UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

ALICIA EVERETTE, Plaintiff, vs. JOSHUA MITCHEM, et al, Defendants.	)	No. 1:15-cv-01261-CCB

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS MITCHEM'S AND SHAFFER'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, OR, IN THE ALTERNATIVE, COMPEL ARBITRATION, OR, IN THE ALTERNATIVE, DISMISS FOR FAILURE TO STATE A CLAIM

Defendants Joshua Mitchem ("Mitchem") and Jeremy D. Shaffer ("Shaffer"), by and through the undersigned counsel, for their Reply Memorandum in Support of their Motion to Dismiss for Lack of Personal Jurisdiction, or, in the alternative, Compel Arbitration, or, in the alternative, Dismiss for Failure to State a Claim, state as follows:

I. PLAINTIFF FAILS TO ESTABLISH A PRIMA FACIE CASE FOR EXERCISING PERSONAL JURISDICTION OVER MITCHEM AND SHAFFER.

Dismissal is proper because Plaintiff fails to present any specific allegations in her Complaint or evidence in her declaration of contacts between Mitchem and/or Shaffer and Maryland or Plaintiff that would in any way give rise to personal jurisdiction. While Plaintiff need only establish a prima facie case for personal jurisdiction, the Court's inquiry must focus on the actions of Mitchem and Shaffer, individually. *See Walden v. Fiore*, 134 S. Ct. 1115 (2014) (emphasizing that in specific jurisdiction analysis the focus is on the defendant's connection with the forum). A plaintiff is entitled to have all inferences drawn in favor of exercising personal jurisdiction, but a court is not limited to considering only a plaintiff's allegations or proffered

evidence. *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 62 (4th Cir. 1993). Rather, a court may rely upon a defendant's proffered proof that contests personal jurisdiction to support dismissal. *Id.* It is only when the assertions by opposing parties "carry the same quantum of trustworthiness" that an inference must be drawn in favor of exercising jurisdiction. *Id.* Furthermore, the Fourth Circuit has held that a court may disregard "conclusory assertions" of personal jurisdiction. *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 402 (4th Cir. 2003).

Mitchem's and Shaffer's declarations demonstrate that they have never had contacts with Maryland or with Plaintiff, they were not involved in the transactions at issue in this litigation, and they have never been employees of Action Payday, Bottom Dollar Payday, or FSST Financial Services, LLC. Docs. 30-2, 30-3. Plaintiff offers no contrary evidence or specific allegations to suggest otherwise. There are no equally trustworthy assertions here that must be resolved in Plaintiff's favor. As a result, this Court lacks personal jurisdiction.

Nonetheless, Plaintiff opposes dismissal by proclaiming that Action Payday, Bottom Dollar Payday, and FSST Financial Services, LLC are "fictitious entities" of Mitchem and Shaffer. Doc. 41 at 8, 10. Plaintiff does not contest Mitchem's and Shaffer's arguments that personal jurisdiction cannot be imputed simply from any ownership interests they may have in these entities. Doc. 30-1 at 6. Furthermore, personal jurisdiction cannot be established by the "mere allegation" that a business entity is fictitious or otherwise the alter ego of an individual defendant. *Mike's Train House, Inc. v. Broadway Ltd. Imports, LLC*, 708 F. Supp. 2d 527, 534 (D. Md. 2010).

Plaintiff's unsupported assertion of an alter ego theory fails on its face and cannot be utilized to establish personal jurisdiction. To reach an individual on the theory that the

