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

ASHANTI MCINTOSH

Plaintiff, Case No. 8:19-cv-02532-WJF-AAS

v.

GLOBAL TRUST MANAGEMENT, LLC
FRANK TORRES

Defendants.

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

Plaintiff Ashanti McIntosh ("Plaintiff") claims that Defendants Global Trust Management, LLC ("GTM") and Frank Torres (collectively "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 previously argued, the valid and enforceable arbitration agreement contained in the Terms and Conditions of Plaintiff's underlying agreement with Mobiloans (the "Arbitration Agreement") requires the parties to arbitrate any and all disputes.

In opposition to Defendants' Motion to Compel, Plaintiff argues that the Arbitration Agreement is unenforceable under Florida state law, and thus, this Court should deny the Motion. As set forth in detail below, Plaintiff's arguments fail and this Court should compel arbitration, or in the alternative, grant Defendants' Motion for Judgment on the Pleadings.

ARGUMENT

I. The Arbitration Provision Delegates the Issue of Arbitrability to the Arbitrator.

"The Supreme Court has explained that where an arbitration agreement contains a delegation provision—committing to the arbitrator the threshold determination of whether the agreement to arbitrate is enforceable—the courts only retain jurisdiction to review a challenge to that specific provision." *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1144 (11th Cir. 2015) (citing *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010)). "Indeed, an agreement to arbitrate these gateway issues is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1264 (11th Cir. 2017). As such, if the underlying loan agreement at issue contains a delegation clause, a district court's review, at least initially, is only to a plaintiff's direct challenge to the delegation clause. *See Parm v. National Bank of California, N.A.*, 835 F.3d 1331, 1334-35 (11th Cir. 2016).

In this regard, just as the arbitrability of a dispute depends upon whether the parties agreed to arbitrate that dispute, the question of "'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." *Jones*, 866 F.3d at 1264 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)) (emphasis in original). Thus, "[c]ourts should enforce valid delegation provisions as long as there is clear and unmistakable evidence that the parties manifested their intent to arbitrate a gateway question." *Id.* Therefore, only if this Court determines that the delegation clause contained in the Arbitration Agreement is itself invalid or unenforceable, may it review the enforceability of the Arbitration Agreement as a whole. *See Parm*, 835 F.3d at 1335.

A. The Arbitration Agreement Contains a Valid Delegation Clause.

In determining whether a valid delegation clause existed, the Middle District of Florida has analyzed the clause under the following Florida law contract principle: "if the terms of [a contract]

are clear and unambiguous, a court must interpret the contract in accordance with its plain meaning, and, unless an ambiguity exists, a court should not resort to outside evidence or the complex rules of construction to construe the contract." *Banks v. Cashcall, Inc.*, 188 F.Supp.3d 1296, 1301 (M.D. Fla. 2016) (citing *Key v. Allstate Ins. Co.*, 90 F.3d 1546, 1548–49 (11th Cir.1996). Specifically, "[t]he inclusion of delegation clauses within arbitration agreements evidence parties 'clearly and unmistakably agree[d]' to transfer questions of arbitrability to the arbitrator." *AMC Pinnacle, Inc. v. Jeunesse, LLC*, 2018 WL 6267314, at *3 (M.D. Fla. Nov. 30, 2018) (citing *Terminix Int'l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005). In this regard, the Eleventh Circuit recognizes delegation clauses as an enforceable means to transfer the Court's authority to the arbitrator. *See Terminix Int'l Co.*, 432 F.3d at 1332. "Thus, faced with a valid delegation clause, courts are required to refer claims to arbitration to allow the arbitrator to decide gateway arbitrability issues such as whether an arbitration agreement is illusory or unconscionable." *Rent–A–Center, West, Inc*, 561 U.S. at 69.

