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

JOSHUA PARNELL,	)	
	)	
Plaintiff,	)	**Civil Action File No.:**
	)	
v.	)	**4:14-cv-00024-HLM**
	)	
CASHCALL, INC.,	)	
	)	
Defendant.	)	
	)	

REPLY IN SUPPORT OF CASHCALL'S MOTION TO COMPEL ARBITRATION AND STAY OR DISMISS PROCEEDINGS

The Court should grant Defendant CashCall, Inc.'s ("CashCall") motion to compel arbitration of Plaintiff Joshua Parnell's ("Plaintiff") claims for two primary reasons: (1) Plaintiff fails to specifically challenge the delegation clause contained in the loan agreement, and (2) the contract at issue requires arbitration and designates both the AAA and JAMS as appropriate arbitration forums for this dispute.

Plaintiff entered into a contract with a valid arbitration clause and agreed that "the validity, enforceability, or scope of th[e] loan or the Arbitration agreement" must be decided by the arbitrator. *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1147-48 (11th Cir. 2015). As the Eleventh Circuit made clear, the delegation clause in the arbitration agreement "unambiguously commits to the

arbitrator the power to determine the enforceability of the agreement to arbitrate." *Id.* at 1148. Plaintiff also agreed that AAA or JAMS could conduct the arbitration. (ECF No. 54-2 at 3-4 (the "Agreement").) Plaintiff falls far from meeting his burden in challenging the delegation clause contained within the Agreement. Accordingly, consistent with the FAA, this Court must allow the arbitrator to decide all issues, including arbitrability.

I. Plaintiff Fails to Specifically Attack the Delegation Clause.

A party that wishes to avoid the application of an arbitration provision containing a delegation clause must explicitly challenge the delegation clause. "[A]s a matter of substantive federal arbitration law," a delegation provision "is simply an additional antecedent agreement" that "is severable from the remainder of the" arbitration clause and must be "challenged . . . specifically." *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70-71 (2010); *see also In re Checking Account Overdraft Litig. MDL No. 2036*, 674 F.3d 1252, 1256 (11th Cir. 202) (quoting *Rent-A-Center*). Plaintiff's Opposition (ECF No. 63) and Second Amended Complaint ("SAC"; ECF No. 48) mount nominal challenges the arbitration clause generally, (*See, e.g.*, SAC ¶¶ 107-128; Opp'n at 18-19 (describing alleged defects in "[t]he arbitration process")) but neither specifically attacks that provision in a manner sufficient to meet Plaintiff's high burden "to

invalidate" the arbitration agreement. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000) ("the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration").

Plaintiff's Opposition to the motion to compel arbitration relies upon 119 paragraphs of his Second Amended Complaint as his "so-called Delegation Clause" challenge. (Opp'n at 6 (citing ¶¶ 1-106, 117-128).) This is hardly the specificity required under applicable law. *See Rent-A-Ctr.*, 561 U.S. at 70-72 ("[U]nless [plaintiff] challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the agreement as a whole for the arbitrator."); *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1148 (11th Cir. 2015) ("the Loan Agreement contains a delegation provision, [this Court] only retain[s] jurisdiction to review a challenge to that particular provision").

While Plaintiff theorizes that he "raised sufficient factual basis to attack the delegation clause," each of his attacks consists of general conclusory challenges to the arbitration agreement as a whole. (Opp'n at 7.) Plaintiff does not offer any reason why the delegation provision, *specifically*, should not be enforced. Rather, Plaintiff generally contends that "a boilerplate ***[loan] agreement*** is sent to the borrower with no chance for revision of the procedures" (Opp'n at 14) and the

"***Loan Agreement's*** . . . proscribed arbitration procedures are nothing more than an illusory attempt to escape federal and state lending laws." (*Id.* at 9 (emphases added).) Because Plaintiff attacks arbitration generally and not the delegation clause specifically, his challenge fails. *See Rent-A-Center*, 561 U.S. at 70-71.

II. Plaintiff's New Challenges Fail To Warrant Denial of Defendant's Motion to Compel Arbitration.

Plaintiff attacks his arbitration agreement as allegedly "void under applicable contract defenses" including "fraud, breach of good faith and fair dealing, and unconscionability." (Opp'n at 8.) Leaving aside that Plaintiff's operative Complaint nowhere challenges the arbitration agreement as "fraudulent" or as constituting a "breach of the duty of good faith and fair dealing" (*see generally* SAC (silent as to these issues)), these eleventh-hour, general contract defenses are legally unsupportable and do not support a denial of the motion to compel arbitration.

