IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

SHA-POPPIN GOURMET POPCORN LLC, an Illinois limited liability company, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
	)	Case No.: 1:20-cv-2523
v.	)	
	)	Honorable Joan B. Gottschall
JPMORGAN CHASE BANK, N.A., et al.,	)	
Defendants.	)	

DEFENDANT JPMORGAN CHASE BANK, N.A.'S BRIEF IN SUPPORT OF ITS MOTION TO STAY FURTHER PROCEEDINGS AND COMPEL ARBITRATION

Sha-Poppin Gourmet Popcorn LLC ("Sha-Poppin") is a JPMorgan Chase Bank, N.A. ("Chase") business customer that alleges Chase "impeded" Sha-Poppin in completing an application for a loan under the Paycheck Protection Program ("PPP") by purportedly "prioritizing [] its favored customers over" Sha-Poppin and not properly processing its online application. (Compl. ¶ 7.) Sha-Poppin's claims lack merit, but that point aside, these claims do not belong in court because Sha-Poppin agreed to arbitrate them. Sha-Poppin has a deposit account with Chase, and when opening this account, Sha-Poppin assented to Chase's Deposit Account Agreement ("DAA"), including its arbitration provision. Also, before attempting to apply online for a PPP loan with Chase, Sha-Poppin agreed to Chase's Digital Services Agreement ("DSA"), which likewise contains an arbitration provision. Both agreements require Sha-Poppin to individually arbitrate its claims. The agreements further delegate any scope and enforceability questions to the arbitrator. Thus, once the Court sees that an agreement to arbitrate exists, the Court has nothing more to do other than grant this motion and compel Sha-Poppin to arbitrate its claims.[1]

Even if the Court were to take that additional step and determine whether Sha-Poppin's claims are covered by the DAA and DSA (which it need not and should not do), Sha-Poppin must

[1] Courts in the Seventh Circuit routinely enforce similar arbitration agreements under the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA") and Illinois law. *See, e.g.*, *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 556–59 (7th Cir. 2003) (reversing district court, enforcing arbitration agreement, and ordering that claims against lender proceed to individual arbitration, as plaintiff class representative failed to "establish that the agreement preclude[d] them from effectively vindicating" its claims in the arbitral forum) (internal citation and quotations omitted); *Clements v. JPMorgan Chase Bank, N.A.*, No. 18 C 660, slip op. at 3–14 (N.D. Ill. Dec. 12, 2018) (enforcing arbitration provision in Chase DAA). Other courts around the country have likewise enforced the same or similar Chase arbitration agreements. *See, e.g., Dill v. JPMorgan Chase Bank, N.A.*, No. 19 Civ. 10947 (KPF), 2020 WL 4345755, at *2–8 (S.D.N.Y. July 29, 2020) (compelling arbitration); *Sunmonu v. Chase Bank, N.A.*, No. GLR-18-1695, 2019 WL 1258788, at *1–3 (D. Md. Mar. 19, 2019) (compelling arbitration); *Johnson v. JPMorgan Chase Bank, N.A.*, No. EDCV 17-2477 JGB (SPx), 2018 WL 4726042, at *3–8 (C.D. Cal. Sept. 18, 2018) (compelling arbitration); *Sanchez v. J.P. Morgan Chase Bank, N.A.*, No. 14-20468-CIV, 2014 WL 4063046, at *1–5 (S.D. Fla. Aug. 15, 2014) (compelling arbitration); *Scott v. JPMorgan Chase & Co.*, No. 13 Civ. 646 (KPF), 2014 WL 338753, at *2–10 (S.D.N.Y. Jan. 30, 2014) (ordering arbitration pursuant to DAA) *aff'd*, 603 Fed. App'x 33 (2d Cir. 2015) (summary order); *Novak v. JP Morgan Chase Bank, NA*, No. 06-14862, 2008 WL 907380, at *2–10 (E.D. Mich. Mar. 31. 2008) (compelling arbitration).

still be compelled to arbitrate. The DAA broadly requires arbitration of all claims arising out of or related to the DAA or Sha-Poppin's Chase account. And Sha-Poppin does not dispute that it was required to have an active Chase deposit account in order to apply for a PPP loan with Chase.[2] Plus, had Sha-Poppin's loan application been approved, PPP loan funds would have been deposited into its Chase account, and Sha-Poppin's alleged injury stems from the failure to receive PPP loan funds into that account.

