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

SAMUEL PEARSON, for himself and a class,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:14CV10070
	)	
UNITED DEBT HOLDINGS LLC,	)	Judge Kendall
	)	
Defendant.	)	

RESPONSE TO MOTION TO DISMISS, COMPEL ARBITRATION OR STAY

United Debt Holdings LLC ("UDH") seeks to compel Samuel Pearson to arbitrate claims that UDH violated the Fair Debt Collection Practices Act, while collecting on an illegal, usurious loan he received from Plain Green LLC. (Doc. 27. See Doc. 1, ¶¶8-27 (verified complaint stating claims against UDH).) Its arguments are based on a document that UDH claims Pearson signed. (Doc. 27-1.) Yet the motion does not show he agreed to the terms in it, or that Pearson signed it. Nor does UDH show it was assigned the document, or has any rights under it.

In fact, the first time that Pearson saw the claimed agreement was June 29, 2015 – the day he signed an affidavit prepared to respond to the pending motion. (Exhibit 1, ¶¶1-2.) He also states that he would remember if he read a ten-page document before entering into an internet transaction, and that he has no copy of any loan agreement with Plain Green. (*Id.*, ¶¶3, 8.)

Before suing UDH, and while being subjected to UDH's abusive collection practices – which included a threat of arrest – Pearson asked for a copy of the agreement which UDH was calling about. (*Id.*, ¶¶4-6.) In response, a representative of UDH cursed at him, and told him he should have kept a copy of his agreement. (*Id.*, ¶7.)

UDH's motion claims –with no support at all – that "the agreement attached hereto contains Pearson's electronic signature. ([Doc 27-1] at 10.) Plaintiff cannot contend otherwise." (Doc. 27 at 5; see *id.* at 2 and 11 (similar).) Pearson ***does*** contend otherwise. There is absolutely no evidence that the document attached to UDH's motion is the loan agreement he entered into, or that he agreed to any terms in it.

I. THERE IS NO PROOF THAT PEARSON AGREED TO TERMS IN THE DOCUMENT THAT UNITED DEBT HOLDINGS RELIES ON

9 U.S.C. §3 provides that arbitration cannot be compelled, and litigation cannot be stayed, unless the Court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an [arbitration] agreement." This requires proof that there is an agreement to arbitrate. *Zurich American Ins. Co. v. Watts Industries Inc.*, 466 F.3d 577, 580 (7th Cir. 2006). *Accord*, *Druco Restaurants Inc. v. Steak 'n Shake Enterprises Inc.*, 765 F.3d 776, 781 (7th Cir. 2014). Whether that happened depends on normal contract formation and construction principles (*Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 296-297 (2010)), and specifically by contract law provisions that do not target arbitration clauses (*Marmet Health Care Center Inc. v. Brown*, 132 S.Ct. 1201, 1204 (2012)).

Any party claiming the benefit of a contract made on the internet must show that terms were displayed in such a manner that the consumer was bound to have noticed them, and thereafter did something to accept them. *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir. 2002), held that "reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." *Accord*, *Hines v. Overstock.com, Inc.*, 668 F.Supp.2d 362, 366-367 (E.D.N.Y. 2009), *aff'd*, 380 Fed.Appx. 22 (2d Cir. 2010); and *Van Tassell v. United Marketing Group LLC*, 795 F.Supp.2d 770, 793 (N.D.Ill. 2011) ("because [a] website fails to provide reasonable notice of the conditions of use, there was not a valid agreement to arbitrate").

