IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 8:19-cv-02532

ASHANTI McINTOSH

Plaintiff,

v.

GLOBAL TRUST MANAGEMENT LLC
DIRECT RECOVERY SERVICES LLC
FRANK TORRES

Defendants.

DEFENDANTS GLOBAL TRUST MANAGEMENT, LLC'S AND FRANK TORRES' DISPOSITIVE MOTION TO COMPEL ARBITRATION, OR IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS WITH INCORPORATED MEMORANDUM OF LAW

Defendants Global Trust Management, LLC ("GTM") and Frank Torres (collectively "Defendants"), by and through their undersigned counsel, hereby moves this Court, pursuant to Fed. R. Civ. P. 12(b)(1) and 9 U.S.C. § 3 for an Order granting Defendants motion to dismiss and/or compel arbitration of Plaintiff Ashanti McIntosh's ("Plaintiff") claims for violations of 15 U.S.C. §§ 1692c, 1692e and 1692f and Florida Statutes § 559.72(9), or in the alternative, for judgment on the pleadings pursuant to Fed. R. Civ. P 12(c), dismissing the Complaint in its entirety.

Plaintiff alleges that Defendants violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*. ("FDCPA") and Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. § 559.72(9) when Defendants hired a third party debt collector to collect and also attempted to collect, themselves, an unenforceable debt because it violated Florida usury laws. As set forth in detail in the below Memorandum of Law, a valid, enforceable agreement to arbitrate Plaintiff's

claims exists and the Court should, therefore, compel arbitration of same. In the alternative, should the Court decline to compel arbitration, the issue of whether the debt originated by Mobiloans, LLC ("Mobiloans") is valid and enforceable is not governed by Florida law as Plaintiff contends, but rather, the laws of the Tunica-Biloxi Tribe of Louisiana pursuant to Plaintiff's line of credit agreement with Mobiloans. As the law governing the validity and enforceability of the subject debt that serves is inapplicable, Plaintiff's claims with the unenforceability of the debt must be dismissed.

In addition, Plaintiff's allegations that Defendants violated various 15 U.S.C. § 1692e and § 1692f through the conduct of a third-party collection agency must also fail because Defendants are not liable for the contents contained on a third-party website which they have no control over. Further, Plaintiff's allegation that Defendant violated 15 U.S.C. § 1692c(b) by conveying information about her debt to their contracted third party debt collector should also be dismissed because the transmission of such information is not a "communication in connection with the collection of a debt." Accordingly, and in the event the Court declines to compel arbitration of Plaintiff's claims, the Court should grant Defendants' motion for judgment on the pleadings and dismiss the Complaint in its entirety.

MEMORANDUM OF LAW

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff applied and was approved for a line of credit account with Mobiloans (the "Mobiloans Account"). *See* Declaration of Frank Torres ("Torres Dec."), ¶ 6; Exhibit A. As a result, Mobiloans extended an open line of credit to Plaintiff. As part of the Mobiloans Account application Plaintiff acknowledged, *inter alia*, that: (1) she read and consented to the Mobiloans Line of Credit Terms and Conditions (the "Terms and Conditions"); and (2) the Mobilaons

Account is governed by the laws of the Tunica-Biloxi Tribe of Louisiana. *Id*. The Terms and Conditions explicitly provides:

> **XIX. Governing Law**
>
> This Agreement is governed by the laws of the Tunica-Biloxi Tribe of Louisiana and the Indian Commerce Clause of the United States Constitutions, and the Arbitration Agreement above is additionally governed by the Federal Arbitration Act ("FAA") and the decisions of the United States Supreme Court interpreting the FAA. We do not have a presence in Louisiana or any other State of the United States of America. Neither this Agreement nor the Lender is subject to the laws of any State of the United States. MobiLoans, LLC may choose to voluntarily use certain federal laws as guidelines for the provision of services. Such voluntary use does not represent acquiescence of the Tribe to any federal law unless found expressly applicable to Tribal operations offering such services.

Torres Dec., Exhibit B, p. 21. In addition, in agreeing to the Terms and Conditions, Plaintiff agreed to arbitrate any claim or dispute arising from or related to her Mobiloans Account (the "Arbitration Agreement"). Torres Dec., Exhibit B, p. 17-21.