The result is also the same under the DSA's arbitration provision, which is also broad, and requires arbitration of all claims arising out of or relating to any digital or online service provided by Chase. Sha-Poppin confirms in its Complaint that it attempted "to submit Sha-Poppin's application through Chase's online portal." (Compl. ¶ 60.) Therefore, both the DAA and DSA encompass Sha-Poppin's claims in this action, which hinge on Sha-Poppin being a Chase deposit account holder that: (i) sought to obtain a PPP loan through Chase by filling out an online application; (ii) relied on its status as a Chase account holder and its existing Chase relationship for the loan; (iii) was required to have a Chase business checking account to even apply for a PPP loan through Chase; and (iv) was allegedly injured because it did not receive a loan deposited into its account quickly enough during the first round of PPP funding.

All issues of scope and enforceability are for the arbitrator, but the arbitration provisions are broad and cover Plaintiff's claim in any event. The Court should grant this motion, compel arbitration, and stay further proceedings pending completion of arbitration.

[2] *See* Declaration of Sarah Pate Reynolds ("Reynolds Decl."), attached hereto as Exhibit 1, ¶ 3); CHASE FOR BUSINESS, Paycheck Protection Program FAQs and Useful Tips, https://recovery.chase.com/cares1/ppp-faqs (last visited October 5, 2020).

BACKGROUND

I. Sha-Poppin Agreed to the DAA.

Sha-Poppin has been a Chase account holder since March 2018, when it opened a Chase Total Business Checking account. When opening the account, Sha-Poppin confirmed its assent to the DAA by signing a signature card "acknowledg[ing] receipt of the Bank's Deposit Account Agreement[,] which include[d] all provisions that apply to this deposit account [] and agree[d] to be bound by the terms and conditions contained therein as amended from time to time." (Declaration of Mohamed Hammami ("Hammami Decl.") ¶ 2, attached hereto as Exhibit 2, Ex. A.)

The DAA plainly confirms that it governs Sha-Poppin's business account:

> Whether you have a personal or business deposit account, this document is the basic agreement between you and us (JPMorgan Chase Bank, N.A. or "Chase"). By signing a signature card or submitting an account application, or by using any of our deposit account services, you and anyone else identified as an owner of the account agree to the terms in this agreement.

(Declaration of Laura L. Deck ("Deck Decl."), attached hereto as Exhibit 3, ¶ 6; Ex. B at p. 5.)[3] In addition, every monthly account statement sent by Chase to Sha-Poppin contained language expressly stating that Sha-Poppin's account is governed by the currently effective DAA. (*Id.* ¶ 9.)

II. The DAA Contains a Binding Arbitration Provision.

The DAA provides that any disputes between Sha-Poppin and Chase are subject to mandatory arbitration:

> You and we agree that upon the election of either of us, ***any dispute relating in any way*** to your account or transactions will be resolved by binding arbitration as discussed below, and not through litigation in any court (except for matters in small claims court).
>
> This arbitration agreement is entered into pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA").

[3] Quotations herein to the DAA refer to the version of the DAA that was in effect when Plaintiff filed its Complaint on April 24, 2020. (Deck Decl. ¶ 6, Ex. B.)

