UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ASHANTI MCINTOSH,

Case Number: 8:19-cv-02532-WFJ-AEP

Plaintiff,

v.

GLOBAL TRUST MANAGEMENT, LLC,
FRANK TORRES,
DIRECT RECOVERY SERVICES, LLC

Defendants.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION, OR IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS ALTERNATIVELY PLAINTIFF'S MOTION TO CONDUCT DISCOVERY AND MOTION TO STAY PENDING APPEAL

COMES NOW the Plaintiff, **Ashanti McIntosh** ("**Plaintiff**" or "**Ms. McIntosh**"), by and through her undersigned counsel, and files this Response in Opposition to Defendants' *Motion to Compel Arbitration, or in the alternative, for Judgment on the Pleadings* (Doc. #13) submitted by Defendants **Global Trust Management, LLC** ("**GTM**") and **Frank Torres** ("**Torres**," together with GTM, "**Defendants**").

INTRODUCTION AND PROCEDURAL HISTORY

1. Ms. McIntosh filed her *Complaint* (Doc. #1) in the United States District Court for the Middle District of Florida, on October 10, 2019, alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et. seq*. ("**FDCPA**"), and the

Florida Consumer Collection Practices Act, Section 559.55, Florida Statutes, *et. seq.* ("**FCCPA**").

2. Defendants filed their *Answer and Affirmative Defenses* (Doc. #16) on January 8, 2020. Defendants did not include in their Answer any affirmative defense or any reference to arbitration.

3. The Parties conducted a case management conference on February 7, 2020 in response to this Court's Order issued on January 29, 2020, and thereafter filed an agreed *Case Management Report ("**CMR**")*. Doc. #21.

4. This Court entered its Case Management Order on February 10, 2020, and also granted the Plaintiff's Motion for Clerk's Entry of Default against Direct Recovery Services, LLC, on February 10, 2020. Doc. #22 and 23.

5. On February 17, 2020, Defendants filed their Motion to Compel Arbitration, or in the alternative for Judgment on the Pleadings.

MEMORANDUM OF LAW

Factual Allegations

Plaintiff's Complaint alleges Plaintiff "allegedly obtained a loan (the "**Debt**") from an internet-based payday loan company called Mobiloans, LLC ("**Mobiloans**")." Doc. #1 at Page 4. The Complaint alleges Mobiloans is a loanshark, and charged interest at rates in excess of 400% annually; thus, the loan is void and unenforceable in the State of Florida. *Id.* at ¶ 26. (*citing* Fla. Stat. § 687.071; *Richter Jewelry Co. v. Schweinert*, 169 So. 750, 758-59 (Fla. 1935) (holding "(t)he effect of such a [usurious] loan contract is to make it wholly void and subject to cancellation by a court of equity.")

The Complaint alleges that around September 2018, Defendant GTM purchased the rights to the loan, despite knowing of the loan's 400% annual interest rate which renders it void and unenforceable. The loan had an alleged balance owed of $1,198.76. Doc. #1 at Page 5. The Complaint also alleges that GTM attempted to collect the illegal loan from Ms. McIntosh directly, as well as through a third-party collection agency, Direct Recovery Services, LLC, and that such collection efforts violated numerous subsections of the FDCPA and FCCPA. *Id at 6*.

Plaintiff's Complaint pleads that Defendant Torres is the Chief Operations Manager and Chief Compliance Officer of GTM, and through these roles, Torres was responsible for key decisions, including determining which debts should be collected and the methods employed to collect them, and for ensuring compliance with state and federal consumer protection statutes. Doc. #1, Page 11. The Complaint also alleges that Torres was personally involved in GTM's collection efforts and was personally responsible for setting the policies by which conduct was taken and for overseeing such conduct. *Id*.

Defendants attached a "Declaration of Frank Torres" to their *Motion to Compel Arbitration, or in the alternative, for Judgment on the Pleadings*. In this Declaration, Torres confirms his role as Chief Operations Officer of GTM and claims that on or about "October, 2015," Ms. McIntosh applied and was approved for a Line of Credit Account with Mobiloans. Doc #24-1 at ¶¶ 1; 6. Ms. McIntosh's alleged application was attached to the Declaration. Doc. #24-2.

Torres' Declaration further claims Ms. McIntosh acknowledged that she had read and agreed to Mobiloans' Term and Conditions, which were also attached to the

Declaration. Doc. #24-3. The attached Terms and Conditions state they became effective on July 16, 2016. Doc. #24-3 at 2. The terms further state that the Annual Percentage Rate ("**APR**") charged by the Mobiloans account fell between **206.73%** and **425.45%**, with variations based on the amount of the line of credit and the number of billing cycles. *Id* at 3.

Torres' Declaration also confirmed that GTM acquired "all rights, title and interest" in Ms. McIntosh's Mobiloans account. Doc. #24-1 at ¶ 12.

Defendants' Motion to Compel Arbitration

Defendants move to compel arbitration of this matter based on the arbitration clause contained in the Mobiloans Terms and Conditions. *See generally,* Doc. #24 at 4-10; Doc. #24-3 at 16-18. GTM seeks to invoke arbitration as a successor-in-interest of Ms. McIntosh's alleged account with Mobiloans.

