UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

ABRAHAM INETIANBOR

Plaintiff,

vs.

CASHCALL, INC.,

Defendant.
_____/

**REPLY IN SUPPORT OF DEFENDANT CASHCALL, INC.'S RENEWED MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY CASE**

Defendant CashCall, Inc. ("CashCall"), submits its reply to *Plaintiff's Opposition to Defendant CashCall, Inc.'s Renewed Motion to Compel Arbitration or Stay Case, and Supporting Memorandum of Law (Doc #53)* ["*Opposition*"; Doc 56]. Nothing in the *Opposition* can avoid the facts that not only does the Loan Agreement binding plaintiff Abraham Inetianbor ("Inetianbor") require arbitration of his claims, but an arbitration has properly been initiated against him through CashCall's *Demand for Arbitration* (executed copy filed as Exhibit 1 to Doc 55). Significantly, CashCall's arbitration demand has been accepted and the arbitration is in process. However, the *Opposition* essentially ignores the Demand for Arbitration and concentrates on issues far afield from the central question: Is Inetianbor required to arbitrate his claims? Well-established law previously recognized by this Court answers the question: Yes.

Accordingly, for the reasons set forth in *Defendant CashCall, Inc.'s Renewed Motion to Compel Arbitration and Dismiss or Stay Case, and Supporting Memorandum of Law* ["*Renewed Motion*"; Doc 53] and below, CashCall respectfully requests that the Court dismiss or stay this action and compel Inetianbor to bring any claims he may have in the now-pending arbitration.

## I. INTRODUCTION

The Court's prior concerns regarding the availability of the designated arbitration forum – which were reflected in the *Order Granting Plaintiff's Motion to Reopen Case* [Doc 45] – have proven unfounded. Attached as Exhibit **A** is a copy of a letter from Tribal Elder Robert Chasing Hawk Sr. accepting CashCall's *Demand for Arbitration*.[1] The *Demand for Arbitration* was sent to Inetianbor via certified mail as required by the Loan Agreement. *See Renewed Motion*, Ex. A to Ex. 1 at 5 [Doc 53-1, pg. 9]. Inetianbor received the *Demand for Arbitration* on May 3, 2013. *See* Exhibit **B**.[2] Inetianbor also received the letter from Tribal Elder Robert Chasing Hawk, Sr., which was e-mailed to him by CashCall's counsel on May 3, 2013. *See* Exhibit **C**. While CashCall's counsel understands from Inetianbor that he is out of town on the dates (May 7-9, 2013) suggested by the arbitrator for the preliminary telephone hearing, *see* Ex. B, the fact remains that the arbitration has properly been initiated.

Inetianbor's *Opposition* contains a litany of complaints, spurious and irrelevant assertions, and much emphasized text, but little actual relevant substance. The *Opposition* focuses on the terms of a Western Sky Consumer Loan Agreement subsequent to the one

[1] The letter is attached without the enclosure of CashCall's *Demand for Arbitration*. As explained below, Inetianbor received the *Demand for Arbitration* on May 3, 2013. It was also served in un-executed form as Exhibit 1 to the *Renewed Motion* and a signed version was served with the *Notice of Filing Defendant CashCall, Inc.'s Executed Demand for Arbitration* [Doc 55].

[2] While Inetianbor contends that the *Demand for Arbitration* was sent to him by regular mail in violation of the terms of the Loan Agreement, *see Opposition* at 11, he is incorrect. As Exhibit B establishes, the *Demand for Arbitration* was sent by certified mail and received by Inetianbor on May 3. Because of the ongoing litigation, a copy of the *Demand for Arbitration* was sent to him by regular mail, both as one of the exhibits to the *Renewed Motion* and with the *Notice of Filing Defendant CashCall, Inc.'s Executed Demand for Arbitration*. Inetianbor's Exhibit "H-2," which he cites as proof of regular mail, *see Opposition* at 11, is an envelope from CashCall's counsel's office; although the date is not readable from the copy, the postage amount makes it likely that the envelope is the one enclosing the *Renewed Motion*. Notably, the *Opposition* was filed on April 29, 2013, which means that Inetianbor had not received the (slower) certified mail delivery at the time he generated his filing.

Inetianbor entered, not the one binding him. *See Opposition* at 2-3. Inetianbor is correct in his assertion that the revision to the Western Sky Consumer Loan Agreement to include the option of either AAA or JAMS arbitration did not occur in March 2011; that revision occurred in February 2012. CashCall apologizes for the error.[3] A copy of the current agreement is attached as Exhibit **D**, and it contains the language quoted at pages 4-5 of CashCall's *Response to Plaintiff's Notice of Compliance (*etc.*)* [Doc 39]. However, whether that particular revision occurred in March 2011 or February 2012 is beside the point, because the question before the Court is whether Inetianbor may avoid his contractual commitment to arbitrate contained in the Loan Agreement binding him.[4] Nothing in his *Opposition* provides grounds for him to avoid his arbitration commitment.

