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

REPLY 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 Reply 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), and 9 U.S.C. §§ 3-4.

Plaintiff's suit, in its entirety, should be compelled to arbitration on an individual basis because a valid, enforceable agreement to arbitrate exists, the claims at issue fall within the scope of the agreement and Defendant acquired all rights under the agreement. Plaintiff's attempt to use this case as both a sword to challenge the interest rate of his Loan Agreement ("Agreement") with United, as well as a shield by arguing that the Agreement is illegal and usurious, should not be accepted. Plaintiff cannot deny the Agreement because it would effectively estop any FDCPA violation related to its terms. Because he is suing based upon the Agreement, and because his claims rely upon the existence of the Agreement, he cannot disclaim its existence. Moreover, 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,

Defendant is equally amenable to a stay of this matter until arbitration can be completed pursuant to the Agreement.

ARGUMENT

On a motion to compel arbitration, the court does not make a determination of the underlying merits of the case- the court's inquiry is limited to the very narrow determination of whether: (1) there is an agreement to arbitrate; and (2) whether it extends to the dispute in question. *Donaldson,* 124 Ill.2d 435, 444 (1988). A party can avoid arbitration only if it proves that it did not enter into a valid contract waiving its right to a judicial forum or that it cannot vindicate its statutory cause of action through arbitration. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000). The plaintiff bears the burden of proving that his claims should not be arbitrated. *Id.* at 91-92. Pearson does not claim he cannot be vindicated in arbitration or challenge the scope of the arbitration clause. He does not claim he never received the underlying loan or that he did not enter into an agreement with Plain Green. His challenge, instead, is that he did not review the agreement until he saw it attached to the instant motion.

Pearson has failed to sustain his burden and prove the invalidity of the Agreement into which he entered. Plaintiff's attempt to discredit United's right to enforcement of the Agreement via his reliance upon *Webb v. Midland Credit Mgmt., Inc.,* No. 11 C 5111, 2012 WL 2022013, at *4 (N.D. Ill. May 31, 2012), is futile. Unlike in *Webb*, where plaintiff's debt was assigned multiple times over to various debt collection entities making chain of assignment difficult to follow, United is, and has always been, the sole collector of Pearson's Plain Green debt. Pearson has filed a lawsuit on a contract, and Defendant has produced said contract, which shows Plaintiff agreed to arbitration. More problematic is that Pearson would plead himself out of court by mooting his statutory cause of action if allowed to argue that there is no valid Agreement.

I. Under the Federal Arbitration Act there is a presumption to arbitrate.

If an issue is arbitrable under the parties' agreement, as it is herein, then the Federal Arbitration Act ("FAA") mandates that the court stay its proceedings and compel arbitration when one party fails, neglects or refuses to comply with the agreement. 9 U.S.C. §4. The United States Supreme Court has explained that there "is both a "liberal federal policy favoring arbitration," *Moses H. Cone,* 460 U.S. 1, (1983), and a "fundamental principle that arbitration is a matter of contract," *Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. 63 (2010)." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745-46 (2011). In line with these principles, courts must place arbitration agreements on equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006), and enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 478 (1989).

Whether a claim is within the scope of an arbitration agreement is a matter of federal, not state, law. *Gore v. Alltel Communs., LLC,* 666 F.3d 1027, 1032 (7th Cir.2012). Under the FAA: (1) there is a presumption to arbitrate when contracts contain arbitration provisions, (2) any doubts concerning the scope of arbitration issues should be resolved in favor of arbitration, and (3) unless the court has a positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, arbitration is appropriate. *Id.* (citing *Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.,* 174 F.3d 907, 909 (7th Cir.1999)).

