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 RENEWED MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY CASE, AND SUPPORTING MEMORANDUM OF LAW

Pursuant to Fed. R. Civ. P. 12(b)(3), defendant CashCall, Inc. ("CashCall"), renews its motion to compel arbitration of this dispute as required by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*., and requests that the Court dismiss or stay the *Second Amended Complaint* [Doc 48] filed by plaintiff Abraham Inetianbor ("Inetianbor") in favor of arbitration.

Preliminary Statement

CashCall recognizes that the Court – based on Inetianbor's inaccurate representations – re-opened the case and allowed Inetianbor to file his *Second Amended Complaint* [Doc 48] on the grounds that (i) the arbitration provision is integral to the Western Sky Loan Agreement ("Loan Agreement") on which CashCall's arbitration demand is based and (ii) arbitration in accordance with that provision is not possible. *See Order Granting Plaintiff's Motion to Reopen Case* [Doc 45] at 5-9. However, whether or not the provision is integral to the Loan Agreement (which CashCall does not concede) arbitration in accordance with the arbitration provision is, in fact, possible – and CashCall's has submitted the appropriate *Demand for Arbitration* to a Tribal

Elder of the Cheyenne River Sioux Tribal Nation. An unsigned copy of CashCall's *Demand for Arbitration* is attached as Exhibit **1**. A signed copy will be filed subsequently and, when the *Demand for Arbitration* is accepted by the Tribal Elder, CashCall will file that documentation with the Court.

Moreover, the letter Inetianbor filed as Exhibit B to *Plaintiff's Notice of Compliance with Order Compelling Arbitration and Report Regarding the Status of the Case* [Doc 36], which he characterizes as one showing that "the Tribe through Hon. Judge[1] Mona R. Demery clearly stated that the Cheyenne River Sioux Tribe does not conduct Arbitration at the Reservation," *see id*. at 1, misrepresents the facts and the proper conclusion. The Cheyenne River Sioux Tribal Court does not "conduct Arbitration" – any more than this Court does. However, the Loan Agreement (a copy of which is attached as Exhibit A to the *Demand for Arbitration* and which is also attached hereto as Exhibit **2**) does not provide that arbitration is to be conducted by the Tribal Court. Instead, the Loan Agreement provides that "[a]rbitration 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." *See id*. at 5 ("Choice of Arbitrator") (emphasis added). As Magistrate/Mediator Demery has now clarified, "The Court does not provide arbitration. Arbitration, as in a contractual agreement, is permissible. However, the Court does not involve itself in the hiring of the arbitrator or setting dates or times for the parties. After there is an arbitration award, the parties may seek to confirm the award in Tribal Court." *See* April 4, 2013, Letter from Mediator/Magistrate Mona R. Demery (attached as Exhibit **3**) at 1 (emphasis added). Thus, through this motion, CashCall seeks to

[1] It should be noted that Ms. Demery is not a "judge" of the tribal court. As denoted on the letter, she is a "Mediator/Magistrate." *See id*.; *see also* Doc 36 Ex. B at 1.

enforce the "contractual agreement" with Inetianbor through which he expressly agreed to arbitrate his claims, which arbitration can and should be conducted in the Cheyenne River Sioux Tribal Nation as provided by the Loan Agreement.[2]

Furthermore, after such an arbitration has been conducted, an "Arbitration Award" will be issued under the auspices of the Cheyenne River Sioux Tribal Court. An example of one such award is attached as Exhibit **4**. And, the Court should note that the Arbitrator in that matter, Mark A. Moreno, is a United States Magistrate Judge for the United States District Court, District of South Dakota (see https://www.sdd.uscourts.gov/?q=court-info).

In sum, Inetianbor has refused to arbitrate and has mislead the Court into understanding that arbitration pursuant to the Loan Agreement is not available; however, the fact is that such arbitration is available. Therefore, the Court's prior *Order Denying Plaintiff's Motion for Remand and Granting Defendant's Motion to Compel Arbitration* ["*Order Granting Motion to Compel Arbitration*"; Doc 33], was absolutely correct: "The terms of the agreement are clear: all disputes between the borrower and the holder of the Note or the holder's servicer must be settled through arbitration." *Id*. at 6 (emphasis added). Accordingly, based on well-established precedent and this Court's prior ruling, this action should be dismissed or stayed in favor of arbitration, because arbitration is possible and, in fact, has been properly initiated.