To the extent that the *Opposition* raises relevant legal issues, Inetianbor's arguments fail. Notably, most of the arguments are attacks on the Loan Agreement as a whole, violating the basic principle that challenges to enforcement of an arbitration provision must be to the provision itself, and not to the contract as a whole. *See*, *e.g.*, *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868, 877 (11th Cir. 2005) (rejecting district court's reliance on adhesion arguments, because they "pertain to the underlying Consumer Loan Agreements as a whole, and not to the Arbitration Agreements specifically").

Therefore, the *Opposition* fails to provide any valid basis to deny CashCall's *Renewed Motion*, the motion should be granted, and Inetianbor should be compelled to arbitration.

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[3] There was a revision to in March 2011, but not to the arbitration provision.

[4] CashCall only raised the subsequent agreement language for purposes of providing Inetianbor an additional option as one of CashCall's proposed "three ways this problem could be resolved." *See Response to Plaintiff's Notice of Compliance* at 4. Inetianbor stated he was amenable to AAA arbitration in *Plaintiff's Reply to Defendant CashCall's Response (*etc.*)* [Doc 42] at 8. However, CashCall has never conceded that the agreement binding Inetianbor is in any way unenforceable; it pointed to the language as an accommodation to him.

## II. NONE OF INETIANBOR'S LEGAL ARGUMENTS HAS MERIT

In a scattering of arguments, Inetianbor argues that the Loan Agreement "lacks mutuality," that CashCall's practices are "deceptive," and the Loan Agreement is "unconscionable" for various reasons. *See Opposition* at 5-9. None of these arguments is a basis to deny enforcement of the arbitration provision; moreover, these issues are not properly before the Court because the Loan Agreement delegates them to the arbitrator. Inetianbor does not even mention – much less specifically challenge – the delegation provision.

The "Arbitration Defined" provision of the Loan Agreement states, in relevant part, "A Dispute includes, by way of example and without limitation, . . . any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement." *See id*. at 5. Thus, all of Inetianbor's challenges have been delegated to the arbitrator; pursuant to well-established authority, all such challenges may only be raised in arbitration. *See*, *e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2279 (2010) ("[U]nless [plaintiff] challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator."); *In re Checking Account Overdraft Litig. MDL No. 2036*, 674 F.3d 1252, 1255-56 (11th Cir. 2012) (enforcing delegation provision; "[b]ecause the delegation provision encompasses *any* issue, it encompasses [plaintiff's] claims for relief." (italics in original)); *Senior Servs. of Palm Beach LLC v. ABCSP Inc.*, No. 12-80226, 2012 WL 2054971, *3 (S.D. Fla. Jun 7, 2012) (Cohn, J.) ("[I]f the parties agree to arbitrate the validity of the arbitration clause, then the courts must defer to the arbitrator on that issue[.]" (citing *Rent-A-Center*, 130 S.Ct. at 2279)).

Similarly, "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing,*

*Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006). Accordingly, all of the issues regarding alleged lack of mutuality, deceptive actions, and unconscionability are ones for the arbitrator to decide.

Furthermore, Inetianbor's claims fail on their substance, even if the Court were to consider them. In *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the Supreme Court put to rest most of these unconscionability-type arguments noting, *inter alia*, that limitations on discovery in arbitration are no basis to deny arbitration, *id*. at 1747, that because such agreements "disallow an ultimate disposition by a jury" is not a proper basis to find them unconscionable, *id*., and that "the times in which consumer contracts were anything other than adhesive are long past," *id*. at 1750. *See also Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1215 (11th Cir. 2011) ("Plaintiffs here do not allege any defects in the formation of the contract, aside from its generally adhesive nature, which alone is insufficient to invalidate a consumer contract.").

Moreover, although he devotes a whole section to the assertion that "The Loan Agreement Lacks Mutuality," *see Opposition* at 9, the Eleventh Circuit rejected exactly this argument in *Jenkins*. As noted in CashCall's reply in support of its original motion to compel arbitration [Doc 26 at 5], *Jenkins* states,

> 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).

400 F.3d at 877 (alterations in original; emphasis added). And, as the Court noted in the *Order Denying Plaintiff's Motion for Remand and Granting Defendant's Motion to Compel Arbitration* [Doc 33], "The reasoning of Jenkins is directly applicable to the instant case." *Id*. at 6.

