Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

August 26, 2016 **Submitted via Email and Postal Mail**

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Re: Supplemental Comment for Docket No. CFPB-2016-0020
Arbitration Agreements; Proposed Rule

Dear Ms. Jackson:

The Human Rights Defense Center (HRDC) respectfully submits this supplemental comment on Docket No. CFPB-2016-0020 regarding arbitration agreements as they relate to inmate calling services (ICS) and prepaid phone accounts established by prisoners' families so they can speak with their incarcerated loved ones, as well as release debit cards.

Arbitration clauses appear in the terms and conditions that consumers must accept to establish prepaid ICS phone accounts to remain in contact with incarcerated loved ones. This condition significantly limits the legal rights of prisoners' families by denying them the benefit of class-action representation. All correctional facilities grant monopoly contracts to prison phone providers, so if families want to talk with their imprisoned loved ones on the phone, they have no choice but to agree to the arbitration clause, which is in the terms and conditions that few people actually read.

ICS provider Global Tel*Link (GTL) recently used the arbitration clause in its Terms and Conditions in an attempt to compel arbitration for named plaintiffs in a consumer class-action suit.[1] The company petitioned the court on August 7, 2015 "for an order compelling arbitration pursuant to the Federal Arbitration Act and staying this matter pending conclusion of the individual arbitrations." **Attachment 1 at 1.** According to the pleadings filed in this case, GTL revised its Terms and Conditions on July 3, 2013 to include an arbitration clause. ***Id.* at 5.**

[1] *See James, et al. v. Global Tel*Link Corporation, et al.*, U.S.D.C. (D. NJ), Case No. 2:13-cv-04989-WJM-MF.

P.O. Box 1151
Lake Worth, FL 33460
Phone: 561-360-2523 Fax: 866-735-7136
pwright@prisonlegalnews.org

On February 16, 2016, the court denied the motion to compel arbitration with respect to four of the five plaintiffs named in GTL's motion and granted the motion with respect to the fifth plaintiff. **Attachment 2.** In an Opinion issued the same day **(Attachment 3)**, the Honorable William J. Martini found that plaintiffs James, King, and Barbara and Milan Skladany created their accounts through GTL's interactive voice response (IVR) system, and while they were notified of the existence of the terms and conditions that could be found on GTL's website, they "were not required to engage in any affirmative conduct to demonstrate acceptance." ***Id.*** **at 6-7.** Judge Martini further found that while IVR users were given notice that GTL's service was "governed by the terms of use," such "notification did not inform them that use of the service alone constituted acceptance of these terms." ***Id.*** **at 11.**

The court did grant GTL's motion to compel arbitration with respect to plaintiff Gibson, who had created an account through the website, noting that she would have been presented with the terms and conditions on the screen and "was required to click on an 'Accept' button in order to move forward in the account creation process." ***Id.*** **at 12.**

EZ Card & Kiosk LLC is another predatory company that price gouges prisoners and then eliminates their ability to pursue legal action through arbitration agreements. John Pope was arrested by the Fort Lauderdale police in November 2014 and held in the Broward County Jail for 17 hours. **Attachment 4 at 1.** Upon his release less than one day after being arrested, Mr. Pope was given a release debit card issued by EZ Card & Kiosk LLC (EZ Card) and the Central Bank of Kansas City in lieu of the $178 cash he had in his possession at the time of his arrest. ***Id.*** **at 2.** There were at least five fees applicable to the debit card which Mr. Pope was subject to in order to access his own money. ***Id.*** Mr. Pope later filed a lawsuit challenging these egregious practices.[2] As with the case cited above, EZ Card moved to compel arbitration on the basis of Mr. Pope's acceptance and use of the release debit card, and the company's motion was granted by the court on September 11, 2015. **Attachment 4.** Thus, Mr. Pope was denied the ability to have his claims adjudicated by the courts – and the thousands of detainees who are released from the Broward County Jail each year are likewise denied justice, as they must arbitrate their claims one-by-one and cannot seek recourse through either individual or class-action lawsuits.

As stated in our initial Comment filed on August 22, there is no meaningful consent to arbitration agreements in the prison or jail context. Such "agreements" serve only to immunize corporate predators from the legal consequences of their unlawful actions, shield them from judicial review and preclude victimized consumers from obtaining counsel and effective relief from our nation's judicial system.

We again urge the CFPB to hold that mandatory arbitration agreements should be void or inapplicable in the criminal justice context for the simple reason that affected consumers have no real choice in the matter. Absent free choice there can be no meeting of the minds or agreement. Our free market system is predicated upon the notion that consumers have choice and companies must earn their customers' business. In the prison and jail context, however, hedge fund-owned corporations[3] have learned that they only need to give kickbacks to the detention agencies that

[2] *See Pope v. EZ Card & Kiosk LLC, et al.*, USDC (S.D. FL), Case No. 0:15-cv-61046-KAM. HRDC attorneys and the law firm of Giskan, Solotaroff, Anderson & Stewart LLP represented Mr. Pope in this action.

[3] GTL is owned by the hedge fund American Securities, while ICS provider Securus is owned by another hedge fund, ABRY Partners.

hold prisoners captive to obtain exclusive, monopoly contracts and then force prisoners and their families to pay whatever outrageous amounts they can charge for phone or money transfer services, or to give people their own funds on debit cards. All because the affected consumers, whose money is being taken and who are actually paying the bills, have no choice. The CFPB should protect these captive consumers from mandatory arbitration agreements.

Thank you for your continued time and attention in this regard.

Sincerely,

Paul Wright
Executive Director, HRDC

Attachments

Attachment 1

GREENBERG TRAURIG, LLP
200 Park Avenue
Florham Park, New Jersey 07932
Philip R. Sellinger
Aaron Van Nostrand
Ph: (973) 360-7900
Attorneys for Defendants
Global Tel*Link Corporation
and DSI-ITI LLC

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBIE JAMES, et al., Plaintiffs, vs. GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE and DSI-ITI LLC, Defendants.	13 Civ. 4989 (WJM) (MF) **NOTICE OF MOTION TO COMPEL ARBITRATION** **ORAL ARGUMENT REQUESTED**

PLEASE TAKE NOTICE that, on a date and time to be set by the Court, defendants Global Tel*Link Corporation and DSI-ITI LLC ("Defendants") shall move before the Honorable William J. Martini at the United States District Court for the District of New Jersey, Martin Luther King, Jr. Federal Building and Courthouse, 50 Walnut Street, Courtroom 4B, Newark, New Jersey 07101, for an order compelling arbitration pursuant to the Federal Arbitration Act and staying this matter pending conclusion of the individual arbitrations.

PLEASE TAKE FURTHER NOTICE that in support of this motion, Defendants will rely upon the brief and the Declaration of John W. Baker, II submitted herewith.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is submitted herewith.

PLEASE TAKE FURTHER NOTICE that, pursuant to L. Civ. R. 78.1(b), Defendants request oral argument on this motion.

GREENBERG TRAURIG LLP

/s/ Philip R. Sellinger
Philip R. Sellinger
Aaron Van Nostrand
200 Park Avenue
Florham Park, New Jersey 07932
Telephone: (973) 360-7900
Facsimile: (973) 301-8410

Attorneys for Defendants
*Global Tel*Link Corporation and*
DSI-ITI LLC

Dated: August 7, 2015

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBIE JAMES, et al., Plaintiffs, vs. GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE and DSI-ITI LLC, Defendants.	13 Civ. 4989 (WJM) (MF) **ORAL ARGUMENT REQUESTED**

DEFENDANTS GLOBAL TEL*LINK CORPORATION AND DSI-ITI LLC'S BRIEF IN SUPPORT OF MOTION TO COMPEL ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT AND TO STAY THIS MATTER PENDING CONCLUSION OF THE INDIVIDUAL ARBITRATIONS

Philip R. Sellinger, Esq.
Aaron Van Nostrand, Esq.
GREENBERG TRAURIG, LLP
200 Park Avenue
Florham Park, New Jersey 07932
Ph: (973) 360-7900

Attorneys for Defendants
*Global Tel*Link Corporation and*
DSI-ITI LLC

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Defendants Global Tel*Link Corporation and DSI-ITI, LLC (together, "GTL") respectfully submit this brief in support of their motion to compel arbitration pursuant to the Federal Arbitration Act and to stay this matter pending conclusion of the individual arbitrations.

PRELIMINARY STATEMENT

GTL provides telecommunication services to jails, prisons and other correctional institutions based on agreements it enters into with the governmental entities that run those institutions. Plaintiffs are inmates or friends and family members of inmates who claim they signed up for an account so they could use GTL's calling services. Although Plaintiffs opened accounts with GTL, they fail to acknowledge the Terms of Use of those accounts.

Plaintiffs likely ignore those Terms of Use because they require arbitration: "***All claims arising out of or relating to these Terms of Use (including its formation, performance and breach) and the Service shall be finally settled by binding arbitration, excluding any rules or procedures governing or permitting class actions***." Plaintiffs' agreements to arbitrate are binding and enforceable under the Federal Arbitration Act, as well as U.S. Supreme Court, Third Circuit and New Jersey precedent. Plaintiffs' claims are covered by the broad language of this provision, requiring arbitration of "[a]ll claims arising out of or relating to these Terms of Use… and the Service…." GTL respectfully requests that the Court

grant their motion and compel Plaintiffs Bobbie James, Crystal Gibson, Barbara Skladany, Milan Skladany and Bettie King to arbitrate their claims on an individual basis, as they agreed to do under their agreement with GTL.

FACTUAL BACKGROUND

A. Plaintiffs' Allegations

GTL "provide[s] managed telecommunications services at state and local correctional facilities in New Jersey and elsewhere in the United States so inmates can communicate with family members, friends, attorneys and other approved persons outside the correctional facilities." Compl. ¶ 12. One way for prisoners to call friends or family outside a correctional facility is by placing collect calls using GTL's services. *Id*. ¶ 25. Other ways includes debit calls or calls paid for by the inmate's commissary account. As alleged in the Complaint, GTL provides those services pursuant to contracts between GTL and state and county facilities. *Id*. ¶ 20.

B. Plaintiffs' GTL Accounts

Plaintiffs consist of six individuals (Bobbie James, Crystal Gibson, Betty King, Barbara Skladany and Milan Skladany) who have or had accounts with GTL. Four of the Plaintiffs are from New Jersey and two are from New York. Compl., ¶ 6-9, 11-12. One plaintiff (Mark Skladany) was incarcerated in Somerset County

Jail from September 2010 to September 2012 and currently is incarcerated in the New Jersey State Prison in Yardville. Compl., ¶ 10.

Plaintiff Crystal Gibson opened an Advance Pay Account through GTL's website on July 29, 2014. Declaration of John W. Baker, II ("Baker Decl.") ¶ 8. Gibson also opened an account on June 13, 2014, through GTL's IVR system and closed the account the same day. *Id.* Gibson alleges in the Complaint that she "became a customer of GTL in approximately September of 2010." Comp., ¶ 42. GTL, however, has no record of any such account dating back to 2010.

Plaintiff Bobbie James opened an Advance Pay Account on February 29, 2012. Plaintiff James continued using her account through 2014 and, specifically, deposited funds in her account using GTL's IVR system 38 times after July 2, 2013 – the date GTL amended its Terms of Use to include an arbitration provision. *See infra* at 4. Plaintiff James also opened up a new account on August 1, 2013 for a different phone number. Baker Decl. ¶ 9.

Plaintiff Barbara Skladany opened an Advance Pay Account on March 2, 2013. She continued using her account through 2014 and, specifically, deposited funds in her account using GTL's IVR system 15 times after July 2, 2013. Plaintiff Barbara Skladany also opened an account on November 16, 2006, and closed the account on August 19, 2013 – after GTL amended its Terms of Use to include an arbitration provision. *Id.*

Plaintiff Milan Skladany opened an Advance Pay Account on July 29, 2011. He continued using his account through 2014 and, specifically, deposited funds in this account using GTL's IVR system 9 times after July 2, 2013. *Id.*

Plaintiff Betty King had two accounts with GTL. The first account was opened on October 18, 2006, and was closed on July 9, 2013. The second account was opened on November 15, 2014, using GTL's IVR system, and Plaintiff King deposited money into that account three times using GTL's IVR system. Baker Decl. ¶ 10.

C. The Arbitration Agreement

By setting up and using their GTL accounts, Plaintiffs Bobbie James, Crystal Gibson, Barbara Skladany, Milan Skladany and Bettie King agreed to GTL's Terms of Use ("TOU"), which – as of July 2, 2013 – require arbitration of any claim arising out of or relating to GTL's services:

> Arbitration. The parties shall use their best efforts to settle any dispute, claim, question, or disagreement directly through consultation and good faith negotiations which shall be a precondition to either party initiating a lawsuit or arbitration. All claims arising out of or relating to these Terms of Use (including its formation, performance and breach) and the Service shall be finally settled by binding arbitration, excluding any rules or procedures governing or permitting class actions. The arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve all disputes arising out of or relating to the interpretation, applicability, enforceability or formation of these Terms of Use, including, but not limited to any claim that all or any part of these Terms of Use is void or voidable. The arbitrator shall be empowered to grant whatever relief would be available in a court under law or in equity. The arbitrator's award

> shall be binding on the parties and may be entered as a judgment in any court of competent jurisdiction. To the extent the filing fee for the arbitration exceeds the cost of filing a lawsuit, we will pay the additional cost.
>
> **The parties understand that, absent this mandatory provision, they would have the right to sue in court and have a jury trial. They further understand that, in some instances, the costs of arbitration could exceed the costs of litigation and the right to discovery may be more limited in arbitration than in court.**

TOU, § R(1) (attached as Ex. A, Baker Decl.) (emphasis in original). The Terms of Use also offer customers two non-arbitration choices: they can opt of arbitration or file an action in small claims court. TOU, § R(3), § R(4). None of the Plaintiffs opted out of arbitration. Baker Decl. ¶ 11. Regardless of the dispute resolution method selected, however, putative class actions are waived. TOU, § R(2).

Customers who opened or refilled their accounts through GTL's website are required to accept the Terms of Use before completing their transaction. Baker Decl. ¶ 2. Customers who opened or refilled their accounts through GTL's automated phone service received the following notice before entering their payment information:

> Please note that your account, and any transactions you complete, with GTL, PCS, DSI-ITI, or VAC are governed by the terms of use and the privacy statement posted at www.offenderconnect.com. The terms of use and the privacy statement were most recently revised on July 3, 2013.

Baker Decl. ¶ 2.

PROCEDURAL HISTORY

On August 20, 2013, Plaintiffs filed a Complaint against GTL asserting seven causes of action: (1) violation of the NJCFA; (2) violation of certain provisions of N.J.S.A. § 56:8-176 of the NJCFA and N.J.A.C. § 45A-803; (3) violation of the New Jersey public utilities statutes (N.J.S.A. § 48-3.1 and 3.2); (4) unjust enrichment; (5) violation of the Federal Communications Act (47 U.S.C. § 201); (6) violation of the Takings Clause of the Fifth Amendment of the United States Constitution; and (7) declaratory judgment.[1] Plaintiffs also seek to certify a nationwide class of all persons since 2002 who either (i) were incarcerated in New Jersey and used GTL's services or (ii) who established an advanced pay account with GTL in order to receive telephone calls from prisoners in New Jersey. Compl, ¶ 61.

In the Complaint, Plaintiffs provide very little information regarding their accounts with GTL. For example, no Plaintiff states how he or she opened an account with GTL – whether online through GTL's website, by using GTL's automated system or by speaking with a customer service representative. Nor does any Plaintiff provide his or her account number with GTL. Accordingly, at the time the Complaint was filed, GTL did not have sufficient information to determine which Plaintiffs were subject to the arbitration clause in the Terms of

[1] Plaintiffs have since voluntarily dismissed their claims under the Federal Communications Act and the New Jersey public utilities statutes. D.E. 41.

Use.