[2] CashCall will, however, agree to AAA arbitration if Inetianbor prefers, as it stated in *Defendant CashCall, Inc.'s Response to Plaintiff's Notice of Compliance (*etc.*)*. *See id*. at 4. The *Order Granting Motion to Reopen Case* does not address Inetianbor's statement that he could agree to arbitration after the *Second Amended Complaint* was accepted by the Court. *See Plaintiffs' Reply to Defendant CashCall's Response to Plaintiffs' Notice of Compliance (*etc.*)* [Doc 42] at 8 ("[P]laintiff MAY consider AAA arbitration if suggested by the court and agreed on by both parties involved but only after the Second Amended Complaint is filed with this Court.").

I. INTRODUCTION AND BACKGROUND

After the Court reopened this case, Inetianbor filed his *Second Amended Complaint*, which is a substantial change from his initial pleadings. Inetianbor originally filed the action in state court on July 12, 2012, using a form filing entitled "Complaint for damages—General form [RCP 1.110(b)]." He then amended his claims through a document entitled "Amendment to #5 and #6 of Original Complaint for Damages - General form [RCP 1.110(b)] filed on July 12th, 2012." *See Defendant CashCall, Inc.'s Notice of Removal* [Doc 1], Exs. A & B. The two documents together as constitute Inetianbor's *Amended Complaint*, which raised for the first time a clam under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq. See id*. at #5(C). The claims in that pleading include "defamation," "usury," and alleged violations of the FCRA, for which the total damages sought were $10,500. *See id*. at Doc 16-1, pgs. 4-6.

Inetianbor's *Second Amended Complaint* ups the ante substantially from his previous claim of $10,500 in damages – by a multiple of thirty. Inetianbor now seeks $50,000 for "defamation of character" allegedly affecting his ability to obtain loans from other lenders, $2,182.95 as damages for alleged "usury," $30,000 as damages for claimed personal injuries ("stress, pain and suffering"), $16,000 for claimed FCRA damages, miscellaneous damages of $3,867.30, removal of the negative credit report, and punitive damages of $250,000. *See id*. at 9-10. Accordingly, Inetianbor's monetary damages sought now total $352,050.25. *See id*. at 10.

As the Court is aware, this dispute centers on Inetianbor's January 5, 2011, consumer loan with Western Sky Financial, LLC ("Western Sky"), which is memorialized in the Loan Agreement. The Loan Agreement contains clearly-identified, broad arbitration provisions that require every dispute relating to the loan to be arbitrated. *See id*. at 3-4. Because the Court has previously interpreted and enforced these provisions, *see Order Granting Motion to Compel Arbitration* at 2, 6-8, CashCall does not repeat its arguments in its prior motion to compel

arbitration and reply here.[3] The Court was correct before, and the Court remains correct – and the fact that arbitration pursuant to the Loan Agreement is available means that the Court should reiterate its prior ruling and compel this matter to arbitration or, in the alternative, stay it pending such arbitration.

II. INETIANBOR'S *SECOND AMENDED COMPLAINT* ENTITLES CASHCALL TO RENEW ITS MOTION TO COMPEL ARBITRATION

Inetianbor's filing of the *Second Amended Complaint* entitles CashCall to again move to compel arbitration because the *Second Amended Complaint* dramatically changes the scope and – by apparently now making significant personal injury claims – the theory of Inetianbor's claims. In *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194 (11th Cir. 2011), the Eleventh Circuit addressed exactly this issue, but in the context of a defendant deemed to have waived its right to seek arbitration – which CashCall clearly has not. *See id*. at 1202-04. Even though waiver had properly been found by the district court, the Eleventh Circuit held that the filing of an amended complaint effectively rescinded the waiver and revived the defendant bank's right to compel arbitration, such that the district court's denial of arbitration was error:

> the 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." *Brown v. E.F. Hutton & Co.*, 610 F.Supp. 76, 78 (S.D. Fla. 1985) (citing J*oseph Bancroft & Sons Co. v. M. Lowenstein & Sons, Inc.*, 50 F.R.D. 415 (D. Del. 1970)). It simply would be unfair to allow the plaintiff to change the scope of the case without granting the defendant an opportunity to respond anew. *Id*.

Id. at 1202. *See also Brown*, 610 F. Supp. at 78 (compelling arbitration and finding that a defendant is entitled to a "fresh start" in answering an amended pleading).

