UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-60066-CIV-COHN-SELTZER

ABRAHAM INETIANBOR

Plaintiff,

vs.

CASHCALL, INC.,

Defendant.
_____/

DEFENDANT CASHCALL, INC.'S REPLY TO "PLAINTIFF MOTION OPPOSING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY CASE, AND SUPPORTING MEMORANDUM OF LAW" [DOC 19]

Defendant CashCall, Inc. ("CashCall"), submits its reply to the *Plaintiff Motion Opposing Defendant's Motion to Compel Arbitration and Dismiss or Stay Case, and Supporting Memorandum of Law* ["*Opposition*"; Doc 19] filed by plaintiff Abraham Inetianbor ("Inetianbor"). Although Inetianbor's arguments are unclear, the gist appears to be that (i) his loan agreement is not enforceable for various generic reasons and (ii) he did not agree to jurisdiction of the arbitration venue (the Cheyenne River Sioux Tribe, in South Dakota). Binding precedent establishes that Inetianbor is mistaken, because Inetianbor's challenges are properly considered by the arbitrator and he has not met his heavy burden to show that either arbitration *per se* or his clear agreement to the venue should be disregarded by the Court.

In further support of *Defendant CashCall, Inc.'s Motion to Compel Arbitration and Dismiss or Stay Case, and Supporting Memorandum of Law* ["*Motion to Compel Arbitration*"; Doc 16], CashCall states as follows:

I. INTRODUCTION

Inetianbor does not dispute that his suit is based on the "Western Sky Loan Agreement" ("Loan Agreement") attached as Exhibit B to the *Motion to Compel Arbitration* and also as Exhibit A to his *Opposition*. He also does not dispute that the Loan Agreement created a contractual obligation; indeed, he asserts "the loan has been legally paid in full and in excess by plaintiff," *Opposition* at 4 (¶ 4) (emphasis omitted), by which he means that he has paid as much as he thinks he should, notwithstanding his contractual obligations. Instead, to the extent that his arguments are clear, Inetianbor attempts to avoid arbitration on three grounds: (i) the Loan Agreement is not enforceable beyond the amount Inetianbor has already paid because of the interest rate "violates the Florida usury laws," (ii) the "Cheyenne River Sioux Tribal Court in South Dakota . . . has no jurisdiction over the plaintiff," and (iii) Western Sky (the lender) "locate[s itself] on Native American reservations in an attempt to evade state and federal consumer protection laws and Cash Call uses them to skirt the law but simultaneously claim to be legally doing business in Florida and the United States." *Id*. at 3 (¶ 6) (internal quotations omitted). None of these arguments has merit, and the third is irrelevant to whether Inetianbor has met his burden to avoid his commitment to arbitration.

As an initial matter, it is Inetianbor's burden to show that he should not be compelled to arbitrate. *See*, *e.g.*, *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004) ("[A] party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity."). Inetianbor cannot meet this burden, especially as the Loan Agreement could not be clearer. The very first sentence of the document highlights the fact that, by entering into the Loan Agreement, Inetianbor submitted himself to the jurisdiction of the Cheyenne River Sioux Tribal Court, and the agreement as a whole reiterates that fact:

> **This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation.** By

> executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and further agree that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.

Opposition Ex. A at 1 [Doc 19, pg. 12] (bold in original). Inetianbor further expressly agreed that he was bound to arbitrate in that venue:

> **Agreement to Arbitrate.** You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.
>
> * * *
>
> **Choice of Arbitrator.** . . . Arbitration shall be conducted in the Cheyenne River Sioux Tribal Nation by your choice of either (i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council, and shall be conducted in accordance with the Cheyenne River Sioux Tribal Nation's consumer dispute rules and the terms of this agreement.

Id. at 3-4 [Doc 19, pgs. 14-15] (bold in original). Moreover, through immediate the next sentence of the Choice of Arbitrator clause, Inetianbor was expressly informed that he does not have to go to South Dakota for any arbitration: **You may appear at Arbitration via telephone or video conference, and you will not be required to travel to the Cheyenne River Sioux Tribal Nation.** *Id*. at 4 [Doc 19, pg. 15] (all emphasis added). And, in yet another clause, Inetianbor was again informed of the governing law:

> **Applicable Law and Judicial Review.** THIS ARBITRATION PROVISION IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE CHEYENNE RIVER SIOUX TRIBE. The Arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement.