After the case was stayed on primary jurisdiction grounds pursuant to GTL's motion (D.E. 36) and the stay was lifted on October 20, 2014 (D.E. 41), GTL filed an Answer to the Complaint on November 26, 2014 (D.E. 46) and filed an Amended Answer on March 9, 2015 (D.E. 67). In the Amended Answer, GTL asserted that "[t]he claims of at least some Plaintiffs and at least some members of the putative class are barred, in whole or in part, by an agreement to resolve all claims through binding arbitration." D.E. 67 at 16.

GTL did not immediately seek permission to file a motion to compel arbitration because it still did not have complete account information for all Plaintiffs. GTL does not require all customers to provide personal identifying information, such as names and addresses, when opening accounts. For example, customers who open their accounts using GTL's automated telephone (IVR) system are not required to provide any personal identifying information. Rather, those customers need only enter their telephone number. Baker Decl. ¶ 3.

For that reason, GTL served interrogatories on Plaintiffs on February 20, 2015, asking for the dates and methods Plaintiffs used to open their accounts, as well as the phone numbers they used. Responses to these interrogatories (albeit incomplete and uncertified) finally were provided by 4 of the 7 Plaintiffs on April 24, 2015, and 2 additional Plaintiffs have provided responses since then.

Although GTL still does not have complete information regarding the accounts of each Plaintiff, it now has sufficient information to confirm that at least 5 of the 7 Plaintiffs are bound by arbitration provision in the Terms of Use.

Pursuant to the Scheduling Order in this matter (D.E. 61), on May 8, 2015, GTL submitted a request for leave to file a motion to compel arbitration (as well as a motion for judgment on the pleadings). After the parties exchanged letters regarding this request (D.E. 75, 76, 78), Judge Falk held a conference call on May 26, 2015, during which he reserved decision on GTL's request for leave to file a motion to compel arbitration. During a status conference on July 14, 2015, Judge Falk granted GTL's request to file a motion to compel arbitration. At Judge Falk's direction during the May 26, 2015 conference call and during the July 14, 2015 conference, GTL has participated in discovery since it requested leave to file a motion to compel arbitration.

ARGUMENT

I. Legal Standards

The Federal Arbitration Act ("FAA")[2] "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). Under Section 2 of the FAA, an agreement to arbitrate "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.[3] The FAA thus reflects "a liberal federal policy favoring arbitration and the

[2] The FAA by its terms, applies to arbitration provisions contained in all contracts that, like those at issue here, "evidenc[e] a transaction involving commerce." 9 U.S.C. § 2; *see also Citizens Bank v. Alafabco, Inc*., 539 U.S. 52, 56 (2003) ("term 'involving commerce' in the FAA . . . ordinarily signal[s] the broadest permissible exercise of Congress' Commerce Clause power"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 276-77 (1995) (directing that FAA be construed broadly to apply to all transactions affecting interstate commerce).

[3] Federal courts in New Jersey have broadly applied *Concepcion* to hold that arbitration provisions and class action waivers cannot be voided on unconscionability or public policy grounds. *See Wolf v. Nissan Motor Acceptance Corp.*, 2011 WL 2490939, *6-7 (D.N.J. June 22, 2011) ("Based on the United States Supreme Court's holding and reasoning in [*Concepcion*], the Court cannot find that any public interest articulated in this case . . . overrides the clear, unambiguous, and binding class action waiver included in the parties' arbitration agreement"); *see also Wolf v. Nissan Motor Acceptance Corp.*, 2012 WL 1079340, *6 (D.N.J. Mar. 29, 2012) (finding plaintiff's arguments regarding unconscionability of arbitration provisions "completely foreclosed … by controlling precedent from the Supreme Court and now from the Third Circuit Court of Appeals"); *Litman v. Cellco P'ship*, 655 F.3d 225, 230 (3d Cir. 2011) (finding leading New Jersey and Third Circuit case on unconscionability of arbitration provisions preempted by FAA and abrogated by *Concepcion*).

fundamental principle that arbitration is a matter of contract." *Concepcion*, 131 S. Ct. at 1745.

A court should compel arbitration where (a) a valid agreement to arbitrate exists, and (b) the agreement encompasses the claims at issue. *See Trippe Mfg. Co. v. Niles Audio Corp*, 401 F.3d 529, 532 (3d Cir. 2005); *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000) (party seeking to invalidate arbitration agreement bears the burden of showing why agreement is invalid). Enforcing arbitration agreements is strongly favored, and any ambiguity as to the arbitrability of a claim should be resolved in favor of arbitration. *See id.* (noting "presumption in favor of arbitrability"); *accord Morales v. Sun Constructors, Inc*., 541 F.3d 218, 221 (3d Cir. 2008); *Gras v. Assocs. First Capital Corp*., 346 N.J. Super. 42, 54 (App. Div. 2001). "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983).

II. At Least Five of the Seven Plaintiffs Agreed to Arbitrate the Claims Asserted in the Complaint.

A. Plaintiff Crystal Gibson Must Arbitrate Her Claims Because She Agreed To Arbitration When Opening Her GTL Account.

Plaintiff Crystal Gibson opened an Advance Pay Account through GTL's website on July 6, 2014. Baker Decl. ¶ 8.[4] As part of the account-opening process, Gibson was presented with the Terms of Use and clicked a button to "accept" the Terms of Use. Baker Decl. ¶ 2. Gibson's registration response constitutes a valid acceptance of the Terms of Use. *See Davis v. Dell, Inc.*, No. 07-630 (AMD), 2007 WL 4623030, *4-5 (D.N.J. Dec. 28, 2007) *aff'd*, No. 07-630 (RBK), 2008 WL 3843837 (D.N.J. Aug. 15, 2008) (enforcing arbitration provision contained in online terms and conditions that plaintiff needed to "click through" in order to purchase product).

B. Plaintiffs Bobbie James, Barbara Skladany and Milan Skladany Must Arbitrate Their Claims Because They Continued Using GTL's Services After the Terms of Use Were Amended To Provide For Arbitration.

Plaintiffs Bobbie James, Barbara Skladany and Milan Skladany opened their accounts before there was an arbitration provision in the Terms of Use (July 2,

[4] Gibson also opened an account on June 13, 2014, through GTL's IVR system and closed the account the same day. Baker Decl. ¶ 8. Gibson agreed to the Terms of Use when she opened this account as well for the reasons set forth in Section II.B. Gibson alleges in the Complaint that she "became a customer of GTL in approximately September of 2010." Comp., ¶ 42. GTL, however, has no record of any such account dating back to 2010.

2013), but continued to use their accounts thereafter. Baker Decl. ¶ 9. That continued use means those Plaintiffs agreed to the revised Terms of Use, including arbitration.

The prior version of the Terms of Use contained the following language providing for modifications:

> These Terms of Use may be amended by the Company from time to time. We will post any material changes to these Terms of Use on the Site with a notice advising of the changes. You may cancel your account within fifteen (15) days following the date the amended Terms of Use are posted by contacting us using the contact information in Section Y below. If you choose to cancel your account within this fifteen (15) day period, you will not be bound by the terms of the revised Terms of Use but will remain bound by terms of these Terms of Use, and, we will provide you with a refund of any fees that you have paid and that have not been used in connection with the Service.

Ex. B, Baker Decl.

GTL posted a notice on the front page of its website regarding the amendment of its Terms of Use on July 2, 2013:

> **ATTENTION Existing ConnectNetwork ACCOUNT HOLDERS**. As of July 2, 2013 the Terms of Use and Privacy Statement (now entitled Your Privacy Rights) that apply to this site and associated products and services were updated. Please review both documents carefully and let us know of any questions using the contact information listed in the documents. By using this site or the associated products or services, you acknowledge and agree to the terms contained in both documents. You may access the documents through links appearing at the top of this site.

Ex. C, Baker Decl. GTL also included the following notice on its automated telephone (IVR) system advising customers regarding the amended Terms of Use:

> Please note that your account, and any transactions you complete, with GTL, PCS, DSI-ITI, or VAC are governed by the terms of use and the privacy statement posted at www.offenderconnect.com. The terms of use and the privacy statement were most recently revised on July 3, 2013.

Baker Decl. ¶ 2. Any customer calling the IVR system received this notice and could not proceed to the remainder of the options, including depositing funds into an account, without hearing this notice. Baker Decl. ¶ 2.

Courts regularly conclude that a customer's continued use or acceptance of services constitutes assent to modified terms of service. In *Coiro v. Wachovia Bank, N.A.*, 2012 WL 628514, *1 (D.N.J. Feb. 27, 2012), for example, the original customer agreement stated that, "[i]f Plaintiff did not agree to the[] new terms, she had the option to close her account within [a] thirty-day period." *Id.* at *3. The plaintiff was mailed two amendments to the customer agreement, the second of which included a class-action waiver provision. *Id.* at *3. The court found this provision reasonable, noting that "[u]nder New Jersey state law, silence may be deemed acceptance 'where the particular circumstances reasonably impose on the offeree a duty to speak if the offer is rejected.'" *Id.* (quoting *Johnson & Johnson v. Charmley Drug Co.,* 11 N.J. 526, 539 (1953)); *see also Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 436-37 (1992) ("[W]hen an offeree accepts the offeror's

services without expressing any objection to the offer's essential terms, the offeree has manifested assent to those terms.") (internal citations omitted); *Lankford v. Irby*, 2006 WL 2828552, *5 (D.N.J. Sept. 29, 2006).

Based on GTL's account records, plaintiffs Bobbie James (February 29, 2012), Barbara Skladany (March 2, 2013) and Milan Skladany (July 29, 2011) opened their accounts before July 2, 2013. Baker Decl. ¶ 9.[5] They all continued using their accounts after July 2, 2013. Specifically, Plaintiff Milan Skladany deposited funds in his account using GTL's IVR system nine times after July 2, 2013. Baker Decl. ¶ 9. Plaintiff Barbara Skladany deposited funds in her account using GTL's IVR system fifteen times after July 2, 2013. Baker Decl. ¶ 9.[6] Plaintiff James deposited funds in her account using GTL's IVR system 38 times after July 2, 2013. Baker Decl. ¶ 9. Plaintiff James also opened up a new account using GTL's IVR system on August 1, 2013 for a different phone number, and, during that process, affirmatively accepted GTL's Terms of Use. Baker Decl. ¶ 9.

As in *Coiro*, Plaintiffs demonstrated their assent by continuing to use the services. If anything, this case is stronger than *Coiro* because these Plaintiffs

[5] According to GTL's records, plaintiff John Crow opened his account prior to July 2, 2013 but never deposited money in or otherwise used his account. GTL has no record of Mark Skladany (an inmate) opening an account with GTL.

[6] Plaintiff Barbara Skladany also opened an account on November 16, 2006, and closed the account on August 19, 2013 – after GTL amended its TOU. Baker Decl. ¶ 9. Because the arbitration agreement applies to all claims arising out of or relating to GTL's "Services," all of Barbara Skladany's claims, including those related to her prior account, fall within the arbitration agreement.

repeatedly were informed of the new Terms of Use each time they used the IVR system. Thus, Plaintiffs James, Barbara Skladany and Milan Skladany are bound by the arbitration provisions and class action waiver in the Terms of Use.

C. Plaintiff Betty King Must Arbitrate Her Claims Because She Agreed to the Amended Terms of Use By Opening a New Account After July 2, 2013.

Based on GTL's records, Plaintiff Betty King had two accounts. The first was opened on October 18, 2006 and was closed on July 9, 2013 – after GTL amended its TOU. The second account was opened through GTL's IVR system on November 15, 2014, and Plaintiff King deposited money into that account three times using GTL's IVR system. Baker Decl. ¶ 10. During this sign-up process, King affirmatively accepted GTL's Terms of Use, including the arbitration provision. Baker Decl. ¶ 2. Because the arbitration agreement applies to all claims arising out of or relating to GTL's "Services," all of King's claims, including those related to her prior account, fall within the arbitration agreement. Thus, King is bound by the arbitration provision and class action waiver contained in the Terms of Use.

D. Plaintiffs' Claims Fall Within the Scope of the Arbitration Clause.

All of Plaintiffs' claims fall within the broad scope of the arbitration provision in the Terms of Use. Those provisions require arbitration of "[a]ll claims arising out of or relating to these Terms of Use (including its formation,

performance and breach) and the Service." "Service" is defined as "any of the products or services that [GTL] . . . provide, including My Phone Account, Offender Trust Fund, Send An Email and Offender Phone Account." This broad language covers "any disputes arising out of" parties' transaction, even if not directly related to contract containing arbitration clause. *See Arakelian v. N.C. Country Club Estates Ltd. P'ship*, No. 08-5286 (JAG), 2009 WL 4981479, *12 (D.N.J. Dec. 18, 2009) (where arbitration provision applied to claims arising out of "this Agreement . . . [or] any other agreements, communications or dealings involving Buyer," court construes such broad language as intending "to cover any disputes arising out of" parties' transaction, even if not directly related to contract containing arbitration clause).

Here, Plaintiffs' claims relate to their accounts with GTL for the provision of ICS. Plaintiffs allege that the fees and rates charged by GTL in conjunction with their ICS accounts were excessive, insufficiently disclosed, and prohibited by the CFA. Compl., ¶ 79-80. These claims unquestionably relate to the "Services" provided by GTL, as defined in the Terms of Use. Accordingly, Plaintiffs' claims are subject to binding arbitration.

III. This Case Should be Stayed Pending Completion of the Individual Arbitrations.

This Court should stay this litigation, including the claims asserted by Mark Skladany and John F. Crow, pending individual arbitration. Section 3 of the FAA

empowers this Court to grant such a stay. 9 U.S.C. § 3 (when a court determines a suit should be referred to arbitration, it "shall on application of one of the parties stay the trial of the action until such arbitration has been had"). "If the issues in the case are within the contemplation of the arbitration agreement, the FAA's stay-of-litigation provision is mandatory, and there is no discretion vested in the district court to deny the stay." *Katchen v. Smith Barney, Inc.*, 2005 WL 1863669 at *7 (D.N.J. Aug. 3, 2005) (quoting *U.S. v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir.2001)); *see also Lloyd v. HOVENSA, LLC*., 369 F.3d 263, 269 (3d Cir. 2004) ("[T]he statute clearly states, without exception, that whenever suit is brought on an arbitrable claim, the Court 'shall' upon application stay the litigation until arbitration has been concluded. In this case, Wyatt requested a stay of the proceeding as part of his motion to compel arbitration. Accordingly, we hold that the District Court was obligated under 9 U.S.C. § 3 to grant the stay once it decided to order arbitration."). "[A] stay, rather than a dismissal, is the required course of action when compelling arbitration." *Quilloin v. Tenet HealthSystem Philadelphia, Inc*., 673 F.3d 221, 227 n. 2 (3d Cir. 2012). GTL has requested a stay here, rather than a dismissal, and that request should be granted.

The entire case, including the claims asserted by Mark Skladany and Dr. John F. Crow, should be stayed pending the arbitration of the claims of the other Plaintiffs. 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts

of the United States upon ***any issue referable to arbitration*** under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, ***shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement***, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Neal v. Asta Funding, Inc*., 2014 WL 131770, at *3 (D.N.J. Jan. 6, 2014) ("When the parties and issues significantly overlap between a court proceeding and an arbitration, a court may stay the entire court action. That is true even where the overlap is not complete, for example, even if some of the parties or issues are not subject to arbitration."). Here, there is a complete overlap between the issues that remain in Court and the issues that would be arbitrated by the other Plaintiffs. Accordingly, a stay pending the results of the individual arbitrations is appropriate.

CONCLUSION

For the reasons set forth herein, above, GTL respectfully requests this court grant this motion to compel arbitration and stay this matter pending the completion of the individual arbitrations.