On or about December 30, 2016 Plaintiff's Mobiloans Account was sold to GTM. Torres Dec., ¶ 9. On October 11, 2019, Plaintiff filed a Complaint in the Middle District of Florida alleging that Defendants violated the FDCPA and FCCPA related to Plaintiff's Mobiloans debt. *See* Complaint, Doc. 1. The Complaint alleges that Plaintiff obtained a payday loan from internet-based lender Mobiloans. Complaint (Doc. 1), ¶ 18. The Complaint further alleges that GTM purchased Plaintiff's Mobiloans Account around October 2017, which had a balance of $1,319.73. *Id*., ¶¶ 33, 35. In addition, Plaintiff alleges that Frank Torres is Chief Operations Manager and Chief Compliance Officer of GTM. *Id*., ¶ 12. According to the Complaint, Mobiloans charges interest rates between 206% and 442% annually. *Id*., Exhibit C. After GTM purchased the account, Plaintiff alleges that GTM and Direct Recovery Services LLC ("DRS"), an independent third party debt collector, attempted to collect Plaintiff's Mobiloan debt. *Id*., ¶¶ 42-45. Plaintiff contends that

Defendants purchased Plaintiff's debt for the purpose of attempting to collect the debt using false threats, harassment, and other similar collection methods, despite knowing Plaintiff's debt was unenforceable and illegal. *Id.*, ¶ 37. While there are vague references to calls placed by GTM to Plaintiff (Doc. 1, ¶¶ 42-43, 74), the overwhelming majority of the factual allegations relate to third-party DRS's collection activity. *Id.*, ¶¶ 54-72. In this regard, Plaintiff's factual allegations rest on a letter DRS sent to Plaintiff and the contents of DRS's website. *Id.*, ¶¶ 54-72. On January 8, 2020 Defendants filed their Answer denying the allegations in the Complaint. (Doc. 16).

ARGUMENT

I. Plaintiff Should Be Compelled to Arbitrate Her Claims

"Motions to compel arbitration are treated generally as motions to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1)." *Bell v. Atl. Trucking Co.*, No. 309-CV-406-J-32MCR, 2009 WL 4730564, at *2 (M.D. Fla. Dec. 7, 2009). "Courts have deemed a motion seeking to compel arbitration as a factual attack as it asserts that a provision of an extrinsic document, an arbitration clause contained within the body of a contract, deprives the court of its power to adjudicate the plaintiff's claims." *Id.*, at *3.

The Federal Arbitration Act ("FAA") governs the enforceability of arbitration agreements. *Bhim v. Rent-A-Ctr., Inc.*, 655 F. Supp. 2d 1307, 1310 (S.D. Fla. 2009). There is an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Given the federal policy favoring arbitration, courts are required to "rigorously enforce agreements to arbitrate." *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1192 (11th Cir. 1995) (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)) (alteration in original). "Accordingly, the FAA requires a court to either stay or dismiss a lawsuit and to compel arbitration upon a showing that (a) the plaintiff entered into a

written arbitration agreement that is enforceable 'under ordinary state-law' contract principles and (b) the claims before the court fall within the scope of that agreement." *Lambert v. Austin Ind.*, 544 F.3d 1192, 1195 (11th Cir. 2008) (citing 9 U.S.C. §§ 2-4). As a matter of policy, courts should resolve "any doubts concerning the scope of arbitrable issues… in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

Section 3 of the FAA provides:

> [i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement[.]

9 U.S.C. § 3 (emphasis added). In accordance with the FAA, "the party seeking to compel arbitration has the initial burden of producing the arbitration agreement and establishing the contractual relationship necessary to implicate the FAA and its provisions granting this Court authority to dismiss or stay [the plaintiff's] cause of action and to compel arbitration." *Compere v. Nusret Miami, LLC*, No. 1:19-CV-20277-KMM, 2019 WL 3939475, at *3 (S.D. Fla. Aug. 20, 2019) (internal citation and quotation omitted). When the party seeking to compel arbitration has met his burden, the opposing party "has the affirmative duty of coming forward by way of affidavit or allegation of fact to show cause why the court should not compel arbitration." *Aronson v. Dean Witter Reynolds, Inc.*, 675 F. Supp. 1324, 1325 (S.D. Fla. 1987). "Whether a valid agreement to arbitrate exists is a matter of state contract law. Under Florida law, a valid contract requires offer, acceptance, and consideration." *Compere*, 2019 WL 3939475, at *3.

The FAA represents a "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S.

333, 339 (2011) (citations and quotations omitted). The FAA provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA also provides that a court must stay its proceedings if an issue before it is subject to arbitration under a written arbitration agreement. *See* 9 U.S.C. § 3. The FAA authorizes a federal district court to issue an order compelling arbitration if there has been a failure to comply with the arbitration agreement. *See* 9 U.S.C. § 4.