Id. (bold and capitalization in original).

Finally, two other clauses of the Agreement bear mention. First, Inetianbor had an express right to opt out of the arbitration provision:

> **Right to Opt Out.** If you do not wish your account to be subject to this Arbitration Agreement, you must advise us in writing at P.O. Box 370, Timber

> Lake, South Dakota, 57565, or via e-mail at info@westernsky .com. You must clearly print or type your name and account number and state that you reject Arbitration. You must give written notice; it is not sufficient to telephone us. We must receive your letter within (60) days after the date your loan funds or your rejection of Arbitration will not be effective. In the event you opt out of Arbitration, any disputes hereunder shall nonetheless be governed under the laws of the Cheyenne River Sioux Tribal Nation.

Id. at 5 [Doc 19, pg. 16] (bold in original). Inetianbor does not contend that he availed himself of this right (nor did he). And, finally, Inetianbor was clearly alerted to the high interest rate (in addition to the TILA disclosure of the rate on the first page of the Loan Agreement):

> **THIS LOAN CARRIES A VERY HIGH INTEREST RATE. YOU MAY BE ABLE TO OBTAIN CREDIT UNDER MORE FAVORABLE TERMS ELSEWHERE. EVEN THOUGH THE TERM OF THE LOAN IS 37 MONTHS, WE STRONGLY ENCOURAGE YOU TO PAY OFF THE LOAN AS SOON AS POSSIBLE. YOU HAVE THE RIGHT TO PAY OFF ALL OR ANY PORTION OF THE LOAN AT ANY TIME WITHOUT INCURRING ANY PENALTY. YOU WILL, HOWEVER, BE REQUIRED TO PAY ANY AND ALL INTEREST THAT HAS ACCRUED FROM THE FUNDING DATE UNTIL THE PAYOFF DATE.**

Id. (bold and capitals in original).

Thus, it is beyond peradventure that Inetianbor knew exactly to what he was agreeing when he took out his loan, including both the dispute resolution terms and the interest rate about which he complains. Notably, nowhere in the *Opposition* does Inetianbor contend that his claims fall outside the ambit of the arbitration provision. *See*, *generally*, *id*. Instead, after accepting the benefits of the agreement, he is attempting to avoid his commitments. He may not do so. As set forth below and in the *Motion to Compel Arbitration*, well-established law binds Inetianbor to his arbitration commitment. Therefore, he is bound to arbitrate his claims.

II. INETIANBOR DOES NOT CHALLENGE THE ARBITRATION CLAUSE, BUT THE CONTRACT AS A WHOLE, WHICH IS AN ISSUE FOR THE ARBITRATOR

As stated above, Inetianbor's challenges go to the contract as a whole, and not to the specifically to the arbitration clause. *See Opposition* at 3 (¶ 6). As a matter of well-established law, Inetianbor's challenges are ones for the arbitrator alone to decide.

As the Eleventh Circuit explained in *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. 2005),

> The FAA "provides a remedy to a party seeking to compel compliance with an arbitration agreement." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967). Such a party can move the district court for an order compelling arbitration. 9 U.S.C. § 4 (2000). Section four of the FAA instructs the federal court to grant the motion and order arbitration once it is satisfied "that the making of the agreement for arbitration . . . is not in issue." *Id*. If, however, the making of the arbitration agreement is in question, then the federal court may first adjudicate that issue. *Id*.
>
> In interpreting this section of the FAA, the Supreme Court has distinguished between claims that challenge the contract generally and claims that challenge the arbitration provision itself. *See Prima Paint Corp.*, 388 U.S. at 403–04, 87 S.Ct. at 1806. . . .
>
> This Court has applied the *Prima Paint* rule to claims of adhesion and unconscionability. We have held that ''[i]f . . . [the party's] claims of adhesion, unconscionability, . . . and lack of mutuality of obligation pertain to the contract as a whole, and not to the arbitration provision alone, then these issues should be resolved in arbitration.'' *Benoay v. Prudential–Bache Secs., Inc.*, 805 F.2d 1437, 1441 (11th Cir.1986) (citations omitted).

Id. at 876-77 (alterations in original; emphasis added). Here, the "making of the agreement" is not at issue; indeed, Inetianbor freely admits that he paid pursuant to the loan agreement. *See Opposition* at 2 (¶ 4). Therefore, Inetianbor's challenges are for the arbitrator, not this Court.

