IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

JOSHUA PARNELL, **Plaintiff,**	)	
v.	)	**Civil Action File No.:**
WESTERN SKY FINANCIAL, LLC, d/b/a Western Sky Funding, Western Sky, WesternSky.com; MARTIN A. ("Butch") WEBB; & CASHCALL, INC.,	)	**4:14-cv-00024-HLM**
Defendants.	)	

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

I. Plaintiff's Opposition Fails Because It Does Not Attack The Delegation Provision, Much Less The Arbitration Clause, *Specifically*.

The Supreme Court's pronouncements on when, if ever, a court can void an arbitration clause make crystal clear that the *only* acceptable grounds for doing so relate to the validity of the arbitration clause *specifically*. A party may not avoid his obligation to arbitrate by arguing that the contract as a whole is unenforceable, or that other provisions of the contract are invalid. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). Similarly, where, as here, an arbitration clause delegates to the arbitrator the authority to decide whether the arbitration clause is enforceable, a court can void the delegation provision only if a party attacks that

provision *specifically*. (*See* Op. Br. 9-10, 11-12); *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006); *Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 998 (11th Cir. 2012).

Plaintiff flouts those principles. He candidly admits that he seeks to avoid his obligation to arbitrate by attacking before this Court (and not in arbitration) the "contract in general" as "unconscionable, illegal and unenforceable." (Opp. 8.) He also seeks to avoid his agreement to arbitrate by arguing that "other provisions of the Loan Agreement" are unenforceable, "namely its choice of law provision." (*Id.* at 9.) Plaintiff then dedicates seven pages of his brief to arguing that the choice-of-law provision is unenforceable. But whether that is so does not alter the Arbitration Clause's enforceability because the Supreme Court has held that "the choice-of-law question … must be decided in the first instance by the arbitrator." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995). Finally, although under clear Supreme Court case law this Court must enforce the delegation provision unless Plaintiff attacks and establishes cause for negating the "delegation provision specifically," (Op. Br. 12 (quoting *Rent-A-Ctr.*, 130 S. Ct. at 2779)), Plaintiff's Complaint and his opposition brief never *mention*, much less attack, the delegation provision.

In short, Plaintiff's opposition brief asserts grounds that are *never* sufficient to avoid an arbitration agreement (that the Loan Agreement as a whole is supposedly unenforceable, or that the Court can void the Arbitration Clause because other provisions of the Loan Agreement are supposedly unenforceable), and directs even those improper arguments to the wrong forum (because the delegation provision states that only the arbitrator can decide those questions).

This Court need proceed no further to enforce the delegation provision and the Arbitration Clause. Nonetheless, even if this Court were the proper forum to consider Plaintiff's arguments, they fail for the reasons discussed below.

II. This Court May Not Void The Arbitration Clause On Unconscionability Grounds.

This Court may not consider Plaintiff's argument that the Arbitration Clause is unconscionable because that argument is not directed at the delegation provision specifically. Nonetheless, that argument would fail even if the Court could consider it because (a) Plaintiff's unconscionability argument is preempted by the FAA; and (b) the Arbitration Clause is not unconscionable.

A. *Concepcion* Forecloses Plaintiff's Attempt To Void The Arbitration Clause On Unconscionability Grounds.

Plaintiff relies upon the GPLA's unconscionability defense, which applies only to "arbitration clause[s] in payday loan contract[s]," O.C.G.A. § 16-17-2(c)(2), not

contracts generally. As CashCall has explained, under binding Supreme Court precedent applying FAA Section 2, the FAA preempts that defense because "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis in original). Likewise, the FAA preempts any state laws that "derive their meaning from the fact that an agreement to arbitrate is at issue," or that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the FAA. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 1753 (2011) (quotations omitted).

Plaintiff's principal argument to distinguish that authority is that, unlike in those cases, he challenges the entire Loan Agreement, not just the Arbitration Clause. (Opp. 22-23.) Plaintiff argues that *Concepcion* does not preempt the GPLA's unconscionability defense because "[t]he GPLA does not declare arbitration clauses in payday loan agreements *in se* illegal," but rather "merely restates well-established Georgia law that contracts that are unconscionable – even payday loan agreements – will not be enforced." (*Id.* at 23.) Plaintiff thus reiterates that, in attempting to avoid his agreement to arbitrate, he is attacking the "payday loan agreement" itself, *not* the Arbitration Clause or delegation provision. But this Court may not credit or consider

Plaintiff's broad attack on the entire Loan Agreement and provisions not in the Arbitration Clause itself. *See* Part I above.