Moreover, the FAA directs that any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 289 (2010). "By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

"A district court must grant a motion to compel arbitration if it is satisfied that the parties actually agreed to arbitrate the dispute." *Sundial Partners, Inc. v. Atl. St. Capital Mgmt. LLC*, No. 8:15-CV-861-T-23JSS, 2016 WL 943981, at *3 (M.D. Fla. Jan. 8, 2016), *report and recommendation adopted*, No. 8:15-CV-861-T-23JSS, 2016 WL 931135 (M.D. Fla. Mar. 11, 2016). "The determination of whether a dispute is arbitrable under the [FAA] consists of two prongs: (1) whether the parties agreed to arbitrate the dispute, and (2) whether legal constraints external to the parties' agreement foreclosed arbitration." *Cusolito v. Citibank, N.A.*, No. 0:17-CV-60963-WPD, 2017 WL 8890662, at *2 (S.D. Fla. Oct. 6, 2017) (quoting *Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir. 2004)) (citation and internal quotation marks omitted). "The second step concerns whether 'Congress has clearly expressed an intention to preclude arbitration of [a]

statutory claim.'" *Id*. (quoting *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1273 (11th Cir. 2002)).

In this regard, "[t]he Eleventh Circuit has held that a claim 'relates to' a contract if the dispute giving rise to the claim 'occurs as a fairly direct result of the performance of contractual duties' and if there is 'some direct relationship' between the dispute and the contract." *Cronin v. Portfolio Recovery Assocs., LLC*, No. 815CV00768EAKEAJ, 2016 WL 1756892, at *3 (M.D. Fla. Apr. 29, 2016) (quoting *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1340—1341 (11th Cir. 2012)). Importantly, it is well-settled that alleged FDCPA violations are a direct result of a plaintiff's "contractual duties and would therefore relate to [the plaintiff's] account and fall within the scope of the Arbitration Agreement." *Id*.; *see also Levinson v. Green Tree Servicing, LLC*, No. 8:14-CV-02120-EAK, 2015 WL 1912276, at *2 (M.D. Fla. Apr. 27, 2015); *Wilder v. Midland Credit Mgmt.*, No. CIVA109CV2039JOFAJB, 2010 WL 2499701, at *4 (N.D. Ga. May 20, 2010), *report and recommendation adopted*, No. CIVA109CV02039JOFAJB, 2010 WL 2499659 (N.D. Ga. June 15, 2010). Furthermore, "it is well-settled that a nonparty can enforce an arbitration agreement if the language of the agreement is broad enough to permit the nonparty to invoke it." *Bolanos v. First Inv'rs Servicing Corp.*, No. 10-23365-CIV, 2010 WL 4457347, at *2 (S.D. Fla. Oct. 29, 2010).

The instant action is analogous to *Cronin*, which dealt with a similar arbitration provision. There, the defendant purchased the plaintiff's account as part of a large portfolio of account from the original creditor and sent letters to debtors that allegedly violated the FDCPA. *Cronin*, 2016 WL 1756892, at *1. In finding that the defendant was entitled to enforce the arbitration agreement, the court held that the plaintiff's FDCPA claim was arbitable as the claim related to the plaintiff's account, and administratively closed the case pending arbitration. *Id*., at *3.

Here, the Terms and Conditions provides, in relevant part that:

> PLEASE READ THIS WAIVER OF JURY TRIAL AND ARBITRATION AGREEMENT CAREFULLY. Unless you exercise your right to opt-out of arbitration in the manner described above, any dispute you have with Lender, its agents, operator of the website where you submitted your Application, purchaser(s) of any interest in the Agreement or your Account, or anyone else under the Agreement, will be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to have a jury, to engage in discovery (except as may be provided in the arbitration rules), and to participate in a class action or similar proceeding. In arbitration, a dispute is resolved by an arbitrator instead of a judge or jury. Arbitration procedures are simpler and more limited than court procedures. Any arbitration will be limited to addressing your dispute individually and will not be part of a class-wide or consolidated arbitration proceeding.
>
> ***Agreement to Arbitrate***. You agree that any Dispute (defined below) will be resolved in accordance with Tribal Law and applicable federal law.
>
> ***Arbitration Defined***. Arbitration is a means of having an independent third party resolve a Dispute. **A "Dispute" is any controversy or claim related in any way to your Mobiloans Credit Account or your application for a Mobiloans Credit Account, involving you and Lender, its marketing agent, collection agent, any subsequent holder of your Mobiloans Credit Account, or any of their respective agents, affiliates, assigns, employees, officers, managers, members or shareholders (each considered a "Holder" for purposes of this Agreement).** The term Dispute is to be given its broadest possible meaning and includes, without limitation, all claims or demands (whether past, present, or future, including events that occurred prior to the opening of your Account), based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e., money, injunctive relief, or declaratory relief). A Dispute includes, by way of example and without limitation, any claim arising from, related to or based upon marketing or solicitations to obtain the Mobiloans Credit Account and the handling or servicing of your Account whether such Dispute is based on a Tribal, federal or state constitution, statute, ordinance, regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this Account or the Arbitration Agreement.