(Deck Decl., Ex. B at 23 (emphasis added).) The arbitration provision broadly covers any claims or disputes arising from or related to the DAA, as well as those arising from or relating to Sha-Poppin's account, transactions, or related services:

> **What claims or disputes are subject to arbitration?**
>
> Claims or disputes between you and us about your deposit account, transactions involving your deposit account, safe deposit box, and any related service with us are subject to arbitration. Any claims or disputes arising from or relating to this agreement, any prior account agreement between us, or the advertising, the application for, or the approval or establishment of your account are also included. Claims are subject to arbitration, regardless of what theory they are based on or whether they seek legal or equitable remedies. Arbitration applies to any and all such claims or disputes, whether they arose in the past, may currently exist or may arise in the future. All such claims or disputes are referred to in this section as "Claims."

(*Id.* at 24.) The DAA outlines the procedures governing the arbitration, including: (1) how arbitration works; (2) the applicable rules; (3) the extent to which Chase will reimburse Sha-Poppin for the costs of arbitration; and (4) how to initiate a claim. (*Id.* at 23-24.)

Sha-Poppin was given the opportunity to "opt out" of arbitration by notifying Chase of such election within 60 days of opening its account by either calling a toll-free telephone number or by contacting a Chase banker. (Declaration of William A. Garrett, attached hereto as Exhibit 4, ¶ 2.) Despite having the choice to opt out of the arbitration agreement by calling a toll-free number or speaking to a Chase banker, Sha-Poppin never did so. (*Id.* ¶ 3.)

The DAA also requires Sha-Poppin's claims to be resolved via by arbitration on an individual basis and precludes any class litigation:

> YOU AND WE ALSO WAIVE ANY ABILITY TO ASSERT OR PARTICIPATE IN A CLASS OR REPRESENTATIVE BASIS IN COURT OR IN ARBITRATION. ALL DISPUTES, EXCEPT AS STATED BELOW, MUST BE RESOLVED BY BINDING ARBITRATION WHEN EITHER YOU OR WE REQUEST IT.

> **What about class actions or representative actions?**
>
> Claims in arbitration will proceed on an individual basis, on behalf of the named parties only. YOU AND WE AGREE NOT TO:
>
> 1. SEEK TO PROCEED ON ANY CLAIM IN ARBITRATION AS A CLASS CLAIM OR CLASS ACTION OR OTHER COMPARABLE REPRESENTATIVE PROCEEDING;
> 2. SEEK TO CONSOLIDATE IN ARBITRATION ANY CLAIMS INVOLVING SEPARATE CLAIMANTS (EXCEPT FOR CLAIMANTS WHO ARE ON THE SAME ACCOUNT), UNLESS ALL PARTIES AGREE;
> 3. BE PART OF, OR BE REPRESENTED IN, ANY CLASS ACTION OR OTHER REPRESENTATIVE ACTION BROUGHT BY ANYONE ELSE; NOR
> 4. SEEK ANY AWARD OR REMEDY IN ARBITRATION AGAINST OR ON BEHALF OF ANYONE WHO IS NOT A NAMED PARTY TO THE ARBITRATION.

(Deck Decl., Ex. B at 23-24 (emphasis in original).)

III. Sha-Poppin Agreed to the DSA.

Sha-Poppin also agreed to arbitration when it accepted the DSA. Sha-Poppin confirmed its acceptance of the DSA on March 19, 2018, when the unique Chase User ID associated with Sha-Poppin's account affirmatively clicked boxes acknowledging that it had read and accepted the DSA. (*See* Declaration of Nicholas Sergi ("Sergi Decl.") ¶ 3, attached hereto as Exhibit 5.) Sha-Poppin re-confirmed its acceptance of the DSA each time it used Chase's online banking services by logging into Chase's online system under its User ID and password, (*id.*, Ex. B at 2) ("When you use or access, or permit any other person(s) or entity(ies) to use or access the Digital Platforms or Services on your behalf, you agree to the terms and conditions of this Agreement."), and when it "attempted to submit Sha-Poppin's application through Chase's online portal." (Compl. ¶ 60.)