Respectfully submitted,

/s/ Philip R. Sellinger
Philip R. Sellinger
Aaron Van Nostrand
GREENBERG TRAURIG, LLP
200 Park Avenue
Florham Park, New Jersey 07932
Telephone: (973) 360-7900
Facsimile: (973) 301-8410

Attorneys for Defendants
*Global Tel*Link Corporation and*
DSI-ITI LLC

Dated: August 7, 2015

GREENBERG TRAURIG, LLP
200 Park Avenue
Florham Park, New Jersey 07932
Philip R. Sellinger
Aaron Van Nostrand
Ph: (973) 360-7900
Attorneys for Defendants
Global Tel*Link Corporation
and DSI-ITI LLC

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBIE JAMES, et al., Plaintiffs, vs. GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE and DSI-ITI LLC, Defendants.	13 Civ. 4989 (WJM) (MF)

DECLARATION OF JOHN W. BAKER, II

I, John W. Baker, II, pursuant to 28 U.S.C. § 1746, make the following declaration:

1. I am Global Tel*Link Corporation's ("GTL") Senior Vice President-Payment Services and Consumer Channels. In that capacity, I have become familiar with GTL's automated telephonic systems and the general process and procedure for setting up an account to access GTL's Inmate Calling Services ("ICS"). I am also familiar with GTL's records relating to the Plaintiffs in this matter, which were provided to me by another GTL employee.

2. In the process of setting up an account, whether online or telephonically through our interactive voice response ("IVR") system, all users are informed of, and required to agree to, GTL's Terms of Use ("TOU"). If a customer signs up for account access on GTL' s website, they

indicate their assent to the TOU by clicking a button that says "Accept." Since approximately July 2, 2013, a customer who signed up through GTL's IVR system was notified, before completing the transaction, that:

> Please note that your account, and any transactions you complete, with GTL, PCS, DSI-ITI, or VAC are governed by the terms of use and the privacy statement posted at www.offenderconnect.com. The terms of use and the privacy statement were most recently revised on July 3, 2013.

3. Customers who open their accounts using GTL's IVR system are not required to provide any personal identifying information. Rather, those customers need only enter their telephone number and payment information.

4. As of July 2, 2013, GTL's Terms of Use included the following provisions:

> **Acceptance of these Terms of Use by Users of the Site**. By using the Service, or clicking the "accept" button when you register to use the Service through the Site or when you are otherwise prompted to do so, you agree to be bound by the terms of these Terms of Use.
>
> **Acceptance of these Terms of Use by Other Users of the Service**. If you create an account to use the Service other than through the Site, and if you do not agree with or consent to the terms of these Terms of Use, you will have thirty (30) days from the date you create the account with us to cancel the account. If you decide that you want to cancel the account within this thirty (30) day period, please contact us using the information provided in Section Z below. If you cancel the account we will provide you with a refund of any fees you have paid and not used in connection with the Service
>
> **Arbitration**. The parties shall use their best efforts to settle any dispute, claim, question, or disagreement directly through consultation and good faith negotiations which shall be a precondition to either party initiating a lawsuit or arbitration. All claims arising out of or relating to these Terms of Use (including its formation, performance and breach) and the Service shall be finally settled by binding arbitration, excluding any rules or procedures governing or permitting class actions. The arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve all disputes arising out of or relating to the interpretation, applicability, enforceability or formation of these Terms of Use, including, but not limited to any claim that all or any part of these Terms of Use is void or voidable. The arbitrator shall be empowered to grant whatever relief would be available in a court under law or in equity. The arbitrator's award shall be binding on the parties and may be entered as a judgment in any court of

competent jurisdiction. To the extent the filing fee for the arbitration exceeds the cost of filing a lawsuit, we will pay the additional cost.

The parties understand that, absent this mandatory provision, they would have the right to sue in court and have a jury trial. They further understand that, in some instances, the costs of arbitration could exceed the costs of litigation and the right to discovery may be more limited in arbitration than in court.

Class Action Waiver. The parties further agree that any arbitration shall be conducted in their individual capacities only and not as a class action or other representative action, and the parties expressly waive their right to file a class action or seek relief on a class basis. If any court or arbitrator determines that the class action waiver set forth in this paragraph is void or unenforceable for any reason or that an arbitration can proceed on a class basis, then the arbitration provision set forth above shall be deemed null and void in its entirety and the parties shall be deemed to have not agreed to arbitrate disputes.

Exception - Litigation of Small Claims Court Claims. Notwithstanding the parties' decision to resolve all disputes through arbitration, either party may also seek relief in a small claims court for disputes or claims within the scope of that court's jurisdiction.

Thirty Day Right to Opt Out. You have the right to opt-out and not be bound by the arbitration and class action waiver provisions set forth this Section by sending written notice of your decision to opt-out to the following address: c/o Global Tel*Link Corporation, 12021 Sunset Hills Road, Reston, Virginia 20190, Attn: Legal Department. The notice must be sent within thirty (30) days of the date you have agreed to Terms of Use; otherwise you shall be bound to arbitrate disputes in accordance with the terms set forth above. If you elect to opt-out of these arbitration provisions, we also will not be bound by them. In addition, if you elect to opt-out of these arbitration provisions, we may terminate your use of the Service. If we terminate your use of the Service, we will provide you with a refund of any fees you have paid and have not been used in connection with the Service.

A complete copy of the version of the TOU in effect as of July 2, 2013, is attached as Exhibit A.

The TOU was available on GTL's website and accessible to all Users as of July 2, 2013.

5. The version of the TOU in effect immediately prior to July 2, 2013, stated as follows with respect to amendments to the TOU:

Amendments. These Terms of Use may be amended by the Company from time to time. We will post any material changes to these Terms of Use on the Site with a notice advising of the changes. You may cancel your account within

> fifteen (15) days following the date the amended Terms of Use are posted by contacting us using the contact information in Section Y below. If you choose to cancel your account within this fifteen (15) day period, you will not be bound by the terms of the revised Terms of Use but will remain bound by terms of these Terms of Use, and, we will provide you with a refund of any fees that you have paid and that have not been used in connection with the Service.

A complete copy of the version of the TOU in effect immediately prior to July 2, 2013, is attached as Exhibit B.

6. GTL posted a notice on the front page of its website regarding the amendment of its TOU on or about July 2, 2013:

> **ATTENTION Existing ConnectNetwork ACCOUNT HOLDERS**. As of July 2, 2013 the Terms of Use and Privacy Statement (now entitled Your Privacy Rights) that apply to this site and associated products and services were updated. Please review both documents carefully and let us know of any questions using the contact information listed in the documents. By using this site or the associated products or services, you acknowledge and agree to the terms contained in both documents. You may access the documents through links appearing at the top of this site.

A copy of the front page of GTL's website is attached as Exhibit C.

7. The mobile version of GTL's website first became available in December 2014. Before that time, if a person visited the website from a mobile device, she or he would see the desktop version of the site. Once the mobile version became available, the TOU could be accessed from a mobile device in at least two ways. If a customer accesses the mobile site at https://m.connectnetwork.com/ and does not yet have an online account, the customer must click "Create an Account." The user is then directed to a page to enter certain contact information, and is then presented with a page with a link to the TOU and a box that must be checked to agree to the TOU. In addition, the menu bar for the mobile site has an option to "View Full Web Site," where the TOU is available.

8. Plaintiff Crystal Gibson opened an Advance Pay Account through GTL's website on July 6, 2014. Gibson also opened an account on June 13, 2014, through GTL's IVR system and closed the account the same day.

9. Plaintiffs Bobbie James (February 29, 2012), Barbara Skladany (March 2, 2013) and Milan Skladany (July 29, 2011) opened their accounts prior to July 2, 2013. They all continued using their accounts after July 2, 2013. Specifically, Plaintiff Milan Skladany deposited funds in his account using GTL's IVR system nine times since July 2, 2013. Plaintiff Barbara Skladany deposited funds in her account using GTL's IVR system fifteen times since July 2, 2013. Plaintiff James deposited funds in her account using GTL's IVR system 38 times since July 2, 2013. Each time these Plaintiffs deposited funds in their respective accounts, they would have heard the notice referenced in Paragraph 2. Plaintiff James also opened up a new account on August 1, 2013, for a different phone number, and, during that process, affirmatively accepted GTL's Terms of Use. Plaintiff Barbara Skladany also opened an account on November 16, 2006, and closed the account on August 19, 2013.

10. Plaintiff Betty King had two accounts with GTL. The first account was opened on October 18, 2006 and was closed on July 9, 2013. The second account was opened on November 15, 2014, via GTL's IVR system, and Plaintiff King deposited money into that account three times using GTL's IVR system. During this sign-up process, King affirmatively accepted GTL's Terms of Use, including the arbitration provision.

11. Plaintiffs Crystal Gibson, Bobbie James, Barbara Skladany, Milan Skladany and Bettie King did not opt-out of the arbitration or class waiver provisions of the TOU.

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

Executed August 4, 2015.

JOHN W. BAKER, II

EXHIBIT A

Terms of Use

Effective Date: July 2, 2013

DSI-ITI, LLC, a wholly-owned subsidiary of Global Tel*Link Corporation, is the provider of the Offender Connect service and the operator of the website located at the url www.offenderconnect.com (the "Site"). These Terms of Use apply when you access, visit or use the Site or use any of the products or services that DSI-ITI, LLC, or its affiliates, Global Tel*Link Corporation, Public Communications Services, Inc., and Value-Added Communications, Inc. (individually "Affiliate" and collectively "Affiliates") provide, including My Phone Account, Offender Trust Fund, Send An Email and Offender Phone Account (the Site and these products and services will be referred to in these Terms of Use as the "Service"). For purposes of these Terms of Use, "Company", "we", "us", or "our", means DSI-ITI, LLC, and any Affiliate where the Affiliate or its products or services are implicated.

A. Acceptance of these Terms of Use by Users of the Site. By using the Service, or clicking the "accept" button when you register to use the Service through the Site or when you are otherwise prompted to do so, you agree to be bound by the terms of these Terms of Use.

B. Acceptance of these Terms of Use by Other Users of the Service. If you create an account to use the Service other than through the Site, and if you do not agree with or consent to the terms of these Terms of Use, you will have thirty (30) days from the date you create the account with us to cancel the account. If you decide that you want to cancel the account within this thirty (30) day period, please contact us using the information provided in Section Z below. If you cancel the account we will provide you with a refund of any fees you have paid and not used in connection with the Service.

C. Eligibility. The Service is intended for individuals who are at least eighteen (18) years old. If you are not at least eighteen (18) years old, please do not access, visit or use the Service.

D. Your Privacy Rights. In connection with your use of the Service, please review the Your Privacy Rights statement ("Privacy Statement") in order to understand how we use information we collect from you when you access, visit or use the Service. The Privacy Statement is part of and is governed by these Terms of Use and by accepting the Terms of Use, you agree to be bound by the terms of the Privacy Statement, and agree that we may use information collected from you in accordance with the Privacy Statement.

E. Registration. As a condition of using certain features of the Service, you may be required to register through the Site and select a password and user I.D. You may not: (1) select or use as a user I.D. a name of another person with the intent to impersonate that person; (2) use as a user I.D. a name subject to any rights of a person other than you without appropriate authorization; or (3) use as a user I.D. a name that is otherwise offensive, vulgar or obscene. We reserve the right to refuse registration of, or to cancel a user I.D., in our sole discretion. You shall be responsible for maintaining the confidentiality of your user I.D. and password.

F. Prohibited Activities. You may not access or use the Service for any purpose other than the purpose for which we make it available to you. We may prohibit certain activities in connection with the Service in our discretion. These prohibited activities include, without limitation, the following:

- Criminal or tortious activity, including child pornography, fraud, trafficking in obscene material, drug dealing, gambling, harassment, stalking, spamming, copyright infringement, patent infringement, or theft of trade secrets.
- Advertising to, or solicitation of, any user to buy or sell any products or services.
- Transmitting chain letters or junk email to other users.
- Using any information obtained from the Service in order to contact, advertise to, solicit or sell any products or services to any user without their prior explicit consent.
- Engaging in any automated use of the Service, such as using scripts to send comments or messages.
- Interfering with, disrupting or creating an undue burden on the Service or the networks or services connected to the Service.
- Attempting to impersonate another user or person.

- Using the user I.D. or account of another user.
- Using any information obtained from the Service in order to harass, abuse or harm another person.
- Accepting payment of anything of value from a third person in exchange for your performance of any commercial activity on or through the Service on behalf of that person.
- Using the Service in a manner inconsistent with any and all applicable laws and regulations.

G. Management of the Service. You acknowledge that we reserve the right, but have no obligation, to (1) take appropriate legal action against anyone who, in our sole determination, violates these Terms of Use, including, without limitation, reporting you to law enforcement authorities, (2) in our sole discretion and without limitation, refuse, restrict access to or availability of, or disable all or a portion of the Service, and (3) otherwise manage the Service in a manner designed to protect the rights and property of the Company and users of the Service and to facilitate the proper functioning of the Service.

H. Monitoring of Calls Made and Email Sent through the Service. You acknowledge and agree that we may, and the correctional facility where an offender is incarcerated may, monitor or record calls made using the Service, and read emails sent using the Service, for law enforcement purposes in accordance with the policies in place at the correctional facility where an offender is incarcerated. By accepting these Terms of Use you authorize us, and the applicable correctional facility, to monitor and record calls you make through the Service and to read emails you send through the Service in accordance with the policies in place at the applicable correctional facility.

I. Use of the Service. The Service and its contents and the trademarks, service marks and logos contained on the Service, are the intellectual property of the Company or its licensors and constitute copyrights and other intellectual property rights of the Company or its licensors under U.S. and foreign laws and international conventions. The Service and its contents are provided for your informational, personal, non-commercial use only and may not be used, copied, reproduced, distributed, transmitted, broadcast, displayed, sold, licensed, or otherwise exploited for any other purpose whatsoever without the express written consent of the Company. You agree not to engage in the use, copying or distribution of the Service or of any of its contents for any commercial purpose. You agree not to circumvent, disable or otherwise interfere with security related features of the Service. We may, but are not obligated to, periodically provide updates to the Service to resolve bugs or add features and functionality. You do not acquire any ownership rights to the Service or to any contents contained on the Service. All rights not expressly granted in these Terms of Use are reserved by the Company. You are solely responsible for your interactions with other users of the Service.

J. Termination of Your Use of the Service. We may suspend or terminate your use of the Service if you violate these Terms of Use or in our discretion. We may also impose limits on or restrict your access to parts or all of the Service without notice or liability.

K. Charges for the Service. Fees will apply to your use of certain features of the Service, including any calls that are made through the Service. The fees and charges may vary based on, among other things, the correctional facility where an offender is incarcerated. We reserve the right to change the fees charged periodically, in our discretion.

L. Submissions. If you submit opinions, suggestions, feedback, images, documents, and/or proposals to us through the Service, or through any other communication with us, you acknowledge and agree that: (1) the submissions you provide will not contain confidential or proprietary information; (2) we are not under any obligation of confidentiality, express or implied, with respect to the submissions you provide; (3) we shall be entitled to use or disclose (or choose not to use or disclose) the submissions you provide for any purpose, in any way, in any media worldwide; (4) the submissions you provide will automatically become the property of the Company without any obligation of the Company to you; and (5) you are not entitled to any compensation or reimbursement of any kind from the Company in connection with your submissions under any circumstances.

M. Links to Other Websites. The Service may contain links to third-party websites, resources or data. You acknowledge and agree that the Company is not responsible or liable for: (1) the availability or accuracy of these third-party websites, resources or data; or (2) the content, products, or services on or available from these websites, resources or data. You also acknowledge that you are solely responsible for, and assume all risk arising from, the use of any these websites, resources and data. Links to third party websites on the Service are not intended as endorsements or referrals by the Company of any products, services or information contained on the applicable websites. These Terms of Use do not apply to third party websites, including the content of and your activity on those websites. You should review third-party websites' terms of service, privacy policies and all other website documents, and inform yourself of the regulations, policies and practices of third-party websites.