I. Legal Standard

Generally, Federal law supports and encourages the use of arbitration by parties to a contract to resolve disputes. "When a contract contains a written arbitration clause and concerns a transaction involving commerce, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.,* applies." *Hardy v. PSI Family Services, Inc.*, No. 3:11-cv-56-J-32JRK, at *3 (M.D. Fla. Apr. 8, 2011) (*citing Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984)). Under the Federal Arbitration Act ("**FAA**"), 9 U.S.C. § 1, *et seq*., a written arbitration agreement "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; *see also Compere v. Nusret Miami, LLC*, No. 1:19-CV-20277-KMM, 2019 WL 3939475, at *3 (S.D. Fla.

Aug. 20, 2019) ("Whether a valid agreement to arbitrate exists is a matter of state contract law.") (Emphasis added).

Despite such preference in favor of arbitration, the courts have recognized that arbitration clauses are subject to the same issues which affect contracts generally. "While the FAA expresses a federal preference for arbitration, Congress tailored the statute 'to make arbitration agreements as enforceable as other contracts, but not more so.'" *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 1806, 18 L. Ed. 2d 1270 (1967). The FAA is, therefore, subject to many constraints. *See Rogers v. Matthews-Currie Ford Co.*, Case No: 8:14-cv-2366-T-27MAP, at *2 (M.D. Fla. Mar. 5, 2015).

The Defendants acknowledge in their motion that "(w)hether 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 v. Nusret Miami, LLC*, No. 1:19-CV-20277-KMM, 2019 WL 3939475, at *3 (S.D. Fla. Aug. 20, 2019). The Defendants also acknowledge the general deference to arbitration ends where "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). These exceptions flow from the language of the FAA itself, which states that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or inequity for the revocation of any contract." 9 U.S.C. § 2.

As such, this Court's analysis must not end simply because a document referencing arbitration exists. The surrounding law and circumstances, based in equity, must be considered when determining if the requisite provision was, or even could be, accepted and therefore enforceable.

II. The Arbitration Provision is a clear attempt by Defendants to avoid state usury laws and is thus unconscionable and unenforceable as a matter of law

The arbitration provision proffered by the Defendants is the latest attempt in a long-standing effort by online payday lenders and their successors-in-interest to avoid state usury laws via inequitable arbitration clauses and sham "rent-a-tribe" Native American affiliations. The Terms and Conditions provided by Defendants makes clear the subject loan was assessed interest rates of at least 206% - more than 10 times the maximum lawful interest rate that an unlicensed lender can charge in Florida.

Mobiloans claims to be "a tribal lending company wholly-owned by the Tunica-Biloxi Tribe of Louisiana, a federally recognized tribe." Doc. #24-2 at 4. Mobiloans' Terms and Conditions, and the arbitration provision contained therein, contain numerous references to "Tribal Law," defined as "any law or regulation duly enacted by the Tunica-Biloxi Tribe of Louisiana." Doc. #24-3 at 17. However, the arbitration provision itself contains numerous limitations as to applicable law, stating:

> ***Agreement to Arbitrate***. You agree that any Dispute (defined below) will be resolved by arbitration in accordance with Tribal Law and applicable federal law. Doc. #13-3 at 17.
>
> ***Choice of Arbitrator.*** …The chosen arbitrator will utilize the rules and procedures applicable to consumer disputes of the chosen arbitration organization, but only to the extent that those rules and procedures are consistent with the terms of this Agreement, Tribal Law and applicable

> federal law . . . Any arbitration under this Agreement may be conducted either on Tribal land or within thirty miles of your residence, at your choice, provided that this accommodation for you shall not be construed in any way (a) as a relinquishment or waiver of the Tribe's sovereign status or immunity, or (b) to allow for the application of any law other than Tribal Law or applicable federal law.
>
> ***Cost of Arbitration.*** …Except where otherwise provided by Tribal Law or applicable federal law, each party will be responsible for its own attorneys' fees and other expenses. Unless prohibited by Tribal Law or applicable federal law, the arbitrator may award fees, costs, and reasonable attorneys' fees to the party who substantially prevails in the arbitration.
>
> ***Waiver of Jury Trial and Waiver of Ability to Participate in a Class Action***. …The arbitrator has the ability to award all remedies available under Tribal Law and applicable federal law, whether at law or in equity. As an integral component of accepting this Agreement, you consent to the jurisdiction of the Tribal courts for purposes of this Agreement.
>
> ***Judicial Review.*** The arbitrator will apply the terms of this Agreement, including the Arbitration Agreement, Tribal Law, and federal law as appropriate… The arbitrator will make written findings and the arbitrator's award may be filed with the Tribal court. Doc. #13-3 at 18. Emphasis added.

Doc. #24-3 at 18. (Underlined emphasis added, bold and italics contained in original). The above excerpts from the Mobiloans Terms and Conditions make clear that only "Tribal Law" and *applicable* federal law apply, as such language appears at least *seven* times throughout the three-page arbitration provision. Noticeably absent from the applicable laws is any mention of state law. Indeed, the arbitration provision discusses state law just once – when defining what constitutes a "Dispute" within the scope arbitration provision:

> ***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….A Dispute includes…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.

Doc. #13-3 at 17. Emphasis added.