Torres Dec., Exhibit B, p. 18-19 (emphasis added). Like in *Cronin*, Plaintiff's FDCPA and FCCPA claims are subject to mandatory binding arbitration because the claims are a direct result of Plaintiff's performance of her contractual obligations. Pursuant to the above-referenced Arbitration Agreement, ***any claim related in any way*** to her Mobiloans Account must be resolved by binding arbitration. *Id*. at p. 19. Here, Plaintiff brought action against Defendants alleging violations of the FDCPA and FCCPA, stemming from GTM's and DRS's efforts to collect on Plaintiff's obligation to pay a debt created by her Mobiloans Account.

It is clear that all of Plaintiff's allegations involve disputes relating to the Mobiloans Account. Specifically, in order to assert her claim under the FDCPA and FCCPA, Plaintiff must establish that a "debt collector" was attempting to collect a "debt" as that term is defined in the FDCPA. Under the FDCPA, a "debt" means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction…" 15 U.S.C. § 1692a(5). A "debt collector" is any person, *inter alia*, "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Necessarily, in order to prevail in this litigated matter, Plaintiff would need to rely on the underlying Mobiloans Account to establish that a debt was owed and that Defendants were debt collectors. As such, all of Plaintiff's claims are subject to mandatory and binding arbitration.

Moreover, any argument that the Arbitration Agreement does not apply to Defendants cannot prevail. The Arbitration Agreement explicitly states that claims related to Plaintiff's Mobiloans Account applies to Mobiloans' subsequent holders, including its officers and managers. Torres Dec., Exhibit B at p. 16. Here, the evidence establishes that GTM purchased Plaintiff's Mobiloans Account and placed her account with DRS to collect the subject debt owed by Plaintiff on GTM's behalf. *See* Complaint (Doc.1), at ¶¶ 33, 44; Torres Dec., ¶¶ 9-10. Thus, there can be

no dispute regarding the applicability of the Arbitration Agreement to GTM and Frank Torres.

Additionally, Plaintiff cannot avoid arbitrating his claims against Defendants because Plaintiff enjoyed the benefits of the Mobiloans Account when she received a line of credit from Mobiloans. Having enjoyed the benefits of the Mobiloans Account, Plaintiff cannot now avoid the burden it imposes and to which she earlier agreed. GTM, as the subsequent holder of Plaintiff's Mobiloans Account, and Frank Torres, as GTM's Chief Operations Officer, may therefore compel Plaintiff to resolve her claims in arbitration pursuant to the Arbitration Agreement.

Pursuant to the FAA, a party to an arbitration agreement "may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. If the court is satisfied that a valid arbitration agreement exists between the parties, the court shall order the parties to proceed to arbitration in accordance with the terms of the agreement. *Id.* As the Complaint raises only issues fully governed by the Arbitration Agreement, Defendants request the Court compel arbitration of Plaintiff's claims against Defendants and dismiss this action, or in the alternative, stay proceedings pending arbitration of Plaintiff's claims.

II. The Court Should Grant Defendants Motion for Judgment on the Pleadings in the Event It Does Not Compel Arbitration

Plaintiff claims that the Mobiloans debt is invalid and unenforceable pursuant to Florida law and, as a result, Defendants violated the FDCPA and FCCPA when collection attempts were made to collect the debt created by the Mobiloans Account. Additionally, Plaintiff claims that Defendants liable for its hired agent's, DRS, alleged violations 15 U.S.C. §§ 1692e and 1692f. Plaintiff's Complaint with respect to Defendants fails as a matter of law for several reasons. First, the Mobiloans Account is governed by the laws of the Tunica-Biloxi Tribe of Louisiana rather than Florida law, and thus, the debt is legally enforceable. Second, Defendants are not liable for

the contents on DRS's website, which, according to Plaintiff, allegedly violated 15 U.S.C. §§ 1692e and 1692f. Third, even if the Court determines Defendants are liable for DRS's conduct, the statements on DRS's website are not violations of the FDCPA. Lastly, Plaintiff's allegation that Defendant violated 15 U.S.C. § 1692c(b) by conveying information about her debt to their contracted third party debt collector should also be dismissed because the transmission of such information is not a "communication in connection with the collection of a debt."

a. Legal Standard

"After the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). "A motion for judgment on the pleadings is governed by the same standard as a Rule 12(b)(6) motion to dismiss." *Guarino v. Wyeth LLC*, 823 F. Supp. 2d 1289, 1291 (M.D. Fla. 2011), *aff'd*, 719 F.3d 1245 (11th Cir. 2013). "Judgment on the pleadings is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998); *see also Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001). "In determining whether a party is entitled to judgment on the pleadings, we accept as true all material facts alleged in the non-moving party's pleading, and we view those facts in the light most favorable to the non-moving party." *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014). In addition to accepting material allegations of fact as true, "the district court may consider an extrinsic document if it is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged." *SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010). When considering a motion for judgment on the pleadings, "[a claim] may not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Hawthorne*, 140 F.3d at 1370

(quoting *Slagle v. ITT Hartford*, 102 F.3d 494, 497 (11th Cir. 1996)).