Plaintiff also seeks to avoid the straightforward application of binding Supreme Court precedent by quoting at length the district court's decision in *Bankwest, Inc. v. Baker*, 324 F. Supp. 2d 1333, 1353-54 (N.D. Ga. 2004), *vacated as moot*, 446 F.3d 1358 (11th Cir. 2006). (Opp. 23-24.) This effort, too, has multiple failings.

First, *Bankwest* predated the Supreme Court's decisions in *Concepcion*, *Italian Colors*, and *Buckeye*, each of which made clear that (1) a court may not void an arbitration clause on the ground that the entire contract containing that provision is unenforceable under state law (*Buckeye*, 546 U.S. at 449); (2) state unconscionability defenses as applied to arbitration clauses with class waivers are preempted by the FAA (*Concepcion*, 131 S. Ct. at 1753); and (3) the fact that an arbitration clause with a class action waiver risks besetting low-dollar claims is irrelevant, as the FAA's command to enforce arbitration agreements trumps those considerations (*Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013)). Plaintiff's decade-old district court decision has, respectfully, been superseded by subsequent Supreme Court cases.

Second, other binding authority rejects *Bankwest*'s reasoning. In *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. 2005), a case

brought under the GPLA, the Court held that "allegations of illegality go to the [loan contract] generally, and not to the arbitration agreement specifically. Therefore, an arbitrator, and not a federal court, should determine whether the underlying transactions are illegal and void." *Id.* at 881 (quotations omitted). Two years later, the Georgia Court of Appeals held likewise. *See Crawford v. Great Am. Cash Advance, Inc.*, 284 Ga.App. 690, 695, 644 S.E.2d 522, 526 (2007) ("Crawford further contends that the trial court erred in compelling arbitration, arguing that the … loan contracts are illegal under the Georgia Payday Loan Act and are thus void ab initio. We disagree.").

Third, Bankwest addressed loans unquestionably subject to the GPLA because they were made by lenders acting through agents operating within Georgia. *Bankwest,* 324 F. Supp. 2d at 1339-40. CashCall has already demonstrated, however, that the GPLA does not apply to loans made by a lender with no physical presence in this state, (Op. Br. 10-11; Dkt. 18-1 at 7-8), and Plaintiff fails to offer any response to this argument.[1]

[1] It is well established in the Northern District of Georgia that the failure to respond to an argument in a motion deems that argument or claim abandoned pursuant to Local Rule 7.1(B). *See Kramer v. Gwinnett Cnty., Ga.*, 306 F. Supp. 2d 1219, 1221 (N.D. Ga. 2004); *see also Sherk v. Adesa Atlanta, LLC*, 432 F. Supp. 2d 1358, 1374 (N.D. Ga. 2006); *Welch v. Delta Air Lines, Inc.*, 978 F. Supp. 1133, 1137 (N.D. Ga. 1997); *Cahela v. James D. Bernard, D.O., P.C.*, 155 F.R.D. 221, 223 (N.D. Ga. 1994).

Fourth, Bankwest was a facial challenge to the GPLA, and made clear that it did not decide "whether any particular application of this provision might be inconsistent with the FAA." 324 F. Supp. 2d at 1354. That decision thus says nothing about whether the particular defenses that Plaintiff has asserted are preempted by the FAA given the circumstances of this case.

B. The Arbitration Clause Is Not Unconscionable.

Even were it not preempted by the FAA, Plaintiff's unconscionability defense would still lack merit. Indeed, CashCall established in its opening brief that the Arbitration Clause is not unconscionable. Plaintiff's arguments to the contrary (a) do not address state law unconscionability at all; or (b) address different arbitration clauses than the one at issue here.

Plaintiff relies upon the effective-vindication rule espoused in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), (Opp. 15), but as CashCall has already explained, that case had nothing to do with state law unconscionability. Instead, that case created a limited exception to the FAA for *federal* claims when arbitration would not give the plaintiff a chance to "effectively … vindicate" those federal claims. (Op. Br. 20); *see also Italian Colors*, 133 S. Ct. at 2311 (discussing the effective vindication exception). Because Plaintiff brings state

law claims—which cannot trump a federal statute—the effective vindication rule does not apply. (Op. Br. 20.)