In *Jenkins*, just like Inetinabor, the plaintiff claimed that the interest rate was usurious and that he should not be bound to arbitrate. The Eleventh Circuit rejected this argument also:

> [In *Bess v. Check Express*, 294 F.3d 1298, 1306 (11th Cir.2002)], [w]e explained the "allegations of illegality go to the deferred payment transactions generally, and not to the arbitration agreement specifically." *Id*. at 1305. Therefore, an arbitrator, and not a federal court, should determine whether the underlying transactions are illegal and void. *Id*. at 1306.

Id. at 881 (emphasis added).

In summarizing and rejecting the plaintiff's arguments, the Eleventh Circuit in *Jenkins* used language directly applicable to Inetianbor's arguments here:

> Jenkins assented to the payday loan contracts and the Arbitration Agreements associated with those contracts. It is undisputed that she signed and dated both a

> Promissory Note and an Arbitration Agreement each time she obtained a loan from FNB. Jenkins argues the pay-day loan contracts are void, not because she failed to assent to the terms of the contracts, but because those terms render the contracts usurious and void under Georgia law. Thus, Jenkins does not challenge the existence of either the payday loan contracts or the accompanying Arbitration Agreements; rather she challenges the content of the contracts—i.e., the rates of interest charged in the loan agreements. As we held in *Bess*, we conclude Jenkins and Defendants entered into "presumptively valid agreement[s] to arbitrate any disputes, including those about the validity of the underlying transaction.'' *Bess*, 294 F.3d at 1306; *see also John B. Goodman Ltd. P'ship* [v. *THF Constr.*], 321 F.3d [1094] at 1096 [(11th Cir. 20003)]. We conclude, therefore, that Jenkins' void ab initio argument, which challenges the legality of the payday lending transactions, is an issue for the arbitrator, not the court, to decide.

Id. at 882 (footnote omitted). In a footnote, the court noted, "Other federal circuit courts have similarly held that allegations claiming high interest loan agreements are void as illegal will not preclude the enforcement of arbitration provisions included in the allegedly illegal contracts." *Id*. at n.12 (citations omitted).

Inetianbor's challenges are functionally-identical to those of the *Jenkins* plaintiff, and warrant the same result. Inetianbor assented to the Loan Agreement and does not dispute that he did so, but he "challenges the content of the contract[]—i.e., the rate[] of interest in the loan agreement[]." 400 F.3d at 882. Accordingly, his challenges are "an issue for the arbitrator, not the court, to decide." *Id*.

II. INETIANBOR IS BOUND TO THE JURISDICTION OF THE CHEYENNE RIVER SIOUX TRIBAL COURT BECAUSE HE EXPRESSLY ASSENTED TO ITS JURISDICTION

To the extent that Inetianbor is generally contesting the jurisdiction of the Cheyenne River Sioux Tribal Court, his arguments must fail, for two independent reasons. First, as the Eleventh Circuit stated in *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257 (11th Cir. 2011), "[a]lthough not strictly an arbitration case, the Supreme Court's *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1[], held that forum-selection clauses are 'prima facie valid.' *Id*. at 10[]." *Id*. at 1264. *Lindo* has a comprehensive discussion of forum selection law within and outside the arbitration context; the Eleventh Circuit's summary conclusion is directly applicable to this case:

> Together, these Supreme Court precedents propound several overarching themes: (1) courts should apply a strong presumption in favor of enforcement of arbitration and choice clauses; (2) U.S. statutory claims are arbitrable, unless Congress has specifically legislated otherwise; (3) choice-of-law clauses may be enforced even if the substantive law applied in arbitration potentially provides reduced remedies (or fewer defenses) than those available under U.S. law; and (4) even if a contract expressly says that foreign law governs, as in *Vimar* [*Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995)], courts should not invalidate an arbitration agreement at the arbitration-enforcement stage on the basis of speculation about what the arbitrator will do, as there will be a later opportunity to review any arbitral award.

Id. at 1269. Therefore, Inetinabor's challenge to the jurisdiction of the Cheyenne River Sioux Tribal Court must fail because venue provisions are presumed proper and Inetianbor has provided no valid grounds for the Court to decline enforcement.