Although the FAA generally requires a federal district court to stay an action pending arbitration, the complaint should be dismissed where a court determines that all of a plaintiff's claims are subject to arbitration. *Sanchez v. CleanNet USA, Inc.,* No. 14 C 2143, 2015 WL 231450, at *7 (N.D.Ill. Jan. 15, 2015); *Chambers v. Aviva Life & Annuity Co.,* No. 12 C 9589, 2013 WL 1345455, at *5 (N.D.Ill. Mar. 26, 2013); *Johnson v. Orkin, LLC,* 928 F.Supp.2d 989, 1008–09 (N.D.Ill.2013);

Denari v. Rist, No. 10 C 2704, 2011 WL 332543, at *11 (N.D.Ill. Jan. 31, 2011); *Reineke v. Circuit City Stores, Inc.,* No. 03 C 3146, 2004 WL 442639, at *5 (N.D.Ill.Mar.9, 2004).

II. Plaintiff cannot disclaim the Agreement nor United's interest in enforcement 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, Pearson's claims in no uncertain terms rely upon and presume the existence of a written agreement. In fact, if there was any doubt as to the Agreement's existence or the attached Agreement in Exhibit 1 being "**the** agreement" Pearson consented to, his Affidavit is confirmation. Pearson's Affidavit does not dispute: receiving the loan money; that his signature is at the bottom of the Agreement; that he typed "I AGREE" next to his signature; that he checked the input box verifying the information provided; or that the Agreement was ever provided to him. *See, generally* Pearson Affidavit, attached hereto as Exhibit 2. Pearson's argument that Pearson never saw the Agreement until recently and Pearson's affirmation that he would remember reading a ten-page document on-line, that he never received the copy of the Agreement he requested, etc., Exhibit 2, ¶¶2-3, 6-7, all fail to prove that the Agreement does not exist or that he did not sign it.

As Pearson correctly underscores in his Response, "[a] party cannot avoid arbitration, however, merely by putting forward a general denial of the facts upon which the right to arbitrate rests." Response at 3 (quoting *Johnson v. Orkin LLC*, 928 F.Supp.2d 989, 1001 (N.D.Ill. 2013) (citations omitted). A general denial is precisely what Pearson has presented to the Court via its Response.

Plaintiff's claims are, in fact, founded upon terms of the Agreement as he claims the interest agreed upon violates the law. Pearson's Complaint asserts three claims against Defendant which are all based upon the Agreement's interest rate: (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 for alleged violation of the Fair Debt Collection Practices Act. These allegations are founded upon the interdependent and concerted alleged misconduct by both United (the non-signatory) and Plain Green (a signatory to the Agreement) in loaning money and enforcing contracts with illegally high interest rates. Pearson is estopped from simultaneously denying the Agreement's existence while pursuing claims founded upon its existence. If the lawsuit exists, the Agreement exists, and its arbitration clause is enforceable. *See Sanchez,* 2015 WL 231450. Plaintiff has not proven otherwise.

The Northern District has held that "courts regularly allow the non-signatory entity to enforce an arbitration agreement against a signatory on the basis of equitable estoppel. *See Leff v. Deutsche Bank AG,* No. 08–CV–733, 2009 WL 1380819, at *7 (N.D.Ill. May 14, 2009) (non-signatory could compel arbitration where Plaintiffs alleged that non-signatory engaged in "interdependent and concerted misconduct" with signatories)." *Sanchez,* 2015 WL 231450, at *7. The same is true herein. Accordingly, Pearson is equitably estopped from disclaiming the existence of the Agreement, the provision to arbitrate, or United's interest and right to the enforcement of the Agreement.

III. Plaintiff's reliance on *Jackson v. Payday Financial* is misplaced and unavailing.

In addition to generally denying the arbitration agreement, Pearson also contends with the Agreement's clear forum-selection clause, choice-of-law provision, and the well-settled doctrine of

tribal exhaustion via a futile reliance upon the highly distinguishable *Jackson v. Payday Financial LLC*, 764 F.3d 765 (7th Cir. 2014). Pearson's attempt to discount the various provisions of the Agreement are unavailing, as the instant case is incredibly dissimilar to *Jackson* for reasons both small - Plain Green, LLC actually being a tribal internet lender vs. a non-tribal internet lender - and large - the instant Agreement permitting arbitration to be administered by a third party such as AAA or JAMS vs. on reservation land by a member of the Cheyenne River Sioux Tribe ("CRST").

