UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 6:14-CV-488-ORL-37TBS

EDDIE L. BANKS,

Plaintiff,

vs.

CASHCALL, INC., and DELBERT SERVICES CORP.,

Defendants.
_____/

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS OR, ALTERNATIVELY, TO COMPEL ARBITRATION AND STAY OR DISMISS THE CASE[1]

I. Plaintiff Has Not Met His Burden To Show That The Forum-Selection Clause Is Unenforceable.

In order to avoid dismissal due to the Forum-Selection Clause,[2] Plaintiff must show that "*extraordinary circumstances* unrelated to the convenience of the parties *clearly disfavor*" enforcing the clause. *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W.D. Tex.*, 134 S. Ct. 568, 575 (2013) (emphasis added). Plaintiff fails to meet his "heavy burden of proof." *Xena Invs., Ltd. v. Magnum Fund Mgmt. Ltd.*, 726 F.3d 1278, 1284 (11th Cir. 2013).

[1] Defendants respectfully submit this reply memorandum of law in further support of their Motion to Dismiss or, Alternatively, to Compel Arbitration and Stay or Dismiss the Case ("Motion to Dismiss") pursuant to the Court's Order of May 7, 2014. (Dkt. 32.) Capitalized terms not otherwise defined herein have the same meaning as in Defendants' Motion to Dismiss and Memorandum in Support.

[2] Plaintiff mischaracterizes Defendants' Motion to Dismiss as having been brought under Fed. R. Civ. P. 12(b)(3) for improper venue. Opp. 4. Defendants were clear that they seek to enforce the Forum-Selection Clause under the doctrine of *forum non conveniens*, as required by the Supreme Court in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013). Mot. 9-10.

A. Plaintiff Has Not Shown That The Forum-Selection Clause Itself Was Based On Fraud.

Though Plaintiff argues that this Court should void the Forum-Selection Clause on fraud grounds, he ignores the operative test. Opp. 4-6.[3] That test asks only if "the clause was reasonably communicated to the consumer . . . , tak[ing] into account the clause's physical characteristics and whether the plaintiff[] had the ability to become meaningfully informed of the clause and to reject its terms." *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009). Under that standard, the Eleventh Circuit has enforced forum-selection clauses in consumer adhesion contracts provided they were disclosed to the consumer. *See id.*; *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1245-46 (11th Cir. 2012) (enforcing forum-selection clause disclosed on the 131st page of a cruise-line brochure). Plaintiff does not claim a failure to disclose. Nor can he. The Forum-Selection Clause was prominently disclosed to Plaintiff on the first page of his Loan Agreement in clear, plain-English prose. (Ex. A at 1.) Because that clause was "not hidden or ambiguous," it "was not signed as a result of fraud or overreaching." *Krenkel*, 579 F.3d at 1281, 1282.

Plaintiff cannot defeat the Forum-Selection Clause by arguing that *other provisions* of the Loan Agreement, or the Loan Agreement as a whole, were fraudulent. To defeat a forum-selection clause, a plaintiff must show that "the inclusion of *that clause* in the contract was the product of fraud." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974) (emphasis added). By contrast, when a plaintiff seeks to attack the contract as a whole, "more general claims of fraud will be litigated *in the chosen forum*, in accordance with the

[3] Plaintiff also argues that the Forum-Selection Clause is unenforceable because the tribal courts do not have jurisdiction. Opp. 6-8. But as described in Defendants' opening brief and below, the tribal exhaustion doctrine requires that tribal courts decide whether they have jurisdiction in the first instance, and so bars this Court from considering that argument now. Mot. 16-18; p. 5 below. That argument therefore provides no basis for refusing to enforce the Forum-Selection Clause.

contractual expectations of the parties." *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1296 (11th Cir. 1998) (emphasis in original). Here, Plaintiff claims that the Forum-Selection Clause is part of an overall scheme "to fraudulently avoid [state] regulation." Opp. 6. But as a federal court recently held, even if all the factual allegations in Plaintiff's Complaint are true—and they are not—they are irrelevant because none relates specifically to the Forum-Selection Clause.[4] *See Heldt v. Payday Fin., LLC*, --- F. Supp. 2d ---, 2014 WL 1330924, at *7 (D.S.D. Mar. 31, 2014).

Finally, although this Court cannot properly consider Plaintiff's argument that the whole Loan Agreement was part of a fraudulent scheme to evade state regulation, the argument fails on the merits. The premise of that argument is Plaintiff's contention that Western Sky was "nothing more than a front" for CashCall. Opp. 5. But Defendants have submitted *evidence*—not mere allegations, as has Plaintiff—that Western Sky operated legitimately and distinctly from CashCall. (*See* Mot., Ex. 4, Lawrence Aff.) As Ms. Lawrence has sworn, Western Sky set the underwriting criteria for all Western Sky loans and made the ultimate decision whether to fund those loans. (*Id.* at ¶ 5.) That Western Sky had an agreement with CashCall to provide support in processing applications and service loans after funding—a common business practice in the loan industry—does not demonstrate that the arrangement was fraudulent. *See California v. Miami Nation Enters., Inc.*, 166 Cal. Rptr. 3d 800, 817 (Cal. Ct. App. 2014) (holding that a tribe engaging in online lending is not deprived of sovereign protections merely because it retains a "minimal percentage of the profits" as part of an agreement with a third-party).