The standard of proof is similar to that on a summary judgment motion, because UDH is seeks a holding that a particular contract exists as a matter of law. *Tinder v. Pinkerton Security*, 305 F.3d 728, 735 (7th Cir. 2002). *Accord*, *Johnson v. Orkin LLC*, 928 F.Supp.2d 989, 1001 (N.D.Ill. 2013) (citing *Tinder* and collecting cases); see *Brown v. Dorsey & Whitney, LLP*, 267

F.Supp.2d 61, 66-67 (D.D.C.2003) (similar). Under this standard, evidence submitted by the party opposing arbitration "is accepted as true, and all justifiable inferences must be drawn in his favor.... A party cannot avoid arbitration, however, merely by putting forward a general denial of the facts upon which the right to arbitrate rests; rather, the party opposing compelled arbitration must identify specific evidence in the record demonstrating a genuine issue of material fact for trial." *Johnson* at 1001 (citing *Tinder* at 735).

Such evidence exists here. Pearson swears he did not see the claimed contract until June 29, 2015 – the day he signed the affidavit presented with this brief. (Exhibit 1, ¶2.) He states he would have remembered seeing such a contract (*id.*, ¶3), and that he asked UDH for a copy of any claimed contract during its attempts to collect from him, but was refused (*id.*, ¶¶6-7).

There is no affidavit authenticating the claimed document. Without such evidence, and given Pearson's statements, UDH cannot claim that the arbitration agreement it presents is genuine, or was agreed to by the parties. *Asset Acceptance LLV v. Tyler*, 2012 IL App (1st) 093559 ¶¶46-51, 966 N.E.2d 1039, 1049-1050 (1st Dist. 2012). Defendant fails to recognize that, even if plaintiff's claims "rely upon and presume the existence of ***a*** written agreement" (Doc. 27 at 11-12 (emphasis added)), that does not establish that what UDH claims is ***the*** agreement in fact represents something to which Pearson consented.

II. THERE IS NO PROOF THAT UNITED DEBT HOLDINGS HAS ANY INTEREST IN ANY LOAN

UDH not only fails to show that the contract it offers is authentic, but also fails to demonstrate that it may enforce that contract. There is nothing attached to the motion showing that UDH is a lawful transferee of the contract it relies on – no purchase agreement, no bill of sale, no assignment and no other document that purports to transfer anything to UDH.

That UDH attempted to collect on a Plain Green debt from Pearson does not demonstrate that it had a right to do so. The Federal Trade Commission and the Attorney General of Illinois

have sought and obtained relief against collectors who allegedly "[used] threats and intimidation tactics to coerce consumers to pay payday loan debts they either did not owe, or did not owe to the defendants" – threats just like the ones UDH made to Pearson. (https://www.ftc.gov/news-events/press-releases/2015/04/ftc-illinois-attorney-general-halt-chicago-area-operation-charged.) See, *e.g.*, *FTC v. K.I.P. LLC, et al.*, No. 1:15CV2985 (N.D.Ill.)*; FTC v. American Credit Crunchers LLC et al.*, 1:12CV1028 (N.D.Ill.); *FTC v. Williams, Scott & Associates LLC*, 1:14CV1599 (N.D.Ga.); *FTC v. Pinnacle Payment Services LLC*, 1:13CV3455 (N.D.Ga.); and *FTC v. Broadway Global Master Inc. et al*, 2:12CV855 (E.D.Cal.). Subsequent investigation into Broadway Global Master's conduct led to an indictment against its incorporator, Kirit Patel, for wire and mail fraud, on which a plea agreement is pending. *United States v. Patel*, No. 2:12CR306 (E.D.Cal.).

The FTC has warned consumers to "be on the alert for scam artists posing as debt collectors. It may be hard to tell the difference between a legitimate debt collector and a fake one. Sometimes a fake collector may even have some of your personal information, like a bank account number." The warning advises consumers to insist on receiving a validation notice which "must include… the name of the creditor you owe," and that consumers should not pay a collector who "refuses to give you all of this information." (www.consumer.ftc.gov/articles/0258-fake-debt-collectors.) Such a validation notice was not provided to Pearson. (Doc. 1, ¶11.) The Consumer Financial Protection Bureau, which now has rulemaking authority over the FDCPA and shares enforcement authority, has published a similar warning. (http://www.consumerfinance.gov/askcfpb/1699/how-can-i-verify-whether-or-not-debt-collector-legitimate.html.) The FBI also issued such an advisory. (https://www.fbi.gov/news/pressrel/press-releases/paydayloanscam_120710.) Pearson actually sought such information from UDH,

but got cursed out instead. (Exhibit 1, ¶¶6-7.) The conduct of UDH towards Pearson conforms to the tactics used by scammers.