By including any state law claims within the scope of the Disputes to be arbitrated, but intentionally *excluding* state law from the applicable law at arbitration, Mobiloans effectively eliminates all state law claims – including Florida's applicable usury laws and Ms. McIntosh's state law claims under the FCCPA. In doing so, Mobiloans makes clear the intent of the arbitration provision at issue is not to "provide an alternative means of dispute resolution in which aggrieved persons may bring their claims, but rather to take those claims away." *See Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 674 (4th Cir. 2016) (holding that the arbitration agreement at issue was "a farce" and unenforceable because it "purportedly fashion[ed] a system of alternative dispute resolution while simultaneously rendering that system all but impotent through a *categorical rejection of the requirements of state and federal law.*")

Indeed, federal courts throughout the country have followed the Fourth Circuit's opinion in *Hayes,* rejecting attempts to enforce arbitration provisions which seek to apply tribal law and exclude state law claims. *See, e.g. Parnell v. Cashcall, Inc*., 181 F. Supp. 3d 1025, 1044 (N.D. Ga. 2016) (declining to enforce arbitration even though "Plaintiff [did] not assert federal claims for relief" because the loan agreement attempted to "convert a choice of law clause into a choice of no law clause"); *MacDonald v. Cashcall,*

Inc., Civil Action No. 16-2781 at *11 (D.N.J. Apr. 28, 2017) (declining to enforce the subject loan agreement's "sham dispute resolution procedures.")

The Second Circuit also faced a similar issue regarding the enforcement of arbitration provisions on these types of loans. It ruled in favor of the consumer for a variety of reasons set forth here: "By applying tribal law only, arbitration for the Plain Green borrowers appears wholly to foreclose them from vindicating rights granted by federal and state law. We agree with the Fourth Circuit that "[t]he just and efficient system of arbitration intended by Congress when it passed the FAA may not play host to this sort of farce." *Id. at 127*, citing *Hayes*, Id. On January 13, 2020, the Supreme Court of the United States denied the petition for a *writ of certiorari* attempting to overturn the Second Circuit's decision in favor of the consumer similarly situated to Ms. McIntosh now.

In each of the aforementioned cases, the relevant arbitration provision was found unenforceable due to unconscionability, a principle of contract law. Because "ordinary state-law contract principles" govern, Florida's defense of unconscionability is at issue. In *Avid Engineering, Inc. v. Orlando Marketplace Ltd*., 809 So. 2d 1, 4 (Fla. Dist. Ct. App. 2001), Florida's Fifth District Court of Appeals, in reviewing the enforceability of an arbitration clause, summarized the issue of unconscionability as follows:

> Florida courts may properly decline to enforce a contract on the ground that it is unconscionable. To support a determination of unconscionability, however, the court must find that the contract is both procedurally unconscionable and substantively unconscionable. The procedural component of unconscionability relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to

> know and understand the disputed contract terms. For example, the court might find that a contract is procedurally unconscionable if important terms were "hidden in a maze of fine print and minimized by deceptive sales practices." In contrast, the substantive component focuses on the agreement itself. As the court explained in *Kohl v. Bay Colony Club Condominium, Inc.*, 398 So.2d 865, 868 (Fla. 4th DCA 1981), a case is made out for substantive unconscionability by showing that "the terms of the contract are unreasonable and unfair." (Internal citations omitted).

The arbitration provision at issue is clearly unconscionable, procedurally. The two relevant parties are Mobiloans, LLC, an online payday lender operating in 29 states nationwide[1], and Ms. McIntosh, an individual resident of Florida. Even with the limited information available at this early stage in litigation, it is clear that the parties are not on equal footing. Ms. McIntosh, according to the Defendants, borrowed money at interest rates exceeding 206%. A consumer in need of such a loan is almost certainly not on the same level of sophistication as a payday lender operating in more than half of the states in the country. Further, Mobiloans is the party responsible for conveying the terms of the arbitration clause to Ms. McIntosh, and as such, is in a much better position to "know and understand the contract terms."

The terms of the arbitration provision are clearly substantively unconscionable as well. As set forth above, the arbitration provision is cleverly designed for the purpose of invoking tribal law to the exclusion of all state law remedies and any federal laws which are not "applicable." However, this "tribal law" appears to be limited to two "codes" available on the Tribe's website - https://www.tunicabiloxi.org/resources/. These two

[1] According to Mobiloans' website, https://www.mobiloans.com/faq, Mobiloans operates in 29 of 51 states. The District of Columbia is included as a state in which Mobiloans does not operate.

"codes" are called the "Tunica-Biloxi Tribe of Louisiana Arbitration Code" and the "Tunica Biloxi Fairness in Lending Code." It therefore appears the *only* laws that would fall within the purview of "tribal law" govern arbitration and lending at interest rates that Florida's statutes deem usurious. The lack of any other tribal laws, or statutory structure, makes clear that the entire system required by the arbitration provision is a sham, created for the sole purpose of skirting usury laws.

Additionally, the arbitration provision does not set forth which federal laws are "applicable," providing no clarity as to which federal rights a consumer is sacrificing. A consumer reviewing the arbitration provision would therefore be left without guidance as to which laws – other than the two "codes" on the tribe's website – are to be applied at arbitration.