N. Disclaimer of Warranties. THE INFORMATION CONTAINED IN AND PROVIDED THROUGH THE SERVICE, INCLUDING TEXT, GRAPHICS, LINKS, OR OTHER ITEMS, IS PROVIDED "AS IS". NEITHER THE COMPANY NOR ITS SUPPLIERS WARRANT THE ACCURACY, ADEQUACY, COMPLETENESS OR TIMELINESS OF THE INFORMATION, MATERIALS, PRODUCTS, AND SERVICES ACCESSED ON OR THROUGH THE SERVICE AND THE COMPANY EXPRESSLY DISCLAIMS LIABILITY FOR ERRORS OR OMISSIONS IN THE INFORMATION OR MATERIALS ACCESSED ON OR THROUGH THE SERVICE. NO WARRANTY OF ANY KIND, WHETHER IMPLIED OR EXPRESSED, INCLUDING BUT NOT LIMITED TO THE WARRANTIES OF NON-INFRINGEMENT, TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND FREEDOM FROM COMPUTER VIRUS, IS GIVEN IN CONJUNCTION WITH ANY INFORMATION, MATERIALS, OR SERVICES PROVIDED THROUGH THE SERVICE.

O. Limitation of Liability. IN NO EVENT SHALL THE COMPANY OR ITS THIRD PARTY SUPPLIERS BE LIABLE FOR ANY DAMAGES, LOSSES OR LIABILITIES INCLUDING, WITHOUT LIMITATION, DIRECT OR INDIRECT, PUNITIVE, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR OTHER DAMAGES, LOSSES OR EXPENSES, INCLUDING ANY LOST PROFITS, LOST DATA, OR LOST SAVINGS, WHETHER BASED ON BREACH OF CONTRACT, BREACH OF WARRANTY, TORT OR ANY OTHER LEGAL THEORY, ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE USE OF THE SERVICE OR RELIANCE ON OR USE OR INABILITY TO USE THE INFORMATION, MATERIALS OR SERVICES PROVIDED THROUGH THE SERVICE, OR IN CONNECTION WITH ANY FAILURE OF PERFORMANCE, ERROR, OMISSION, INTERRUPTION, DEFECT, DELAY IN OPERATION OR TRANSMISSION, COMPUTER VIRUS OR LINE OR SYSTEM FAILURE, EVEN IF THE COMPANY OR ITS THIRD PARTY SUPPLIERS ARE ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, LOSSES OR EXPENSES.

P. Unauthorized Transactions. In the event that you use a credit card to pay for any products or services offered through the Site, you are representing to the Company that you are authorized to use that credit card.

Q. Indemnification. You agree to defend, indemnify and hold the Company harmless from and against any and all claims, damages, and costs including attorneys' fees, arising from or related to your use of the Service.

R. Dispute Resolution.

1. Arbitration. The parties shall use their best efforts to settle any dispute, claim, question, or disagreement directly through consultation and good faith negotiations which shall be a precondition to either party initiating a lawsuit or arbitration. All claims arising out of or relating to these Terms of Use (including its formation, performance and breach) and the Service shall be finally settled by binding arbitration, excluding any rules or procedures governing or permitting class actions. The arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve all disputes arising out of or relating to the interpretation, applicability, enforceability or formation of these Terms of Use, including, but not limited to any claim that all or any part of these Terms of Use is void or voidable. The arbitrator shall be empowered to grant whatever relief would be available in a court under law or in equity. The arbitrator's award shall be binding on the parties and may be entered as a judgment in any court of competent jurisdiction. To the extent the filing fee for the arbitration exceeds the cost of filing a lawsuit, we will pay the additional cost.

The parties understand that, absent this mandatory provision, they would have the right to sue in court and have a jury trial. They further understand that, in some instances, the costs of arbitration could exceed the costs of litigation and the right to discovery may be more limited in arbitration than in court.

2. Class Action Waiver. The parties further agree that any arbitration shall be conducted in their individual capacities only and not as a class action or other representative action, and the parties expressly waive their right to file a class action or seek relief on a class basis. If any court or arbitrator determines that the class action waiver set forth in this paragraph is void or unenforceable for any reason or that an arbitration can proceed on a class basis, then the arbitration provision set forth above shall be deemed null and void in its entirety and the parties shall be deemed to have not agreed to arbitrate disputes.

3. **Exception - Litigation of Small Claims Court Claims.** Notwithstanding the parties' decision to resolve all disputes through arbitration, either party may also seek relief in a small claims court for disputes or claims within the scope of that court's jurisdiction.

4. **Thirty Day Right to Opt Out.** You have the right to opt-out and not be bound by the arbitration and class action waiver provisions set forth this Section by sending written notice of your decision to opt-out to the following address: c/o Global Tel*Link Corporation, 12021 Sunset Hills Road, Reston, Virginia 20190, Attn: Legal Department. The notice must be sent within thirty (30) days of the date you have agreed to Terms of Use; otherwise you shall be bound to arbitrate disputes in accordance with the terms set forth above. If you elect to opt-out of these arbitration provisions, we also will not be bound by them. In addition, if you elect to opt-out of these arbitration provisions, we may terminate your use of the Service. If we terminate your use of the Service, we will provide you with a refund of any fees you have paid and have not been used in connection with the Service.

S. Amendments. These Terms of Use may be amended by the Company from time to time. We will post any material changes to these Terms of Use on the Site with a notice advising of the changes. You may cancel your account within thirty (30) days following the date the amended Terms of Use are posted by contacting us using the contact information in Section Z below. If you choose to cancel your account within this thirty (30) day period, you will not be bound by the terms of the revised Terms of Use but will remain bound by terms of these Terms of Use, and, we will provide you with a refund of any fees that you have paid and that have not been used in connection with the Service.

T. No Oral Modifications. Employees of the Company are not authorized to modify these Terms of Use, either verbally or in writing. If any employee of the Company offers to modify these Terms of Use, he or she is not acting as an agent for the Company or speaking on our behalf. You may not rely, and should not act in reliance on, any statement or communication from an employee of the Company or anyone else purporting to act on our behalf.

U. No Third Party Beneficiaries. These Terms of Use are between you and the Company. There are no third party beneficiaries.

V. Independent Contractors. No agency, partnership, joint venture, or employment is created as a result of these Terms of Use and you do not have any authority of any kind to bind the Company in any respect whatsoever.

W. Non-Waiver. The failure of either party to exercise in any respect any right provided for herein shall not be deemed a waiver of any further rights hereunder.

X. Force Majeure. The Company shall not be liable for any failure to perform its obligations hereunder where the failure results from any cause beyond the Company's reasonable control, including, without limitation, any mechanical, electronic or communications failure or degradation.

Y. Severability. If any provision of these Terms of Use is found to be unenforceable or invalid, that provision shall be limited or eliminated to the minimum extent necessary so that these Terms of Use shall otherwise remain in full force and effect and enforceable.

Z. Contact Us. If you have any questions about these Terms of Use, you may contact us by email at termsofuse@offenderconnect.com or by postal mail at c/o Global Tel*Link Corporation, 12021 Sunset Hills Road, Suite 100, Reston, Virginia 20190, Attn: Legal Department.

AA. Assignment. These Terms of Use are not assignable, transferable or sublicensable by you except with our prior written consent. We may transfer, assign or delegate these Terms of Use and our related rights and obligations without obtaining your consent.

EXHIBIT B

Terms of Use

DSI-ITI, LLC, a wholly-owned subsidiary of Global Tel*Link Corporation, is the provider of the Offender Connect service and the operator of the website located at the url www.offenderconnect.com (the "Site"). These Terms of Use apply when you access, visit or use the Site or use any of the products or services that DSI-ITI, LLC, or its affiliates, Global Tel*Link Corporation, Public Communications Services, Inc., and Value-Added Communications, Inc. (individually "Affiliate" and collectively "Affiliates") provide, including My Phone Account, Offender Trust Fund, Send An Email and Offender Phone Account (the Site and these products and services will be referred to in these Terms of Use as the "Service"). For purposes of these Terms of Use, "Company", "we", "us", or "our", means DSI-ITI, LLC, and any Affiliate where the Affiliate or its products or services are implicated.

A. Acceptance of these Terms of Use by Users of the Site. By using the Service, or clicking the "accept" button when you register to use the Service through the Site or when you are otherwise prompted to do so, you agree to be bound by the terms of these Terms of Use.

B. Eligibility. The Service is intended for individuals who are at least eighteen (18) years old. If you are not at least eighteen (18) years old, please do not access, visit or use the Service.

C. Your Privacy Rights. In connection with your use of the Service, please review the Your Privacy Rights statement ("Privacy Statement")***[INTERNAL NOTE -- PLEASE HYPERLINK THE WORDS YOUR PRIVACY RIGHTS SO IT DIRECTS THE USER TO THE PRIVACY POLICY – ALSO PLEASE DELETE THIS INTERNAL NOTE]*** in order to understand how we use information we collect from you when you access, visit or use the Service. The Privacy Statement is part of and is governed by these Terms of Use and by accepting the Terms of Use, you agree to be bound by the terms of the Privacy Statement, and agree that we may use information collected from you in accordance with the Privacy Statement.

D. Registration. As a condition of using certain features of the Service, you may be required to register through the Site and select a password and user I.D. You may not: (1) select or use as a user I.D. a name of another person with the intent to impersonate that person; (2) use as a user I.D. a name subject to any rights of a person other than you without appropriate authorization; or (3) use as a user I.D. a name that is otherwise offensive, vulgar or obscene. We reserve the right to refuse registration of, or to cancel a user I.D., in our sole discretion. You shall be responsible for maintaining the confidentiality of your user I.D. and password.

E. Prohibited Activities. You may not access or use the Service for any purpose other than the purpose for which we make it available to you. We may prohibit certain activities in connection with the Service in our discretion. These prohibited activities include, without limitation, the following:

- Criminal or tortious activity, including child pornography, fraud, trafficking in obscene material, drug dealing, gambling, harassment, stalking, spamming, copyright infringement, patent infringement, or theft of trade secrets.
- Advertising to, or solicitation of, any user to buy or sell any products or services.
- Transmitting chain letters or junk email to other users.
- Using any information obtained from the Service in order to contact, advertise to, solicit or sell any products or services to any user without their prior explicit consent.
- Engaging in any automated use of the Service, such as using scripts to send comments or messages.
- Interfering with, disrupting or creating an undue burden on the Service or the networks or services connected to the Service.
- Attempting to impersonate another user or person.
- Using the user I.D. or account of another user.
- Using any information obtained from the Service in order to harass, abuse or harm another person.
- Accepting payment of anything of value from a third person in exchange for your performance of any commercial activity on or through the Service on behalf of that person.
- Using the Service in a manner inconsistent with any and all applicable laws and regulations.

F. Management of the Service. You acknowledge that we reserve the right, but have no obligation, to (1) take appropriate legal action against anyone who, in our sole determination, violates these Terms of Use, including, without limitation, reporting you to law enforcement authorities, (2) in our sole discretion and without limitation, refuse, restrict access to or availability of, or disable all or a portion of the Service, and (3) otherwise manage the Service in a

manner designed to protect the rights and property of the Company and users of the Service and to facilitate the proper functioning of the Service.

G. Monitoring of Calls Made and Email Sent through the Service. You acknowledge and agree that we may, and the correctional facility where an offender is incarcerated may, monitor or record calls made using the Service, and read emails sent using the Service, for law enforcement purposes in accordance with the policies in place at the correctional facility where an offender is incarcerated. By accepting these Terms of Use you authorize us, and the applicable correctional facility, to monitor and record calls you make through the Service and to read emails you send through the Service in accordance with the policies in place at the applicable correctional facility.

H. Use of the Service. The Service and its contents and the trademarks, service marks and logos contained on the Service, are the intellectual property of the Company or its licensors and constitute copyrights and other intellectual property rights of the Company or its licensors under U.S. and foreign laws and international conventions. The Service and its contents are provided for your informational, personal, non-commercial use only and may not be used, copied, reproduced, distributed, transmitted, broadcast, displayed, sold, licensed, or otherwise exploited for any other purpose whatsoever without the express written consent of the Company. You agree not to engage in the use, copying or distribution of the Service or of any of its contents for any commercial purpose. You agree not to circumvent, disable or otherwise interfere with security related features of the Service. We may, but are not obligated to, periodically provide updates to the Service to resolve bugs or add features and functionality. You do not acquire any ownership rights to the Service or to any contents contained on the Service. All rights not expressly granted in these Terms of Use are reserved by the Company. You are solely responsible for your interactions with other users of the Service.

I. Termination of Your Use of the Service. We may suspend or terminate your use of the Service if you violate these Terms of Use or in our discretion. We may also impose limits on or restrict your access to parts or all of the Service without notice or liability.

J. Charges for the Service. Fees will apply to your use of certain features of the Service, including any calls that are made through the Service. The fees and charges may vary based on, among other things, the correctional facility where an offender is incarcerated. We reserve the right to change the fees charged periodically, in our discretion.

K. Submissions. If you submit opinions, suggestions, feedback, images, documents, and/or proposals to us through the Service, or through any other communication with us, you acknowledge and agree that: (1) the submissions you provide will not contain confidential or proprietary information; (2) we are not under any obligation of confidentiality, express or implied, with respect to the submissions you provide; (3) we shall be entitled to use or disclose (or choose not to use or disclose) the submissions you provide for any purpose, in any way, in any media worldwide; (4) the submissions you provide will automatically become the property of the Company without any obligation of the Company to you; and (5) you are not entitled to any compensation or reimbursement of any kind from the Company in connection with your submissions under any circumstances.

L. Links to Other Websites. The Service may contain links to third-party websites, resources or data. You acknowledge and agree that the Company is not responsible or liable for: (1) the availability or accuracy of these third-party websites, resources or data; or (2) the content, products, or services on or available from these websites, resources or data. You also acknowledge that you are solely responsible for, and assume all risk arising from, the use of any these websites, resources and data. Links to third party websites on the Service are not intended as endorsements or referrals by the Company of any products, services or information contained on the applicable websites. These Terms of Use do not apply to third party websites, including the content of and your activity on those websites. You should review third-party websites' terms of service, privacy policies and all other website documents, and inform yourself of the regulations, policies and practices of third-party websites.

M. Disclaimer of Warranties. THE INFORMATION CONTAINED IN AND PROVIDED THROUGH THE SERVICE, INCLUDING TEXT, GRAPHICS, LINKS, OR OTHER ITEMS, IS PROVIDED "AS IS". NEITHER THE COMPANY NOR ITS SUPPLIERS WARRANT THE ACCURACY, ADEQUACY, COMPLETENESS OR TIMELINESS OF THE INFORMATION, MATERIALS, PRODUCTS, AND SERVICES ACCESSED ON OR THROUGH THE SERVICE AND THE COMPANY EXPRESSLY DISCLAIMS LIABILITY FOR ERRORS OR OMISSIONS IN THE INFORMATION OR MATERIALS ACCESSED ON OR THROUGH THE SERVICE. NO WARRANTY OF ANY KIND, WHETHER IMPLIED OR EXPRESSED, INCLUDING BUT NOT LIMITED TO THE WARRANTIES OF NON-INFRINGEMENT, TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND FREEDOM FROM COMPUTER VIRUS, IS GIVEN IN CONJUNCTION WITH ANY INFORMATION, MATERIALS, OR SERVICES

PROVIDED THROUGH THE SERVICE.

N. **Limitation of Liability**. IN NO EVENT SHALL THE COMPANY OR ITS THIRD PARTY SUPPLIERS BE LIABLE FOR ANY DAMAGES, LOSSES OR LIABILITIES INCLUDING, WITHOUT LIMITATION, DIRECT OR INDIRECT, PUNITIVE, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR OTHER DAMAGES, LOSSES OR EXPENSES, INCLUDING ANY LOST PROFITS, LOST DATA, OR LOST SAVINGS, WHETHER BASED ON BREACH OF CONTRACT, BREACH OF WARRANTY, TORT OR ANY OTHER LEGAL THEORY, ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE USE OF THE SERVICE OR RELIANCE ON OR USE OR INABILITY TO USE THE INFORMATION, MATERIALS OR SERVICES PROVIDED THROUGH THE SERVICE, OR IN CONNECTION WITH ANY FAILURE OF PERFORMANCE, ERROR, OMISSION, INTERRUPTION, DEFECT, DELAY IN OPERATION OR TRANSMISSION, COMPUTER VIRUS OR LINE OR SYSTEM FAILURE, EVEN IF THE COMPANY OR ITS THIRD PARTY SUPPLIERS ARE ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, LOSSES OR EXPENSES.

