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

Samuel Pearson, Plaintiff, v. United Debt Holdings LLC., Defendant.	)	Case: 14-cv-10070 Honorable Judge Kendall

MOTION AND MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION

Defendant United Debt Holdings LLC ("Defendant" or "United"), by and through its attorneys Justin M. Penn and Raven E. Burke, submit the following Motion and Memorandum in Support of Defendant's Motion To Stay and Compel Arbitration pursuant to the Federal Rules of Civil Procedure 12(b)(3) and 12(b)(6), 9 U.S.C. § 3, and the doctrine of tribal exhaustion.

PRELIMINARY STATEMENT

Plaintiff brings this case in an effort to challenge the terms of his Loan Agreement (the "Agreement") with United. However, the consumer-friendly terms themselves – which were known to Plaintiff at the time the loan was made with the original creditor, Plain Green, LLC ("Plain Green") – preclude this action. The Agreement's choice-of-law, forum selection, arbitration, and class-action-waiver clauses prevent Plaintiff from pursuing his claims in this Court. Although dismissal is entirely appropriate, Defendants are equally amenable to a stay of this matter until arbitration can be completed pursuant to the Agreement.

BRIEF STATEMENT OF FACTS

Plain Green, LLC ("Plain Green") is a lending company. According to the Complaint, Plaintiff obtained a loan from Plain Green sometime in 2014, failed to pay, and received calls from

United seeking to collect his debt. See Plaintiff's Complaint ("Complaint"), at Docket Entry "DE" 1. Importantly, the Agreement he signed contains choice-of-law, forum-selection, class-action-waiver, and mandatory arbitration provisions, each of which precludes the perpetuation of this case in this Court. See Plaintiff's Consumer Loan Agreement, attached hereto as Exhibit 1.

On December 16, 2014, Pearson commenced this action, purporting to represent a putative class. The Complaint alleges that Defendant violated the Fair Debt Collection Practices Act ("FDCPA") by charging unlawful interest in connection with Plaintiff's loan. To this end, the Complaint asserts three claims against Defendant: (1) a claim for alleged violation of the Illinois Interest Act; (2) a claim for alleged violation of the Illinois Criminal Code; and (3) a claim that United knew, or recklessly disregarded, that the loan it attempted to collect upon is void and unenforceable under the FDCPA. United obviously denies these claims. United, however, seeks to have this case stayed in favor of the binding arbitration required under the Agreement.

ARGUMENT

I. This Court should dismiss this case for improper venue.

The provisions of the Agreement preclude litigation in Illinois.

Pearson's Agreement contains a forum-selection clause and courts must consider the actual terms of the Agreement. *Continental Cas. Co. v. American Nat'l Ins. Co.*, 417 F.3d 727, 733 (7th Cir. 2005). The Agreement acknowledges consent to the "sole subject matter and personal jurisdiction of the Chippewa Cree Tribal Court, and [that Pearson] further agree that no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation." (Loan Agreement at 1.) Irrespective of any arbitration requirements, the forum-selection clause dictates that this case cannot proceed in the present forum. Specifically, the Agreement contains a waiver stating, "[y]ou hereby agree that you are waiving your right to a jury trial, to have a court decide your dispute…and to certain discovery and other procedures that would be available in a lawsuit." (Loan Agreements at

8 (bold type-face omitted)). Because this case has been filed in an improper venue, a Rule 12(b)(3) motion to dismiss may be properly granted. *Thompson v. Fajerstein*, No. 08 C 3240, 2008 WL 4279983, at *4 (N.D. Ill. Sept. 17, 2008) (Kocoras, J.) ("A challenge to venue based on a forum selection clause is properly brought as a Rule 12(b)(3) motion to dismiss.")