It appears that information relating to high-interest loans has been sold by lead-generators, or lenders, to others. Possession of information on alleged debtors on such loans does not demonstrate that a debtor owes on a particular internet loan, or that he owes a third-party collector or debt buyer on that loan, and not the original creditor. The only thing that would demonstrate that is an authenticated loan document, and an authenticated document showing that the collector may collect on it. Neither has been presented here. Bald assertions are insufficient. *Midland Funding LLC v. Loreto*, 34 Misc.2d 1232(A), 950 N.Y.S.2d 492, 2012 WL 638807 at *1-*4 (Richmond Co. (N.Y.) Civil Ct. Feb. 23, 2012).

Counsel for UDH surely knows the need to show that a collector has some rights in an alleged contract, having lost a motion to compel arbitration on exactly that ground in *Webb v. Midland Credit Management Inc.*, No. 1:11CV5111, 2012 WL 2022013 (N.D.Ill. May 31, 2012). They knew that could not just offer an unauthenticated document without evidence that UDH had acquired any rights under the agreement. The situation here is worse than in *Webb*. In *Webb* (2012 WL 2022013 at *3-*5), the collector presented an affidavit that lacked the proper foundation; UDH did not even bother to do that here. Under the circumstances, UDH's omission is not inadvertent.

In short, this Court is entitled to evidence which supports the claims made by UDH. It has provided none. Rejection of its arguments, and its motion, is proper. [1]

[1] By the same token, any claim that a class action waiver is enforceable requires proof that a contract containing such a waiver was agreed upon, and that UDH holds any interest in that contract – proof that is missing here. (See Doc. 27 at 11-12.)

III. ABSENT PROOF OF AN ENFORCEABLE AGREEMENT, OTHER ARGUMENTS MADE BY UNITED DEBT HOLDINGS FALL

UDH claims that the purported agreement's forum-selection clause requires dismissal, because it should have been brought in the Chippewa Cree Tribal Court. (Doc. 27 at 2.) UDH's failure to prove that the document was agreed to by Pearson, or that UDH has any interest in it, sinks this argument. However, even if the document were authenticated, and if it were owned by UDH, neither the forum-selection clause, nor claims as to a choice-of-law provision or a need for "tribal exhaustion," could provide UDH with any grounds for relief.

All these issues were addressed in *Jackson v. Payday Financial LLC*, 764 F.3d 765 (7th Cir. 2014), *cert. denied*, 135 S.Ct. 1894 (2015), which UDH fails to disclose. That case dealt a non-tribal internet lender (CashCall Inc.) who contracted with another lender based on a Native American reservation (Western Sky Financial LLC). Under this agreement, CashCall funded and controlled internet loans made to consumers nationwide, which were nominally made by Western Sky Financial, in an attempt to have the tribe's laws regarding consumer lending – or lack thereof – apply instead of more stringent state laws and regulations. See *Jackson*, 764 F.3d at 772. The District Court in *Jackson* (Kocoras, J.), on a limited remand of the appeal for fact-finding, summarized findings made by the New Hampshire Banking Department:

> respondents were engaged in a business scheme and took substantial steps to conceal the business scheme from consumers and state and federal regulators. The findings included the fact that Western Sky was nothing more than a front to enable CashCall to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive practices from prosecution by state and federal regulators. The Department found a reasonable basis to believe the business scheme described constituted an unfair or deceptive act or practice used as a shield to evade licensure from the Department by exploiting Indian Tribal Sovereign Immunity. [Exhibit 2 (District Court findings of fact in *Jackson*) at 5.]