A. Plaintiff's Fraud Allegations Are Insufficient.

With respect to the newly alleged fraud, Plaintiff fails to differentiate between alleged fraud in the formation of the Loan Agreement, fraud specifically in the inclusion of an arbitration provision, and fraud with respect to the delegation clause. (*See* SAC at ¶ 2; Opp'n at 8-11.) Instead, Plaintiff generally labels the loan agreement as a sham that violates Georgia law. (*See* Opp'n at 9 ("Plaintiff

applied for his loan and signed the Loan Agreement, . . . in reliance that he was receiving a loan which was legal in the State of Georgia . . . [.]").) Plaintiff then cites to a number of cases addressing arbitration agreements, which unlike here, did not allow arbitration before the AAA or JAMS. *Id.* The agreement at issue, including the delegation clause, is not the product of fraud. And to the extent Plaintiff attacks the loan agreement as a whole, that argument should be addressed only by the AAA or JAMS arbitrator who will ultimately adjudicate the parties' dispute, and not this Court. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) ("a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."); *Miccosukee Tribe of Indians of Florida v. Cypress*, --- F.3d ----, No. 14-12115, 2015 WL 9310571, at *3-4 (11th Cir. Dec. 23, 2015) ("allegations that the entire agreement was the product of fraud must be presented to the arbitrator for resolution").

B. Plaintiff's Allegations Regarding Breach of the Duty of Good Faith and Fair Dealing Also Fail.

Plaintiff's newly minted good faith and fair dealing theories likewise fail. No allegations in the SAC support any such actionable theories. *See Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1429 (11th Cir. 1990) (requiring allegations of fact sufficient to show a breach of an actual term of an agreement to support claim of breach of duty.) Moreover, Plaintiff's argument that CashCall

breached the duty of good faith and fair dealing by referencing allegedly non-existent tribal arbitration rules is completely undercut because both the AAA and JAMS are available and willing to hear Plaintiff's dispute. (*See* Brief in Support of Motion to Compel ("MTC Br.") (ECF No. 54-1) at 5-8, 13-17.) The AAA and JAMS are reputable arbitration administrators that have real, not "fictional procedures laid out for [the parties'] dispute[.]" (Opp'n at 13.)

C. The Delegation Clause Is Not Unconscionable.

Plaintiff's facial unconscionability challenge fails as well. As an initial matter, and as explained above, because Plaintiff's challenge is not to the delegation clause specifically, it must be rejected. *See* Section I, *supra*. Nevertheless, had Plaintiff specifically challenged the delegation clause as unconscionable in his SAC, that argument would fail as well.

1. *Concepcion* Forecloses Plaintiff's Attempt to Void the Arbitration Clause On Unconscionability Grounds.

Plaintiff's unconscionability defense, which is based on a Georgia statute that discriminates against arbitration, is preempted 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). And, even were it not preempted by the FAA, Plaintiff's unconscionability defense would still lack merit because *AT&T Mobility LLC v.*

Concepcion, 563 U.S. 333 (2011), forecloses each of the specific unconscionability arguments advanced by Plaintiff.

Plaintiff advances two primary hypotheses in support of his unconscionability challenge. He alleges that the Agreement is procedurally unconscionable because it was an adhesion contract and because the parties did not have equal bargaining power. He further alleges that the Agreement is substantively unconscionable because the arbitration procedures outlined in the agreement are non-existent and because the Eleventh Circuit held that the clause was unconscionable in *Inetianbor*. Neither argument withstands scrutiny. Even more importantly, because Plaintiff attacks the agreement as a whole, neither argument is for the Court to address prior to review by the arbitrator.

First, the only two factors raised by Plaintiff to support his claim of procedural unconscionability – contract adhesion and unequal bargaining power – are foreclosed by *Concepcion*. *Concepcion*, 563 U.S. at 346-47 (recognizing that "the times in which consumer contracts were anything other than adhesive are long past"). As discussed in CashCall's opening brief, "Plaintiff does not allege that he was coerced into assenting to the [d]elegation [c]lause, rushed through his opportunities to review it, was denied answers to questions about the meaning of the delegation provision, or was prevented from making a free and willing choice

to accept the Loan Agreement's terms, including the [d]elegation [c]lause. On the contrary, the SAC demonstrates that Plaintiff initiated and signed the loan application from the comfort of his own home and had the opportunity to change his mind." (MTC Br. at 12, n. 3.) Accordingly, Plaintiff's procedural unconscionability challenges, even if limited to the delegation clause, fail.