II. The forum selection clause is enforceable.

"A forum selection clause is a creature of contract resulting from consent and agreement." *Thompson*, 2008 WL 4279983 at *4. Forum selection clauses "are prima facie valid and should be enforced like any other contractual provision, unless they are unreasonable or the product of fraud or undue influence." *Penn, L.L.C. v. New Edge Network, Inc.*, No. 03 C 5496, 2003 WL 22284207, at *2 (N.D. Ill. Oct. 3, 2003) (Conlon, J.) (citing *Northwestern Nat'l Ins. Co. v. Donovan,* 916 F.2d 372, 375–76 (7th Cir.1990)).[1] The party who selects the venue bears the burden of establishing that it was properly chosen and that the forum-selection-clause is inapplicable. *Penn, L.L.C.,* 2003 WL 22284207, at *1.

The forum-selection here clause is enforceable because Plaintiff cannot establish that it is unreasonable, the product of fraud, or the product of undue influence. For example, the Plaintiff was given ample notice of the forum selection provision. At least six statements in the Agreement specifically convey that any dispute will be subject to the laws and courts of the Chippewa Cree Tribe. (Loan Agreement at 1, 6-9.) Moreover, Plaintiff separately acknowledged and agreed to the Arbitration Agreement, which itself contains multiple statements about the forum selection. (Loan Agreement at 6-9.)

[1] The citation to federal law in this brief is not a waiver of the Loan Agreement's choice-of-law clause. As a general matter, Tribal courts are guided by federal law as they apply Tribal law. *See, e.g., Ducheneaux v. Cheyenne River Sioux Tribe Election Bd.*, 2 Am. Tribal Law 39 (Cheyenne River Sioux C.A. May 25, 1999). Therefore, federal law provides an indication of how Tribal courts would decide the matters, and does not serve as a waiver of the selection of Tribal law. (See Agreement generally.)

Pearson made a highly discretionary choice when entering into the Plain Green Loan Agreement, he was not "'a hapless consumer' subjected to a gun-to-the-head moment." *Schwarz v. Sellers Markets, Inc.,* 812 F. Supp. 2d 932, 937 (N.D. Ill. 2011). On the contrary, Plaintiff applied for the loan at his own pace, over the internet. There was no deadline or other pressure to sign the Agreement, and Pearson could have walked away at any moment. Moreover, Pearson had a right, if he so chose, to later cancel the Agreement without cost or further obligation, by calling a toll-free number by 5:30PM on the first banking day after the effective loan date. (Agreement at 5.) Instead, Pearson made the conscious decision to enter and maintain the Loan Agreement, and he is presumed to know its terms and consents to be bound by them. 3 Arthur L. Corbin, Corbin on Contracts 607 (1989).

Proceeding with arbitration on "tribal land or within thirty miles of [borrower's] residence, at [borrower's] choice" (Agreement at 7), will not impose such difficultly or inconvenience on Pearson to justify the invalidation of the forum-selection clause. *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 525 (7th Cir. 2001) (requiring that "the selected forum [be] so gravely difficult and inconvenient that the complaining party will for all practical purposes be deprived of its day in court" (alteration marks omitted)). To the contrary, the Agreement conveniently allows Pearson to choose from several arbitration organizations, including the American Arbitration Association, JAMS, or another organization agreed upon by the parties. (See Agreement at 7.)

Enforcement of the forum-selection clause is in line with Illinois' public policy, the forum in which this suit was originally brought. *AAR*, 250 F.3d at 525. Under Illinois law, consumer protection and usury laws do not constitute public interests which are strong enough to invalidate contractual choice-of-forum provisions. *Amaro v. Capital One Bank,* No. 97 C 4638, 1998 WL 299396, at *7-8 (N.D. Ill. May 21, 1998) (Grady, J.). Instead, as was the case in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991), (1) some portion of the defendants do business with

customers in a variety of locations and have a special interest in limiting the forum in which they can be sued; (2) the clause dispels confusion about where suit can be brought; (3) by limiting the forum in which defendants can be sued, customers receive a benefit by way of a reduced rates; and (4) there is no evidence that the Plaintiff here is physically or financially unable to litigate in the agreed-upon forum. Accordingly, the forum-selection clause requires Pearson to resolve his dispute by arbitration in accordance with Chippewa Cree tribal law.