The "least sophisticated consumer" standard is used to evaluate claims for violations of 15 U.S.C. §§ 1692e and 1692f. *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1193, 1200 (11th Cir. 2010). "The least-sophisticated consumer standard takes into account that consumer-protection laws are not made for the protection of experts, but for the public – that vast multitude which includes the ignorant, the unthinking, and the credulous." *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1258-59 (11th Cir. 2014) (internal citation and quotations omitted). "However, the test has an objective component in that while protecting naive consumers, the standard also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness." *Id*. at 1259 (quoting *LeBlanc*, 601 F.3d at 1194 (11th Cir. 2010)). Although the least sophisticated consumer standard is used in evaluating misrepresentations and unconscionable means to collect a debt, Plaintiff's allegations concerning her claims that Defendants violated §§ 1692e and 1692f relate exclusively to the statutory legality and enforceability of Plaintiff's debt originated by Mobiloans.

b. Plaintiff's 15 U.S.C. §§ 1692e, 1692e(2)(a), 1692e(5), 1692e(10), and 1692f and Fla. Stat. §559.72(9) Claims Based on the Unenforceability of the Debt.

Plaintiff claims that the Mobiloans debt is invalid and unenforceable pursuant to Florida law and, as a result, Defendants violated the FDCPA and FCCPA when collection attempts were made to collect the debt created by the Mobiloans Account. The validity of the debt in the context of usury limitations, however, is not evaluated under Florida law but, instead, the law of the state to which the parties to the contract agreed. *See L'Arbalete, Inc. v. Zaczac*, 474 F. Supp. 2d 1314, 1320–22 (S.D. Fla. 2007). Indeed, the Florida Supreme Court discussed the validity and enforceability of debts that would be usurious pursuant to Florida law, but where the parties agreed to the laws of another jurisdiction and the transaction had a reasonable relation to the foreign

jurisdiction in *Morgan Walton Properties, Inc. v. Int'l City Bank & Tr. Co.*, 404 So. 2d 1059, 1063 (Fla. 1981).

In *Morgan*, the court addressed the certified question of "whether Florida's legislation on usurious interest establishes a public policy that prevents the application of the traditional choice of law rules to [contracts] executed and to be performed in Louisiana." *Id*. at 1062. There, the court determined that it "[did] not think the mere fact that there exists in Florida a usury statute which prohibits certain interest rates establishes a strong public policy against such conduct in this state where interstate loans are concerned." *Id*. Importantly, the court held that "[i]n a situation where, under the law of one state with a relation to the transaction, it is void, while under the law of the other state with a relation, the interest is forfeited but principal is an enforceable debt, the law construes the parties' intent to be that the law of the latter should apply." *Id*. at 1063. Thus, where parties to a contract agree that the law of another jurisdiction controls the terms of the contract and the contract is enforceable under the laws of the other jurisdiction, the laws of that jurisdiction apply. *See id*.

Here, Plaintiff's claims that Defendants violated 15 U.S.C. §§ 1692e, 1692e(2)(a), 1692e(5), 1692e(10), and 1692f and Fla. Stat. §559.72(9) because Defendants attempted to collect a debt that void as usurious under Florida law are without merit. As demonstrated by Plaintiff's Mobiloans Account application and the Terms and Conditions, the laws of the Tunica-Biloxi Tribe of Louisiana applies to her Mobiloans Account, not Florida law. *See* Torres Dec., Exhibit A, at p. 3; Exhibit B, at p. 21. In this regard, the Complaint alleges that the debt in question is void and unenforceable because Florida law prohibits interest rates to exceed 18%. Complaint (Doc. 1), ¶¶ 26, 32. However, as demonstrated by the Terms and Conditions, the Mobiloans Account is "governed by the laws of the Tunica-Biloxi Tribe of Louisiana and the Indian Commerce Clause

of the United States Constitutions, and the Arbitration Agreement above is additionally governed by the Federal Arbitration Act ("FAA") and the decisions of the United States Supreme Court interpreting the FAA." Torres Dec., Exhibit B, at p. 21. Furthermore, when Plaintiff applied for her Mobiloans Account, she acknowledged that laws of the Tunica-Biloxi Tribe of Louisiana governed the Mobiloans Account. *Id.*, Exhibit A, p. 3. Specifically, Plaintiff acknowledged and agreed "that the line of credit account is governed by the laws of the Tunica-Biloxi Tribe and that the account may not have any limitations on the terms of the account that the laws of my state may provide." *Id.* Accordingly, the debt in question cannot be held to be void and unenforceable pursuant to Florida law because Florida law does not govern the Mobiloans Account.