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[3] However, to the extent necessary to preserve the record, CashCall incorporates those arguments and the attached documents herein. *See Defendant CashCall, Inc.'s Motion to Compel Arbitration and Dismiss or Stay Case, and Supporting Memorandum of Law [1-24-13]*[Doc 16] and *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)* [Doc 26]

Thus, in *Krinsk*, where the plaintiff expanded the class definition, that amendment was found to be a change in scope or theory sufficient to entitle the defendant to rescind a prior waiver. *See* 654 F.3d at 1203-04, Similarly, in *Brown*, the court compelled arbitration where the second amended complaint:

> significantly broadened the focus of the litigation in that Plaintiff now alleges that damage occurred with respect to the entire course of dealings between the parties—not simply one transaction. Whereas the original complaint alleged that the damages suffered by the Plaintiff totaled some $50,000 as a result of one "unsuitable" transaction, the Second Amended Complaint alleges that mismanagement of the entire account resulted in damages of $150,000.

610 F. Supp. at 78. Thus, in *Brown* the trebling of the damages sought was sufficient to revive a right to compel arbitration.

Here, Inetianbor has increased the scope of his damages thirty-fold, from $10,500 to $352,050.25, and added significant personal injury allegations to boot. And, of course, CashCall has never been deemed to have waived its right to arbitration. Instead, the Court's prior ruling was based on the misapprehension that arbitration pursuant to the Loan Agreement was not possible. However, the facts show that it is, and therefore Inetianbor's new, dramatically-expanded claims should be compelled to arbitration.

III. THE FAA MANDATES DISMISSAL OR A STAY OF THIS ACTION IN FAVOR OF ARBITRATION

The FAA governs the enforcement, interpretation, and validity of arbitration clauses in commercial contracts, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983), and establishes a strong presumption in favor of arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). By "enacting the FAA, Congress demonstrated a 'liberal federal policy favoring arbitration agreements.'" *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991)). Accordingly, the FAA "requires the courts to 'rigorously enforce

agreements to arbitrate.'" *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. Medpartners, Inc.*, 312 F.3d 1349, 1358 (11th Cir. 2002) (quoting *Mitsubishi*, 473 U.S. at 626).

"[T]he Supreme Court [has] made clear that the strong federal preference for arbitration of disputes expressed by Congress in the [FAA] must be enforced where possible." *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1258 (11th Cir. 2003) (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000)) (emphasis added). Thus, "any doubts concerning the scope of arbitral issues should be resolved in favor" of arbitrating Inetianbor's claims. *Moses H. Cone*, 460 U.S. at 24-25. In fact, "parties must clearly express their intent to exclude categories of claims from their arbitration agreement." *Paladino v. Avnet Computer Techs., Inc.,* 134 F.3d 1054, 1057 (11th Cir. 1998). Here, as the Court previously found in the *Order Granting Motion to Compel Arbitration*, the Loan Agreement clearly expresses the parties' intent to arbitrate every claim which could arise from that agreement; no claims are excluded and all of Inetianbor's claims are encompassed. *See id*. at 6.

As noted above, one of Inetianbor's claims is for usury under Florida law. *See Second Amended Complaint* at 6. In *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 445-46 (2006), the Supreme Court reversed the Florida Supreme Court's denial of arbitration to the defendant check-cashing company on public policy grounds where the plaintiff contended that the defendant "charged usurious interest rates and that the Agreement violated various Florida lending and consumer-protection laws, rendering it criminal on its face." *See id*. at 443. The allegedly usurious nature of the contract was irrelevant to the Court's analysis, because any challenge to the substance of the contract "either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid" is not to be decided by a court, but by an arbitrator. *See id*. at 444-446. *Buckeye* is directly on point, and its holding is

clear: "We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id*. at 449. Therefore, as the Court ruled with respect to Inetianbor's *Amended Complaint*, the *Second Amended Complaint* must also be compelled to arbitration.

IV. CONCLUSION

WHEREFORE, 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.

Certificate of Good Faith Conference

Pursuant to Local Rule 7.1(a)(3), I hereby certify that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve the issues raised in the motion and has been unable to do so. In addition to Inetianbor's prior rejection of arbitration, counsel for CashCall spoke with plaintiff Inetianbor regarding its most recent filing and was told that he opposes "everything" CashCall files.

Respectfully submitted,

Date: April 23, 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 the foregoing was filed via CM/ECF and served as indicated below 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 e-mail at rootdoctorabe@gmail.com on April 23 and by U.S. Mail on April 24, 2013)
Pro se plaintiff
4271 NW 5th Street, #247
Plantation, FL 33317