IV. The DSA Contains a Binding Arbitration Provision.

The DSA in effect at the time Sha-Poppin filed this lawsuit applies to any of Chase's "Digital Platforms":

> This Digital Services Agreement ("**DSA**" or "**Agreement**") ***governs your use of the following websites*** and mobile applications owned by [Chase]:

- *Chase Online*
- *Chase Mobile®*
- *Chase Business Online*
- *J.P. Morgan Online*
- *J.P. Morgan Mobile (collectively, the "Digital Platforms").*

(Sergi Decl., Ex. B at 1 (emphasis added).) The term "Chase Business Online" is defined as "the online, client-facing platform, www.chase.com/business, on which JPMC customers who hold a Business Account may conduct online banking and access the Online Services." (*Id.* at 44.)

When Sha-Poppin logged into the Chase Business Online service and attempted to apply for a PPP loan, as it admits in the Complaint, it brought this dispute within the scope of the DSA. (Compl. ¶ 60.) The DSA, like the DAA, broadly requires individual arbitration of any dispute relating in any way to the DSA itself or to any Chase Digital Service:

> YOU AND WE AGREE THAT UPON THE ELECTION OF EITHER OF US, ANY DISPUTE RELATING IN ANY WAY TO THIS AGREEMENT, OR YOUR USE OF THE DIGITAL PLATFORMS AND SERVICES, WILL BE RESOLVED BY BINDING ARBITRATIONS AS DISCUSSED BELOW, AND NOT THROUGH LITIGATION IN ANY COURT [].
>
> YOU AND WE ARE WAIVING THE RIGHT TO HAVE OUR DISPUTE HEARD BEFORE A JUDGE OR JURY, OR OTHERWISE TO BE DECIDED BY A COURT OR GOVERNMENT TRIBUNAL. YOU AND WE ALSO WAIVE ANY ABILITY TO ASSERT OR PARTICIPATE IN A CLASS OR REPRESENTATIVE BASIS IN COURT OR IN ARBITRATION.

(Sergi Decl., Ex. B at 38-39.) Sha-Poppin also confirmed its agreement to all other agreements governing its Chase account, including the DAA:

> [Y]ou agree to be bound by and comply with such other written requirements as we may provide to the Digital Platforms or Services, including, but not limited to, ***all account agreements***, any end user license agreement (EULA), and all applicable State, Federal and International laws and regulations.

(*Id.* at 2 (emphasis added).)

V. Sha-Poppin's Claims Are Within the Scope of the Arbitration Provisions.

With the DAA and DSA in place, Sha-Poppin filed this action against Chase, asserting claims relating to Sha-Poppin's online application for a Chase PPP loan. Sha-Poppin alleges that it attempted to apply for PPP funding via Chase's "online portal" numerous times. (Compl. ¶¶ 60–61.) Sha-Poppin alleges in conclusory and unsupported fashion that it was unable to obtain a PPP loan because "Chase Bank had made the decision, internally, to prioritize the submission of PPP applications for its bigger and longstanding business clients over small businesses like, Sha-Poppin." (*Id.* ¶ 66.) Based on its alleged inability to secure a PPP loan through Chase Business Online, Sha-Poppin brings claims against Chase for negligence, fraudulent concealment, tortious interference with prospective economic advantage, unjust enrichment, and deceptive practices under the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA"). (*Id.* ¶¶ 84–116.) Sha-Poppin purports to bring these claims on behalf of putative nationwide and Illinois classes of other Chase business account holders that met the criteria for receiving a PPP loan, and applied for or attempted to apply for a PPP loan through Chase, but whose applications were allegedly not processed on a first-come, first-served basis. (*Id.* ¶ 70.)