Plaintiff also relies heavily (at 16-18) on two district court decisions in other cases involving Western Sky, *Jackson v. PayDay Fin., LLC*, No. 11-cv-9288 (N.D. Ill. Aug. 28, 2013), and *Inetianbor v. CashCall, Inc.*, No. 13-cv-60066 (S.D. Fla. Aug. 19, 2013). But as Plaintiff later acknowledges, his Arbitration Clause is different from the one at issue in those cases in a crucial way: Plaintiff's Arbitration Clause authorizes him to select the AAA or JAMS to administer the arbitration. (Dkt. 3-2 at 4.) Later, Plaintiff argues that is irrelevant because under that provision "there is no 'choice of arbitrator' allowed — only a choice of an arbitration administrator." (Opp. 19.) But that does not matter because there is no requirement that an arbitration clause designate who the arbitrator must be. The Eleventh Circuit thus has rejected a challenge to an arbitration clause that did "not specify the identity of the arbitrator, forum, location or allocation of costs from the arbitration," because "Section 5 of the [FAA] provides courts with the authority to identify an arbitrator for parties who cannot agree upon one." *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312, 1313 (11th Cir. 2005), *overruled on other grounds by Lawson v. Life of S. Ins. Co.*, 648 F.3d 1166, 1171 (11th Cir. 2011). Nor does it matter, even if true, that "[t]here is no Tribal arbitration" or tribal "consumer dispute rules," as Plaintiff argues. (Opp.

20.) As CashCall has explained, the Arbitration Clause authorizes Plaintiff to replace Tribal arbitration with arbitration administered by the AAA or JAMS, and there is no question those arbitral fora are available. (Op. Br. 23-25.) Plaintiff once again ignores that argument.

C. Plaintiff's Other Arguments May Not Void The Arbitration Clause.

Plaintiff makes a flurry of additional arguments about the Loan Agreement's supposed unconscionability in an effort to void the Arbitration Clause. Specifically, Plaintiff contends that the Loan Agreement is unconscionable because (1) its interest rate is usurious; (2) the choice-of-law and forum-selection clauses (not the Arbitration Clause) allegedly violate Georgia public policy; (3) the forum-selection clause (not the Arbitration Clause) is unconscionable; (4) arbitration would be "prohibitively expensive … in view of the amounts in controversy"; and (5) the Loan Agreement precludes class proceedings. (Opp. 21.) Each argument fails.

The Court may not consider the first three arguments under *Prima Paint* because they do not relate to the Arbitration Clause, much less its delegation provision. (*See* pp. 1-3 above.)

Italian Colors squarely rejected the fourth argument, as "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the

elimination of the right to pursue that remedy," which is all the FAA demands to enforce an arbitration clause. 133 S. Ct. at 2311 (emphasis omitted).

Finally, *Concepcion* forecloses Plaintiff's fifth argument, as the Supreme Court there held that "[t]he overarching purpose of the FAA … is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748.

III. Plaintiff's Attack On The Choice-Of-Law Clause Is Irrelevant and Wrong.

As discussed above, Plaintiff dedicates the first seven pages of his argument to his claim that the choice-of-law provision is unenforceable. Even if true, that provides no ground for voiding the Arbitration Clause because the FAA requires this Court to enforce the Arbitration Clause irrespective of whether Georgia or CRST law applies. Further, even if Plaintiff's choice-of-law arguments were somehow relevant, under the Loan Agreement's Arbitration Clause and controlling Supreme Court precedent, those arguments are for the arbitrator, and not a court. (*See* pp. 1-3 above); *Vimar Seguros y Reaseguros*, 515 U.S. at 541.

Nonetheless, a brief response to the substance of Plaintiff's choice-of-law claim is in order to discuss two glaring deficiencies in Plaintiff's argument: (1) Plaintiff's

failure to mention, much less discuss, Georgia law authorizing parties to select the law of a foreign jurisdiction to govern their dispute; and (2) Plaintiff's false claim that the CRST courts will not give Plaintiff the opportunity to seek redress. (Opp. 12-13.)

As to the first point, Plaintiff does not cite the standard for determining if a choice-of-law clause is unenforceable. In diversity cases, federal courts apply the choice-of-law rules of the state in which they sit, here Georgia. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Under Georgia law, "the law of the jurisdiction chosen by parties to a contract to govern their contractual rights will be enforced unless application of the chosen law would be contrary to the public policy or prejudicial to the interests of this state." *CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Grp., Inc.*, 283 Ga. 426, 428, 659 S.E.2d 359, 361 (2008). "Enforcement of a contract or a contract provision which is valid by the law governing the contract will not be denied on the ground of public policy, unless a strong case for such action is presented; mere dissimilarity of law is not sufficient for application of the public policy doctrine." *Nationwide Gen. Ins. Co. v. Parnham*, 182 Ga. App. 823, 825, 357 S.E.2d 139, 142 (1987) (quotation omitted). Thus, "[t]he fact that the law of the forum state is different than the law of the foreign state does not mean that the foreign state's law necessarily is against the public policy of the forum state." *CS-Lakeview at Gwinnett*, 283 Ga. at 428, 659 S.E.2d at 361 (quotations omitted).