Although the Eastern District of Virginia recently reviewed Mobiloans' arbitration provision and found it enforceable due to the inclusion of the phrase, "applicable federal law," (*See Gibbs v. Stinson*, Civil Action No. 3:18cv676 (E.D. Va. Sep. 30, 2019) (stating "Because the Mobiloans Contract as a whole contemplates the application of federal law to the arbitration proceedings, the Court will grant the Motion to Compel Arbitration as to Mobiloans.")), this non-binding opinion omits any analysis of the forfeiture of a consumer's rights under *state law*. Indeed, the court in *Gibbs* made numerous references to an applicable legal standard that would appear at odds with its opinion, citing both *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 336 (4th Cir. 2017) and *Hayes*, 811 F.3d at 675, in reviewing arbitration provisions from online lenders

Plain Green and Great Plains as an "unambiguous attempt to apply tribal law to the exclusion of federal *and state law.*" (Emphasis added).

The court in *Gibbs*, at *50, further omitted any analysis as to the forfeiture of a federal court's review of a potential arbitration award, as mandated by Mobiloans' arbitration provision. *See* Doc. #24-3 at 18 (section titled "Judicial Review," stating "The arbitrator will make written findings and the arbitrator's award may be filed with the *Tribal court*.") (Emphasis added). Perhaps because of this lack of analysis, the *Gibbs* court actually contemplates judicial review of any arbitration award, stating "The Court may not intervene again until a party objects to the arbitration award or seeks enforcement thereof." *Gibbs v. Stinson*, at *50. However, enforcement of the arbitration provision takes such court "intervention" out of play, instead placing such review in the hands of the "tribal" court.

Indeed, allowing Mobiloans' arbitration clause to be enforced makes clear why such enforcement would be unconscionable. Ms. McIntosh allegedly took out a loan from Mobiloans carrying an interest rate over 206% annually. As aforementioned, such interest rates vastly exceed the statutory maximum in Florida – 18% per annum or 30% per annum if lent by a licensee. *See* Fla. Stat. §§ 687.02; 516.031.

While the state of Florida does not *per se* ban the collection of an "interstate" loan charging usurious rates pursuant to Florida law, in order to be enforceable in Florida, the parties must have agreed to the laws of another jurisdiction *and* the transaction must have a reasonable relation to the foreign jurisdiction. *See Morgan Walton Properties, Inc. v. Int'l City Bank & Tr. Co.*, 404 So. 2d 1059, 1063 (Fla. 1981). In the present matter, the

loan was allegedly entered into by Ms. McIntosh, online, while residing in Florida. Ms. McIntosh has never set foot on any land belonging to the Tunica Biloxi Tribe of Louisiana. Domain Registration records show www.mobiloans.com operates from the IP address 13.86.252.227, which corresponds to a physical location of San Jose, California, meaning that any online application for a loan would have been received by a server more than 1000 thousand miles away from Louisiana.

The entire transaction for an online loan such as the loan at issue takes place off tribal land - the application is submitted online in Florida, via a website whose server is hosted in San Jose, California; the funds transferred to the consumer's bank account in Florida, and payments are withdrawn from the Florida account. The only colorable relation to tribal jurisdiction stems from the choice of law provision and the arbitration provisions' requirement that the arbitrator apply tribal law.

In *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960 (9th Cir. 2018), the Ninth Circuit Court of Appeals held that such online transactions "take place" in the state where the transaction was initiated. The conduct at issue in *California v. Iipay Nation* involved online gambling, offered on a website owned by the Iipay Nation of Santa Ysabel, a federally recognized tribe. The tribe claimed that the "gaming activity" at issue occurred on tribal lands and was thus subject to tribal law, and not subject to the Unlawful Internet Gambling Enforcement Act ("UIGEA"). *Id*. at 966. The Ninth Circuit disagreed, finding that the placing of bets and wages was initiated from the patrons' locations in California and thus, "when Iipay accepts financial payments over the internet as part of those bets or wagers, Iipay violates the UIGEA." *Id.* at 967.

Just like the consumers in *California* clicking the "place wager" button online from their home computers, the online payday loan at issue in this matter was initiated far from tribal lands and received by a computer server even farther from tribal lands; funds were transmitted to the consumer off tribal land, and accepted from the consumer away from tribal land. Hence, under the principles expressed in *Morgan Walton Properties, Inc. and Iipay, supra,* there is no nexus between the transaction and the law sought to be applied regarding disputes. Moreover, as the arbitration provisions exclude state law claims, they render the contract substantively unconscionable and unenforceable.

III. The Delegation Clause is similarly unconscionable and unenforceable as a matter of law

The arbitration provision Defendants seek to enforce contains a "delegation clause" – a clause that seeks to not only compel arbitration, but delegate the issue of arbitrability to the arbitrator. Doc. #24-3 at 17. The clause states "A Dispute includes… any issue concerning the validity, enforceability, or scope of this Account *or the Arbitration Agreement*." *Id.* (Emphasis added). However, when a party attacks the validity of a delegation clause, the issue of arbitrability is properly determined by the federal court. *See Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 (2d Cir. 2019) ("[A] specific attack on the delegation provision is sufficient to make the issue of arbitrability one for a federal court.")