But under the DAA, Sha-Poppin agreed to individually arbitrate "any dispute relating in any way to [its] account or transactions [] by binding arbitration, and not through litigation in any court." (Deck Decl., Ex. B at 23.) Similarly, Sha-Poppin also agreed, through the DSA's arbitration provision, to arbitrate all claims "relating in any way" to the DSA or to Sha-Poppin's "use of the Digital Platforms and Services," including Chase Business Online. (Sergi Decl., Ex. B at 38-39.)[4] Sha-Poppin concedes that it attempted to apply for a Chase PPP loan, using the portal online,

[4] The term "Services" in the DSA includes all Chase digital banking services accessed either through a mobile device or tablet, as well as those accessed through a desktop computer or laptop. (Serg Decl. Ex. B at 1.)

because it "already held a [Chase] small-business account." (Compl. ¶¶ 59–60). Indeed, only businesses with an active Chase business checking account were even able to apply for a PPP loan with Chase. (Reynolds Decl. ¶ 3.) This fundamental requirement is reflected in Sha-Poppin's own class definition. (Compl. ¶ 70 (limiting the Class to "Chase Business Banking account holders").) Sha-Poppin, therefore, cannot dispute that all transactions and deposits relating to a Chase PPP loan had to involve, and occurred only because of, its Chase Business account and by means of an online digital service. Sha-Poppin's claims, therefore, necessarily arise out of and relate to their accounts, transactions, and online services with Chase and are governed by the DAA, the DSA, and their arbitration provisions.

LEGAL STANDARD

Section 2 of the FAA states that written arbitration agreements "evidencing a transaction involving [interstate] commerce [] shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This embodies a "liberal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Courts have long interpreted the FAA with a "healthy regard for the federal policy favoring arbitration" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

"To compel arbitration, a party need only show: (1) an agreement to arbitrate, (2) a dispute within the scope of the arbitration agreement, and (3) a refusal by the opposing party to proceed to arbitration." *Zurich Am. Ins. Co. v. Watts Indus.*, 466 F.3d 577, 580 (7th Cir. 2006). While "the threshold question of 'whether the parties have submitted a particular dispute to arbitration, *i.e.*, the *question of arbitrability*,' is generally to be decided by the court," that general rule is set aside where "'the parties clearly and unmistakably provide otherwise.'" *Wal-Mart Stores, Inc. v.*

Helferich Patent Licensing, LLC, 51 F. Supp. 3d 713, 719 (N.D. Ill. 2014) (quoting *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002)). The Supreme Court "has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by clear and unmistakable evidence." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (internal citations and quotations omitted). If the parties so delegate, "a court possesses no power to decide the arbitrability issue [] even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Id.* at 529.

ARGUMENT

I. The FAA Applies and Requires that this Dispute Be Sent to Arbitration

The liberal federal policy favoring arbitration agreements creates a strong presumption favoring enforcement and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses J. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). Based on the express language of the arbitration provisions in both the DAA and DSA, the FAA applies. (Deck. Decl. Ex. B at 23; Sergi Decl. Ex. B at 39.) The FAA also applies because the DAA and DSA are contracts involving interstate commerce, *see, e.g.*, *Kemph v. Reddam*, No. 13 CV 6785, 2015 WL 1510797, at *2 (N.D. Ill. Mar. 27, 2015) (recognizing that financing agreements were contracts involving interstate commerce), and the Complaint alleges transactions between citizens of different states. (Compl. ¶¶ 12–13.) The FAA requires courts to "rigorously enforce" arbitration agreements according to their terms to further the purpose of the FAA and facilitate streamlined proceedings. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *see also AT&T Mobility*, 563 U.S. at 339; *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

II. Sha-Poppin Assented to the DAA and DSA When it Opened its Chase Account and Tried to Apply for a PPP Loan Using Chase's Online Portal.

Sha-Poppin agreed to arbitrate its claims in multiple ways. First, Sha-Poppin assented to the DAA when it opened its Chase account, executed a signature card for its Chase account, and acknowledged receipt of the DAA. Second, Sha-Poppin assented to the DSA when it affirmatively clicked separate boxes confirming that it had read and agreed to the DSA and then utilized Chase's online portal to try to apply for a PPP loan.

a. Sha-Poppin agreed to the DAA by executing a signature card.