individual is the alter ego of a corporation, the allegations and evidence must justify piercing the corporate veil of the entity under the forum's state law. *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 434 (4th Cir. 2011). This Court previously cautioned, however, that "Maryland generally is more restrictive than other jurisdictions in allowing a plaintiff to pierce the corporate veil." *Harte-Hanks Direct Mktg./Baltimore, Inc. v. Varilease Tech. Fin. Grp., Inc.*, 299 F. Supp. 2d 505, 514 (D. Md. 2004). Piercing under Maryland law may occur "only where necessary to prevent fraud or to enforce a paramount equity." *Id. See also Serio v. Baystate Properties, LLC*, 60 A.3d 475, 488 (Md. Ct. App. 2013) (summarizing that "Maryland is averse to disregarding the entity shield in a business situation in the absence of fraud"). Factors to consider under Maryland law include "gross undercapitalization of the corporation, a dominant shareholder's siphoning of corporate funds, the absence of corporate records, or other indicators that the corporation is merely a facade for the shareholder's operations." *Harte-Hanks*, 299 F. Supp. 2d at 514. "The party seeking to pierce the corporate veil bears the burden of proof." *Id.*

Under this framework, this Court concluded that allegations in the complaint and evidence presented by affidavit regarding an individual's status as officer, director, employee and owner of defendant corporations was insufficient on its own to confer personal jurisdiction over him. *Id.* at 513, 516. There were no allegations or evidence that the individual corporations were grossly undercapitalized or "merely shell corporations or facades" for his personal operations or that he siphoned corporate funds. *Id.* at 515. Furthermore, there was no evidence of the individual's involvement directly with Maryland or the underlying transactions leading to the lawsuit. *Id.* As a result, the plaintiff failed to establish even a prima facie case of personal jurisdiction. *Id.*

Here, Plaintiff similarly fails to establish the propriety of piercing the veil in order to exercise jurisdiction over Mitchem and Shaffer. The Complaint omits any allegations of fraud. Plaintiff's mere allegations that these are fictitious entities and that Mitchem and Shaffer advertised, marketed, distributed, collected, sold solicited, and lent to Plaintiff and others in Maryland are conclusory, unsupported, and self-contradictory. When discussing the actual loans at issue Plaintiff's Complaint and declaration establish that the underlying transactions involved representatives and other unidentified individuals—not Mitchem or Shaffer. Doc. 1 at ¶ 44 ("These websites have online loan applications, and allow users to engage in online chat with 'Action PayDay' and 'Bottom Dollar PayDay' representatives"); Doc. 41-1 at ¶ 6 ("I would speak with the payday lender's representative"), ¶ 8 ("After I received my initial loan and I knew who the lenders were, I would go to them directly for additional loans, such as to their website").

Plaintiff's only specific allegation against either Mitchem or Shaffer is that the website for Bottom Dollar Payday is registered to Mitchem. Doc. 1 at ¶ 33. Even if true, the "mere act of registering" a domain name is insufficient to confer personal jurisdiction. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 223 (4th Cir. 2002) (citing *Heathmount A.E. Corp v. Technodome.com*, 106 F. Supp. 2d 860, 866 (E.D. Va. 2000)). *See also Englert v. Alibaba.Com Hong Kong Ltd.*, No. 4:11CV1560 RWS, 2012 WL 162495, at *4 (E.D. Mo. Jan. 19, 2012) (rejecting the argument that personal jurisdiction existed over a majority shareholder of a corporation simply because the shareholder owned the corporation's website). Plaintiff omits any allegation or evidence suggesting that these entities are grossly undercapitalized, that Mitchem and Shaffer siphon funds, or any other specific indicator that Mitchem and Shaffer operate their business as a facade for personal operations.

Even in arguing an alter ego theory, Plaintiff still fails to attribute any specific action to

Mitchem and Shaffer, let alone, specific action that occurred in conjunction with the transactions at issue in her Complaint. Because Plaintiff fails to specifically allege or provide evidence of Mitchem's and Shaffer's contacts with Maryland, dismissal for lack of personal jurisdiction is proper.