With regard to Plaintiff's FCCPA claim and in addition to Florida law's inapplicability to the Mobiloans Account, Florida courts have found no violation of Fla. Stat. §559.72(9) for failing to provide notice of assignment. *See Ramos v. CACH, LLC*, 183 So. 3d 1149, 1152 (Fla. 5th DCA 2015) ("the 2010 changes to section 559.715 … did not create a private cause of action … and makes no reference to the FCCPA's notice provision"); *see also Schmidt v. Synergentic Commc'ns, Inc.*, No. 214-CV-539-FTM-29, 2015 WL 248635, at *3 (M.D. Fla. Jan. 20, 2015) ("there is no private cause of action under the FCCPA for failure to serve a notice of assignment").Likewise, loans issued to Florida residents by an unlicensed deferred presentment provider, as alleged by Plaintiff, are not rendered void or unenforceable under Florida law. *See Cross v. Point & Pay, LLC*, 274 F. Supp. 3d 1289, 1296 (M.D. Fla. 2017) ("section 560.204 does not render agreements with money transmitters who are unlicensed thereunder unenforceable"). Given that Mobiloans Account is governed by the laws of the Tunica-Biloxi Tribe of Louisiana rather than Florida law, Plaintiff's claims that Defendants violated 15 U.S.C. §§ 1692e, 1692e(2)(a), 1692e(5), 1692e(10), and 1692f and Fla. Stat. §559.72(9) must be dismissed with prejudice.

c. Plaintiff's 15 U.S.C. §§ 1692e, 1692e(5), and 1692f Claims Based on the DRS' Alleged Conduct.

Plaintiff further argues that Defendants violated 15 U.S.C. § 1692e, 15 U.S.C. § 1692e(5), 15 U.S.C. § 1692e(10), 15 U.S.C. § 1692f because Defendants falsely threatened to take legal action against Plaintiff for the nonpayment of her debt and to report Plaintiff's debt to credit reporting agencies, without the intention to pursue either course of action. These claims rest solely on the statements displayed on DRS's website, which contain general information about DRS's collection practices. *See* Complaint (Doc. 1), at Exhibit F. Significantly, Defendants have no connection, control, or input as to the contents of DRS's website, nor does Plaintiff allege that Defendants own or otherwise control DRS's website. *See Id*, at ¶¶ 45, 55-72. As such, Defendants are not liable as a matter of law for what DRS communicates on its website. *See Rivas v. Midland Funding LLC*, 398 F.Supp.3d 1294, 1303-05 (S.D. Fla. 2019) (appeal pending).

In *Rivas*, the plaintiff alleged that the debt-owning defendant violate 15 U.S.C. § 1692e and the FCCPA for "asserting the existence of [a] legal right when such person knows that the right does not exist." *Id.* at 1303; 1305-06. These allegation were solely based off of a third-party debt servicer's website. *Id.* at 1303-05. In dismissing the plaintiff's claim, the district court determined that any alleged misleading statements contained on website through which debtor made payments to debt servicer, were not statements by debt owner attempting to collect debt, and thus, debt owner did not violate 15 U.S.C. § 1692e. Specifically, the court noted there was no evidence in the record establishing that debt owner exercised any control over the website or the debt owner made any of the alleged representations on website. *Id.* at 1305. Accordingly, the court held "even when viewing all the evidence and factual inferences reasonably drawn from the evidence in the light most favorable to [the plaintiff]," the complete lack of record evidence to support the claims mandates the entry of summary judgment as a matter of law with respect to the

plaintiffs 15 U.S.C. § 1692e and FCCPA claims. Here, Plaintiff does not allege Defendants have any control or connection with DRS website and her allegations show that DRS exclusively controls and operates its website, including the statements at issue in the instant case. Accordingly, like the debt owner in *Rivas*, Defendants cannot be held liable for what DRS communicates on its website. Therefore, Plaintiffs FDCPA claims against Defendants should be dismissed.

i. DRS' Website Content As a Matter of Law Does Not Violate the FDCPA.