In *Terminix*, the District Court denied the defendant's motion to compel arbitration agreeing with the plaintiff that the arbitration agreement was not enforceable because it eliminated plaintiff's statutory remedies and rights under Florida's Deceptive and Unfair Trade Practices Act. *Terminix*, 432 F.3d at 1329. However, the Eleventh Circuit reversed the district court's ruling and determined that questions regarding the validity of remedial restrictions in the parties' arbitration agreement should be decided by the arbitrator, rather than the court. *Terminix*, 432 F.3d at 1333; *see also Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230 (11th Cir. 2018). Ordinarily, the Court observed, "when one party challenges the validity of an arbitration clause on the ground that it contains unenforceable remedial restrictions, the court must first determine whether those remedial restrictions are, in fact, unenforceable[.]" *Id.* at 1331. Despite this general rule, the *Terminix* Court determined that the case before it did not present an ordinary case. *See Id.* at 1332

Accordingly, the Court side-stepped the usual process it outlined regarding its authority to review the validity of an arbitration agreement. The Court did so because "the parties [had] agreed that the arbitrator will answer [the question of validity] by providing ... that 'arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association (AAA).'" *Id*. at 1332. The AAA Rules provided that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Id*. Thus, because of the incorporation of those AAA Rules into the arbitration agreement, the Eleventh Circuit ruled, it was the arbitrator's role—not the role of the Court—to determine validity of the parties' arbitration agreements. *Id*. at 1332.

Numerous courts in the Eleventh Circuit have followed this *Terminix* precedent in compelling arbitration in light of the parties' intent to allow the arbitrator to decide issues related to an arbitrations existence, scope, or validity. *See Houck v. Carerr Educ. Corp.*, 2013 WL 3287063, at * 2 (M.D. Fla. June 28, 2013) (granting the defendant's motion to compel arbitration because under *Terminix*, the parties incorporation of the AAA Rules in the arbitration agreement "clearly and unmistakably" delegates the issue of validity to the arbitrator); *In re Checking Account Overdraft Litigation*, 2019 WL 6838631, at *4-5 (S.D. Fla. Sept. 26, 2019) (same); *AMC Pinnacle, Inc*. 2018 WL 6267314 at * 3-4 (finding the arbitration provision contained a valid delegation clause requiring the court to refer gateway issues of arbitrability to the arbitrator, and thus, declined to address plaintiff's arguments regarding whether the arbitration agreement unconscionable).

Moreover, the lack of specificity or inclusion of the AAA Rule in an arbitration agreement does not prevent a court from finding the parties intended to have the arbitrator resolve issues regarding the scope and validity of the delegation clause or agreement. *See Steffaine A. v. Gold Club Tampa, Inc.*, 2020 WL 588284, at * 3 (M.D. Fla. Feb. 6, 2020); *Moore-Woodland v. Blue*

Diamond Dolls, Inc., 2016 WL 11491578, at *4 (M.D. Fla. May 9, 2016); *see also JPay, Inc. v. Kobel*, 904 F.3d 923, 939 (11th Cir. 2018) (concluding that contractual agreement to arbitrate "any and all" disputes sufficed to delegate questions of arbitrability to the arbitrator).

Here, the Arbitration Agreement incorporates the AAA Rules into the agreement evidencing the parties' intention to delegate questions of arbitrability to the arbitrator. Specifically, the Choice of Arbitrator provision contained in the Arbitration Agreement provides in pertinent part:

> Regardless of who demands arbitration, you shall have the right to select any of the following arbitration organizations to administer the arbitration: the American Arbitration Association (1-800-778-7879) https://www.adr.org; JAMS (1-800-352-5267) https://jamsadr.com; or an arbitration organization agreed upon by you and the other parties to the Dispute. The chosen arbitrator will utilize the rules and procedures applicable to consumer disputes of the chosen arbitration organization, to the extent that those rules and procedures do not contradict Tribal Law or the express terms of this Agreement….