O. **Unauthorized Transactions.** In the event that you use a credit card to pay for any products or services offered through the Site, you are representing to the Company that you are authorized to use that credit card.

P. **Indemnification.** You agree to defend, indemnify and hold the Company harmless from and against any and all claims, damages, and costs including attorneys' fees, arising from or related to your use of the Service.

Q. **Dispute Resolution.**

1. **Arbitration**. The parties shall use their best efforts to settle any dispute, claim, question, or disagreement directly through consultation and good faith negotiations which shall be a precondition to either party initiating a lawsuit or arbitration. All claims arising out of or relating to these Terms of Use (including its formation, performance and breach) and the Service shall be finally settled by binding arbitration, excluding any rules or procedures governing or permitting class actions. The arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve all disputes arising out of or relating to the interpretation, applicability, enforceability or formation of these Terms of Use, including, but not limited to any claim that all or any part of these Terms of Use is void or voidable. The arbitrator shall be empowered to grant whatever relief would be available in a court under law or in equity. The arbitrator's award shall be binding on the parties and may be entered as a judgment in any court of competent jurisdiction. To the extent the filing fee for the arbitration exceeds the cost of filing a lawsuit, we will pay the additional cost.

The parties understand that, absent this mandatory provision, they would have the right to sue in court and have a jury trial. They further understand that, in some instances, the costs of arbitration could exceed the costs of litigation and the right to discovery may be more limited in arbitration than in court.

2. **Class Action Waiver.** The parties further agree that any arbitration shall be conducted in their individual capacities only and not as a class action or other representative action, and the parties expressly waive their right to file a class action or seek relief on a class basis. If any court or arbitrator determines that the class action waiver set forth in this paragraph is void or unenforceable for any reason or that an arbitration can proceed on a class basis, then the arbitration provision set forth above shall be deemed null and void in its entirety and the parties shall be deemed to have not agreed to arbitrate disputes.

3. **Exception - Litigation of Small Claims Court Claims.** Notwithstanding the parties' decision to resolve all disputes through arbitration, either party may also seek relief in a small claims court for disputes or claims within the scope of that court's jurisdiction.

4. **Thirty Day Right to Opt Out.** You have the right to opt-out and not be bound by the arbitration and class action waiver provisions set forth this Section by sending written notice of your decision to opt-out to the following address: c/o Global Tel*Link Corporation, 12021 Sunset Hills Road, Reston, Virginia 20190, Attn: Legal Department. The notice must be sent within thirty (30) days of the date you have agreed to Terms of Use; otherwise you shall be bound to arbitrate disputes in accordance with the terms set forth

above. If you elect to opt-out of these arbitration provisions, we also will not be bound by them. In addition, if you elect to opt-out of these arbitration provisions, we may terminate your use of the Service. If we terminate your use of the Service, we will provide you with a refund of any fees you have paid and have not been used in connection with the Service.

R. Amendments. These Terms of Use may be amended by the Company from time to time. We will post any material changes to these Terms of Use on the Site with a notice advising of the changes. You may cancel your account within fifteen (15) days following the date the amended Terms of Use are posted by contacting us using the contact information in Section Y below. If you choose to cancel your account within this fifteen (15) day period, you will not be bound by the terms of the revised Terms of Use but will remain bound by terms of these Terms of Use, and, we will provide you with a refund of any fees that you have paid and that have not been used in connection with the Service.

S. No Oral Modifications. Employees of the Company are not authorized to modify these Terms of Use, either verbally or in writing. If any employee of the Company offers to modify these Terms of Use, he or she is not acting as an agent for the Company or speaking on our behalf. You may not rely, and should not act in reliance on, any statement or communication from an employee of the Company or anyone else purporting to act on our behalf.

T. No Third Party Beneficiaries. These Terms of Use are between you and the Company. There are no third party beneficiaries.

U. Independent Contractors. No agency, partnership, joint venture, or employment is created as a result of these Terms of Use and you do not have any authority of any kind to bind the Company in any respect whatsoever.

V. Non-Waiver. The failure of either party to exercise in any respect any right provided for herein shall not be deemed a waiver of any further rights hereunder.

W. Force Majeure. The Company shall not be liable for any failure to perform its obligations hereunder where the failure results from any cause beyond the Company's reasonable control, including, without limitation, any mechanical, electronic or communications failure or degradation.

X. Severability. If any provision of these Terms of Use is found to be unenforceable or invalid, that provision shall be limited or eliminated to the minimum extent necessary so that these Terms of Use shall otherwise remain in full force and effect and enforceable.

Y. Contact Us. If you have any questions about these Terms of Use or your account, you may contact us by email at termsofuse@offenderconnect.com or by postal mail at c/o Global Tel*Link Corporation, 12021 Sunset Hills Road, Suite 100, Reston, Virginia 20190, Attn: Legal Department.

Z. Assignment. These Terms of Use are not assignable, transferable or sublicensable by you except with our prior written consent. We may transfer, assign or delegate these Terms of Use and our related rights and obligations without obtaining your consent.

EXHIBIT C

Terms Of Use Your Privacy Rights

Español | Contact Us Help

Home | Sign Up | Locations | Mobile Features

Access My Account

User ID and Password are case-sensitive.

User ID:

Password:

Log In

Forgot your User ID?
Forgot your Password?

Create My Account

Click to create a ConnectNetwork Account.

Sign Up

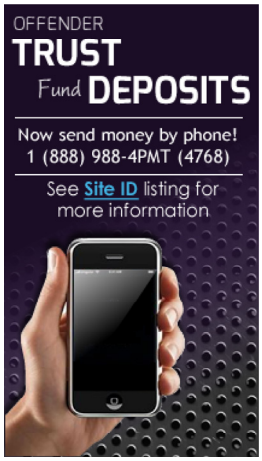
GTL Services

- My Phone Account
- Send an Email

GTL Financial Services

- Offender Trust Fund
- Offender Phone Account
- Arizona Visitation Fee
- Community Corrections

News & Updates



NEWS & UPDATES

• **ATTENTION Existing ConnectNetwork ACCOUNT HOLDERS AND USERS.** The **Terms of Use** and **Your Privacy Rights** that apply to this site and associated products and services were updated on **MARCH 30, 2015**. Please review both documents carefully and let us know of any questions. By using this site or the associated products or services, you acknowledge and agree to the terms contained in both documents. You may access the documents through links appearing at the top of this site.

• **AdvancePay Low Balance Text Alerts** Text ADVANCE to 91613 to sign up. Click here for details

• **ATTENTION Existing ConnectNetwork ACCOUNT HOLDERS.** As of July 2, 2013 the **Terms of Use** and **Privacy Statement** (now entitled **Your Privacy Rights**) that apply to this site and associated products and services were updated. Please review both documents carefully and let us know of any questions using the contact information listed in the documents. By using this site or the associated products or services, you acknowledge and agree to the terms contained in both documents. You may access the documents through links appearing at the top of this site.

• **Attention TDOC (Tennessee Department of Corrections) customers.** PIN Debit (Offender Phone Account) deposits can now be made on ConnectNetwork.com. To make a deposit for a TDOC offender, start by creating an ConnectNetwork account. Please note, **phone account** deposits are available on ConnectNetwork.com.

Deposits to an inmate's trust account, as well as probation, community corrections, and background check payments are provided by TouchPay Holdings, LLC d/b/a GTL Financial Services, which is also the owner and manager of this website. TouchPay Holdings, LLC d/b/a GTL Financial Services is wholly owned by GTL Corp.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBIE JAMES, et al., Plaintiffs, vs. GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE and DSI-ITI LLC, Defendants.	13 Civ. 4989 (WJM) (MF) **CERTIFICATE OF SERVICE**

I hereby certify that on August 7, 2015, the foregoing documents were filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the New Jersey District Court's Local Rules, and/or the New Jersey District's Rules on Electronic Service upon the following parties and participants:

Lindsey H. Taylor , Esq.
Carella, Byrne, Cecchi, Olstein,
Brody & Agnello
5 Becker Farm Road
Roseland, NJ 07068

James A. Plaisted, Esq.
Walder Hayden & Brogan
5 Becker Farm Road
Roseland, NJ 07068

/s/ Philip R. Sellinger
Philip R. Sellinger
Aaron Van Nostrand
GREENBERG TRAURIG, LLP
200 Park Avenue
Florham Park, New Jersey 07932
Attorneys for Defendants
*Global Tel*Link Corporation and DSI-ITI LLC*

Dated: August 7, 2015

Attachment 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BOBBIE JAMES, et al., **Plaintiffs,** **v.** **GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE and DSI-ITI LLC,** **Defendants.**	Civ. No. 13-4989 (WJM) **ORDER**

THIS MATTER comes before the Court on the Defendants' motion to compel arbitration and stay this proceeding; for the reasons set forth in the accompanying opinion; and for good cause shown;

IT IS on this 11th day of February 2016, hereby,

ORDERED that Defendants' motion to compel arbitration is **GRANTED** as to Plaintiff Crystal Gibson and that the action as to Ms. Gibson is stayed pending conclusion of the arbitration; and it is further

ORDERED that Defendants' motion to compel arbitration and stay this proceeding is **DENIED** as to the remaining Plaintiffs.

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

Attachment 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BOBBIE JAMES, et al., **Plaintiffs,** **v.** **GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE and DSI-ITI LLC,** **Defendants.**	Civ. No. 13-4989 (WJM) **OPINION**

This matter comes before the Court on Defendants' motion to compel arbitration and stay this proceeding in the interim. The Plaintiffs bring this putative class action over fees charged by the Defendants for phone calls made by inmates from pay phones in New Jersey correctional institutions. The Court decides this motion without oral argument. Fed. R. Civ. P. 78(b). For the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** the Defendants' motion.

I. BACKGROUND

A. Factual Background

Global Tel*Link Corporation, Inmate Telephone Service, and DSI-ITI LLC (collectively, "the Defendants" or "GTL") manage telecommunications services at state and local correctional facilities in New Jersey and other states. (Complaint ¶ 12, ECF No. 1.) The Defendants are all Delaware corporations, and Plaintiffs allege that they operate as a single economic unit. (*Id.* ¶¶ 14-16.) The State of New Jersey gave GTL the exclusive right to provide telecommunications services for inmates so that they may communicate with family, friends, and other approved persons outside the prisons. (*Id.*) GTL's service can be accessed by users telephonically through an interactive voice response ("IVR") system—using standardized scripts and prompts—or via GTL's website. (Declaration of John W. Baker ("Baker Dec'l") ¶ 2, ECF No. 95-2.) Through either of these methods, users can sign up for an account and deposit funds. (*Id.*)

Those who create an account through GTL's website are shown a copy of GTL's Terms of Use ("TOU") within their browser, and the user must click a button labeled "Accept" in order to complete the account creation process. (*Id.*) In contrast, users of the IVR system receive the following notice over the phone:

> Please note that your account, and any transactions you complete, with GTL, PCS, DSI-ITI, or VAC are governed by the terms of use and the privacy statement posted at www.offenderconnect.com. The terms of use and the privacy statement were most recently revised on July 3, 2013.

(*Id.*) GTL states that every user of the IVR service receives this notice before he or she can proceed to the remainder of the options. (Defendants' Brief in Support of Motion to Compel Arbitration ("Def. Brief") at 13.) However, unlike the website, users of the IVR system do not have to affirmatively register assent to the TOU. (*See* Baker Dec'l ¶ 2.)

The TOU contains an arbitration agreement and a corresponding class-action waiver. (*Id.* ¶ 4.) Users have thirty days in which to opt-out of both of these provisions. (Baker Dec'l, Ex. A ("TOU") § R(4), ECF No. 95-2.) The TOU also notes that use of the service (or clicking "Accept" when registering online) constitutes acceptance of the terms. (*Id.* §§ A-B.) Similar to the opt-out provisions, users have thirty-days in which to cancel their account if they do not agree to the TOU's terms. (*Id.*) Prior to July 2013, the TOU stated that GTL may amend the terms and that it would "post any material changes to [the TOU] on [its] Site with a notice advising of the changes." (Baker Dec'l, Ex. B § R, ECF No. 95-2.) Should a user not agree with the updated terms, they have fifteen days within which to cancel their account without being bound by the new TOU. (*Id.*) GTL alleges that a message was posted on its website's frontpage on or about July 2, 2013, informing users of the updated TOU. (Baker Dec'l ¶ 6.) The version of the TOU prior to July 2013 also stated that use of the service constituted acceptance of the terms. (Baker Dec'l, Ex. B § A.)

The plaintiffs in this action (Bobbie James, Crystal Gibson, Betty King, John Crow, and Barbara, Mark, and Milan Skladany, collectively, the "Plaintiffs") are inmates or friends or family of inmates, and used GTL's calling services in order to communicate with their loved ones. (Complaint ¶ 39.) GTL alleges that Crystal Gibson opened an account through GTL's website on July 29, 2014. (Baker Dec'l

¶ 8.) Prior to this, Gibson also opened an account through the IVR system on June 13, 2014, but closed it the same day. (*Id.*) However, Gibson states that she became a customer of GTL in approximately April 2011, but does not provide records for such an account. (Declaration of Crystal Gibson ¶ 2, ECF No. 99-4.) Bobbie James and Barbara and Milan Skladany opened accounts prior to July 2, 2013, but continued using their accounts after this date. (Baker Dec'l ¶ 9.) Betty King opened her first account on October 18, 2006, and closed it on July 9, 2013. She then opened a second account on November 15, 2014, through the IVR system. (*Id.* ¶ 10.) Lastly, GTL has not provided details for accounts opened by Dr. John Crow or Mark Skladany. Though Mr. Skladany's declaration does not state when he began using the service, the Complaint notes that Dr. Crow opened an account with GTL in April 2013. (Complaint ¶ 59.)

B. Procedural Background

The Plaintiffs filed this putative class action in August 2013 alleging violations of the New Jersey Consumer Fraud Act ("NJCFA"), the Federal Communications Act ("FCA"), the Takings Clause of the Fifth Amendment, and various New Jersey public utilities statutes, as well as alleging unjust enrichment and seeking declaratory judgment. GTL moved to dismiss or stay this case, arguing that the Federal Communications Commission ("FCC") has primary jurisdiction. (Docket No. 20.) In an opinion dated September 8, 2014, the Court stayed this proceeding until either: (a) the FCC made a determination as to whether the challenged charges and practices violated the FCA, (b) the Plaintiffs voluntarily dismissed the FCA cause of action, (c) the Plaintiffs failed to file an administrative complaint with the FCC within 90 days from the filing of the D.C. Circuit's opinion, or (d) the parties made a showing of good cause to lift the stay. (Docket Nos. 35, 36.) Following the Court's opinion and order, Plaintiffs moved to withdraw the relevant counts from their complaint that had prompted this Court to stay the action. (Docket No. 38.) On November 26, 2014, GTL filed its answer and then filed an amended answer on March 9, 2015. (Docket Nos. 46, 67.) In the amended answer, GTL raised the possibility of arbitration, noting that some of the Plaintiffs (and the putative class members) may be subject to binding arbitration. (Defendants' Amended Answer at 16, ECF No. 67.) On May 6, 2015, GTL sought leave to file a motion to compel arbitration, which was granted on July 14, 2015. (Docket No. 75.) Subsequently, GTL filed the instant motion. In the interim, after GTL's first answer and prior to the filing of the instant motion, the parties engaged

in discovery pursuant to a scheduling order entered on February 17, 2015. (Docket No. 61.)