Second, as to substantive unconscionability, Plaintiff ignores *Concepcion*'s holding that a generally applicable law is preempted if it "would have a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342. The question under *Concepcion* is thus whether the state law defense at issue *either* derives its meaning from the fact that arbitration is at issue *or* would have a disproportionate effect on arbitration agreements. *Id.* The Georgia statute at issue, O.C.G.A. § 16-17-2(c)(2), does both. (*See* SAC ¶¶ 149-50.) The discriminatory statute is, therefore, preempted by the FAA. (*See* MTC Br. at 17-18.)

Furthermore, Plaintiff's unconscionability arguments are preempted because, if accepted, they would have a disproportionate impact on the loan agreement's arbitration provisions, which is prohibited by *Concepcion*. Plaintiff seeks to avoid arbitration on the ground that the *arbitral forum* it designates supposedly does not exist (completely ignoring the JAMS or AAA alternative); that the *arbitral* procedural rules supposedly do not exist (ignoring the JAMS and

AAA rules); and that requiring *arbitration* would somehow allow CashCall to avoid regulation (ignoring that the JAMS or AAA arbitrator would make that determination). (Opp'n at 14-15.) All of those arguments "derive their meaning from the fact that an agreement to arbitrate is at issue," and would "disproportionate[ly] impact" arbitration agreements. *Concepcion*, 563 U.S. at 339, 342. That they are "cast as an application of unconscionability doctrine" does not make them valid. *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1211 (11th Cir. 2011). Thus, Plaintiff's arguments are foreclosed by applicable precedent.[1]

2. Plaintiff's Reliance on *Inetianbor* Is Misplaced.

Plaintiff argues that the Eleventh Circuit's decision in *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014), compels a conclusion that the Agreement here is unconscionable. (Opp'n at 15-17.) There are two fatal errors in this assertion: (1) *Inetianbor* addresses an arbitration clause fundamentally

[1] The Arbitration Clause is not substantively unconscionable under a pre-*Concepcion* analysis. The Arbitration Clause places all the burdens of arbitration on CashCall, not Plaintiff, by requiring CashCall to pay all applicable fees and allowing Plaintiff the choice of conducting the arbitration within thirty miles of his residence. (MTC Br. at 8.) It also gives Plaintiff the right to select the particular arbitral forum the parties would use, including two of the most reputable arbitration organizations in the country, the AAA or JAMS. (*Id.* at 7.)

different from the one that Plaintiff signed,[2] and (2) Plaintiff cites only the non-binding *concurrence* in *Inetianbor*. As such, *Inetianbor* is inapplicable.

Plaintiff misleadingly asserts that in *Inetianbor*, "the Eleventh Circuit reviewed CashCall's arbitration clause" and concluded that it was "a sham and unconscionable." (Opp'n at 15.) The assertion is wrong on many levels. First, in *Inetianbor*, the court considered **a different arbitration clause, with no allowance for AAA or JAMS arbitration**. Second, all of Plaintiff's *Inetianbor* citations and quotations come from a *concurrence*, in which no other judge joined and which was *not* part of the majority opinion or rationale. *Compare Inetianbor*, 768 F.3d at 1346 (Martin and Hinkle, JJ.), *with id.* at 1354 (Restani, J., concurring). In fact, the *Inetianbor* majority never mentions unconscionability. *Id.*

Inetianbor and *Jackson* are irrelevant here. In both *Jackson* and *Inetianbor*, the borrower had agreed that arbitration would be conducted by either "(i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council." *Jackson*, 764 F.3d at 769; *Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303, 1305 (S.D. Fla. 2013). But Plaintiff's agreement to arbitrate explicitly permits Plaintiff to choose arbitration before the AAA or JAMS (or any other entity agreed upon by the

[2] Although Plaintiff does not address *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014) in his unconscionability argument, Defendant notes that that case is equally unpersuasive because the Seventh Circuit also addressed an entirely different arbitration provision than the one at issue here.

parties), and does not mention use of a Tribal Elder or Tribal Council members as the arbitrator. (Agreement at 5.) Simply put, to allow for AAA or JAMS arbitration cannot be unconscionable.[3]

III. Plaintiff Incorrectly Asserts That No Arbitrator or Rules Exist to Decide Whether the Arbitration Clause Is Valid.

Plaintiff carries the burden to provide evidence sufficient to convince a neutral fact-finder that the delegation clause is not enforceable; CashCall has no duty to prove enforceability (even though it has done so). *See Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2315 (2013) (holding a party "seek[ing] to invalidate an arbitration agreement" bears the burden of showing it is unenforceable); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000) ("the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration"). Unable to counter CashCall's evidence demonstrating that almost a dozen arbitrations are taking place before the AAA and JAMS pursuant to the Agreement, (ECF No. 54-3 at 1-64), Plaintiff simply pretends that such compelling evidence does not exist. (Opp'n at 14-15.)