Even if the Court determines that Defendants could be vicariously liable for the statements on DRS's website, the statements themselves do not violate the FDCPA because they are not deceptive, misleading or falsely threaten legal action or credit reporting. Although the Eleventh Circuit readily accepts that a communication may be deemed a "threat" to take legal action in violation of 15 U.S.C. § 1692e(5) even if the communication is implied or stated in conditional terms, the "least sophisticated consumer" standard "also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness." *See Thompson v. Resurgent Capital Services, L.P.*, Case No. 2:12-cv-01018-JEO, 2015 WL 12681653, at * 4 (N.D. Ala. 2015) (discussing *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185 (11th Cir. 2010). In *LeBlanc*, the letter at issue stated:

> If we are unable to resolve this issue within 35 days we may refer this matter to an attorney in your area for legal consideration. If suit is filed and if judgment is rendered against you, we will collect payment utilizing all methods legally available to us, subject to your rights below.

LeBlanc, 601 F.3d at 1195. There, the court rejected the defendant's argument that it was entitled to dismissal as a matter of law, holding that "a reasonable juror applying the 'least-sophisticated consumer' standard could also view the letter as either an overt or thinly-veiled threat of suit." *Id.* In this regard, the court rejected the defendant's argument that the letter's use of "conditional

language such as "if" and "may" precluded the existence of a threat. *Id.* at 1196. Even with that language, the court reasoned, the letter could be read "as intimating that a lawsuit will follow *immediately* after the end of the 35 day 'grace' period," and the court found even "more significant" the fact that the letter shifted to "more forceful language" to the effect that, if a successful lawsuit followed, the collector promised to "*collect payment utilizing all methods legally available*." *Id*. (emphasis original).

However, in *Thompson*, the district court determined the defendant's letter—as a matter of law—was not a "threat" pursuant to 15 U.S.C. 1692e(5). *Thompson*, 2015 WL 12681653, at * 4. The letter at issue there read:

> If your account is currently being reported to the three major consumer reporting agencies, we will submit a request to update your tradeline to "account information disputed by consumer."

Id. In distinguishing the letter from the letter in *LeBlanc*, the district court determined the statement could not be understood, "even by the 'least-sophisticated consumer,' as a threat, express or implied, to credit report Plaintiff's debt or to take any other action adverse to Plaintiff if she did not pay." *Id.* The court reasoned that the "least sophisticated consumer can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care." *Id.* Accordingly, the court held statement at issue advises "simply that 'if' the debt was being reported to major credit reporting agencies, they would be told merely that Plaintiff had *disputed information about the debt.*" *Id.* Therefore, the court dismissed the plaintiff's 15 U.S.C. § 1692e(5) claim because there was no evidence of a threat in the communication. *Id.*

Here, the statements on DRS's website mirror the statements at issue in *Thompson* more closely than the statements at issue in *LeBlanc*. Specifically, pursuant to the Complaint, DRS's website states:

> If you have been contacted by an Action Advisor it means that your account has been selected for legal action. Please understand that if you contact us you may be able to rescind the process.

Complaint (Doc. 1), Ex. F. Thus, DRS's statement, like the statement in *Thompson*, simply advises that if the Plaintiff has been contacted by an Action Advisor that her account has been flagged for legal action. Plaintiff does not allege that an Action Advisor contacted her, nor is there any evidence of forceful language or language implying a lawsuit is imminent. Accordingly, pursuant to the least sophistic consumer standard, DRS's website statement as a matter of law is not an actionable "threat" pursuant to § 1692e.

With respect to DRS's credit reporting statement on its website, Plaintiff alleges the statement violates 15 U.S.C. § 1692e(5) and § 1692f. Specifically, Plaintiff alleges that DRS, as agent for DTM, threatened to report Plaintiff's debt to credit reporting agencies with no intention to make such a report. This claim is solely based on the factual inference drawn from an allegation which states DRS does not report to the three main credit reporting agencies, and therefore, DRS does not have the ability to report any data to credit reporting agencies. Although the court is required to draw all reasonable inferences in favor of plaintiff, "[a] complaint does not state a facially plausible claim for relief if it shows only "a sheer possibility that the defendant acted unlawfully." *U.S. Postal Services v. Post Office Associates, L.L.L.P.*, Case No. 8:10-cv-1682-T-27TBM, 2011 WL 1792704, at *3 (M.D. Fla. 2011) (citing *Hardy v. Regions Mortg., Inc.*, 449 F.3d 1357, 1359 (11th Cir.2006)). Accordingly, in evaluating the sufficiency of a plaintiff's pleadings, the court must make reasonable inferences in Plaintiff's favor, but is "not required to draw plaintiff's inference." *See Aldana v. Del Monte Fresh Produce, N.A.*, Inc., 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, "unwarranted deductions of fact" in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations. *Id.*