[4] Plaintiff relies solely on an Order to Cease and Desist by New Hampshire's Department of Banking as proof of fraud. Opp. 5. But that Order does not address the Forum-Selection Clause *itself*, and so is irrelevant. Further, by its own terms, that Order was not final; in fact, it *initiated* proceedings and therefore contained only *allegations* of wrongdoing. *See* Opp. Ex. 1, at 1. This Court should give it no weight.

B. The Public-Interest Factors Favor Enforcing The Forum-Selection Clause.

Plaintiff's only attempt at meeting his burden to show that "public-interest factors" favor voiding the Forum-Selection Clause is his statement that "this suit seeks to resolve whether Defendants' scheme can legally circumvent Florida laws[.]" Opp. 8. The Florida Supreme Court has already answered that question: "Florida's usury statute prohibiting certain interest rates does not establish a strong public policy against two parties' contractually agreeing to apply another [jurisdiction]'s law, under which the agreement was valid." *Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166, 1168 (Fla. 1985). That rule applies "even though as a factual matter the designation may indeed have been motivated by a desire to 'evade' Florida's usury law." *Morgan Walton Props., Inc. v. Int'l City Bank & Trust Co.*, 404 So. 2d 1059, 1062 (Fla. 1981). Under Florida's choice-of-law rules, therefore, CRST law applies here, which "mitigates strongly in favor of dismissal." *Membreno v. Costa Crociere S.p.A.*, 425 F.3d 932, 937-38 (11th Cir. 2005).

The need for a CRST court to apply CRST law is further enhanced because Plaintiff misstates what that law is. Plaintiff contends that the Loan Agreement violates CRST law. Opp. 4. However, the CRST does not have a limitation on interest rates in loan agreements because the CRST repealed the usury limit established in its 1978 Law and Order Code when it adopted Tribal UCC § 16-3-112 in 1997. (Affidavit of Steven C. Emery (Ex. 1) ¶¶ 8-14.) Thus, to the extent there is any lack of clarity on whether the adoption of the Tribal UCC repealed the CRST's prior usury statute, the need for a tribal forum to hear this case in the first instance under the tribal exhaustion doctrine is only heightened. Mot. 16-18.

II. Plaintiff Must Exhaust His Tribal Remedies.

Plaintiff devotes a scant two sentences to the tribal exhaustion doctrine, arguing only that "neither of the . . . two Defendants . . . appear [*sic*] to have any connection with the" CRST. Opp. 9. But Plaintiff does not contest Defendants' demonstration that tribal jurisdiction is colorable here, which is all Defendants must show for exhaustion to apply.[5] Mot. 16-18. Further, Plaintiff's broad-brush attack on Western Sky's business model—which if sustained would call into question the ability of tribal businesses to exercise the same rights as non-tribal businesses to outsource certain operations to third parties—and his baseless claim that the Loan Agreement violates CRST law highlight the need for a CRST court to hear this case in the first instance. Finally, Plaintiff acknowledges the decision in *Heldt* to order tribal exhaustion in a case indistinguishable from this one, Opp. 8-9, but makes no argument as to how *Heldt* does not apply here. For good reason: there is no way to distinguish *Heldt* from this case. This Court should take the same approach as in *Heldt* and order Plaintiff to exhaust his tribal remedies.[6]

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[5] Contrary to Plaintiff's implication, Opp. 9, Defendants can enforce the Forum-Selection Clause because they "stand[] in the shoes of the assignor [Western Sky] and may enforce the contract against the original obligor in [their] own name[s]." *MDS (Canada) Inc. v. Rad Source Tech., Inc.*, 720 F.3d 833, 857 (11th Cir. 2013).

[6] Defendants acknowledge that a district judge in the Northern District of Georgia recently found the Forum-Selection Clause to be invalid due to fraud or overreaching and that CRST courts do not have jurisdiction over Western Sky loan agreements. *See Parnell v. Western Sky Fin., LLC*, No. 4:14-cv-24-HLM, slip op. at 32-44, 51-52 (N.D. Ga. Apl. 28, 2014). Defendants respectfully disagree with *Parnell*, which cited no case law in support of its forum-selection clause holding. In addition, *Parnell* ignored clear Supreme Court and circuit court precedent from throughout the country holding that tribal exhaustion is mandatory whenever there is a colorable claim of tribal court jurisdiction. CashCall has asked the *Parnell* court to certify an interlocutory appeal of its decision under 28 U.S.C. § 1292(b) and, if the request is granted, will ask the Eleventh Circuit to reverse the district court. In addition, *Parnell* relied upon a ground for refusing to order tribal exhaustion that is not in play here. The *Parnell* court "decline[d] to consider" whether it should stay the action and require tribal exhaustion because the defendants had not "offered to file a tribal court