Notably, Defendants do not mention the issue of delegation in their Motion to Compel Arbitration. Regardless, the delegation clause fails for the same reasons that the full arbitration provision fails – it is unconscionable due to its waiver of state and federal

law. As noted above, "whether a valid agreement to arbitrate exists is a matter of state contract law." 9 U.S.C. § 1; *Compere,* No. 1:19-CV-20277-KMM, 2019 WL 3939475, at *3 (S.D. Fla. Aug. 20, 2019). However, the arbitration provision at issue makes clear that tribal law applies in lieu of state contract law. Thus, if the issue of the enforceability of arbitration were to be determined at arbitration, the arbitrator would apparently be forced to apply "tribal" contract law to determine enforceability. However, again as stated above, the tribe only appears to have an "Arbitration Code" and a "Fairness in Lending Code." As a result, it does not appear *any* contract laws and/or defenses to contract formation exist. The delegation clause therefore has the effect of nullifying the consumer's rights under state law and the FAA to determine the enforceability of the arbitration provision pursuant to state contract law. Such a forfeiture of state and federal law renders the provision unconscionable and unenforceable.

IV. Defendants have waived the right to arbitrate through participation in litigation to the prejudice of Plaintiff

Defendants have waived their right to enforce the Mobiloans' arbitration provision through participation in litigation. "A waiver of the right to arbitration is appropriate where the court finds, after reviewing the 'totality of the circumstances,' that a party 'has acted inconsistently with the arbitration right.'" *Schatt v. Aventura Limousine Trans. Serv*, No. 10-22353-Civ-Cooke/Bandstra, at *7 (S.D. Fla. Nov. 30, 2010) (*citing S H Contractors, Inc. v. A.J. Taft Coal Co.,*906 F.2d 1507, 1514 (11th Cir. 1990)). "Waiver will occur whenever a party seeking arbitration 'substantially participated in litigation to a point inconsistent with an intent to arbitrate

and this participation results in prejudice to the opposing party.'" *Id.* (*citing Morewitz v. W. of Eng. Ship Owners Mut. Prot. Idemn. Ass'n,*62 F.3d 1356, 1366 (11th Cir. 1995)). "Prejudice has been found in situations where the party seeking arbitration allows the opposing party to undergo the types of litigation expenses that arbitration was designed to alleviate." *Id.* (citations omitted).

Global Trust Management was served on October 30, 2019. Doc #7. No mention or attempt to enforce the arbitration was made until 110 days later. By responding to Plaintiff's complaint, engaging in negotiation regarding scheduling and obligations required under the CMR and agreeing to such CMR, the Defendants 'substantially participated in litigation to a point inconsistent with an intent to arbitrate,' thereby satisfying the first element of waiver.

Further, as it is well established the FAA does not provide the same discovery rights as the Federal Rules of Civil Procedure, Defendant's delay, after agreeing to a discovery schedule and requesting additional time under that schedule, resulted in prejudice to the Plaintiff. Plaintiff's Complaint seeks damages for violations of the FDCPA and FCCPA. Both statutes have a stated intent of protecting consumers. *See* 15 U.S.C. §§ 1692(b); 1692(e); Fla. Stat. § 559.552 ("In the event of any inconsistency between any provision of this part and any provision of the federal act, the provision which is *more protective of the consumer or debtor shall prevail*.") (Emphasis added). Both statutes also permit a prevailing consumer to recover attorneys' fees and costs, and as such, are clearly designed to minimize the burden on a consumer by reducing costs. *See* Fla. Stat. § 559.77; 15 U.S.C. § 1692k(a)(3).

It would be inequitable to compel arbitration if, as in this case, the consumer has already incurred costs and expenses related to litigation which Defendant has participated in, when these costs are recoverable under the FCCPA and FDCPA, but not recoverable under tribal law if the arbitration provision is permitted. Had Defendants timely objected and raised the issue of arbitration at the outset, Plaintiff would have avoided the time and expense of engaging in litigation activity rendered useless if the case were remanded to arbitration. Defendants' delay in asserting its alleged arbitration rights thus caused Plaintiff material injury and prejudice in this matter, satisfying the second element required to establish Defendants' waiver of its right to arbitration. Accordingly, this Court should find that the Defendants waived their right to compel arbitration through participation in litigation and delay.

Additionally, the Defendants have loaded a premature motion for summary judgment on the legal merits into their current Motion to Compel. This constitutes, once again, participation in litigation to the point of prejudicing the consumer-plaintiff. Within the same document stating this Court has no jurisdiction, the Defendants attempt to invoke the Court's jurisdiction to dodge liability. Should the Court now enforce the arbitration provision, the consumer will have to respond to these arguments in both forums, incurring unnecessary fees and costs. This type of duplicity is an attempt by the Defendants to "outspend" the consumer in litigation. It is the exact concern legislators had when passing the FDCPA and FCCPA as one-way fee shifting private attorney general statutes.

V. Unresolved issues of fact warrant additional discovery before referral to Arbitration

While the above makes clear that the arbitration provision at issue is unconscionable and unenforceable on its face, significant additional issues of fact remain which warrant additional discovery prior to any referral to arbitration. The FAA, 9 U.S.C. § 4, states "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof…" As such, Plaintiff should be permitted 120 days to conduct discovery on the issues set forth below, and to a trial on the issue of the enforceability of the arbitration agreement following the discovery.