The Illinois Department of Financial and Professional Regulation has entered cease-and-desist orders against high-interest lenders based on Native American reservations who hold no

license from the Department, notwithstanding choice of law provisions.[2] This follows the IDFPR's treatment of unlicensed, non-tribal lenders, whether within Illinois,[3] or outside Illinois.[4]

The Court in *Jackson* invited the participation of the Attorney General of Illinois, and the Federal Trade Commission, as *amici curiae*. Attorney General Madigan's brief, citing *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 132 (7th Cir. 1990), argued that a business could not force a contractor to waive "legislatively provided protections, whether directly through waiver provisions or indirectly through choice of law." *Jackson v. Payday Financial LLC*, No. 12-2617 (7th Cir.), Doc. 68 at 22-23. Such a waiver of statutory rights cannot be done through a choice-of-law clause, even if it is within an arbitration provision. *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2310 (2013) ("a provision in an arbitration agreement forbidding the assertion of certain statutory rights" is impermissible).

The Seventh Circuit, after considering the views of the Attorney General and the FTC, agreed with them and with the borrowers who brought the case. *Jackson* held that "a more-than-colorable argument can be made that the loan agreements' choice of law clause should not be enforced and that Illinois law ought to govern the parties' dispute" (compare *Jackson*, 764 F.3d

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[2] *In re MNE Servs.*, 13 CC 499 & 13 CC 503 (IDFPR Dec. 17, 2013) (based on the reservation of the Miami Tribe in Oklahoma); *In re Great Eagle Lending*, 13 CC 508 (IDFPR Nov. 18, 2013) (Big Valley Pomo (Cal.)); *In re North Star Finance*, 13 CC 501 (IDFPR Nov. 18, 2013) (Fort Belknap (Mont.)); *In re American Web Loan*, 13 CC 450 (IDFPR Oct. 10, 2013) (Otoe-Missouria (Okla.)); *In re Bottom Dollar Payday*, 13 CC 395 (IDFPR June 19, 2013) (Flandreau Santee Sioux (S.D.)); *In re Fireside Cash*, 12 CC 567 (IDFPR Dec. 10, 2012) (Oglala Sioux (S.D).); *In re Red Leaf Ventures*, 12 CC 569 (IDFPR Dec. 5, 2012) (Flandreau Santee Sioux); and *In re VIP Loan Shop*, 12 CC 573 (IDFPR Dec. 5, 2012) (Flandreau Santee Sioux).

[3] *In re Federal Acceptance*, 13 CC 511 (IDFPR Dec. 17, 2013); *In re Courtesy Loans*, 13 CC 513 (IDFPR Dec. 17, 2013); and *In re Bell Funding*, 12 CC 560 (IDFPR Nov. 5, 2012).

[4] *In re Saint Armands Servs.*, 14 CC 100 (IDFPR Apr. 4, 2014) (Kan.); *In re Insight Capital*, 13 CC 512 (IDFPR Dec. 19, 2013) (Ala.); *In re Goldline Funding*, 13 CC 515 (IDFPR Dec. 12, 2013) (Kan.); *In re Joro Res.*, 13 CC 504 (IDFPR Nov. 15, 2013) (British Virgin Islands and Texas); *In re Hydrafund.org*, 13 CC 339 (IDFPR May 3, 2013) (Nev.); *In re Hammock Cred. Servs.*, 12 CC 581 (IDFPR Nov. 26, 2012) (Fla.); *In re Integrity Advance*, 12 CC 444 (IDFPR Oct. 5, 2012) (Del.); *In re Kenwood Servs.*, 12 CC 445 (IDFPR Oct. 5, 2012) (Del.); *In re Mountain Top Servs.*, 12 CC 423 (IDFPR Oct. 5, 2012) (Nev.); and *In re Global Payday Loan*, 07 CC 119 (IDFPR May 30, 2007) (Utah).