II. PLAINTIFF'S REQUEST FOR JURISDICTIONAL DISCOVERY IS UNWARRANTED AND SHOULD BE DENIED.

Plaintiff's request for jurisdictional discovery should be denied because her Complaint's allegations and her inadequate declaration fail to establish a prima facie case for personal jurisdiction. Dismissal—not discovery—is appropriate because Plaintiff continues to rely on speculation and conclusory allegations despite the evidence offered by Mitchem and Shaffer against exercising jurisdiction. *Unspam Technologies, Inc. v. Chernuk*, 716 F.3d 322, 330 n.1 (4th Cir. 2013); *Carefirst*, 334 F.3d at 402; *Armstrong v. Nat'l Shipping Co. of Saudi Arabia*, No. CIV.A. ELH-13-03702, 2015 WL 751344, at *15 (D. Md. Feb. 20, 2015); *Asher & Simons, P.A. v. j2 Global Canada, Inc.*, 965 F. Supp. 2d 701, 705 (D. Md. Aug. 28, 2013); *Stokes v. JPMorgan Chase Bank, NA*, No. 8:11-CV-02620, 2012 WL 527600, at *4 (D. Md. Feb. 16, 2012); *Harte-Hanks*, 299 F. Supp. 2d at 514; *Birrane v. Master Collectors, Inc.*, 738 F. Supp. 167, 169 (D. Md. 1990). Additionally, Plaintiff failed to propose the discovery she intends to seek or demonstrate that such discovery will result in information that will alter this Court's jurisdictional analysis. As a result, Plaintiff's request for jurisdictional discovery should be denied. Mitchem and Shaffer are contemporaneously filing and fully incorporate herein by reference their arguments in their Memorandum in Opposition to Plaintiff's Motion for Discovery.

III. PLAINTIFF'S CHALLENGES TO THE LOAN AGREEMENTS' VALIDITY MUST BE RESOLVED BY AN ARBITRATOR.

Arbitration is proper because Plaintiff only challenges the validity of the loan agreements as a whole and not specifically the arbitration provision. The Fourth Circuit has instructed that in compelling arbitration courts are to "engage in a limited review to ensure that the dispute is arbitrable—i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 302 (4th Cir. 2002) (quoting *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)). The party seeking to compel arbitration need only demonstrate

> (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.

Adkins v. Labor Ready, Inc., 303 F.3d 496, 500-01 (4th Cir. 2002) (quoting *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991)).

The written agreement's existence may be demonstrated by authenticating it pursuant to Federal Rule of Evidence 901. *Achey v. BMO Harris Bank, N.A.*, 64 F. Supp. 3d 1170, 1175 (N.D. Ill. 2014). "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). This may be accomplished through the testimony of a witness with knowledge who testifies that "the item is what it is claimed to be." Fed. R. Evid. 901(b)(1). *See also Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 542 (D. Md. 2007) (noting that the rule is "not a particularly high barrier to overcome" because "'[t]he Court need not find that the evidence is necessarily what the proponent claims, but only that there is

sufficient evidence that the *jury* ultimately might do so'" (quoting *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006) (emphasis in original))).

The United States Supreme Court has long recognized that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006). *See also Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010) (observing that "we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene"); *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (reciting the rule that "attacks on the validity of an entire contract, as distinct from attacks aimed at the arbitration clause, are within the arbitrator's ken" (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967)).

Plaintiff here does not challenge the arbitration provision, but only the enforceability of the loan agreements. She attempts to counter the evidence of the loan agreement documents attached to Mitchem's and Shaffer's Motion to Dismiss only by asserting through a declaration that she does "not ***recall*** receiving documents that contained payment schedule tables", not that she did not electronically sign the loan and arbitration agreements. Doc. 41-1 at ¶ 9 (***emphasis added***). *See also* Loan Agreements, Doc. 30-4, 30-5, 30-6, 30-7. These loan agreements were properly authenticated. *See* Declaration of David Odell, Doc. 30-8 (declaring familiarity with the ordinary course of business of Action Payday and Bottom Dollar Payday, their electronic handling and preservation procedures, and accordingly identifying the loan agreements within the Plaintiff's specific file). *See also Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1077 (E.D. Cal. 2014) (ruling that an arbitration agreement was properly authenticated when supported by declaration of an individual familiar with defendant's practices and procedures that

reviewed Plaintiff's file). Plaintiff fails to counter David Odell's declaration or even address it with probative contrary evidence. Instead, Plaintiff merely contends that she does not recall these documents. Doc. 41 at 11, Doc. 41-1 at ¶ 9.