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[3] Separately, *Jackson* is also unpersuasive because it applied an outdated common-law "reasonableness" test to gauge the validity of the arbitration clause there. *See* 764 F.3d at 777. The Eleventh Circuit explicitly rejects that test. *See Sam Reisfeld & Son Imp. Co. v. S. A. Eteco*, 530 F.2d 679, 680-81 (5th Cir. 1976) (holding that the "reasonableness" test is not "applicable to arbitration clauses" because "the enforceability of [an] arbitration clause ... is governed exclusively by the explicit provisions of the [FAA]").

Rather than accept the straight-forward reading of the Agreement advanced by CashCall and accepted by numerous federal courts – that the parties may choose to arbitrate before the AAA or JAMS using either of those organizations' rules – Plaintiff attempts to create ambiguity where there is none.[4] According to Plaintiff, the delegation clause and the rest of the Agreement are invalid because they require a non-existent authorized representative of the CRST to conduct the arbitration using "imaginary Tribal Dispute Rules." (Opp'n at 3-5, 10, 18-19.) This is a plain misreading of the controlling contract language – which allows use of the AAA or JAMS, both of whom are undeniably available. (MTC Br. at 18-22.)

Further, Plaintiff appears to contend that he has no choice of an arbitrator – only a choice of an arbitration administrator. (Opp'n at 3-5.) This argument is a non-starter: there is no requirement that an arbitration clause designate who the arbitrator must be. Instead, an arbitrator will be selected using the rules of the arbitral forum selected by Plaintiff. Indeed, "Section 5 of the [FAA] provides courts with the authority to identify an arbitrator for parties who cannot agree upon

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[4] Were there any ambiguity, the dispute necessarily must be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "constru[ing] . . . the contract language itself").

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).

Plaintiff's further contention that there are "neither authorized representatives of the Cheyenne River Sioux Tribe who conduct arbitrations nor any applicable consumer dispute rules," is irrelevant, even if true. (Opp'n at 10.) The Agreement only requires use of the CRST consumer dispute rules *if* the parties use a CRST forum. (Agreement at 5.) If the parties use the AAA, JAMS, or another arbitral organization, the Loan Agreement states 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 Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate[.]" (*Id.*) Plaintiff does not point to any conflict between the procedural rules of the AAA or JAMS and CRST law. Further, if no tribal consumer dispute rules exist, there would be no conflict between those rules and the selected arbitration organization's rules, so that the arbitration organization's rules would control under the Agreement's plain terms. (*Id.*)

In any event, Plaintiff directs his challenges to the wrong forum: under binding Supreme Court and Circuit precedent, any potential conflict between

CRST law and the designated organization's procedural rules—and Plaintiff identifies none—is an issue for the arbitrator to decide.[5] *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Aluminum Brick & Glass Workers Int'l Union v. AAA Plumbing Pottery Corp.*, 991 F.2d 1545, 1550 (11th Cir. 1993).

Finally, Plaintiff cannot overcome the evidence presented by CashCall regarding nearly a dozen arbitrations proceeding before the AAA or JAMS pursuant to the exact arbitration clause and delegation provision at issue here. (ECF No. 54-3 at 1-64).[6] Plaintiff has not presented, and cannot present, any evidence that he attempted to proceed with arbitration and was unable to do so. Because Plaintiff has not presented the Court with any basis from which it could conclude that arbitration cannot proceed before AAA or JAMS pursuant to their consumer dispute rules, his hypothesis that the forum does not exist necessarily fails.

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[5] Organizations like the AAA are not unaccustomed to addressing alleged conflicts between their rules and tribal law. *See, e.g., Oglala Sioux Tribe v. C&W Enterprises, Inc.*, 542 F.3d 224, 231-32 (8th Cir. 2008) (noting that arbitrator resolved conflict between the AAA's jurisdictional rules and the tribe's assertion of sovereign immunity).

[6] The vindication of rights exception to the FAA is inapplicable here because Plaintiff has no federal claims. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985). Moreover, the evidence regarding ongoing arbitrations demonstrates that the Arbitration Clause does allow claimants to vindicate their rights.

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 29th day of February, 2016.

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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 MOTION TO COMPEL ARBITRATION AND STAY OR DISMISS PROCEEDINGS** 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 MOTION TO COMPEL ARBITRATION AND STAY OR DISMISS PROCEEDINGS** to the Clerk of Court using the CM/ECF system which automatically sent e-mail notification of such filing to the attorneys of record in this action, each of whom is a registered participant in the Court's electronic notice and filing system.

This 29th day of February, 2016.

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