at 775 n.23 to Doc. 27 at 10), that "because the plaintiffs' activities do not implicate the sovereignty of the tribe over its land and its concomitant authority to regulate the activity of nonmembers on that land, the tribal courts do not have jurisdiction over the plaintiffs' claims" against the lenders (compare *Jackson* at 782 to Doc. 27 at 2-5), and that the cases that UDH relies on for its tribal exhaustion claim (*Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 33 (1st Cir. 2000) and *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 814 (7th Cir. 1993)) were inapplicable (compare *Jackson* at 785-786 to Doc. 27 at 8-10). See *id.* at 766 (relying on *Carnival Cruise Lines Inc. v. Shute*, 499 U.S. 585 (1991)) and Doc. 27 at 4-5 (UDH's failed attempt to rely on *Shute*).[5]

Plain Green's loans were made under a similar, fraudulent "rent-a-tribe" scheme, organized by Think Finance Inc. (a non-tribal, Delaware corporation) and other non-tribal entities. (See Exhibit 3 (complaint in *Pennsylvania v. Think Finance Inc.*, No. 141101359 (Phila. Co. Ct. Common Pleas Nov. 13, 2014), *removed*, No. 2:14CV7139 (E.D.Pa. Dec. 17, 2014)); and Exhibit 4 (Plain Green contracts found in record in *Chippewa Cree Tribe et al v. Roberts et al*, No. 4:14CV63 (D. Mont. Aug. 28, 2014).) The terms of the claimed document require the application of Chippewa Cree law to the exclusion of all other federal and state laws, in order to defend against claims that state laws and regulations prohibit attacks what is an extremely usurious transaction. Plaintiff claimed in his complaint that the interest rate on his loan "exceeded 200 percent." (Doc. 1, ¶15.) He disputes the authenticity of the document UDH

[5] *Kemph v. Reddam*, No. 1:13CV6785, 2015 WL 1510797 (N.D.Ill. Mar. 27, 2015) failed to follow *Jackson*. Pearson respectfully submits that this was in error, and that this Court should apply the holdings of the Court of Appeals. In particular, the holdings in *Kemph* as to choice-of-law issues (2015 WL 1510797 at *4) do not consider the effect of choice-of-law and choice-of-forum clauses working in tandem – *i.e.*, the denial of substantive rights to which a litigant is entitled. Requiring consideration of choice-of-law issues to be made by an arbitrator in this case, and requiring that arbitrator to apply Chippewa Cree law (and no other), enables the overall scheme to evade state law, and cannot be enforced for the same reasons that support rejection of the arbitration clause as a whole.

presented (see Exhibit 1); however, that document purports to show that Plain Green imposed an interest rate of 373.97% – a rate that is almost three times as much as the one imposed by the loans considered in *Jackson* (764 F.3d at 768-769). (Doc. 27-1 at 2.)

The basic failure of UDH to prove that the document it presented is valid and enforceable is enough to make denial of its motion proper. Beyond that, its failure to address, or even acknowledge, binding authority dooms its arguments.

IV. CONCLUSION

Pearson respectfully submits that UDH's motion should be denied.

Respectfully submitted,

/s/ Thomas E. Soule
Thomas E. Soule

Daniel A. Edelman
Cathleen M. Combs
James O. Latturner
Thomas E. Soule
EDELMAN COMBS LATTURNER & GOODWIN LLC
20 S. Clark Street Suite 1500
Chicago IL 60603
(312) 739-4200
(312) 419-0379 (FAX)
courtecl@edcombs.com

CERTIFICATE OF SERVICE

I certify that Justin Penn, counsel for defendant (jpenn@hinshawlaw.com), was served with this document by operation of the Court's electronic filing system on June 30, 2015.

/s/ Thomas E. Soule
Thomas E. Soule