While the FAA governs the enforceability of the arbitration agreement, Illinois law controls whether a valid arbitration agreement exists. (Deck Decl., Ex. B at 20 (agreeing that the DAA is "governed by federal law and, when not superseded by federal law, the law of the state where your account is located").) This Court sits in diversity, so Illinois choice of law rules control. *See Wachovia, Sec., LLV v. Banco Panamericano*, 674 F.3d 743, 751 (7th Cir. 2012) ("In diversity cases, we look to the substantive law of the state in which the district court sits") (internal citations omitted). Illinois law generally gives effect to parties' choice of law clauses in a voluntary agreement. *See Midway Home Entm't v. Atwood Richards Inc.*, No. 98 C 2128, 1998 WL 774123, at *3 (N.D. Ill. Oct. 29, 1998) (choice-of-law provision enforced even where chosen forum "left the Illinois residents no recourse"). Sha-Poppin's account is in Illinois, so Illinois law applies per the terms of the parties' agreement. (Deck Decl., Ex. B at 20.)

An arbitration agreement's validity is analyzed using "state contract law governing the formation of contracts." *James v. McDonald's Corp*., 417 F.3d 672, 677 (7th Cir. 2005). In Illinois, an offer, acceptance, and consideration are the "basic ingredients" of a contract. *Melena v. Anheuser-Busch, Inc*., 847 N.E.2d 99, 109 (Ill. 2006). "'A binding contract between a bank and a depositor is created by signature cards and a deposit agreement.'" *Kaplan v. JPMorgan Chase*

Bank, N.A., No. 14 C 5720, 2015 WL 2358240, at *5 (N.D. Ill. May 12, 2015) (quoting *Continental Cas. Co. v. Am. Nat'l Bank & Tr. Co. of Chi.*, 768 N.E.2d 352, 357 (Ill. App. Ct. 2002)).

Such a contract was plainly formed in the DAA: (1) Chase offered to provide banking services to Sha-Poppin pursuant to the DAA; (2) Sha-Poppin accepted Chase's offer by signing a signature card and using Chase's banking services; and (3) valid consideration underlies the parties' mutual obligations in the DAA. *See Kaplan*, 2015 WL 2358240, at *1, 5 (binding contract formed via signed signature card that references Chase rules and regulations); *Continental Cas.*, 768 N.E.2d at 357–58 (collecting cases showing that a signature card and deposit agreement form a contract between a bank and its customer).

The DAA's arbitration agreement is unquestionably a valid contract under Illinois law. *See Perik v. JP Morgan Chase Bank, U.S.A., N.A.*, Nos. 1-09-3088, 1-10-1320, 2011 WL 10068062, at *10 (Ill. App. Ct. Dec. 15, 2011) (affirming order compelling arbitration where plaintiff demonstrated intent to be bound by Chase deposit agreement by "signing the signature card" and continuing to use the account).

b. Sha-Poppin also affirmatively agreed to the DSA.

Sha-Poppin also agreed to arbitrate its claims when it agreed to the DSA, used Chase's online services, and sought to submit its PPP application through Chase's online portal. "Signifying agreement by clicking on a box on the screen," a "type of assent called clickwrap," "generally provides adequate notice." *Sherman v. AT&T Inc.*, No. 11 C 5857, 2012 WL 1021823, at *3 (N.D. Ill Mar. 26, 2012) (citing *Treiber & Straub, Inc. v. UPS*, 474 F.3d 379, 382 (7th Cir. 2007) ("signif[ying] agreement by clicking on a box on the screen" is "common in Internet commerce")); *see also Friends for Health: Supporting N. Shore Health Ctr. v. PayPal, Inc.*, No. 17 CV 1542, 2018 WL 2933608, at *4–5 (N.D. Ill. June 12, 2018) (granting motion to compel arbitration where "it would have been impossible for any of the plaintiffs to create a PayPal

account" without "affirmatively check[ing] a box, or click[ing] a button, indicating that they accepted the user agreement"); *O'Quinn v. Comcast Corp.,* No. 10 C 2491, 2010 WL 4932665, at *3 (N.D. Ill. Nov. 29, 2010) (compelling arbitration where "Comcast [] require[d] the customer to click a box accepting the Customer Agreement in order to access Comcast's Internet service for the first time").