The Georgia courts thus have held that the fact that a loan agreement between a Georgia resident and an out-of-state lender violates Georgia's usury statute does not preclude Georgia courts from applying non-Georgia law under normal choice-of-law principles. *Commercial Credit Plan, Inc. v. Parker*, 152 Ga. App. 409, 263 S.E.2d 220 (1979). In *Commercial Credit Plan*, Georgia residents took out a loan whose term exceeded the maximum allowed under Georgia's usury statute from a South Carolina lender. *Id.* at 410, 263 S.E.2d at 221-22. The lender sued to enforce the note, and the Georgia residents argued that the note was unenforceable under Georgia law and that it violated Georgia public policy to apply South Carolina law to uphold the note. *Id.*

The Georgia Court of Appeals rejected that argument. The court acknowledged that Georgia had a strong public policy against usury, but held that the public policy did not apply to loan contracts formed outside of Georgia, even if entered into by Georgia residents. The court noted "the *intrastate* nature of the state's regard for money contracts and for the protection of Georgia debtors from unscrupulous exactions, that the public policy of the state is generally limited to enforcement of contracts to be performed in this state, and *does not extend to the enforcement of valid contracts made in other states*, for which the rules of comity will be observed." *Id.* at 412, 263 S.E.2d at 222 (emphases added). As CashCall has argued here, the Court of

Appeals noted that Georgia's usury statutes are focused on protecting Georgia residents who take out loans from lenders *in Georgia*, as "the Act is utterly silent" with respect "to the enforcement in Georgia of loan contracts made in another state, and valid under the laws of that state." *Id.* at 412, 263 S.E.2d at 223. The Court therefore rejected the trial court's decision to void the loans based on the purpose of the Georgia statute, which the trial court described as "manifest to protect Georgia citizens against usury." *Id.* (quotations omitted). That policy, the Court of Appeals held, only applied to loan agreements formed in the state. *Id.*

Under black-letter choice-of-law principles, therefore, the choice-of-law provision designating CRST law is enforceable. As discussed in CashCall's briefs in support of its motion to dismiss, the Loan Agreement was formed on the CRST Reservation, not in Georgia, because the last act necessary to consummate the contract occurred in Georgia. (Dkt. 18-1 at 17-18; Dkt. 18-5 ¶¶ 4-5; Reply in Further Support of CashCall, Inc's Renewed Motion to Dismiss Based on *Forum Non Conveniens* at 8-9.) Plaintiff has never offered any evidence to the contrary. Because Georgia's usury statutes "do[] not extend to the enforcement of valid contracts made in other states," it

does not violate Georgia public policy to apply CRST law to Plaintiff's Loan Agreement. *Commercial Credit Plan*, 152 Ga. App. at 412, 263 S.E.2d at 222.[2]

Finally, contrary to Plaintiff's arguments, CRST law will provide Plaintiff an adequate opportunity to seek redress. The Supreme Court has stated that "Tribal courts have repeatedly been recognized as appropriate forums for … disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). Further, the CRST has robust laws to protect consumers of which Plaintiff can avail himself. (Reply in Further Support of CashCall, Inc's Renewed Motion to Dismiss Based on *Forum Non Conveniens* at 13-14 n.6.)

Thus, whether the choice-of-law provision is enforceable is not a question properly before this Court. But Plaintiff's allegations that the choice-of-law provision is unenforceable or that the CRST does not have laws applicable to this dispute are unfounded.

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[2] *Commercial Credit Plan* dealt with a loan that allegedly violated the Georgia Industrial Loan Act. 152 Ga. App. at 410, 263 S.E.2d at 221. But the principle that Georgia's usury statutes do not apply to out-of-state lenders is the same under the statute Plaintiff invokes, the GPLA. As CashCall has demonstrated, that statute does not apply to loans made in "interstate commerce," as here. (Op. Br. 10-11; Dkt. 18-1 at 7-8.)

IV. CONCLUSION

For the reasons stated above and in CashCall's opening brief, this Court should compel arbitration and dismiss or stay Plaintiff's action.

Respectfully submitted this 18th day of April, 2014.

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CERTIFICATE OF COMPLIANCE

In compliance with N.D. Ga. R. 7.1D, I certify that the foregoing **REPLY IN SUPPORT OF CASHCALL, INC.'S RENEWED MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY ACTION** has been prepared in conformity with N.D. Ga. R. 5.1. This memorandum was prepared with Times New Roman (14 point) type, with a top margin of one and one-half (1 ½) inches and a left margin of one (1) inch. This memorandum is proportionately spaced, and is no longer than 15 pages.

/s/ William J. Holley, II
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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically submitted the foregoing **REPLY IN SUPPORT OF CASHCALL, INC.'S RENEWED MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY ACTION** to the Clerk of Court using the CM/ECF system which automatically sent e-mail notification of such filing to the following attorneys of record, each of whom is a registered participant in the Court's electronic notice and filing system:

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