III. The Arbitration Clause Is Enforceable And Requires All Of Plaintiff's Claims To Be Arbitrated.

A. The FAA Applies To Plaintiff's Loan Agreement.

The FAA applies to the Arbitration Clause. Plaintiff attempts to distinguish all the cases Defendants cited in their opening brief on the ground that application of the FAA is "contrary to the [Loan] Agreement's explicit rejection of any federal law." Opp. 9-10.[7] But federal law governs the enforcement of the Arbitration Clause regardless of what decisional law the parties have chosen to govern their dispute. *See Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008) (parties cannot contract around the FAA); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995) ("[T]he choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration[.]").

B. The Enforceability And Scope Of The Arbitration Clause Are Delegated To Arbitration.

Plaintiff candidly admits that he "challenges the legality of the entire [L]oan [A]greement," Opp. 12, and that "the contract in general is unconscionable, illegal and unenforceable," *id.* at 13. That argument is barred by Supreme Court and Eleventh Circuit precedent precluding a court from voiding an Arbitration Clause based on arguments about a contract's unenforceability as a whole. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449

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action to determine jurisdiction." *Id.* at 44 n.5. Defendants make that offer here. However, the more appropriate course is to order *Plaintiff* to exhaust his tribal remedies.

[7] Plaintiff also attempts to distinguish the cases cited by Defendants because Plaintiff's Arbitration Clause somehow requires the arbitrator to be "selected on racial characteristics." Opp. 11. To the contrary, the Arbitration Clause merely requires that the arbitrator be an "authorized representative" of the Cheyenne River Sioux Tribal Nation. (Ex. A at 3-4.) The Arbitration Clause also gives *Plaintiff* the right to select the American Arbitration Association, JAMS, or another mutually agreeable arbitration organization to administer the arbitration. (*Id.* at 4.) Contrary to Plaintiff's argument, race is not mentioned anywhere in the Arbitration Clause.

(2006); *Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 998 (11th Cir. 2012); *see also* Mot. 21-22 (discussing cases). Further, the Arbitration Clause here delegates to the arbitrator the authority to decide "any issue concerning the validity, enforceability, or scope of . . . the Arbitration agreement." (Ex. A. at 4.) The Supreme Court has held that where an arbitration agreement "clearly and unmistakably" delegates "threshold issues concerning the arbitration agreement" to arbitration, those issues may not be decided by a court absent a showing that the delegation provision *itself*—and not the contract or arbitration provision generally—is invalid. *Rent-A-Cntr., W., Inc. v. Jackson*, 561 U.S. 63, 68, 69 n.1 (2010). In short, parties can "agree[] to arbitrate the very issue of 'arbitrability,'" which they have done here. *Martinez v. Carnival Corp.*, 744 F.3d 1240, 1246 (11th Cir. 2014). Nothing in Plaintiff's Complaint or opposition brief can be read as an attack on the delegation portion *itself*.[8] Plaintiff has not met his burden to show that the Arbitration Clause is unenforceable.

CONCLUSION

For these reasons and those in Defendants' opening brief, Defendants respectfully request that the Court dismiss the Complaint or compel arbitration and stay or dismiss the case.

[8] This includes Plaintiff's labeling of the Arbitration Clause as a "sham." Opp. 14. Plaintiff has submitted no evidence in support of that allegation, instead relying upon a district court decision in another case and a state administrative order. Opp. 14-15. Plaintiff's argument is meritless for three reasons. *First*, the district court decision Plaintiff invokes involved a Western Sky arbitration clause *different* than the one at issue in this case. *Compare* Ex. A at 3-5 *with Jackson v. Payday Fin., LLC*, No. 11-C-9288, 2012 WL 2722024, at *2 (N.D. Ill. July 9, 2012). Unlike the Western Sky arbitration clause at issue in *Jackson*, Plaintiff's Arbitration Clause allows arbitration before the AAA, JAMS, or any other mutually agreeable arbitral forum. (Ex. A at 4.) *Second*, to the extent *Jackson* is relevant here, Defendants vigorously dispute the district court's conclusion and are challenging it on appeal. *See Jackson*, No. 12-2617 (7th Cir.). *Third*, for the reasons discussed above at p. 3 n.4, the Order issued by the New Hampshire Department of Banking should be given no weight.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of *Defendants' Reply Memorandum of Law in Further Support of Their Motion to Dismiss or, Alternatively, to Compel Arbitration and Stay or Dismiss the Case* were served on May 19, 2014, on all counsel or parties of record on the following Service List via CM/ECF.

s/Christopher S. Carver
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