In sum, "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *Concepcion*, 131 S.Ct. at 1753 (citing *Rent-A-Center*, 130 S.Ct. at 2774). Here, the Loan Agreement requires Inetianbor to arbitrate "any Dispute" which term "is to be given the

broadest possible meaning[.]" *Id*. at 4. Therefore, Inetianbor's arguments against enforcement must be rejected and he must honor his contractual commitment to arbitrate his claims.[5]

Finally, the Court may not accept Inetianbor's implicit invitation to speculate as to what might happen in arbitration as a basis to deny enforcement of the arbitration provision. *See* , *e.g.*, *Opposition* at 12-13. Such arguments have repeatedly been rejected by the Eleventh Circuit. *See*, *e.g.*, *Summers v. Dillards, Inc.*, 351 F.3d 1100, 1101 (11th Cir. 2003) (speculation about costs an improper basis to deny arbitration, noting that "if a party considers his liability for costs to be excessive or to deprive him of his statutory remedy, he may seek judicial review of the award"); *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1261 (11th Cir. 2003) ("Whether [plaintiff] will, in fact, incur attorneys' fees in this matter depends entirely on whether he prevails in arbitration."); *Bess v. Check Express*, 294 F.3d 1298, 1304 (11th Cir. 2002) ("[A]ny discussion of [Plaintiff's] potential costs under the AAA rules necessarily is based on speculation and cannot provide an adequate basis for concluding that [his] costs likely would be prohibitively expensive."). Inetianbor must first raise his claims through arbitration; only when he has done so may he raise challenges to the actual conduct of the arbitration in this Court.

## III. INETIANBOR MUST BRING HIS CLAIMS IN THE PENDING ARBITRATION

In one of the few arguments related to the issue properly before the Court, Inetianbor appears to argue that because he was not given the choice to select "either (i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council," Loan Agreement at 5, the Court should not accept CashCall's *Demand for Arbitration* as valid. *See Opposition* at 2 (¶ 3). However, as

[5] In the *Order Denying Plaintiff's Motion for Remand and Granting Defendant's Motion to Compel Arbitration*, the Court expressly rejected Inetianbor's arguments that CashCall is not entitled to enforce the arbitration provision, that the tribal court does not have jurisdiction over him, and that Western Sky's allegedly-improper affiliation with the tribe constitutes a basis to deny arbitration. *See id*. at 6-8 (citing *Jenkins*). Inetianbor's arguments on these points in the *Opposition* in no way undermine the Court's prior, correct analysis of these issues.

the Court is well aware, Inetianbor has refused to arbitrate – and is now refusing to do so despite the indisputable fact that the arbitration is in process. Furthermore, the "Choice of Arbitrator" provision expressly provides CashCall with the option to select the arbitrator in the event the other party – *e.g.*, Inetianbor – fails to choose an arbitrator. *See* Loan Agreement at 5. In accordance with that provision, CashCall has exercised its contractual right and Inetianbor is obligated to arbitrate before Tribal Elder Robert Chasing Hawk Sr.

Moreover, even if the Court were to decide that CashCall's selection of a Tribal Elder in accordance with the Loan Agreement should not be honored, Section 5 of the FAA mandates that Inetianbor's agreement to arbitrate be enforced.[6] *See In re Checking Account Overdraft Litig. MDL No. 2036*, 685 F.3d 1269, 1283-84 n.20 (11th Cir. 2012) ("We reject Barras's alternative ground for affirmance, that a purported moratorium on conducting consumer-related disputes by the AAA renders her arbitration clause unenforceable, because 9 U.S.C. § 5 establishes a procedure for appointing a replacement arbitrator 'if for any . . . reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire.' 9 U.S.C. § 5 (2006); *see Brown v. ITT*

[6] Section 5 states,

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5 (2012) (emphasis added).

*Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir.2000)."); *see also Brown*, 211 F.3d at 1222 ("The unavailability of the NAF does not destroy the arbitration clause.").[7]

CashCall has repeatedly attempted to accommodate Inetianbor – but with the caveat that he must comply with his contractual commitment to arbitrate. Well-established law mandates that he do so, and that the Court grant the *Renewed Motion*.

## IV. CONCLUSION

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

Respectfully submitted,

Date: May 9, 2013

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[7] Although the Court found the arbitral forum integral to the Loan Agreement, *see Order Granting Motion to Reopen Case* [Doc 45] at 5-7, the established availability of the arbitral forum moots that issue. In addition, CashCall notes that the Loan Agreement contains a clause requiring severance of any invalid aspect of the arbitration provision. *See id*. at 6 ("If any of this Arbitration Provision is held invalid, the remainder shall remain in effect[.]"). Thus, either through applying Section 5 or through severance, any perceived problem with arbitration provision – and CashCall submits that no such problem exists – is curable such that there is no basis to deny arbitration.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY,** that on May 9, 2013, I electronically filed a true and correct copy of the *Reply in Support of Defendant CashCall, Inc.'s Renewed Motion to Compel Arbitration and Dismiss or Stay Case* with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on parties as listed (through counsel or those reflected as appearing without counsel) in the below Service List via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Christopher S. Carver
Attorney

**SERVICE LIST**

***Inetianbor v. CashCall, Inc.***
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