III. The arbitration agreement prevents the case from proceeding in this Court.

There is a strong federal policy in favor of arbitration and the enforcement of arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). Therefore, "questions of arbitrability must be addressed 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…" *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). In light of said policy, in order "[t]o 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." *Mori v. East Side Lenders, LLC*, No.1:11–CV–01324, 2011 WL 2518966, at *2 (N.D. Ill. June 24, 2011) (Coleman, J.) (citing *Zurich Am. Ins. Co. v. Watts Indus.,* 466 F.3d 577, 580 (7th Cir. 2006)).

The Agreement contains a provision to arbitrate.

The Agreement attached hereto contains Pearson's electronic signature. (Agreement at 10.) Plaintiff cannot contend otherwise. The Agreement contains an arbitration provision which requires that any dispute, regardless of the theory or relief sought, be submitted to binding arbitration. (Agreement at 6-7.) Conversely, the Agreement also contains a "Right to Opt Out" clause, the entirety of which is in bold type-face, informing Plaintiff that if he does not wish to be subjected to the agreement to arbitrate he can "advise us in writing…or via e-mail…we must receive your letter

or e-mail within 60 days after the date your loan funds." (Agreements at 6 (bold type-face omitted).) The same paragraph makes clear that if the right to opt-out of arbitration is exercised, "any disputes hereunder shall nonetheless be governed under the laws of the Chippewa Cree Tribe and must be brought within the court stem thereof." *Id.* Pearson never submitted a rejection of arbitration letter or e-mail within the time period specified or thereafter.

Accordingly, after being fully informed of all of the above information and still entering into the Agreement, Pearson willfully agreed to the terms stating that "[u]nless you exercise your right to opt-out of arbitration in the manner described above, any dispute you have with Lender or anyone else under this Agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court…and to participate in a class action or similar proceeding." (Agreement at 6.) Furthermore, Pearson agreed to the clause that "arbitration will be governed by the chosen arbitration organization's rules and procedures applicable to consumer disputes, to the extent that those rules and procedures do not contradict either the law of the Chippewa Cree Tribe or the express terms of this Agreement to Arbitrate." (Agreement at 7.)

Even if Plaintiff could establish that this Choice of Arbitrator clause was in some way deficient, that would not invalidate the entire agreement. Instead, as required by the Agreement's severance clause, "[i]f any of this Arbitration Provision is held invalid, the remainder shall remain in effect." (Agreement at 6.); *Mori,* 2011 WL 2518966, at *5 (noting that the severance clause allowed the court to strike the portion of Arbitration Agreement regarding the identity of the Arbitrator). In such a case, the Court can designate an Arbitrator. 9 U.S.C. § 5 (2006).

2. Plaintiff's Claims are within the scope of the arbitration provision.

The arbitration provision broadly covers any claims arising from the Agreement:

> Arbitration is a means of having an Independent third party resolve a Dispute. A "Dispute" is any controversy or claim between you and Lender, its marketing agent, collection agent, any subsequent holder of this Note… The term Dispute is to be given its broadest possible meaning and includes, without limitation, all claims or

> demands (whether past, present, or future, including events that occurred prior to the opening of this Account), based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief). **A Dispute includes**, by way of example and without limitation, any claim arising from, related to or based upon marketing or solicitations to obtain the loan and the handling or servicing of your account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law, and including **any issue concerning the validity, enforceability, or scope of this loan or the Agreement to Arbitrate.**

(Agreement at 7.)(emphasis added.)

Pearson asserts three claims – two regarding the interest charged under the loans, and one challenging its enforcement. It is without question that each of these claims "concern[s] the validity, enforceability, or scope of this loan or the Agreement to Arbitrate."

Plaintiff has refused to arbitrate.

By filing the present action, Pearson has sufficiently demonstrated his refusal to arbitrate his otherwise arbitrable claims. *See, e.g., LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194, 198 (2d Cir. 2004) ("A party has refused to arbitrate if it commences litigation…" (citation omitted)); *First Family Fin. Serv. v. Fairley,* 173 F. Supp. 2d 565, 572 (S.D. Miss. 2001) ("The Court cannot conceive of a more explicit refusal to arbitrate than the bringing of an arbitrable claim in state court that one has contractually agreed to arbitrate.") Therefore, the three requirements for compelling arbitration have been satisfied. *See, Mori*, 2011 WL 2518966, at *2.