As an initial matter, the Mobiloans' arbitration provision which Defendants seek to enforce clearly states "Mobiloans Line of Credit Account Terms and Conditions *Effective July 26, 2016*." Doc. #24-3 at 2. (Emphasis added). However, the Declaration of Frank Torres, the only affidavit provided by Defendants in conjunction with their Motion to Compel Arbitration, states "On or about October, 2015,, Plaintiff Ashanti McIntosh…applied and was approved for a Mobiloans, LLC Line of Credit Account." Doc. #24-1 at ¶ 6. (Emphasis added). The arbitration provision at issue was therefore not in effect at the time Ms. McIntosh allegedly applied with Mobiloans. The application provided by Defendants does not contain any date and thus provides no clarity on the issue. *See* Doc. #24-2. Indeed, it is entirely unclear from the record at this stage as to why or how the arbitration provision at issue applies to Ms. McIntosh's alleged line of credit, as it was ***not in effect*** at the time Ms. McIntosh allegedly applied for a line of credit with Mobiloans.

Further, as aforementioned, the only affidavit provided by Defendants to authenticate the alleged arbitration provision is the Declaration of Frank Torres. Doc. #24-1. Torres, by his own sworn statements, is the Chief Operations Officer of GTM. GTM is a debt buyer and debt collector and thus a successor-in-interest to the party that initiated the arbitration agreement – Mobiloans. Torres never claims to have worked for Mobiloans or been involved with Mobiloans in any capacity which would give him personal knowledge of its business records. Simply buying a Mustang does not make one qualified to produce a reliable affidavit regarding the business practices of Ford Motor Company, although Defendant asks this Court believe otherwise.

Torres attempts to authenticate the arbitration provision by stating "This Declaration is based on my own personal knowledge…including my review of GTM's business records…maintained in the regular course and scope of GTM's business." Doc. #24-2 at ¶ 5. (Emphasis added). Torres then states, "A true and accurate copy of Plaintiff's Mobiloans Account application is attached hereto as Exhibit A." *Id.* at ¶ 6.

At *best*, Torres' Declaration could be used to establish that the attached Account Application is the same application that GTM purchased from Mobiloans. However, Torres does not provide any document evidencing the chain of title of Plaintiff's Account, such as a bill of sale, and does not provide any authenticating statement from Mobiloans. Further, Torres provides no basis by which GTM can conclude that the attached Application and Terms and Conditions are true and correct copies of the agreements allegedly entered into by Plaintiff. Neither Torres nor GTM were involved at

the time the application was submitted, and neither can testify as to the terms agreed to at that time. Plaintiff disputes that such an arbitration agreement was agreed to by her.

Mr. Torress has no personal knowledge as to the creation of these unsigned documents. He has not shown any personal knowledge of the originating company's policies and procedures. In fact, Torres does not even know the day the documents were created, instead referencing the month of "October, 2015," generally. Doc. #24-1 at ¶ 6.

Florida contract law is clear this type of affidavit is insufficient. See, for example, *Martins v. PNC Bank, National Ass'n*, 170 So. 3d 932, 937 (Fla. Dist. Ct. App. 2015), finding a submitted affidavit "gives no basis for his ability to vouch for the timely creation, routine retention, and accuracy of any of the records of PNC Bank which are the only identified source of his knowledge. Additionally, Arthur's affidavit does not speak to any efforts undertaken by him or anyone else to verify the accuracy of the records that PNC Bank received from the predecessor lender." Just like the affidavit in *Martins*, Torres lacks the requisite personal knowledge or detailed verification of someone with personal knowledge to authenticate the document upon which the Defendants rely.

Indeed, the Terms and Conditions, on their face, contradict Torres' Declaration. The effective date of the Terms and Conditions is nearly two years after the application date – making clear that these *were not* the Terms and Conditions agreed to by Ms. McIntosh at the time of her application.

Defendants' Motion for Judgment on the Pleadings

Alternatively, should this matter not be referred to arbitration, Defendants move for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Doc. #24. As noted by the Defendants, "A motion for judgment on the pleadings is governed by the same standard as a Rule 12(b)(6) motion to dismiss." *Id.* (citing *Guarino v. Wyeth LLC*, 823 F. Supp. 2d 1289, 1291 (M.D. Fla. 2011), *aff'd,* 719 F.3d 1245 (11th Cir. 2013)). As such, "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). "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).

VI. Defendants' Motion for Judgment on the Pleadings Regarding Plaintiff's Claims under 15 U.S.C. §§ 1692e, 1692e(2)(a), 1692e(5), 1692e(10), and 1692f and Fla. Stat. §559.72(9) Should be Denied

Plaintiff's Complaint alleges that Defendants violated the FDCPA, 15 U.S.C. §§, 1692e, 1692e(2)(a), 1692e(5), and 1692e(10), as well as the FCCPA, Section 559.72(9) by attempting to collect a debt which was unenforceable and void in the state of Florida. Doc. #1 at ¶¶ 75-78. Plaintiff's Complaint also alleges that Defendants violated the FDCPA, 15 U.S.C. § 1692f, when "they assigned the Debt to [Direct Recovery Solutions, LLC] for collection, despite knowing that the Debt was unenforceable and void, and

knowing full well that Summit would utilize illegal methods of collection, including false threats and harassment." Doc. #1.

Defendants move for judgment on the pleadings for these claims because "the validity of the debt in the context of usury limitations 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). However, Defendants then cite to *Morgan Walton Properties, Inc. v. Int'l City Bank & Tr. Co.*, 404 So. 2d 1059, 1063 (Fla. 1981).

