UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

NICOLE MARIE SWIGER, *on behalf of herself and all individuals similarly situated*,	:	CIVIL ACTION
Plaintiff,	:	NO. 2:19-cv-12014-BAF-RSW
v.	:	
JOEL ROSETTE, TED WHITFORD, TIM MCINERNEY, and KENNETH E. REES,	:	
Defendants.	:	

REPLY IN SUPPORT OF DEFENDANT KENNETH E. REES'S MOTION TO COMPEL ARBITRATION

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I. PLAINTIFF'S ARGUMENTS TO AVOID ARBITRATION LACK MERIT.[1]

A. *Henry Schein* remains controlling.

Plaintiff twice quotes *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), for the proposition that "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists," such that a court can evaluate issues of arbitrability. Pl.'s Opposition at 16, 21 n.17. While accurately quoted, Plaintiff misses the point of *Henry Schein* by omitting its very next sentence.

[1] Plaintiff has "objected" to Rees's Motion to Compel Arbitration because she has sought a declaratory judgment "that the arbitration clause in the Plain Green loan agreement is void and unenforceable" and "to avoid such a declaratory judgment, defendant Rees must seek summary judgment." Plaintiff cites no authority for this proposition, and her attempt to impose another procedural hurdle is contrary to the plain text of Federal Arbitration Act. *See* 9 U.S.C. § 3. There was no need for Rees to do anything—let alone move for summary judgment—other than move to compel arbitration pursuant to Section 3. Plaintiff's request to "award summary judgment in favor of plaintiff" under Rule 56(f) is also meritless for at least two reasons. First, the plain text of Rule 56(f) requires that Rees be given "notice and a reasonable time to respond" by the Court prior to any entry of summary judgment against him absent a formal summary judgment motion by Plaintiff. *See Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 487 (6th Cir. 2009)(noting that "in the Sixth Circuit, […]the district court must afford the party against whom *sua sponte* summary judgment is to be entered ten-days notice and an adequate opportunity to respond"). Second, summary judgment for Plaintiff is inappropriate as Plaintiff has offered no **evidence** that could support summary judgment in her favor on her declaratory judgment claim in violation of Rule 56(c). This lack of evidence requires that the case be compelled to arbitration, not a judgment in Plaintiff's favor. *Yaroma v. Cashcall, Inc.*, 130 F. Supp. 3d 1055, 1065 (E.D. Ky. 2015) (compelling arbitration of claims against non-Tribal servicing company despite Plaintiffs' unsupported allegations of unconscionability, prospective waiver, and that the loan agreement was void *ab initio* given the interest rates charged given lack of evidence).

Plaintiff has also "objected" to Rees's Motion to Compel Arbitration for a purported failure to adequately comply with Local Rule 7.1. That is simply false. *See* September 30, 2019 email chain between A. Falk and M. Alamo, attached as Ex. 'A.' Opposing counsel was explicit in his response to Rees's meet and confer effort: "[h]ad you read the Complaint, you would have surely recognized that the answer to your first request is 'no'. To confirm, no to arbitration." *Id.* Plaintiff's second "objection" is meritless.

There, the Supreme Court stated, "if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 530.

Here, there is a valid agreement to arbitrate into which Plaintiff entered that requires arbitration of any dispute "involving" her loan agreement with Plain Green. Compl. at Ex. B. That agreement also unquestionably contains a delegation provision, requiring arbitration of "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." *Id.* Given this language, the Court must compel arbitration of these threshold issues—including Plaintiff's effective vindication challenge (Opp'n at 16-24) and any challenge to whether Rees, as a nonsignatory, can compel arbitration (Opp'n at 8-16). *De Angelis v. Icon Entm't Grp. Inc.*, 364 F. Supp. 3d 787, 795-97 (S.D. Ohio 2019) (explicitly holding that after the Supreme Court's decision in *Henry Schein*, in the presence of a delegation provision, a court must compel arbitration of both effective vindication arguments and issues involving compelling arbitration against non-signatories to the arbitration agreement). To hold otherwise, as the court in *De Angelis* recognized, "would be to engage in the type of analysis that the Supreme Court held impermissible in *Henry Schein, Inc.*," because "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 796-97.[2] Given the clear and

[2] Plaintiff advances the reasoning of the Eastern District of Virginia in *Gibbs v. Stinson*, which Plaintiff asserts 'debunked' Rees's reading of *Henry Schein*. Opp'n at 21. But any careful analysis of the opinion *Gibbs v. Stinson* must acknowledge that the Court's rejection of *Henry Schein* was founded upon that Court's erroneous assertion that a delegation provision cannot be valid if it is contained in an arbitration agreement that is alleged to be invalid. *Gibbs v. Stinson*, No. 3:18CV676, 2019 WL 4752792, at *12 (E.D. Va. Sept. 30, 2019). That holding directly conflicts with the Supreme Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448-49 (2006), which enforced an arbitration agreement notwithstanding a challenge that the loan

conspicuous delegation clause, Plaintiff is free to raise her arguments over gateway issues of arbitrability with the arbitrator in the first instance, as the parties intended.