Here, Sha-Poppin expressly assented to the DSA when it affirmatively clicked separate boxes confirming that it had read and agreed to the DSA. (Sergi Decl. ¶ 3.) By clicking the boxes, Sha-Poppin not only confirmed that it had read and agreed to the DSA, but again confirmed its assent to the DAA, which agreement the DSA incorporates by reference. (*Id.*, Ex. B, p. 2.)

III. The DAA and DSA Delegate Questions of Scope and Enforceability to the Arbitrator.

"[P]arties can agree to arbitrate 'gateway questions of arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr.,* 561 U.S. at 68–69. To do so, the agreement must "clearly and unmistakably" express an intent to arbitrate gateway questions of arbitrability in their agreement. *Howsam*, 537 U.S. at 83–84. Northern District courts consistently hold that incorporating the private arbitration association rules "constitutes clear and unmistakable evidence" that the parties agreed to delegate threshold arbitrability questions to the arbitrator. *In re Dealer Mgmt. Sys. Antitrust Litig.*, Nos. 18-cv-864, 1:19-cv-1412, 2020 WL 832365, at *4–6 (N.D. Ill. Feb. 20, 2020) (collecting dozens of cases and holding that parties delegate question of arbitrability to an arbitrator where their agreement incorporates the AAA Rules).

Both the DAA and DSA expressly provide that the JAMS and AAA rules govern any arbitration. (Deck Decl., Ex. B at 24; Sergi Decl., Ex. B at 40.) The JAMS and AAA rules, in turn, make clear that questions of arbitrability are delegated to the arbitrator. *See* Rule JAMS 11(b)

("The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter");[5] Rule AAA R-7(a) ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim").[6]

Because these agreements "clearly and unmistakably" show that the parties have delegated the threshold issue of arbitrability to the arbitrator, all disputes regarding the arbitrability of Sha-Poppin's claims must be decided by the arbitrator. *See Helferich*, 51 F. Supp. 3d at 720 (collecting cases and holding that incorporation of AAA rules into agreement evidenced parties' intent to have an arbitrator decide questions of arbitrability).

IV. Even if the Court Reaches Questions of Scope, Sha-Poppin's Claims Are Covered.

Faced with valid arbitration agreements and delegation provisions, the Court should not proceed further into the question of scope. But even if the Court were to consider that question, it is clear that Sha-Poppin's claims against Chase fall squarely within the scope of the two agreements' arbitration provisions. In the Seventh Circuit, it is "harder to draft a broader clause" in the arbitration context than one with "relating to" language. *Carbajal v. H&R Block Tax Servs.*, 372 F.3d 903, 1067 (7th Cir. 2004); *see also Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.*, 174 F.3d 907, 909–10 (7th Cir. 1999) ("arising out of or relating to" language is "extremely broad[,] capable of an expansive reach," and "necessarily create[s] a presumption of arbitrability"). Such clauses should be construed expansively in favor of compelling arbitration. *See Info. Sys. Audit & Control Ass'n v. TeleComm. Sys.*, No. 17 C 2066, 2017 WL 2720433, at *3–5 (N.D. Ill. June 23, 2017) (Gottschall, J.); *Bahoor v. Varonis Sys., Inc.*, 152 F. Supp. 3d 1091, 1109–10 (N.D. Ill. 2015)

[5] https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-11

[6] https://www.adr.org/sites/default/files/CommercialRules_Web.pdf

(compelling arbitration of claims given the broad nature of the "arising out of or relating to" language in the parties' agreement).