IV. This Court should stay this case and require the Plaintiff to pursue arbitration under the Agreement.

Having demonstrated that arbitration is appropriate in this case, the proceeding in this Court should be stayed pending arbitration. The FAA requires:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (2006).

Therefore, United requests that the Court apply § 3, and stay this proceeding until arbitration can take place in accordance with the Agreement.

IV. Tribal Exhaustion requires that the case be dismissed or stayed.

"The doctrine [of tribal exhaustion] requires litigants, in some instances, to exhaust their remedies in tribal courts before seeking redress in federal courts." *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993). The doctrine is motivated by the desire to support tribal self-determination and self-government, and the recognition that a tribal court's authority is diminished by a federal court's exercise of jurisdiction over reservation affairs. *Id.* at 813. (citing *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 14-15 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 856 (1985)).

The application of tribal exhaustion to the activities of non-Indians on reservation land is presumed. *Altheimer*, 983 F.2d at 813 (citing *Iowa Mutual*, 480 U.S. at 18). However, even off reservation activity is subject to tribal exhaustion if, "at a bare minimum," it impacts directly upon tribal affairs. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 32 (1st Cir. 2000) (citing *Altheimer,* 983 F.2d at 814). Although the analysis of the impact on tribal affairs can be highly fact-dependent, there are at least three circumstances where any one of which satisfies the test: (1) where there is a direct attack on a tribal court's jurisdiction, (2) where a case is pending in tribal court, or (3) where the dispute concerns tribal law more than it does state and federal law. *Altheimer*, 983 F.2d at 814.

The instant case satisfies the first and third items on the list.[2] With regard to the first item, by filing his Complaint in Illinois, Pearson directly attacks the jurisdiction of the Tribal court by violating his agreement to "consent to the sole subject matter and personal jurisdiction of the Chippewa Cree Tribal Court." (Loan Agreement at 1.) With regard to the third circumstance, the Agreement not only concerns tribal law, but explicitly requires the interpretation and application of the laws of the Chippewa Cree Tribe, specifically stating that "no other state or federal law or regulation shall apply to this Agreement."[3] (Loan Agreement at 1, 6.) Tribal exhaustion acknowledges a Tribal Court's expertise regarding its own laws and protects a tribe's ability to "interpret its own ordinance and define its own jurisdiction." *Altheimer,* 983 F.2d at 814.

If the Court prevents an arbitrator adhering to the law of the Chippewa Cree Tribe from arbitrating this case, a cascading erosion of the policy interests underlying tribal exhaustion would result. First, it "would place the two judicial systems in direct competition with each other, and thereby undermine the tribal court's authority over tribal affairs." *Ninigret*, 207 F.3d at 33. This, in turn, erodes confidence in the authority and reputation of the institution. The weakening of Tribal legal institutions has a detrimental impact on the Tribe's efforts toward self-governance and autonomy. Tribal exhaustion exists to prevent said negative results. Therefore, the Court should apply tribal exhaustion and either dismiss or stay the present case. *Altheimer*, 983 F.2d at 813 (the Court may choose between the two remedies).

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[2] The second item – a pending tribal court action – is not required for the application of tribal exhaustion. *Ninigret,* 207 F.3d 21 (citing cases).

[3] The Loan Agreement contains a choice-of-law provision which states: "[t]his Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, Montana ("Chippewa Cree")." (Loan Agreement at 1 (bold type-face omitted)).

V. If the Court declines to otherwise dismiss or stay this case, dismissal is still appropriate.

If the Court dismisses or stays this case, the analysis ends there. *See, e.g., Mori,* 2011 WL 2518966, at *5 ("If the district court determines that the agreement to arbitrate is valid, the court has no further power or discretion to address the issues raised in the complaint and must stay the proceedings and order arbitration." (citing *Volkswagen of Am., v. Sud's of Peoria, Inc.*, 474 F.3d 966, 971 (7th Cir. 2007)). If, however, the Court declines such a dismissal or stay, other threshold challenges to Plaintiffs' claims become ripe.