B. Plaintiff agreed to arbitrate all claims involving her loan agreement, including against Rees.

Notwithstanding *Henry Schein*, Plaintiff incongruously attempts to have her cake and eat it too—making claims against Rees that arise out of her loan agreement while also seeking to disclaim the arbitration agreement in that loan agreement requiring her to arbitrate all claims arising out of her loan agreement. Opp'n at 8-16. Plaintiff's arguments on this point fail for two reasons: (1) Plaintiff agreed to arbitrate the claims that she now seeks to avoid; and (2) Plaintiff is estopped from using her loan agreement as a basis for her claims against Rees while also refusing to arbitrate her claims arising under her loan agreement.

Plaintiff agreed to arbitrate any claim against Plain Green's "servicing and collection representatives and agents, and each of their respective agents, representatives, employees, officers, directors, members, managers, attorneys, successors, predecessors, and assigns." Compl. Ex. B at 8 Plaintiff's Complaint explicitly alleges that Rees is currently an officer and director of Think Finance—a servicer of Plain Green—and her claims against Rees each rely upon the assertion that Rees continues to act in that capacity.[3] *See, e.g.,* Compl. at ¶¶ 21-22, 91-92, 95-97, 105,

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agreement was invalid. Furthermore, the decision in *Gibbs* was based upon a belief that an arbitrator would be called upon to "determine whether a valid and enforceable arbitration agreement exists absent the federal or state law tools necessary to do so." *Gibbs*, 2019 WL 4752792, at *12. That concern, however, does not apply to Plaintiff's loan agreement, as the parties agreed to "look to the federal arbitration act and judicial interpretations thereof for guidance in any arbitration that may be conducted." Compl. at Ex. B (emphasis omitted).

[3] Plaintiff's Opposition appears to admit that her allegations of ongoing wrongdoing on the part of Rees were unfounded, and that her claims against Rees are solely based upon a single allegation that Rees "having set once a conspiracy to violate Michigan

187. But in trying to avoid having to arbitrate her claims against Rees, Plaintiff finally admits that Rees and Think Finance have "had no direct or indirect relationship with Plain Green since June 1, 2016 while [Plaintiff's] loan was made in December, 2018," and as such Rees "lacks standing to invoke arbitration under the loan contract." Opp'n at 16. That admission directly contradicts the claims in Plaintiff's Complaint.

Plaintiff must choose—either arbitrate claims her claims against Rees founded upon his purported status as an officer, director, or agent of a servicing company used by Plain Green, or abandon her claims against Rees and proceed against the company (Plain Green) that has operated independently from Think Finance for years before her loan. Plaintiff cannot have it both ways. Either Rees is explicitly contemplated as a party under the arbitration agreement, or Plaintiff's claims against Rees lack merit.

Notwithstanding that Plaintiff's claims were explicitly within the scope of the arbitration agreement, under Michigan law, Plaintiff is also estopped from refusing to arbitrate against a nonparty to her loan agreement given the extremely broad language of the agreement. *See Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C.*, 742 N.W.2d 409, 421 (Mich. App. 2007).[4] In *Rooyakker*, the court examined whether

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criminal usury laws *inter alia* in motion, he is civilly liable for its consequences…" Opp'n at 1 n.3. But Plaintiff's Complaint contains only a single conspiracy claim—Count Four. The remaining claims in the Complaint each purport to impose liability on Rees for his individual violations of those statutes. Given these admissions, Rees expects that Plaintiff will be withdrawing Counts One through Three, and Five through Ten of her Complaint as to Rees.

[4] Known as equitable estoppel, courts across the country have recognized that such a form of estoppel is necessary "to prevent a party from using the terms or obligations of an agreement as the basis for his claims against a nonsignatory, while at the same time refusing to arbitrate with the nonsignatory under another clause of the same agreement." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1129 (9th Cir. 2013) (internal citation omitted). That is precisely what Plaintiff attempts to do in opposing Rees's Motion to Compel by arguing Rees is a nonparty to the arbitration agreement.

arbitration could be compelled by nonparties to the arbitration agreement where the litigant agreed to arbitrate "'any dispute or controversy arising out of or relating to' the agreement." *Id.* Given this "broad language of the arbitration clause," court held that an arbitrator had authority to hear such claims even against nonparties. *Id.* Plaintiff agreed to practically identical language in her loan agreement here, and the result should be identical. *See* Compl. Ex. B at 8 (Plaintiff's agreement to arbitrate "any claim or controversy […] otherwise involving this Agreement or the Loan.").

The Court should not permit Plaintiff to avoid arbitrating the very claims and disputes arising out of her loan agreement that she agreed to in her loan agreement. As a result, Plaintiff's claims against Rees must be compelled to arbitration.