Plaintiff's position is entirely disingenuous. The Complaint acknowledges the existence of the loan agreements—it is the entire basis of her lawsuit. If no loan agreement existed then there is no controversy or reason for Plaintiff's request that the Court declare the loans to be "void and enforceable." *See* Doc. 1 at ¶ 140. Plaintiff acknowledges that she agreed to "terms and conditions when I obtained payday loans." Doc. 41-1 at ¶ 9. Her Complaint specifically alleges certain terms and conditions at issue including usurious interest rates and preauthorized electronic fund transfers. Doc. 1 at ¶¶ 47-49. She acknowledges that she accepted the benefit of the loan agreements by accepting the loan amounts. Doc. 1 at ¶ 48. She even asserts that she "paid approximately $2,552.50 on these loans." Doc. 1 at ¶ 48. While Plaintiff clearly relies on the existence of loan agreements, she fails to proffer evidence of any loan agreements contrary to those authenticated by David Odell. As a result of Plaintiff's allegations and the undisputed authentication, the exhibits to Mitchem's and Shaffer's motion are undoubtedly the loan agreements at issue.

The method by which Plaintiff challenges the loan agreements here has been previously deemed inadequate to prevent enforcement of an arbitration provision. *See generally Nat'l City Golf Fin. v. Higher Ground Country Club Mgmt. Co., LLC*, 641 F. Supp. 2d 196, 207-08 (S.D.N.Y. 2009). In *Higher Ground,* a third-party plaintiff sought to avoid arbitration with affidavits from its representatives who claimed to have "'no recollection of ever signing such an agreement and…no reason to believe that such an agreement was ever signed.'" *Id.* at 207. The third-party plaintiff argued that the *Buckeye* holding excluded circumstances where the plaintiff

challenges that the contract was never signed, but the court cautioned against such a "superficial reading" and application of precedent. *Id.* at 206 (citing *Buckeye*, 546 U.S. at 444 n.1). Instead, the court concluded that regardless of the affidavits and the absence of any signature, the third-party plaintiff still "manifested an intent to adopt or agree to the unsigned" agreement when it "accepted the benefit of the bargain…and, in so doing, ratified the contract by its action." *Id.* at 207. The third-party plaintiff's "acceptance of the bargain binds it not merely to the basic terms proffered by [third-party defendant], but also to the arbitration clause and the other 'fine print' provisions of the contract." *Id.* The court reasoned that this was sufficient to bind the third-party plaintiff to the arbitration provision. *See also Braxton v. O'Charley's Rest. Properties, LLC*, 1 F. Supp. 3d 722, 727 (W.D. Ky. 2014) (ruling "even assuming that Plaintiffs did not electronically sign the arbitration agreement, they each manifested their assent to that agreement in other ways").

In *Grant-Fletcher v. Collecto, Inc.*, the court determined under Maryland contract law that an arbitration agreement existed even though the nonmoving party claimed to have not signed it. No. CIV.A. RDB-13-3505, 2014 WL 1877410, at *6 (D. Md. May 9, 2014).. The evidence demonstrated that the moving party did not issue its services without a completed agreement, the agreement contained the nonmoving party's personal information, and to utilize the services at issue the non-moving party would have to accept the terms "one way or another." *Id.* "The fact that [the non-moving party] may have chosen not to access or read the language of the Arbitration Agreement does not render it invalid or non-binding." *Id.* at *7. As a result, there was sufficient evidence to conclude that existence of an arbitration agreement. *Id.*