II. LEGAL STANDARD

Federal law presumptively favors the enforcement of arbitration agreements. *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 178 (3d Cir. 1999). "The question of arbitrability—whether a[n] . . . agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). In considering the propriety of arbitration, a court must make "a two-step inquiry into (1) whether a valid agreement to arbitrate exists and (2) whether the particular dispute falls within the scope of that agreement." *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005). "When determining both the existence and the scope of an arbitration agreement, there is a presumption in favor of arbitrability." *Id.*

The Third Circuit has held that when arbitrability is apparent on the face of the complaint (and/or documents relied upon in the complaint) a motion to compel arbitration should be analyzed under the Rule 12(b)(6) standard. *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 773–74 (3d Cir. 2013). However, if either the complaint does not facially establish arbitrability or if the non-movant submits enough evidence to put the question of arbitrability in issue, then the motion to compel arbitration "should be judged under the Rule 56 standard." *Id.* Under the summary judgment standard, the moving party must demonstrate that no genuine issue of material fact exists "concerning the formation of the [arbitration agreement]." *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980). Moreover, the court must give the non-moving party the "benefit of all reasonable doubts and inferences." *Id.*

While the moving party has the burden of showing that the parties executed an agreement to arbitrate, *see Schwartz v. Comcast Corp.*, 256 F. App'x 515, 519 (3d Cir. 2007), if the moving party fulfills this showing, the agreement to arbitrate is found presumptively valid and enforceable, 9 U.S.C. § 2. Then, it is the non-moving party that bears the burden of proving that the agreement is invalid. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 228-29 (3d Cir. 2012).

III. DISCUSSION

A. Agreement to Arbitrate

"Before a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect." *Par–Knit Mills*, 636 F.2d at 54. Plaintiffs contest this fundamental requirement for the instant motion, arguing that they never assented to the arbitration agreement contained within GTL's TOU.

"To determine whether the parties have agreed to arbitrate, [courts] apply 'ordinary state-law principles that govern the formation of contracts.'" *Century Indem. Co. v. Certain Underwriters at Lloyd's, London, subscribing to Retrocessional Agreement Nos. 950548, 950549, 950646*, 584 F.3d 513, 524 (3d Cir. 2009). The parties have not briefed the issue of choice-of-law. A number of the Plaintiffs in this matter are New Jersey residents and, though the Defendants are incorporated in Delaware with principal places of business in Alabama, they provided their telecommunications services in the State of New Jersey. (Complaint ¶¶ 6-17.) In turn, the parties both cite to and apply New Jersey law in their papers. Consequently, the Court concludes that New Jersey law applies to the issue of contract formation underlying the instant motion.

i. Motion to Strike

Before delving into the merits of GTL's motion, the Court first tackles the motion to strike raised by Plaintiffs in their opposition brief. Plaintiffs ask this Court to strike legal conclusions made by John F. Baker in his declaration. GTL, in turn, asks the Court to strike similar statements in the Plaintiffs' declarations. The Court denies both motions to strike. The Court will *sua sponte* disregard any legal arguments and conclusions in these declarations if and as necessary to its analysis.

Second, Plaintiffs argue that GTL's failure to produce the Post-2013 IVR script in a timely fashion necessitates that the Court exclude it pursuant to Rule 37(c)(1) of the Federal Rules of Civil Procedure. There are five factors to consider when determining whether to exclude evidence for non-disclosure: "(1) the 'prejudice or surprise' of the party against whom the evidence is brought, (2) the ability of that party to cure the prejudice, (3) the extent to which including the evidence would disrupt the orderly and efficient trial of the case, (4) bad faith or willfulness in failing to comply with the court's order, and (5) the importance of the evidence." *Warner Chilcott Labs. Ireland Ltd. v. Impax Labs., Inc.*, No. 8-CV-

6304, 2012 WL 161804, at *2 (D.N.J. Jan. 19, 2012) (citing *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904–05 (3d Cir. 1977)). But, should the evidence be considered critical, its exclusion is deemed an extreme sanction, which should not be normally imposed "absent a showing of willful deception or flagrant disregard of a court order by the proponent of the evidence." *Pennypack*, 559 F.2d at 905.

As a preface, the Third Circuit has directed that cases should be "disposed of on merits whenever practicable." *Hill v. Williamsport Police Dep't.*, 69 F. App'x 49, 51 (3d Cir. 2003). There is certainly warrant to Plaintiffs' argument that GTL should have produced the entirety of the IVR script in its original motion. However, as to Plaintiffs' assertion that the script should have been produced before the motion, fact discovery was still open when the instant motion was filed, (*See* Docket No. 102), and the Plaintiffs have not cited to—nor has the Court been able to find—an instance where evidence was stricken prior to the closing of discovery. In addition, the script is critical evidence, as it is the basis on which the Court must decide whether GTL and its users agreed to arbitrate their disputes. *See infra* at 8. Excluding the scripts would, thus, hamper an orderly adjudication of GTL's motion by the Court. Lastly, while the record demonstrates that discovery between the parties has been contentious to some degree, the Court fails to find evidence that GTL acted with "bad faith or willfulness in failing to comply" with this Court's discovery orders. Therefore, the Court denies Plaintiffs' motion to strike the Post-2013 IVR scripts.

ii. Accounts Created via the Phone

Because users of GTL's system can create and use their accounts by way of either the IVR service or the website, there are two distinct methods through which Plaintiffs could provide their assent to the arbitration clause within the TOU. The Court will, thus, tackle each medium separately in order to determine whether Plaintiffs made an "express, unequivocal agreement" to arbitrate their claims.

Plaintiffs James, King, and Barbara and Milan Skladany created their accounts through the IVR system.[1] As a threshold matter, the parties have not

[1] It appears that Gibson created a short-lived account through the IVR system. However, Plaintiffs have not made clear whether Gibson has any claims arising from this account. Should such claims exist, the reasoning here would apply equally to any obligation Gibson has to arbitrate such claims.

pointed to and the Court is unaware of any decisions that have addressed the issue of contract formation through an automated phone service—where users are notified of the existence of a service's terms and conditions over the phone and are, subsequently, bound by them. In this case, GTL informed users—on every call—that the service they were providing was governed by a TOU and where users could obtain these terms—on its website. (*See* Baker Dec'l ¶ 2.) However, users were not required to engage in any affirmative conduct to demonstrate acceptance of the TOU. Based on this, Plaintiffs argue that they cannot be ordered to arbitrate, as they did not have "full knowledge of [their] legal rights" and did not assent "to surrender those rights." *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442 (2014) *cert. denied*, 135 S. Ct. 2804 (2015).

As with any other contract, for an agreement to arbitrate to be "legally enforceable" the parties must (i) "agree on essential terms and [(ii)] manifest an intention to be bound by those terms," *i.e.* the contract must be the product of mutual assent and requires a "meeting of the minds." *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 435 (1992) (*cited with approval in Elliott & Frantz, Inc. v. Ingersoll-Rand Co.*, 457 F.3d 312, 323 (3d Cir. 2006)); *see also Atalese*, 219 N.J. at 442. Agreement is predicated on the parties being "fairly informed of the contract's terms before entering into the agreement." *Hoffman v. Supplements Togo Mgmt., LLC*, 419 N.J. Super. 596, 606 (N.J. Super. Ct. App. Div. 2011) (*quoted with approval in Weisman v. New Jersey Dep't of Human Servs.*, 982 F. Supp. 2d 386, 394 (D.N.J. 2013) *aff'd* 593 F. App'x 147 (3d Cir. 2014)). This is the "reasonable notice" standard and it "is a question of law for the court to determine." *Caspi v. Microsoft Network, L.L.C.*, 323 N.J. Super. 118, 126 (N.J. Super. Ct. App. Div. 1999) (*quoted with approval in Liberty Syndicates at Lloyd's v. Walnut Advisory Corp.*, No. 09-CV-1343, 2011 WL 5825777, at *3 (D.N.J. Nov. 16, 2011)). Consequently, the manifestation of assent requires an "unqualified acceptance" on the part of the offeree. *Weichert*, 128 N.J. at 435. Such "[a]cceptance can be express, creating an express contract, or implied by conduct, creating a contract implied-in-fact." *Liberty Syndicates*, 2011 WL 5825777, at *3.

The Court finds that these prerequisites of contract formation are equally applicable to users of telecommunication services, such as the ones in the instant action. *See, e.g., Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) ("While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.") With the proliferation of contracts over the Internet between companies and their end users,

New Jersey courts—state and federal—have applied these fundamental precepts to determine the enforceability of such contracts. *See, e.g.*, *Liberty Syndicates*, 2011 WL 5825777, at *6; *Hoffman*, 419 N.J. Super. at 612; *Holdbrook Pediatric Dental, LLC v. Pro Computer Serv.*, LLC, No. 14-CV-6115, 2015 WL 4476017, at *7 (D.N.J. July 21, 2015). In particular, the Court finds similarity between the method of notice and assent employed by GTL in this case and those used in "browsewrap" agreements, where "by merely using the services of . . . the website [] the user is agreeing to and is bound by the site's terms of service." *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012). In determining the validity of "browsewrap" agreements, courts look to whether users were provided with a "reasonably conspicuous notice of the existence of contract terms" and whether the user registered an "unambiguous manifestation of assent to these terms." *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002); *see also Hoffman*, 419 N.J. Super. at 609 (noting that *Specht's* application of reasonable notice under California law was similar to New Jersey law). Accordingly, the Court will analyze whether "the specifics surrounding agreement revealed either that the user knew or should have known about the existence of the [terms of use] that contained the forum selection clause," *Liberty Syndicates*, 2011 WL 5825777, at *4, and whether Plaintiffs' use of the service is sufficient to manifest assent to the arbitration agreement within.

a) Reasonable Notice of Terms

Plaintiffs were put on constructive notice as to the existence of the TOU and the fact that GTL's service was governed by the terms therein. Since neither party has put forth evidence that any of the Plaintiffs had actual knowledge of the agreement, the Court will instead determine "reasonable notice" based on whether a reasonably prudent user "would have known of the existence" of the arbitration agreement. *Specht*, 306 F.3d at 31. The IVR system provided an audio notice regarding the presence of terms of use at the outset—before customers could proceed to the remainder of the options—and users were informed how they could access the TOU, which was freely available on GTL's website. (*See* Baker Dec'l ¶ 2.) This prominent placement was sufficient to put users on inquiry notice as to the existence of the TOU. *See, e.g.*, *Ticketmaster L.L.C. v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096, 1107 (C.D. Cal. 2007) (finding notice where the homepage displayed a warning regarding the presence of terms of use and the hyperlink to the terms were available on every page). *Cf. Specht*, 306 F.3d at 31 (finding reasonable notice lacking where the terms were placed on a "submerged

screen" and "did not carry an immediately visible notice of [their] existence"); *In re Zappos.com, Inc. Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058, 1064 (D.Nev. 2012) (finding lack of notice regarding the Terms and Conditions, which were buried in the middle to bottom of every page and amongst other links); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) *aff'd* 380 F. App'x 22 (2d Cir. 2010) (same). Moreover, the message was repeated each time a user called into the service. *See, e.g., Verio*, 356 F.3d at 401 (imputing knowledge of the terms of use based on the users' repeated use of the site and exposure to the accompanying notice); *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C 04–04825, 2005 WL 766610, at *5 (N.D. Cal. Apr. 1, 2005) (finding reasonable notice where every page had a notice stating the existence of the "Terms of Use.") The medium employed by the parties to transact their business necessitates a consideration of what qualifies as reasonable and, as Plaintiffs acknowledge, it would be "virtually impossible for the terms and conditions including the arbitration clause to be available to a customer on the phone."[2] (Plaintiffs' Opposition to Motion to Compel Arbitration ("Pl. Opp.") at 12, ECF No. 99.) Thus, the Court finds that GTL's notice was sufficient to draw a reasonably prudent user's attention to the existence of the TOU and the arbitration clause within, presenting it in a conspicuous manner in light of the medium of communication used by GTL's service.

b) Unqualified Assent

Moving to the second prerequisite—acceptance—the Court is faced with two separate issues: (i) whether New Jersey law allows for assent through use and (ii) whether the notice needed to inform users that they were providing acceptance in this fashion.[3] Under New Jersey law, "[s]ilence does not ordinarily manifest

---

[2] Similarly, Plaintiffs' assertion that the IVR notice should have informed users as to the presence of the arbitration clause within the TOU is unavailing. "Arbitration clauses are not singled out for more burdensome treatment than other waiver-of-rights clauses under [New Jersey] state law." *Atalese*, 219 N.J. at 444. Plaintiffs provide no reason why the arbitration provision should have been distinguished for inclusion on the IVR notice and to find that Plaintiffs "are not bound by [the arbitration] clause would be equivalent to holding that they were bound by no other clause either." *Caspi*, 323 N.J. Super. at 126.

[3] Plaintiffs argue that GTL should have required users to provide their assent through the IVR system—for example, by pressing a number on their keypad to register acceptance of the TOU. Plaintiffs' argument is unpersuasive. For one, New Jersey law does not require that assent be provided in this way. Second, any assent procured by asking users to agree to terms they have not had the opportunity to review would be plainly void.

assent, but the relationships between the parties or other circumstances may justify the offeror's expecting a reply and, therefore, assuming that silence indicates assent to the proposal." *Weichert*, 128 N.J. at 436-37 (1992) (citing *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 539 (1953)). Courts in New Jersey (both state and federal) have extended the principle of assent through silence to "use," finding assent where the offeree was given notice of terms and proceeded to use the services of the offeror. *See, e.g., Novack v. Cities Service Oil Co.*, 149 N.J. Super. 542, 548 (N.J. Super. Ct. Ch. Div. 1977) *aff'd sub nom. Novak v. Cities Serv. Oil Co.*, 159 N.J. Super. 400 (N.J. Super. Ct. App. Div. 1978) (finding that "acceptance or use of the card by the [cardholder] makes a contract between the parties according to" the terms of the cardholder agreement); *CACH of NJ, LLC v. Bode*, No. A-1137-13T3, 2014 WL 7192550, at *2 (N.J. Super. Ct. App. Div. Dec. 19, 2014) ("Use of a credit card creates a contract between the parties according to its terms"); *Ellin v. Credit One Bank*, No. 15-CV-2694, 2015 WL 7069660, at *3 (D.N.J. Nov. 13, 2015) (same).[4]

However, in order for silence or use to establish assent, the offeror must "give[] the offeree reason to understand that assent may be manifested" in such a way. *Restatement (Second) of Contracts* § 69 (1981). Surveying the landscape of "browsewrap" cases, the Ninth Circuit noted that "courts have been more amenable to enforcing browsewrap agreements" "where the website contains an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound" by the terms of use. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014); *see also Cairo*, 2005 WL 756610, at *2, *4–5 (enforcing forum selection clause in website's terms of use notice stated: "By continuing past this page and/or using this site, you agree to abide by the Terms of Use for this site, which prohibit commercial use of any information on this site.") Courts base enforceability on such a notice because "conduct of a party is not

[4] Plaintiffs contend that any assent obtained through use would be limited only to the offer's essential terms, which would not include an arbitration clause. *See Weichert*, 128 N.J. at 437. The Court does not find this argument compelling, as New Jersey courts have included and enforced mandatory arbitration provisions that are part of agreements procured in such a manner. *See, e.g., Ellin*, 2015 WL 7069660, at *3 (affirming validity of agreement that put plaintiff on notice regarding the agreement's arbitration clause and denoted acceptance by using the credit card's services); *MBNA Am. Bank, N.A. v. Bibb*, No. A-4087-07T2, 2009 WL 1750220, at *4 (N.J. Super. Ct. App. Div. June 23, 2009) (stating that defendant was required to arbitrate with the plaintiff bank since the credit card agreement specified that "when defendant 'use[]d [the] account, [she] agree[d] to' its terms.")

effective as a manifestation of his assent unless he . . . knows or has reason to know that the other party may infer from his conduct that he assents." *Restatement (Second) of Contracts* § 19 (1981). Since a contract is formed and a user is bound by the terms and conditions immediately upon using the service, such explicit notice at the outset forms the necessary predicate to establishing an "unambiguous manifestation of assent" to those terms.