Plaintiff's claims should be dismissed based on the Choice-of-Law provision.

The Agreement makes clear that the substantive laws of the Chippewa Cree Tribe govern. (Agreement 2, 5, 6.) "It is only under exceptional circumstances that a district court will not honor a reasonable choice-of-law provision." *Mori,* 2011 WL 2518966, at *5 (citing *Auto–Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 547 (7th Cir. 2009)). "When a contract contains a choice of law provision, the law of the state chosen by the parties will be applied to any issue which the parties could have resolved by an explicit provision in their contract." *DeJohn v. The .TV Corp. Int'l*, 245 F. Supp. 2d 913, 922 (N.D. Ill. 2003) (citing *Scientific Holding Co. v. Plessey Inc.*, 510 F.2d 15, 22 (2d Cir. 1974); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)). Similarly, the parties cannot pursue claims under the laws of a state which has not been selected; any such claims must be dismissed. *DeJohn*, 245 F. Supp. 2d at 922.

Consequently, Plaintiff's claims – which are uniformly raised under Illinois law – cannot proceed and should be dismissed for failure to state a claim under Rule 12(b)(6). *See, e.g., Amaro,* 1998 WL 299396, at *7-8 (noting that consumer protection and usury laws do not supersede a choice-of-law provision).

Plaintiff's putative class claims should be dismissed based on the Class-Action-Waiver provision.

The Agreement prevents the Plaintiff from bringing a class action lawsuit in connection with the loan. (Agreement at 7-8.) Class-action-waivers are enforceable both in conjunction with and separate from arbitration agreements. *AT&T Mobility LLC,*131 S. Ct. 1740; *Bonanno v. Quizno's Franchise Co., LLC*, No. 06-cv-02358-CMA-KLM, 2009 WL 1068744, at *11 (D. Colo. Apr. 20, 2009) (enforcing class action waiver provision that did not accompany an arbitration clause). If the Court declines to dismiss or stay this case pending arbitration, United requests that the class portion be dismissed pursuant to Rule 12(b)(6), or relevant arbitration law, because the class-action posture violates the class-action waiver in the Agreement.

Plaintiff cannot disclaim the Agreement because his claims are founded upon its existence.

It is well settled that under the doctrine of equitable estoppel, a non-signatory may compel arbitration in two distinct circumstances: when the signatory references to or presumes the existence of a written agreement in asserting its claims against the non-signatory, and when the signatory raises allegations of "substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *Paragon Micro, Inc. v. Bundy*, 14 C 00203, 2014 WL 2441969 (N.D. Ill. May 28, 2014), *quoting Hoffman v. Deloitte & Touche, LLP,* 143 F.Supp.2d 995, 1004–05 (N.D.Ill.2001); *see also MS Dealer Serv. Corp. v. Franklin,* 177 F.3d 942, 947 (11th Cir.1999)); *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.,* 659 F.2d 836, 838–39 (7th Cir.1981) (finding that the plaintiff was equitably estopped from arguing that the non-signatory could not invoke the arbitration clause because the basis of the plaintiff's claims against the non-signatory were connected to the contract with the arbitration clause).

Both circumstances apply here. First, the claims in no uncertain terms rely upon and presume the existence of a written agreement. Plaintiff's claims are, in fact, founded upon terms of

the Agreement as he claims the interest agreed upon violates the law. Similarly, the allegations are founded upon the interdependent and concerted alleged misconduct by both United (the non-signatory) and Plain Green (a signatory to the Agreement). As such, Plaintiff is equitably estopped from disclaiming the existence of the Agreement or the provision to arbitrate.

CONCLUSION

WHEREFORE, for the foregoing reasons, United respectfully prays this Honorable Court stay this matter until arbitration can be completed under the terms of the Arbitration Agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **May 5, 2015,** I electronically filed the forgoing ***Motion and Memorandum in Support of Defendant's Motion to Stay Proceedings and Compel Arbitration*** with the Clerk of the U.S. District Court, using the CM/ECF system reflecting service to be served upon all parties of record.

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