Here, Plaintiff skeptically asserts that DRS is not a furnisher to data the three major credit reporting agencies, namely, Equifax, Experian, and Trans Union, and therefore, DRS has no ability to report any data to any credit reporting agencies. *See* Complaint (Doc. 1), at ¶¶ 61-64. These alleged unreasonable factual inferences form the basis for Plaintiff's § 1692f claim. Moreover, the FDCPA imposes no obligation on Defendants or DRS to explain to Plaintiff the age of the debt or when the debt will no longer appear on Plaintiff's credit report. *See Olsen v. Cavalry Portfolio Services, LLC*, Case No. 8:15-cv-2520-T-23AAS, 2016 WL 4248009, at * 2. Further, Plaintiff never alleges that her debt is too old to be reported under the Fair Credit Reporting Act. Thus, Plaintiff fails to allege how DRS's website statement regarding credit reporting activities renders the statement false or deceptive. *See Id.*

d. Plaintiff's 15 U.S.C. § 1692c(b) Claim

Regarding Plaintiff's claim that Defendants violated 15 U.S.C. § 1692c(b), the Middle District of Florida in *Hunstein v. Preferred Collection and Mgmt. Servs., Inc.*, Case No. 8:19-cv-983-T-60SPF, 2019 WL 5578878 (M.D. Fla. Oct. 29, 2019) (appeal pending) recently addressed this exact claim where a debt collector disclosed a consumer's information to a third party. There, the plaintiff, who was represented by the same law firm as the instant action, claimed that the defendant sent information regarding the plaintiff's debt to a third party mail house to prepare and send a collection letter on its behalf violated the FDCPA and FCCPA because the mail house was an unauthorized third party. *Id.*, at *1. In dismissing the FDCPA claims against the defendant, the court held that transmitting information regarding a debt to a mail house was not a communication made "in connection with the collection of a debt." *Id.*, at *3. The court discussed the Eleventh Circuit's standard in determining whether a communication is in connection with the collection of a debt, and noted the threshold question is "whether the communication makes an express or

implied demand for payment." *Id.*, at *2. Additionally, the court addressed the plaintiff's conflation of two communications: (1) the transmission of information to the mail house in order to generate the collection letter; and (2) the actual collection letter that was allegedly sent from the mail house to the plaintiff. *Id.*, at *3. In distinguishing the two communications, the court observed that the transmission of information was merely a communication with a third party, not a communication in connection with the collection of a debt. *Id.* Given the distinction, the court dismissed the FDCPA claims with prejudice and declined to exercise supplemental jurisdiction over the FCCPA claim.

Here, Plaintiff claims that Defendants violated the § 1692c(b) of the FDCPA by communicating information about a debt to an unauthorized third party. *See* Doc. 1, ¶ 81. Like *Hunstein*, however, communicating information to a third party only falls within the purview of the FDCPA if the communication makes an express or implied demand for payment. *See Hunstein*, 2019 WL 5578878, at *2 (citing *Farquharson v. Citibank, N.A.*, 664 F. App'x 793, 801 (11th Cir. 2017); *Kinlock v. Wells Fargo Bank, N.A.*, 636 F. App'x 785, 787 (11th Cir. 2016)). The allegations that Plaintiff did not authorize Defendants to convey information related to her Mobiloans Account cannot be determined to be a "communication in connection with the collection of a debt." As such, Plaintiff does not and cannot allege that providing information to DRS was such a communication prohibited by the FDCPA. Accordingly, Plaintiff's claim that Defendants violated 15 U.S.C. § 1692c(b) must be dismissed with prejudice.

e. Plaintiff's 15 U.S.C. § 1692e(11) Claim

Plaintiff claims that "hardship statement" attached to DRS's email was did not have the required disclosure that the request for information was in connection with the collection of Plaintiff's debt. However, the least sophisticated consumer standard prevents liability for bizarre

or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness. *LeBlanc*, 601 F.3d at 1194. DRS's letter prominently displays "**This Communication is From A Debt Collector. This Is An Attempt To Collect A Debt; Any Information Obtained Will Be Used For That Purpose."** Doc 1, Exhibit D, p. 3 (emphasis in original). Furthermore, the letter makes direct reference to the "Hardship Payment Arrangement." *Id.* at p. 2. Accordingly, DRS's direct reference to the "Hardship Payment Arrangement" in its email and the fact it was attached to the same email does not lend Plaintiff to a bizarre or idiosyncratic interpretations of the email. Therefore, Plaintiff's 15 U.S.C. § 1692e(11) claim should be dismissed.

CONCLUSION

Based on the forgoing, Defendants Global Trust Management, LLC and Frank Torres respectfully request the Court grant their motion to compel arbitration and dismiss or stay this action. Should the Court decline to compel the arbitration of Plaintiff's claims, the Court should grant Defendants' motion for judgment on the pleadings and dismiss the Complaint in its entirety.

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