Pearson glosses over the glaring difference of the arbitration agreement in *Jackson* requiring arbitration of the parties' disputes be conducted by the CRST, on Reservation land, in accordance with CRST rules on consumer disputes. 764 F.3d at 776. The Seventh Circuit ordered a limited remand for the district court to determine whether the specified arbitrator and method of arbitration was actually available. *Id.* at 770. The district court found that no such forum existed because the CRST had no experience with arbitration, did not have any trained or experienced arbitrators, did not have any consumer dispute rules, and did not even authorize arbitration under its laws. *Id.* at 770, 776. Based on those findings, the Seventh Circuit held that the specified arbitration mechanism was nonexistent and any prospect of a fairly conducted arbitration under the terms of the agreement was a "sham and an illusion." *Id.* at 776–79. Accordingly, the arbitration agreement was unreasonable and unconscionable under tribal, federal, and state law. *Id.*

On the contrary, this Agreement permits arbitration to be administered by a third party such as the American Arbitration Association ("AAA"), JAMS, or another organization agreed upon by the parties and pursuant to that organization's consumer dispute rules. (See Agreement at 7.) Accordingly, "the concerns in *Jackson* are inapplicable. AAA and JAMS are experienced arbitral forums with robust and readily accessible dispute procedures, and, to our knowledge, they are independent from any of the parties." *Kemph v. Reddam,* No. 1:13CV6785, 2015 WL 1510797, at *5 (N.D.Ill. Mar. 27, 2015) Unlike in *Jackson*, where there was "no prospect of a meaningful and fairly

conducted arbitration," the Agreement here provides the possibility for an unbiased and fair dispute resolution process. *See Hayes*, 2015 WL 269483, at *3–4 (finding the borrower's ability to select AAA or JAMS as arbitration administer "saves the arbitration agreement from meeting the same fate as ... *Jackson* "); *Chitoff v. CashCall, Inc.*, No. 14 C 60292, 2014 WL 6603987 (S.D.Fla. Nov. 17, 2014) (compelling arbitration where the plaintiff failed to prove the arbitration forum was unavailable, in part because the agreement allowed AAA or JAMS to conduct the arbitration).

Pearson's reliance upon *Jackson* is precarious in light of Judge Aspen's recent ruling (in a case involving Pearson's instant counsel) in *Kemph v. Reddam,* 2015 WL 1510797 (Mar. 27, 2015). That case is much more similar to Pearson's, involving comparable loan agreements and choice-of-law provisions. Therein, Judge Aspen correctly distinguished *Jackson* at length from facts analogous to the instant Agreement, and granted defendant's motion to compel arbitration upon finding the parties' arbitration agreement enforceable and that plaintiffs' claims must be resolved through said binding arbitration. Likewise, the arbitration agreement herein exists, is enforceable and applies to Pearson's claims. Accordingly, Pearson should be bound to the contracted for arbitration agreement.

IV. Class arbitration waiver is enforceable

Finally, the Agreement prevents 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). The Supreme Court has repeatedly found that contractual waivers of the right to participate in class arbitration are enforceable. *See Am. Exp. Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2312 (2013) (enforcing class arbitration waiver); *Concepcion*, 131 S.Ct. at 1753 (finding the FAA preempts California law holding class arbitration waivers unconscionable); *see also Kemph v. Reddam,* No. 13 CV

6785, 2015 WL 1510797, at *6 (N.D. Ill. Mar. 27, 2015)(enforcing the class arbitration waiver in a substantially similar loan agreement).

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.

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 **July 15, 2015,** I electronically filed the forgoing ***Reply 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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