not in control of third parties who may have contributed to the violations alleged in Plaintiff's complaint." (Doc. 18 at 12). Plaintiff provides no case law or authority to support that additional discovery into such matters would be proper at this stage in the proceedings. Therefore, Plaintiff's request for "arbitration related discovery" will be denied at this time.

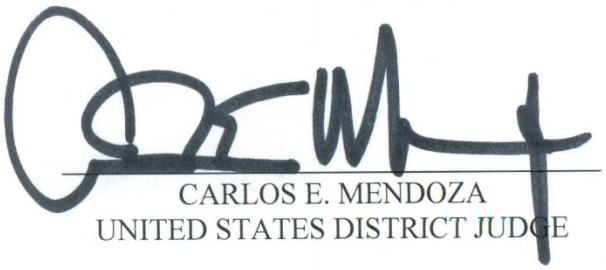
IV. CONCLUSION

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

1. Defendant's Opposed Motion to Compel Arbitration and to Stay Plaintiff's Case (Doc. 15) is **GRANTED**. **Within thirty days**, Plaintiff shall submit all claims to binding arbitration in accordance with the Residential Services Agreement.
2. This case is **STAYED** pending arbitration. **On or before December 19, 2019**, and every one hundred and eighty days thereafter, Defendant shall file a report as to the status of the arbitration proceeding. Additionally, Defendant shall notify this Court within fourteen days of the final resolution of the arbitration proceeding.
3. Defendant's Memorandum in Support of Motion to Stay Proceedings (Doc. 16) is **DENIED as moot.**

4. The Clerk is directed to administratively close this case.

DONE and **ORDERED** in Orlando, Florida on October 21, 2019.



CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record