The Court here should conclude likewise. Plaintiff does not challenge the arbitration provision. She only asserts that she does not recall the loan agreements proffered by Mitchem

and Shaffer. The remaining evidence relied upon by Plaintiff along with her own allegations suggest otherwise. Plaintiff's claims are based on the loan agreements. The uncontested Declaration of David Odell establishes that these loan agreements including the arbitration provisions are the loan agreements by which Plaintiff acted and on which she based this lawsuit. Doc. 30-8 at ¶ 10. Furthermore, Plaintiff fails to challenge the evidence in the Declaration of David Odell that a consumer must sign electronically and click an "Accept" button before a loan document is recorded on the servers of Action Payday and Bottom Dollar Payday. Doc. 30-8 at ¶ 6. Still, she concedes that she does "recall generally clicking through terms and conditions when I obtained payday loans." Doc. 30-8 at ¶ 9. Thus, just as in *Grant-Fletcher*, the fact that Plaintiff does not recall or did not read each provision is insufficient to avoid enforcement of the arbitration provision.

Plaintiff merely attacks the validity of the loan agreements in their entirety. Plaintiff offers no argument that any of her claims are beyond the scope of the arbitration provision or that it should otherwise be unenforced. As a result, dismissal is proper. *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001) (holding that "dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable").

IV. THE COURT SHOULD ENFORCE THE CLASS ACTION WAIVER UNCONTESTED BY PLAINTIFF.

Plaintiff also fails to contest the class action waiver provision of the loan agreements. Thus, the Court should also enforce this provision and preclude Plaintiff from attempting to arbitrate or litigate in any representative capacity for others.

V. COUNT V OF THE COMPLAINT MUST BE DISMISSED BECAUSE PLAINTIFF ABANDONED IT BY NOT OPPOSING MITCHEM'S AND SHAFFER'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM.

If this Court denies Mitchem's and Shaffer's Motion to Dismiss for lack of personal jurisdiction and Motion to Compel Arbitration without the ability to renew such motions, Count V of the Complaint must be dismissed. Mitchem and Shaffer moved, in the alternative, to dismiss Count V of Plaintiff's Complaint for failure to state a claim because the allegations are barred on their face by the Electronic Fund Transfer Act's one-year statute of limitations. Doc. 30 at 1. Plaintiff failed to oppose Mitchem's and Shaffer's arguments. *See generally* Doc. 41. This Court has previously ruled that a plaintiff abandons a claim by failing to respond to a defendant's argument for dismissal. *Ferdinand-Davenport v. Children's Guild*, 742 F. Supp. 2d 772, 777 (D. Md. 2010). *See also Bancroft Commercial, Inc. v. Goroff*, No. CIV. CCB-14-2796, 2014 WL 7409489, at *7 (D. Md. Dec. 31, 2014) (ruling that a plaintiff's opposition to a motion to dismiss that "contained no specific arguments addressing defendants' points" constituted abandonment of the claim); *Grinage v. Mylan Pharm., Inc.*, 840 F. Supp. 2d 862, 867 (D. Md. 2011) (noting in ruling on defendant's motion to dismiss that plaintiff "failed to address [defendant's] argument in her response, so the court will treat this claim as abandoned"). Because Plaintiff's opposition fails to respond to Mitchem's and Shaffer's arguments for dismissal of Count V, Plaintiff has abandoned that claim and dismissal is proper.

WHEREFORE, Defendants Joshua Mitchem and Jeremy D. Shaffer respectfully request this Court to dismiss them as defendants in this lawsuit for lack of personal jurisdiction, or, in the alternative, and without waiving their defense of lack of personal jurisdiction, Defendants Joshua Mitchem and Jeremy D. Shaffer request this Court dismiss to compel arbitration and enforce the

class action waiver or, in the alternative, dismiss for failure to state a claim pursuant to the Electronic Fund Transfer Act, and for any and all other relief this Court deems just and equitable.

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CERTIFICATE OF NOTIFICATION

The undersigned certifies that on August 28, 2015, a copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system which sent electronic notification of such filing to all those individuals currently electronically registered with the Court.

/s/ David B. Applefeld
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