In *Morgan* the Florida Supreme Court held that promissory notes, executed and payable in Louisiana, but which were secured by mortgages on Florida real property, were enforceable in Florida courts despite charging interest rates that were usurious under Florida law, but permissible under Louisiana law. *Id.* The notes contained a choice-of-law provision stating that Louisiana law would govern. The court found the notes enforceable "since the transactions had a *normal and reasonable relation to Louisiana*, and either the express or constructive intent of the parties was that Louisiana law should apply." *Id.* at 1063. (Emphasis added). Indeed, the court in *Morgan* stressed the importance of the notes ***execution in Louisiana***, stating "Under the traditional Florida choice of law rules for contracts cases, the law of Louisiana would apply, *since both the place of execution and the place of performance of the agreements was Louisiana.*" *Id.* at 1062.

In the case at issue, as aforementioned, the alleged transaction occurred in the state of Florida – the funds were transferred to and from a Florida bank account

belonging to a Florida resident who never set foot on tribal land. Thus, unlike the promissory notes in *Morgan*, there is no link, direct or otherwise, to the foreign jurisdiction - in this case, the Tunica-Biloxi Tribe of Louisiana. As the Ninth Circuit found in *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, an online transaction such as this occurs ***in the state where the transaction is initiated*** – in Ms. McIntosh's case, Florida. Thus, both the "place of execution" and "place of performance" are in Florida. Indeed, the alleged loan bears no rational relation to the Tunica-Biloxi Tribe of Louisiana.

Moreover, even if, *arguendo*, the loan was legally collectable in Florida, GTM is still a "debt collector" as defined by the FDCPA and FCCPA and is prohibited from taking certain actions to collect debts – even legally collectable debts. Plaintiff alleges GTM, directly or through its agents for which it is liable, disclosed information improperly to third parties, made false threats of reporting the loan to credit reporting agencies, threatened legal action it had no ability or intention to commence, and more. Any one of these allegations is sufficient to state claim under the FDCPA and FCCPA, irrespective of the provenance of the underlying debt.

Alternatively, Plaintiff should be permitted to conduct additional discovery on the issue of the tribe's relation to the transaction at hand. Mobiloans claims to be "owned and operated by the Tunica-Biloxi Tribe of Louisiana." Doc. #24-3 at 2. Plaintiff's Complaint is quiet as to Mobiloans' relationship to the tribe and to the instant matter. However, Plaintiff contends that Mobiloans' is one party in a "Rent-A-Tribe" scheme designed to avoid state usury laws. Mobiloans is no stranger to such allegations and was included in a

class action lawsuit alongside online payday lenders Plain Green and Great Plains, alleging Mobiloans was beneficially owned by non-tribal investors who created a sham tribal affiliation to avoid state usury laws, paying the tribe a few pennies on the dollar for its cooperation. *See Gibbs v. Plain Green, LLC, et al.,* 3:17-cv495 (E.D. Va. 2019). Defendants' Motion has placed Mobiloans' relationship to the tribe directly at issue in the present case and Plaintiff should be permitted discovery on the issue prior to any ruling on Defendants' Motion. Should Plaintiff be required to plead factual allegations in her Complaint regarding Mobiloans' sham relationship to the tribe, Plaintiff requests leave to amend her Complaint, as she has not previously amended her Complaint and permitting amendment would be in furtherance of the policy of resolving claims on their merits.

VII. Defendants' Motion for Judgment on the Pleadings Regarding Plaintiff's 15 U.S.C. § 1692c(b) claim should be Denied.

Defendants further move for judgment on the pleadings regarding Plaintiff's claims under **15 U.S.C. § 1692c(b). Doc. #24. Plaintiff's Complaint alleges that Defendants violated § 1692c(b) "**when they communicated information about the alleged Debt to [GMA Investments], an unrelated third party [when GMA Investments] was not an attorney for GTM or Ms. McIntosh, was not a [consumer reporting agency], and Ms. McIntosh did not consent to the communication. Doc #1 at ¶ 74.

Defendants' cite to *Hunstein v. Preferred Collection and Mgmt. Servs., Inc*., Case No. 8:19-cv-983-T-60SPF, (M.D. Fla. Oct. 29, 2019), noting that the Middle District of Florida "recently addressed this exact claim where a debt collector disclosed a consumer's information to a third party." *Hunstein*, as noted by Defendants, is currently

pending appeal to the Eleventh Circuit. For the reasons set forth below, Defendants' Motion should be stayed pending the appeal.

To obtain a stay pending appeal, the moving party must show that: (1) it has a substantial likelihood of success on the merits; (2) it will suffer irreparable injury unless the stay issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the stay would not be adverse to the public interest. *Valle v. Singer*, 655 F.3d 1223, 1225 (11th Cir. 2011). "The likelihood of success is typically the most important factor." *United States v. O'Callaghan*, 805 F. Supp. 2d 1321, 1327 (M.D. Fla. 2011) (citing *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)).

Hunstein concerned communication of a debtor's information to an unrelated mail house, for purposes of preparing and mailing a collection letter based on the information provided. *Id.* Plaintiff's Complaint in the present matter alleges that Defendants communication Ms. McIntosh's personal information to a third-party debt collector for collection. Doc. #1. Thus, while the facts differ slightly, the legal issues align.