Second, the "doctrine of tribal exhaustion" bars Inetianbor's argument. This doctrine requires that tribal courts be given opportunity to first address questions regarding their jurisdiction. Thus, as the Supreme Court stated in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985): "[E]xhaustion is required before such a claim may be entertained by a federal court[]. Until petitioners have exhausted the remedies available to them in the Tribal Court System . . . it would be premature for a federal court to consider any relief." *Id*. at 857. *See also Inglish Interests, LLC v. Seminole Tribe of Fla, Inc.*, No. 10-cv-367, 2011 WL 208289, *4 (M.D. Fla. Jan. 21, 2011) ("[P]laintiff would have to exhaust available remedies in the tribal court system before pursuing relief in federal court." (citing *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 855– 56) (other citation omitted)).

Furthermore, Inetianbor has no argument that he cannot properly enter into a contract subjecting himself to tribal jurisdiction; he can, and he is bound by his voluntary choice. *See*, *e.g.*, *Montana v. United States*, 450 U.S. 544, 565 (1981) ("A tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."); *see also Miccosukee Tribe of*

Indians of Fla. v. Kraus-Anderson Const. Co., 607 F.3d 1268, 1275 n.14 (11th Cir. 2010) ("*Montana* plainly states that a nonmember . . . can consent to tribal court jurisdiction by contract.").

Accordingly, whether because Inetianbor's consent to venue in the Cheyenne River Sioux Tribal Court is valid or because any dispute to the jurisdiction of that venue must be heard in that venue first – and CashCall submits that both apply – Inetianbor's contractual agreement to arbitrate his claims in the Cheyenne River Sioux Tribal Court must be enforced.

III. CASHCALL DID NOT WAIVE ITS RIGHT TO ARBITRATION

Although not in his *Opposition* to the *Motion to Compel Arbitration*, Inetinabor's filing in opposition to CashCall's *Motion to Stay Discovery (*etc.*)* [Doc 18] raises the issue of waiver. *See Plaintiff's Motion Opposing Defendant's Motion to Stay Discovery (*etc.*)* ["*Opposition to Motion to Stay Discovery*"; Doc 23] at 2 (¶ 3). Although CashCall preserves its argument that the failure of Inetianbor to raise this argument in his *Opposition* to the *Motion to Compel Arbitration* itself waives the waiver argument, CashCall responds to it in this reply, as this reply is the logical place to address any waiver argument the Court may deem Inetianbor to have.

Inetianbor's waiver argument contends, in essence, that the time period between the initiation of the proceedings and CashCall's filing of its *Motion to Compel Arbitration* alone waives CashCall's arbitration right – which argument he bases on an irrelevant provision of the California Civil Procedure Code. *See Opposition to Motion to Stay Discovery* at 2 (¶ 3). Inetianbor is mistaken, for several reasons.

First, there was no delay in moving to compel arbitration. When CashCall was served – and after it resolved the improper entry of a default, *see Notice of Removal* at 2 n. 1 – CashCall both moved to dismiss and sought a more definite statement to figure out the basis for his suit, which appeared to be some sort of claim for defamation. *See Notice of Removal* at Doc 1-4,

pg. 18. The state court granted a more definite statement. *See id*. at Doc 1-4, pg. 46. Inetianbor then amended his claims, stating clearly for the first time that he was challenging the Loan Agreement itself, and CashCall properly removed the action. *See id*. at Doc 1, pgs. 1-2. Upon removal, CashCall timely filed the *Motion to Compel Arbitration*. There was no "delay" and, accordingly, no waiver of CashCall's right to arbitration.

Furthermore, in determining whether a party has waived its right to arbitrate, the Court must follow a two-part test: first the Court must decide if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right, and, second, the Court looks to see whether, by doing so, the other party has in some way been prejudiced. *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315-16 (11th Cir. 2002). Because federal law favors arbitration, "any party arguing waiver of arbitration bears a heavy burden of proof." *Citibank, N.A. v. Stok & Associates, P.A.*, 387 F. App'x. 921, 923 (11th Cir. 2010) (internal quotations and citations omitted). Inetianbor meets neither prong of the test, especially given his heavy burden of proof.