C. Rees is not estopped from compelling arbitration.

Plaintiff argues Rees is collaterally estopped from arguing that the Plain Green loan agreement is enforceable by virtue of Rees having litigated a similar issue in the case of *Gingras v. Rosette*.[5] Opp'n at 6-8. Plaintiff's collateral estoppel arguments on this point are straightforward and require little analysis to conclude that they lack any merit. Indeed, Plaintiff fails on all three necessary elements of collateral estoppel.

In Michigan, collateral estoppel requires a litigant to prove, "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v. State Farm Insurance Co.*, 677 N.W.2d 843, 845–46 (Mich. 2004) (cleaned up). Plaintiff "bears the burden of proving that the doctrine applies." *Lewis v. City of Detroit*, No. 09-CV-

[5] Of course, beyond these legal arguments, the issues in *Gingras* are materially different than those here. For example, an obvious difference between these cases is the respective standards for unconscionability, which are determined by reference to state law. *See* 9 U.S.C. § 2. In fact, Plaintiff fails to even argue for the unconscionability of the arbitration agreement under Michigan law. This renders Plaintiffs collateral estoppel arguments meaningless.

14792, 2011 WL 2084067, at *2 (E.D. Mich. May 24, 2011) (citation omitted). Plaintiff has failed to meet her burden on all elements.

To begin with, Plaintiff fails to demonstrate that a valid and final judgment exists in the *Gingras* case, or that an issue of fact was conclusively determined in that action. Rather, in denying a motion to compel arbitration in that case, the Vermont District Court merely accepted the allegations of a complaint and noted "Plaintiffs are entitled to an opportunity to prove that they are true." *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163, at *18 (D. Vt. May 18, 2016). Yet to be said to have been litigated, "a question must be put into issue by the pleadings, submitted to the trier of fact, and determined by the trier." *King v. Munro*, --- N.W.2d ----, No. 341714, 2019 WL 4383025, at *2 (Mich. App. July 23, 2019). That did not happen in *Gingras*. Similarly, given that record, there has not been a full opportunity to litigate the factual issues—particularly where a petition for certiorari has been filed. Pet. for Writ of Cert., *Sequoia Capital Operations, LLC v. Gingras*, No. 19-331 (Sept. 11, 2019), attached hereto as Ex. 'B.'

Finally, Plaintiff has failed to show that there is mutuality of estoppel, or that an exception to mutuality applies. Plaintiff was not a litigant in the putative nationwide class in *Gingras*, and she did not seek to intervene in that action. There is thus no mutuality of estoppel. And while Michigan has relaxed the mutuality requirements in some cases, the "offensive use of collateral estoppel" such as what Plaintiff seeks to use against Rees, "**is not permissible** in Michigan." *Lewis*, 2011 WL 2084067, at *2 (emphasis added); *see also Monat*, 677 N.W.2d at 852 (noting Michigan law recognizes an exception to the mutuality requirement only in cases of defensive collateral estoppel, and has refused to recognize a similar exception for offensive collateral estoppel). There is thus no basis on which to apply collateral estoppel here.

D. Plaintiff offers no basis to apply the prospective waiver doctrine.

To the extent the Court refuses to apply *Henry Schein* and *De Angelis*, it should reject Plaintiff's prospective waiver/effective vindication challenge. Opp'n at 16-24. As addressed in Rees's opening brief, the prospective waiver doctrine simply does not apply here to prevent arbitration of Plaintiff's claims. Mot to Compel Arb., ECF No. 7 at 16-22. Plaintiff's Opposition does nothing to meaningfully engage with these authorities. Similarly, Plaintiff fails to show, with evidence akin to that required to avoid summary judgment, that they will be unable to effectively vindicate their claims under Chippewa Cree law. Indeed, Plaintiff has the ability to recover significant damages and remedies under Chippewa Cree law. *See, e.g.*, Section 10-6-201, Chippewa Cree Tribal Lending and Regulatory Code, attached as Ex. C. This ability to pursue some remedies under Tribal law is fatal to Plaintiff's prospective waiver defense. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1269 (11th Cir. 2011); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993). Plaintiff does not engage with Rees's mandatory authority on this point. Instead, Plaintiff cites to other Native American lending cases for the proposition that because other circuits have held that a choice of Native American law provision is invalid, an identical result is required here. Opp'n at 20-24. Such an argument, however, holds no weight, and has been rejected by courts in this Circuit. *See Yaroma v. Cashcall, Inc.*, 130 F. Supp. 3d 1055, 1065 (E.D. Ky. 2015).

The Court should reject Plaintiff's baseless effective vindication challenge. She has offered nothing to show she is unable to pursue any remedies under Tribal law.

Dated: October 21, 2019

Respectfully Submitted,
/s/ Michelle L. Alamo

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CERTIFICATE OF SERVICE

I, MICHELLE L. ALAMO, hereby certify that on this 21st day of October 2019, I filed electronically a copy of the foregoing *Reply in Support of Kenneth E. Rees's Motion to Compel Arbitration.* This document is available for viewing and downloading from the ECF system and electronic notification has been sent to all counsel of record via the court's CM/ECF system.

s/ Michelle L. Alamo
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