Here, users were given notice that GTL's service was "governed by the terms of use." But, the IVR notification did not inform them that use of the service alone constituted an acceptance of these terms. (*See* Baker Dec'l ¶ 2.) "Unqualified acceptance" is incumbent on each party understanding at the moment of contract formation—from when they will be bound by the terms—the manner in which they are providing assent. Without being put on notice that their use would be interpreted as agreement, a reasonably prudent user of the IVR service had neither the knowledge nor intent necessary to provide "unqualified acceptance."[5] *See Be In, Inc. v. Google Inc.*, No. 12-CV-03373-LHK, 2013 WL 5568706, at *9 (N.D. Cal. Oct. 9, 2013) (stating that because only a link was provided to the terms of use there was no grounds to find that defendants were put on notice that mere use constituted assent); *Holdbrook*, 2015 WL 4476017, at *6 (finding no enforceable contract where "there [was] no statement that signing the agreement indicated acceptance of the "Terms and Conditions," nor [was] there an instruction to sign the contract only if [offeree] agreed to the additional terms.") Consequently, without an understanding that they were accepting to be bound by the TOU, which included an agreement to arbitrate, there was no "legally enforceable contract" created between GTL and the Plaintiffs.

---

[5] Though the first clause of the TOU informed users that their use of the service would constitute acceptance of the terms, such notification was in essence too late—occurring after GTL intended to bind its users to the agreement. *See Hines*, 668 F. Supp. 2d at 367. Similarly, unlike in *Verio*—where the Second Circuit found that repeatedly receiving a notice of terms after the defendant made its query (*i.e.* called into the service) was sufficient to ascribe notice, and thus ameliorating the *ex post facto* nature of the notice—the IVR notification's essential failure to inform callers that their assent would be garnered through use cannot be remedied by relying on the fact that users heard the notice on multiple occasions. *See Verio*, 356 F.3d at 401-02 (finding that defendant was bound by terms where notice informed accessors of the data that submission of their query constituted assent to the plaintiff's terms and that defendant repeatedly saw this message in its daily access of data).

iii. Assent to Updated Terms of Service

Since Plaintiffs who used GTL's IVR service did not manifest assent to the TOU, it is axiomatic that they did not agree to the clause allowing the company to modify the terms on a one-party basis and delineating the manner by which users would be notified of such amendments. Thus, even though GTL alerted IVR users as to when the TOU was last updated, such notification—based on a non-enforceable contract and without telling users that use constituted assent to the amended terms—was insufficient to bind users to the arbitration clause contained within the modified TOU. *Cf. Coiro v. Wachovia Bank, N.A.*, No. 11-CV-3587, 2012 WL 628514, at *3 (D.N.J. Feb. 27, 2012) (finding that plaintiff was bound by arbitration clause in modified agreement where the initial agreement stated that defendants could modify the terms of the agreement so long as plaintiff had thirty-day notice within which to close her account if she disagreed); *Mayer v. Verizon New Jersey, Inc.*, No. 13-CV-3980 (D.N.J. May 6, 2014), ECF No. 31 (finding acceptance of amendments through continued use of services).

iv. Accounts Opened Through the Internet

According to GTL's records, Gibson was the only plaintiff that created an account through its website. (*See* Baker Dec'l ¶ 8.) As part of this process, GTL asserts that, on a desktop computer, Gibson would have been presented with all of the terms of the TOU on the screen and she was required to click an "Accept" button in order to move forward in the account creation process.[6] (*See id.* ¶ 2.) Gibson confirms this in her declaration, stating that she "check[ed] off the box for the terms of service" when she setup her account over the Internet. (Gibson Dec'l ¶ 7.) This form of electronic contract is referred to as a "clickwrap" agreement, where users are required to take affirmative action to manifest assent and are informed that such action will comprise their assent to the displayed terms. *See Liberty Syndicates*, 2011 WL 5825777, at *4. Numerous courts, including in this District, have enforced such agreements. *See, e.g., Davis v. Dell, Inc.*, No. 07-CV-630, 2007 WL 4623030, *4-5 (D.N.J. Dec. 28, 2007) *aff'd*, No. 07-630 (RBK), 2008 WL 3843837 (D.N.J. Aug. 15, 2008); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 237 (E.D. Pa. 2007); *TradeComet.com LLC v. Google, Inc.*, 693 F. Supp. 2d 370, 377–78 (S.D.N.Y. 2010). Therefore, since Gibson was presented with all

[6] Since Gibson would have been presented with only this version of the site (and not the mobile version that went live in December 2014), the Court will restrict its analysis accordingly.

of the terms of the TOU—giving reasonable notice of the arbitration agreement—and because Gibson provided her assent to the TOU, she is required to arbitrate her claims against GTL, which fall under the broad scope of the arbitration clause. *See, e.g.*, *Caspi*, 323 N.J. Super. at 122 (affirming lower court's decision to enforce arbitration clause where agreement "appear[d] on the computer screen in a scrollable window next to blocks providing the choices 'I Agree' and 'I Don't Agree'" and proceeding with registration required assent, which plaintiff provided.)

B. Duress

Because the Court has determined that Gibson assented to arbitrate her claims against the Defendants, the Court will now analyze whether such assent was garnered by GTL under duress and whether GTL waived its right to arbitrate the claims.[7] Section 2 of the Federal Arbitration Act ("FAA") "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Concepcion*, 563 U.S. at 339. These grounds include 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Id.* "The FAA 'instructs courts to refer to principles of applicable state law' in order to determine the standards for such contract defenses." *Trippe*, 401 F.3d at 532.

In its reply, GTL argues that because the arbitration clause contains a "delegation provision" any affirmative defense as to the invalidity of the arbitration clause must be referred to the arbitrator, basing the argument on the Supreme Court's holding in *Rent-A-Center, West, Inc. v. Jackson*. 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). However, the Third Circuit distinguished the Supreme Court's holding in *Rent-A-Center*, leaving it inapplicable to the instant action. *Quilloin*, 673 F.3d 221.

In *Rent-A-Center* the plaintiff, signed a contract to arbitrate disputes arising out of his employment, which contained within it an agreement to arbitrate arbitrability—a delegation clause similar to the one in the instant action. *Id.* at 65. As the Third Circuit opined, due to "the confusion caused by an agreement to

[7] Though the duress and waiver defenses are only applicable to Gibson (as described by the Court *supra*), since these defenses were raised by all of the Plaintiffs and Plaintiffs bring this suit on behalf of a putative class, the Court will continue referring to Plaintiffs collectively with respect to these defenses.

arbitrate nested within another agreement to arbitrate, the *Rent-A-Center* Court found it necessary to distinguish between the overall arbitration agreement [(the contract to arbitrate)], and the agreement to arbitrate arbitrability [(the delegation clause)]." *Quilloin*, 673 F.3d at 229. The Supreme Court's decision, thus, turned on the fact that "the plaintiff 'challenged only the validity of the contract as a whole' rather than the validity of the delegation clause," and under prior jurisprudence the question of arbitrability of the contract itself "must go to an arbitrator." *Id.*

Here, Plaintiffs have taken care to raise their duress argument specifically towards the arbitration clause and not the TOU as a whole. When "a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under" the FAA. *Rent-A-Center*, 561 U.S. at 71.

Having determined that the duress argument is a threshold matter for the Court to resolve, the Court finds Plaintiffs' argument unpersuasive. Under New Jersey law, the determination of duress is a two-part test: (1) a demonstration that the victim of the duress was subject to a wrongful or unlawful act or threat, and (2) that such act or threat must be one which deprives the victim of his unfettered will. *See Cont'l Bank of Pa. v. Barclay Riding Academy*, 93 N.J. 153, 176 (1983). "The key factor in determining whether duress exists is 'the wrongfulness of the pressure exerted.'" *Recchia v. Kellogg Co.*, 951 F. Supp. 2d 676, 683 (D.N.J. 2013). However, the wrongful act must entail more than "merely taking advantage of another's financial difficulty." *Cont'l Bank*, 93 N.J. at 177. Instead, the party accused of coercion must have "contributed to or caused" the financial difficulty claimed. *Id.* at 177.

The Court finds that Plaintiffs have failed to demonstrate the first prong of this test. GTL's service was not the only method by which it was possible to contact inmates. Putting aside in-person visits and mail, inmates could have communicated through collect calls or by the use of funds deposited in their commissary accounts, both of which would allow the inmate to call directly. Focusing on the arbitration clause, Plaintiffs were provided thirty days in which they could opt-out of both the arbitration and the class-action waiver provisions. Where parties have a choice, but fail to act upon it, it cannot be said that they were deprived of their "unfettered will."

C. Waiver

Plaintiffs also argue that GTL's decision to wait two years before filing the instant motion amounts to a waiver of the right to arbitrate. The Third Circuit has held that if "a party has acted inconsistently with the right to arbitrate," a court may find that the party has waived its right to enforce an arbitration agreement. *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 208 (3d Cir. 2010) (internal quotation mark omitted). However, the Third Circuit has gone on to state that "[g]iven [the] strong preference to enforce private arbitration agreements, [courts] will not infer lightly that a party has waived its right to arbitrate" and waiver "will normally be found only where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery." *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 451 (3d Cir. 2011) (internal quotation mark omitted). A determination of waiver rests on a finding that the party seeking arbitration has, through their litigation conduct, subjected the non-moving party to sufficient prejudice by failing to promptly arbitrate the dispute.

In *Hoxworth v. Blinder, Robinson & Co.*, the Third Circuit set forth six "nonexclusive" factors that a court may use to guide its prejudice inquiry:

> (1) timeliness or lack thereof of the motion to arbitrate; (2) extent to which the party seeking arbitration has contested the merits of the opposing party's claims; (3) whether the party seeking arbitration informed its adversary of its intent to pursue arbitration prior to seeking to enjoin the court proceedings; (4) the extent to which a party seeking arbitration engaged in non-merits motion practice; (5) the party's acquiescence to the court's pretrial orders; and (6) the extent to which the parties have engaged in discovery.

980 F.2d 912, 926-27 (3d Cir. 1992). All these factors need not be present in order for a court to justify finding waiver, and the court's determination "must be based on the circumstances and context of the particular case." *Nino*, 609 F.3d at 208. After conducting a review of the *Hoxworth* factors, the Court finds that Plaintiffs have failed to demonstrate sufficient prejudice to deem GTL's right to arbitrate as waived.

i. Timeliness and Notice

Plaintiffs' contention is primarily grounded on the length of time between their initiation of this action and GTL seeking leave to file its motion to compel

arbitration—around two years. While Plaintiffs cite to a number of Third Circuit decisions that have found waiver for substantially shorter delays, many of these hinged on the fact that the moving party "offered no explanation . . . for its delay." *See Gray Holdco*, 654 F.3d at 455; *Nino*, 609 F.3d at 210; *see also In re Pharmacy Ben. Managers Antitrust Litig.*, 700 F.3d 109, 118 (3d Cir. 2012); *JPMorgan Chase Bank, N.A. v. Republic Mortgage Ins. Co.*, No. 10-CV-6141, 2012 WL 6005384, at *4 (D.N.J. Nov. 30, 2012). The Third Circuit has stated that "the length of the time between when a party initiates or first participates in litigation and when it seeks to enforce an arbitration clause is not dispositive in a waiver inquiry." *Gray Holdco*, 645 F.3d at 455. Instead, the Third Circuit has asked courts to look to the party's "explanations for its delay." *Id.* GTL offers a satisfactory explanation for waiting approximately two years before bringing the instant motion. *See Thyssen, Inc. v. Calypso Shipping Corp.*, 310 F.3d 102 (2d Cir. 2002) (finding no waiver where defendant did not seek arbitration until more than eighteen months after suit was filed) *cited with approval in Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 598 (3d Cir. 2004).

The first thirteen months of this case were spent on GTL's motion regarding jurisdiction. For nine of those months, the motion was under advisement with the Court, and the Court subsequently agreed with GTL and granted a stay. In light of this, the Court does not feel it is appropriate to count these nine months against GTL. Shortly after the case moved forward, as the Plaintiffs withdrew some of their claims in order to avoid the stay, GTL provided notice in an affirmative defense of its intent to seek arbitration—the third *Hoxworth* factor—and thereafter sought leave to file a motion to compel arbitration. *See Nino*, 609 F.3d at 211 (noting that disclosure of intent to seek arbitration in an answer "is an important consideration . . . for the waiver analysis."); *Healthcare Servs. Grp., Inc. v. Fay*, No. 13-CV-66, 2015 WL 5996940, at *2 (E.D. Pa. Oct. 14, 2015) (finding no waiver where the motion to compel arbitration was not brought until two and a half years after the action was initiated). *Cf. Gray Holdco*, 654 F.3d at 457 (finding prejudice where moving party notified non-movant of intent to arbitrate on the same day that it filed its demand for arbitration with the AAA). While the two-year period would—in the abstract—likely demonstrate a waiver of the right to arbitrate, analyzing the unique procedural history in this action evidences that this time was not spent extending the litigation to prejudice the Plaintiffs.

ii. Contestation of the Merits

The second, fourth, fifth, and sixth *Hoxworth* factors aim to highlight any prejudice suffered by the non-movant as a result of the movant's active engagement in litigation in lieu of seeking arbitration. The second *Hoxworth* factor looks to the "extent to which the party seeking arbitration has contested the merits of the opposing party's claims." 980 F.2d at 927. Though a motion to dismiss can address the merits of the underlying claims, the Court does not find that to be the case here, as GTL's motion was aimed at the threshold issue of jurisdiction. *Cf. Just B Method, LLC v. BSCPR, LP*, No. CIV.A. 14-1516, 2014 WL 5285634, at *10 (E.D. Pa. Oct. 14, 2014); *Republic Mortgage*, 2012 WL 6005384, at *4 (finding waiver after two motions to dismiss and a cross-motion for summary judgment); *Hoxworth*, 980 F.2d at 925-26 (finding waiver after motion to dismiss and opposition to class certification were filed). Additionally, "[t]he Third Circuit has found in the past that a single merits-based motion to dismiss did not waive a right to arbitration." *Serine v. Marshall, Dennehey, Warner, Coleman & Goggin*, No. 14-CV-4868, 2015 WL 4644129, at *3 (E.D. Pa. Aug. 5, 2015) *citing Wood v. Prudential Insurance Company of America*, 207 F.3d 674, 680 (3d Cir. 2000). Consequently, the Court does not find that this factor weighs in favor of waiver.

iii. Non-Merits Motion Practice and Discovery

As to the fourth *Hoxworth* factor—engagement in "non-merits motion practice"—there has been little motion practice with regards to non-merits issues. 980 F.2d at 927. The parties have, however, engaged in a number of discovery-related disputes, which implicates the sixth *Hoxworth* factor—"the extent to which the parties have engaged in discovery." *Id.* In analyzing this factor, the Third Circuit has looked to not only the extent of discovery by the parties, but also whether the movant has engaged in discovery that would have been unavailable in an arbitration, thus prejudicing the non-movant. *Id.* at 926. Third Circuit opinions finding waiver have had significant discovery exchanges, including multiple depositions, interrogatories, documents requests and productions, as well as discovery-related motion practice. *See, e.g.*, *Nino*, 609 F.3d at 213; *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 224 (3d Cir. 2007); *Hoxworth*, 980 F.2d at 925-26; *Gray Holdco*, 654 F.3d at 460.