An "order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs. v. Commc'ns Workers*, 475 U.S. 643, 650 (1986). "Where the arbitration provision is broad, as it is here, only an 'express provision excluding a particular grievance from arbitration or the most forceful evidence of a purpose to exclude the claim from arbitration' can keep the claim from arbitration." *Exelon Generation Co., LLC v. Local 15, Int'l Bhd of Elec. Workers, AFL–CIO*, 540 F.3d 640, 646 (7th Cir. 2008) (quoting *AT&T Techs.*, 475 U.S. at 650).

Here, the DAA covers "any claims or disputes arising from or relating to this agreement," as well as "any dispute relating in any way to your account or transactions," including any "[c]laims or disputes between you and us about your deposit account, transactions involving your deposit account, safe deposit box, and ***any related service*** with us [and any] claims or disputes arising from or relating to this agreement, [or] any prior agreement between us[.]" (Deck Decl., Ex. B at 23–24) (emphasis added).) Sha-Poppin's allegations easily fall within this broad provision.

The dispute here plainly arises out of and relates to Sha-Poppin's account and "any related service" because, but for that account, Sha-Poppin would not and could not have applied for a PPP loan through Chase. Sha-Poppin's very own class definitions make clear that all of the alleged claims are inextricably tied to its status as a Chase business deposit account holder. (Compl. ¶ 70 (limiting the Class to "Chase Business Banking account holders").) Sha-Poppin also admits that it applied for a PPP loan with Chase because it "already held a [Chase] small-business account." (*Id.*

¶ 59), and Sha-Poppin could not have applied for a PPP loan through Chase without a Chase Business deposit account. (Reynolds Decl. ¶ 3.) Further, the alleged inability to obtain a timely PPP loan impacted Sha-Poppin's account because that is where the PPP loan proceeds would have been deposited. (*Id.* ¶ 2.)

Sha-Poppin's chosen claims (although meritless) also confirm that they arise out of Sha-Poppin's Chase account. The claim for negligence relies on an alleged "duty of care [owed] to those who use [Chase] to apply for SBA loans." (Compl. ¶ 85.) Similarly, Sha-Poppin's claim for fraudulent concealment asserts that Chase owed a duty to speak based on the fact that Sha-Poppin applied as a Chase business customer and "existing business partner." (*Id.* ¶ 95.) The claim for tortious interference also hinges on Sha-Poppin's status as a Chase account holder, as it alleges that Chase had knowledge of a business expectancy "to the extent it received a PPP loan application from Plaintiff and the putative Class." (*Id.* ¶ 101.) Finally, the claims for violation of the ICFA and for unjust enrichment rely on Sha-Poppin's assertions that it "applied, or attempted to apply for" PPP loans from Chase. (*Id.* ¶¶ 109, 113.)

Finally, the DSA's arbitration provision covers any claim related to the DSA or to any use of the Digital Platforms and Services, which directly covers Sha-Poppin's attempt to submit a PPP loan application through Chase's online service. (*Id.* ¶¶ 60–61.) Thus, although the scope of the arbitration is an issue for the arbitration, the claims asserted in this case are covered by the broad arbitration provisions in any event.

V. This Action Should Be Stayed Pending Arbitration.

Under the FAA, a court should grant a motion to stay judicial proceedings after compelling arbitration. *See* 9 U.S.C. § 3 (requiring court to issue a stay upon compelling arbitration); *see also Rent-A-Ctr.*, 561 U.S. at 68. The Court should therefore stay all further proceedings against Chase until Sha-Poppin and Chase complete arbitration on Sha-Poppin's individual claims.

CONCLUSION

For the foregoing reasons, this Court should enter an order (i) compelling Sha-Poppin to arbitrate its claims on an individual basis and (ii) staying this action pending completion of arbitration.

Dated: October 5, 2020

Respectfully submitted,

By: /s/ *Jonathan H. Claydon*

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served on counsel of record through the Court's CM/ECF system on October 5, 2020.

/s/ Jonathan H. Claydon