The FDCPA, 15 U.S.C. § 1692c(b) clearly prohibits a debt collector from communicating, *in connection with the collection of any debt*, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector. The statute permits such communications only when the consumer has provided consent, a court has provided permission, or as may be necessary to effectuate a post-judgment remedy – none of which are present in this case. Doc. #1 at ¶¶ 39-45.

The court in *Hunstein* held that the communication to the mail house was not in connection with the collection of a debt, as "Hunstein…cannot allege that Preferred attempted to collect Hunstein's debt from [the mail house]." *Id.* at *6-7. The court relied on the standard set forth in *Farquharson v. Citibank, N.A.*, 664 F. App'x 793, 801 (11th Cir. 2016), stating:

> When determining whether a communication was made in connection with the collection of a debt, the courts look to the language of the communication itself to ascertain whether it contains a demand for payment and warns of additional fees or actions if payment is not tendered.

Notably, both courts looked for a "demand for payment" as to what constitutes "in connection with collection."

It is well established that in interpreting the coverage of the FDCPA, the text of the Act itself governs. *See Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1036 (2019) ("First , and most decisive, is the text of the Act itself.") The FDCPA prohibits third-party communications "*in connection with* the collection of any debt." 15 U.S.C. § 1692c(b). (Emphasis added). The Obduskey court similarly acknowledged the accuracy of the Plaintiff's current interpretation of that language: "For example, the FDCPA broadly limits debt collectors from communicating with third parties 'in connection with the collection of any debt' § 1692c(b)." *Id at 1037.*

The standard applied in *Hunstein* directly contravenes the plain language of the FDCPA. Merriam-Webster defines "in connection with" as "for reasons that relate to." Thus, the plain meaning of the text of the FDCPA prohibits third-party communications

"for reasons that relate to" collection. Reasons relating to collection is *not* the same as a direct collection attempt, and thus does not require a "demand for payment."

This distinction is evident from the text of the FDCPA itself. 15 U.S.C. §1692c(b) specifically permits a communication to a "consumer reporting agency if otherwise permitted by law." This carve-out was obviously not included by Congress for purposes of protecting a debt collector demanding payment from the CRA. Rather, the clear purpose was to protect debt collectors who furnish information regarding a consumer debt to the CRA for the purpose of including the debt on a consumer's credit report. Congress did not intend to limit the protections of 1692c(b) to those communications that "demand payment" or "warn of additional fees or actions if payment is not tendered" – as furnishing data to a CRA does neither.

Indeed, the communication of a debt to a CRA is similar to the communication at issue in this case. Plaintiff's Complaint alleges that Defendants assigned the debt to a third party, GMA Investments, for the purpose of collecting that debt from Plaintiff. Doc. #1. Similarly, when a debt is reported to a CRA, information is disclosed to the CRA – a third party – with the expectation that the CRA then takes its own actions - presumably inclusion of the information on the consumer's credit reports – with the ultimate goal and purpose of collecting the debt from the Plaintiff.

The intended result of the Defendants' communication to the third-party debt collector was *collection*. The communication of the debt to Direct Recovery Services, LLC thus "relates to" collection and the communication is therefore "in connection with" collection of any debt. The courts in *Hunstein* and *Farquharson* have improperly

narrowed the scope of the FDCPA by interpreting "in connection with collection" as necessarily including a demand for payment or threat of additional fees or actions if payment is not tendered - a legal standard that stands in opposition to the clear intent of Congress and the plain meaning of the FDCPA, § 1692c(b).

The above reasons demonstrate that Plaintiff has a high likelihood of success on appeal in *Hunstein* which should warrant a stay of the present matter until *Hunstein* is resolved, as such resolution will result in binding precedent. Plaintiff would be prejudiced should a stay not be granted, as the result would be dismissal of Plaintiff's claims. Defendants, however, would not be prejudiced by a stay. Accordingly, assuming this Court does not refer the matter to arbitration, this Court should grant an Order staying the present matter pending the resolution in *Hunstein.*

CONCLUSION

WHEREFORE, Plaintiff requests that Defendants' *Motion to Compel Arbitration, or in the alternative, Motion or Judgment on the Pleadings* be Denied. Alternatively, Plaintiff requests leave of Court to conduct discovery on the issues of the validity of the arbitration clause proffered by Defendants and the non-party, Mobiloans', relation to the Tunica-Biloxi Tribe of Louisiana, with at least 120 days to conduct such discovery. As an alternative to denial of Defendants' Motion for Judgment on the Pleadings regarding Plaintiff's § 1692c(b) claim, Plaintiff requests a stay of Defendants' Motion pending the appeal in *Hunstein*.

Respectfully submitted, March 23, 2020, by:

/s/ *Thomas M. Bonan*
Thomas M. Bonan, Esq.
Florida Bar No. 118103
Seraph Legal, P.A.
2002 East 5th Avenue, Suite 104
Tampa, Florida 33605
Phone: 813-321-2347
Fax: (855) 500-0705
Tbonan@seraphlegal.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **March 23, 2020**, a copy of the foregoing was filed electronically with the Clerk of Court via the ECF/CM filing system. A true and correct copy of the foregoing was sent via electronic notice system or email to Defendants' counsel of record.

/s/ *Thomas M. Bonan*
Thomas M. Bonan, Esq.
Florida Bar No. 118103