Here, the discovery, while not *de minimus*, does not rise to a level sufficient to constitute prejudice to the Plaintiffs. For one, a number of the discovery

disputes seem to have been either (i) initiated by the Plaintiffs or (ii) took place after the instant motion was filed. *See Maxum Found., Inc. v. Salus Corp.*, 779 F.2d 974, 983 (4th Cir. 1985) (finding that defendant's participation in discovery and pretrial conferences after it had filed its motion to compel arbitration did not constitute waiver) *discussed with approval in Nino*, 609 F.3d at 212-13. Moreover, the discovery requested by GTL in this case—interrogatories and requests for production—seem to have been pertinent to the issue of arbitration. Lastly, there is no evidence that GTL engaged in any discovery that would not have been available in an arbitration. *See, e.g.*, *Smith v. Lindemann*, No. 10-CV-3319, 2014 WL 835254, at *12 (D.N.J. Mar. 4, 2014); *NN&R, Inc. v. OneBeacon Ins. Grp.*, No. 03-CV-5011, 2006 WL 231596, at *5 (D.N.J. Jan. 30, 2006). *Cf. Smith v. IMG Worldwide, Inc.*, 360 F. Supp. 2d 681, 688 (E.D. Pa. 2005). Consequently, the fourth and sixth factors weigh against finding waiver.

iv. Acquiescence to Pre-Trial Orders

The last factor for the Court to consider is GTL's "acquiescence to the court's pretrial orders," the fifth *Hoxworth* factor. 980 F.2d at 927. GTL has participated without objection in a number of case management conferences, drafted and submitted a Joint Discovery Plan, negotiated a Discovery Confidentiality Order, and even negotiated and agreed to a revised scheduling order approximately a month before the instant motion was filed. *See Nino*, 609 F.3d at 213. Consequently, this is the sole factor that the Court finds weighs for waiver.

However, taken as a whole, the Court does not find that the fifth factor alone pushes the needle far enough to establish that GTL has waived its right to arbitrate. GTL puts forth plausible reasons for its delay in bringing the instant motion and, since the determination of the jurisdiction issue, GTL has acted in a manner consistent with the intent to arbitrate, including providing adequate notice and limiting motion practice and discovery. If "prejudice is the touchstone for determining whether the right to arbitrate has been waived by litigation conduct," *Ehleiter*, 482 F.3d at 222, the Court does not find that the Plaintiffs have been prejudiced to such an extent that a finding of waiver is appropriate here.

D. Stay as to the Remaining Plaintiffs

Lastly, the Court denies GTL's request to stay this proceeding in regards to Plaintiffs Mark Skladany and John F. Crow. Section 3 of the FAA states that if a

Court finds that a matter is "referable to arbitration," "on application of one of the parties [the Court must] stay the [] action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C.A. § 3. However, the Third Circuit has stated that "Section 3 was not intended to mandate curtailment of the litigation rights of anyone who has not agreed to arbitrate any of the issues before the court." *Mendez v. Puerto Rican Int'l Cos.*, 553 F.3d 709, 712 (3d Cir. 2009). As such, the determination of a stay as to parties who have not agreed to arbitrate is in the discretion of the court. *Id.* GTL's stay argument centers on the fact that all of the other named Plaintiffs must arbitrate their claims. GTL argues that staying the proceeding pending the outcome of those arbitrations will save judicial resources. However, as discussed above, the Court finds that only Gibson is required to arbitrate her claims. Since, GTL will be required to continue litigating against the majority of the Plaintiffs, GTL's economy and efficiency arguments are moot. *Cf. Villano v. TD Bank*, No. 11-CV-6714, 2012 WL 3776360, at *9 (D.N.J. Aug. 29, 2012) (granting stay where there was only one non-arbitrating party involved in the litigation). Furthermore, the Court finds that a stay would only serve to materially prejudice the non-arbitrating Plaintiffs. Accordingly, the Court will stay Gibson's claims pending completion of arbitration—as mandated by the FAA—but will decline to stay the claims of the remaining Plaintiffs, who are not bound by the arbitration agreement.

IV. CONCLUSION

For the above reasons, this Court **GRANTS** the Defendants' motion to compel arbitration and stay this proceeding as to Ms. Gibson, but **DENIES** the motion as to the remaining Plaintiffs.

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

Date: February 11, 2016

Attachment 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-61046-CIV-MARRA

JOHN EDWARD POPE, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

EZ CARD & KIOSK LLC (a division of GENERAL PAYMENT SYSTEMS, INC.); and THE CENTRAL BANK OF KANSAS CITY,

Defendants.
_____/

OPINION AND ORDER

This cause is before the Court upon Defendant Central Bank of Kansas City's Motion to Compel Arbitration and Stay or Dismiss Proceedings (DE 21).[1] The Motion is fully briefed and ripe for review. The Court has carefully considered the Motion and is otherwise fully advised in the premises.

I. Background

John Edward Pope ("Plaintiff" "Pope") filed a class action Complaint against Defendants EZ Card & Kiosk, LLC ("EZ Card") and Central Bank of Kansas City ("Central Bank") (collectively, "Defendants") for a violation of the Electronic Funds Transfer Act, 15 U.S.C. § 1693 et seq. (count one), a violation of the Florida Deceptive and Unfair Trade Practices Act, Florida Statute § 501.201 et seq. (count two), conversion (count three) and unjust enrichment (count four). The Complaint alleges the following:

Plaintiff was arrested by the Fort Lauderdale police in November of 2014 and was jailed

[1] Defendant EZ Card & Kiosk, LLC filed a Notice of Joinder of the motion. (DE 31.)

overnight. When booked, the Broward County Jail (the "Jail") confiscated $178 in cash from Plaintiff. Plaintiff was released 17 hours later. When released, the Jail did not return Plaintiff's cash, but gave him a prepaid debit card issued by EZ Card and the Bank of Kansas City. (Compl. ¶ 1.) The Jail did not give Plaintiff the option of receiving his cash back and the prepaid card required Plaintiff to pay EZ Card and the Bank of Kansas City to access his own money. (Compl. ¶ 2.) Defendants required Plaintiff to "pay various exorbitant, unreasonable fees to retrieve the money" taken from him. (Compl. ¶ 4.) Plaintiff used the card to purchase food and other items. (Compl. ¶ 39.)

When Plaintiff was released from custody, the debit card he received had a balance of approximately $128, which was based upon the $178 cash that the Jail confiscated from him the day he was arrested, minus the cost of the bond, the booking fee, the uniform fee and the daily subsistence fee that the Jail charged him. (Compl. ¶ 34.) Released individuals have no choice but to accept the EZ Card debit card in lieu of cash or check. These individuals do not voluntarily engage with the company, enroll in the program or take any affirmative steps to form a contractual relationship with either Defendant. (Compl. ¶ 22.) Plaintiff did not assent to receiving the card over cash and never assented to any terms of contract with Defendants. (Compl. ¶ 35.) The fees applicable to Plaintiff's debit card included: (1) a monthly maintenance charge of $4.95; (2) an ATM balance inquiry fee of $1.99; (3) an ATM withdrawal fee of $2.99; (4) a point of sale fee of $0.99; (5) a card replacement fee of $5.95 and (6) a fee of $4.00 to receive a paper statement. (Compl. ¶ 37.)

Defendant Central Bank has submitted a declaration by Trent Sorbe, the president of the Central Payment Division of Central Bank of Kansas City. (Sorbe Decl. ¶ 1, DE 22.) The

cardholder agreement states that "[b]y retaining and using the Card, you agree to be bound by the terms and conditions contained in this Agreement. (Cardholder Agreement, Ex. A, Sorbe Decl., DE 22.) A similar provision appears on the back of the debit card issued by Central Bank. (Ex. B, Sorbe Decl. DE 22.)

At the top of the cardholder agreement is a statement reading "THIS AGREEMENT CONTAINS AN ARBITRATION PROVISION," which directs the cardholder to the arbitration provision. (Cardholder Agreement.) The arbitration provision defines an arbitrable claim as:

> any claim, dispute or controversy between you and use arising from or relating to the Card or Agreement . . . including the validity, enforceability or scope of this Arbitration Provision or the Agreements. "Claim" includes claims of every kind and nature, including but not limited to initial claims, counterclaim, cross-claims and third-party claims and clams based upon contract, tort, fraud and other intentional torts, statutes, regulations, common law and equity. The term "Claim" is to be given the broadest possible meaning that will be enforced and includes, without limitation, any claim, dispute or controversy that arises from or relates to (i) your Card; (ii) the amount of available funds in your Card account; (iii) advertisements, promotions or oral or written statements related to your Card, goods or services purchased with your Card; (iv) the benefits and services related to your Card; and (v) your enrollment for any Card.

(Cardholder Agreement § E.4(c)).

The Cardholder Agreement provides that any claims "shall be referred to either the Judicial Administration and Mediation Services ("JAMS") or the American Arbitration Association ("AAA"), as selected by the party electing to use arbitraiton." (Id. at § E.4(c).) The Agreement gives the cardholder the opportunity to opt-out of arbitration as well as the ability to avoid arbitration by filing in small claims court. (Id. at § § E.4(b) and (c).)

The Agreement gives the cardholder the option to cancel the debit card and receive a check refund for the balance. The Cardholder Agreement provides:

> Amendment, Cancellation and Expiration
>
> . . . . You may cancel this Agreement by returning the Card to us. Your termination of this Agreement will not affect any of our rights or your obligations arising under this Agreement prior to termination.
> In the event that your Card Account is cancelled, closed, or terminated for any reason, you may request the unused balance to be returned to you via a check to the mailing address we have in our records. There may be a fee for this service. See Section A(3) (Fee Schedule) of this Agreement for more information regarding fees. . . .

(Cardholder Agreement § E.2.)

The fee schedule in the Cardholder Agreement reflects no charge to the customer if the account is closed and a check is issued at the customer's request. (Id. at § A.3.)

Plaintiff states he was not given an opportunity to reject the debit card or receive his money back in the form of cash or check. (Pl. Decl. ¶ 8, DE 35.) He does not recall receiving a Cardholder Agreement or terms or conditions with the debit card. (Id. at ¶ 9.) No one talked to him about the Cardholder Agreement or the terms and conditions of the debit card and he never agreed to arbitrate claims against Defendants. (Id. at ¶ 12.)

Defendants have submitted records from the Jail which indicate that Plaintiff signed a Withdrawal Receipt and Inmate Bank Account Refund Options form and elected to received funds remaining on his Jail account via debit card. (Emanauel McCray Decl. ¶ 6, DE 39.) The refund options form provided to Plaintiff provided two options: Option one provided for repayment by debit card and identified specific fees associated with that card. Option two provided a refund in the form of a check. (Refund option form, DE 39.) Plaintiff selected the "debit card" option. (Id.) It is the Jail's policy and procedure to provide all inmates who elect a debit card in lieu of a check with copies of the Withdrawal Receipt, Inmate Bank Account Refund Options form and the EZ Exit Release Card Cardholder Agreement. (McCray Decl. ¶ 5.)

In reply, Plaintiff submitted another declaration. (Pl. Sec. Decl., DE 45-1.) At the time of Plaintiff's arrest, he did not have a bank account, debit card or credit card. (Id. at ¶ ¶ 5-7.) Other than the $178.00 in cash that the Jail confiscated, he had no other money. (Id. at ¶ 8.) Had he left the Jail without the debit card, Plaintiff would have had no access to money until he received a check. (Id. at ¶ 9.) While he does not recall signing the Withdrawal Receipt or the Inmate Bank Account Refund Options form, he does not challenge the authenticity of his signature. (Id. at ¶ 11.)

Defendants move to compel arbitration on the basis of Plaintiff's acceptance and use of the debit card. Plaintiff responds that there was no mutual assent or consideration between him and Defendants. Plaintiff also claims issues of fact preclude any finding that Plaintiff agreed to arbitrate as a matter of law. In reply, Defendants point out that Plaintiff agreed to the terms and conditions of the Cardholder Agreement when he voluntarily elected to receive repayment through the issuance and use of the debit card and therefore the agreement was supported by consideration. In his sur-reply, Plaintiff argues that he was not offered a genuine alternative to the debit card and his receipt of the Cardholder Agreement does not settle issues of fact.

II. Discussion

The Supreme Court has articulated a strong federal policy favoring arbitration agreements. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). One of the purposes of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq., is to "ensure judicial enforcement of privately made agreements to arbitrate." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985). As such, arbitration agreements must be "rigorously enforce[d]"

by the courts. Id. at 221. Because arbitration is a matter of contract, however, the FAA's strong pro-arbitration policy only applies to disputes that the parties have agreed to arbitrate. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995). "[A] party plainly cannot be bound by an arbitration clause to which it does not consent." BG Grp., PLC v. Republic of Argentina, — U.S. —, 134 S. Ct. 1198, 1213 (2014) (Sotomayor, J. concurring).

For the purposes of a motion to compel arbitration, the Court may consider affidavits. See Samadi v. MBNA America Bank, N.A., 178 Fed. App'x 863, 866 (11th Cir. 2006). In fact, the party opposing a motion to compel arbitration has an affirmative duty of coming forward with affidavits or deposition transcripts to show that the court should not compel arbitration. See Sims v. Clarendon Ins. Co., 336 F. Supp. 2d 1311, 1314 (S.D. Fla. 2004). Federal substantive law of arbitrability determines which disputes are within the scope of the arbitration clause. Lawson v. Life of the South Ins. Co., 648 F.3d 1166, 1170 (11th Cir. 2011).

Here, the Court finds that Plaintiff consented to arbitration. The Jail gave him an option to receive a check, but Plaintiff elected to take the debit card instead. Plaintiff signed a form which provided him with a choice of his refund options. That form noted the fees associated with the debit card and the option to receive instead a check, minus postage, from the Jail. Upon choosing the debit card, the Jail's procedure is to give individuals, such as Plaintiff, the Cardholder Agreement which provided him with the option to receive his money via check as well. Plaintiff used the card to purchase food and other items. Based on these facts, Plaintiff is bound by the Cardholder Agreement and any claims he wishes to pursue are subject to arbitration. See Krutchik v. Chase Bank USA, N.A., 531 F. Supp. 2d 1359, 1364-65 (S.D. Fla. 2008) (the "[p]laintiff failed to follow the specified procedure for rejecting the [ ] terms and

continued using the credit card, his actions constitute a legal acceptance of the terms contained within the cardmember agreement, including the arbitration provision, and the agreement is binding").

In arguing that he did not agree to arbitration, Plaintiff relies upon Regan v. Stored Value Cards, Inc., No. 1:14-CV-01187-AT, 2015 WL 570524 (N.D. Ga. Jan. 13, 2015). The facts of that case differ significantly. When the plaintiff in Regan was released the day after his arrest, he was given a prepaid card and was not given an opportunity to reject the card. Id. at * 4. He was not given a cardholder agreement before being given the card, was not told the cardholder agreement was in his discharge paperwork and he did not sign the cardholder agreement. Id. Given that Plaintiff chose the debit card over a check, Regan is inapposite.[2]

Plaintiff also contends that the Jail did not offer him a "genuine alternative" to the debit card. Plaintiff states that the confiscated money represented all the money he had in the world and waiting for a check to arrive in the mail was not an option. The Court finds, however, that Plaintiff made a choice based upon his particular circumstances. These individual circumstances do not render Plaintiff's decision to accept the debit card, with its terms and conditions, including arbitration, coerced or unconscionable.

III. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendants' Motion to

[2] Likewise, Plaintiff's contention that the agreement was not supported by consideration is equally unpersuasive. Plaintiff received the benefit of a debit card over a check, which gave Plaintiff immediate access to the funds. See Real Estate World Florida Commercial, Inc. v. Piemat, Inc., 920 So. 2d 704, 706 (Fla. Dist. Ct. App. 2006) ("the consideration required to support a contract need not be money or anything having monetary value, but may consist of either a benefit to the promisor or a detriment to the promisee.")

Compel Arbitration and Stay or Dismiss Proceedings (DE 21) is **GRANTED**. The case shall be stayed pending completion of the arbitration and the clerk shall administratively close the case. All pending motions are denied as moot.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 11th day of September, 2015.

KENNETH A. MARRA
United States District Judge