"'Mere delay is insufficient to support a defense of waiver.'" *Hiotakis v. Celebrity Cruises Inc.*, No. 10-22954-CIV, 2011 WL 2148978, *8 (S.D. Fla. May 31, 2011) (quoting *Hale v. Dep't of Revenue*, 973 So. 2d 518, 522-23 (Fla. 1st DCA 2008)). *See also Brown v. E.F. Hutton & Co., Inc.*, 610 F. Supp. 76, 79 (S.D. Fla. 1985) ("[D]elay alone does not constitute a default or waiver of a valid arbitration clause.").

Asserted delay is the sole basis for Inetianbor's waiver assertion, *see Opposition to Motion to Stay* at 2 (¶ 3), but waiver requires more than mere delay. "'[W]aiver occurs when a party seeking arbitration substantially participates in litigation to a point inconsistent with an intent to arbitrate.'" *Ivax Corp.*, 286 F.3d 1309, 1316 (quoting *Morewitz v. West of Engl. Ship Owners Mut. Prot. & Indem. Ass'n,* 62 F.3d 1356, 1366 (11th Cir. 1995). That has not happened here; CashCall filed a motion to determine the basis of Inetianbor's vague claims and then, upon

properly removing the action, moved to compel arbitration once Inetianbor stated that his claims were based upon the Loan Agreement – which has a broad, binding arbitration provision.

As for the second prong of the test, "[a] party opposing arbitration must also demonstrate that he had been prejudiced by the delay." *Brown*, 610 F. Supp. at 79. Inetianbor has not addressed this prong at all, and can show no prejudice. Here, virtually nothing substantive has occurred and "[w]hen little meaningful litigation has taken place, [the Eleventh Circuit] has declined to find waiver from even longer delays." *Citibank*, 387 F. App'x at 925. Therefore, Inetianbor can meet neither prong of the waiver test, and his waiver argument should be rejected.

Finally, even if this Court were inclined to find that CashCall waived its right to compel arbitration by not raising arbitration earlier, "fairness dictates that a waiver of arbitration be nullified by the filing of an amended complaint." *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1202 (11th Cir. 2011). In *Krinsk*, the Eleventh Circuit held that a "defendant will be allowed to plead anew in response to an amended complaint, as if it were the initial complaint, when the 'amended complaint … changes the theory or scope of the case.'" *Id*. at 1202 (quoting *Brown*, 610 F. Supp. at 78). Here, Inetinabor's amendment both clarified and substantially changed his theory of the case. Accordingly, under *Krinsk*, any waiver that may have obtained was voided by Inetianbor's amendment.

IV. CONCLUSION

WHEREFORE, for the reasons set forth above and in the *Motion to Compel Arbitration*, defendant CashCall, Inc. respectfully requests that the Court compel plaintiff Abraham Inetianbor to arbitration, dismiss or, in the alternative, stay this action pending arbitration, and provide CashCall with such other and further relief as the Court deems just and proper.

Respectfully submitted,

Date: February 7, 2013

AKERMAN SENTERFITT
1 S.E. Third Avenue – Suite 2500
Miami, FL 33131
Tel. 305-374-5600
Fax. 305-374-5095

By: s/ Christopher S. Carver
CHRISTOPHER S. CARVER, ESQ.
Florida Bar No. 993580
christopher.carver@akerman.com
ANDREW M. SHAPIRO, ESQ.
Florida Bar No. 0100015
andrew.shapiro@akerman.com

Counsel for Defendant CashCall, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of *Defendant CashCall, Inc.'s Reply to "Plaintiff Motion Opposing Defendant's Motion to Compel Arbitration and Dismiss or Stay Case, and Supporting Memorandum of Law" [Doc 19]* was filed via CM/ECF and served as indicated below on February 7, 2013, on all counsel or parties of record on the following Service List.

s/ Christopher S. Carver
Attorney

SERVICE LIST

Christopher S. Carver, Esq.
christopher.carver@akerman.com
AKERMAN SENTERFITT
1 S.E. Third Avenue – Suite 2500
Miami, FL 33131
Tel. 305-374-5600
Fax. 305-374-5095
Attorneys for Defendant CashCall, Inc.

Andrew M. Shapiro, Esq.
andrew.shapiro@akerman.com
AKERMAN SENTERFITT
1 S.E. Third Avenue – Suite 2500
Miami, FL 33131
Tel. 305-374-5600
Fax. 305-374-5095
Attorneys for Defendant CashCall, Inc.

Abraham Inetianbor
(service by mail)
Pro se plaintiff
4271 NW 5th Street, #247
Plantation, FL 33317