Doc. 24-3 at p. 20 (emphasis added). Furthermore, the Arbitration Agreement explicitly defines "Dispute" to include "any issue concerning the validity, enforceability, or scope of this Account or the Arbitration Agreement." Doc. 24-3 at p. 20. Thus, it is clear and unmistakable that the parties here agreed to have the issue of the arbitrability to be decided by the arbitrator. Accordingly, as the above decisional authority requires, all of Plaintiff's claims, including the issue of arbitrability, must be submitted to the arbitrator. Therefore, this Court should grant Defendants' Motion to Compel Arbitration.

II. Plaintiff's Argument That the Arbitration Agreement is Unenforceable Fails Because it Challenges the Arbitration Agreement, Delegation Clause, and the Entire Agreement on the Same Grounds.

In the event that the Court does not enforce the valid delegation provision contained in the Arbitration Agreement, it should compel arbitration regardless. In opposition, Plaintiff challenges

the enforceability of the Arbitration Agreement disguised as an attack on the enforceability of the Agreement as a whole. To that end, Plaintiff asserts that the Arbitration Agreement is unenforceable for the same reason the Agreement is invalid: the exclusion Florida state law from both make them unenforceable. *See* Complaint (Doc. 1); Doc. 31, at p. 6-14.

In this regard, there are two types of validity challenges under § 2 of the FAA: "One type challenges specifically the validity of the agreement to arbitrate," and "[t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." *Rent–A–Center, West, Inc,*, 561 U.S. at 70 (citation omitted). Only the type of challenge specifically to validity of the arbitration agreement is relevant to a court's determination whether an arbitration agreement in enforceable, while the other peripheral challenges to the contract as a whole do prevent a court from enforcing a specific agreement to arbitrate. *See id.*

In *Rent-A-Center*, the Supreme Court ruled that that Ninth Circuit should have compelled arbitration because the defendant did not specifically attack the arbitration agreement or the delegation clause, but rather argued that entire agreement as a whole was unconscionable under state law. *See Id.* at 73-76. In doing so, the Court noted that the defendant "opposed the motion to compel on the ground that the *entire arbitration agreement*, including the delegation clause, was unconscionable." *Id.* at 73 (emphasis in original). Additionally, the Court determined that the underlying point of the defendant's argument was that the entire agreement was unconscionable under state law. *See Id.* at 75. Similarly, the Southern District of Florida, in *In re Checking Account Overdraft Litigation*, applied Eleventh Circuit precedent to circumstances alike to the instant case:

> "Plaintiffs do not identify any specific defect in the delegation clause and instead argue only that it is unconscionable "for the same reasons" as the contract more generally. Plaintiffs' argument is thus

> an "attack [on] the allegedly [unconscionable] nature of the entire agreement, of which the delegation provision [is] one part." *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1265 (11th Cir. 2017). Given the presence of an express delegation clause, plaintiffs' "challenge to the contract as a whole" is "committed to the power of the arbitrator[,]" and not the Court. *Parnell*, 804 F.3d at 1146."

In re Checking Account Overdraft Litigation, 2019 WL 6838631, at *5.

Likewise, here, Plaintiff's attack on the Arbitration Agreement, the delegation provision, and the entire Agreement is based on the same argument. For example, Plaintiff argues: "the delegation provision fails for the same reasons that the full arbitration prevails- it is unconscionable due to its wavier of state and federal law." Doc. 31, at p. 14-15. Accordingly, as the above case law illustrates, because Plaintiff failed to *specifically* attack the Arbitration Agreement this Court should grant Defendants' motion to compel arbitration.[1]

III. The Arbitration Agreement's Choice of Law Provision Is Enforceable.

Plaintiff further argues that Arbitration Agreement is unenforceable because its choice of law provision bears no reasonable relation to the Tribe's jurisdiction. *See* Doc. 31, at p. 12-13. In doing so, Plaintiff relies on a non-binding Ninth Circuit Opinion that interpreted the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. § 5361, *et seq*. *See California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960 (9th Cir. 2018). As such, this case has no weight here and the Agreement bears a normal relation to the Tunica-Biloxi Tribe of Louisiana (the "Tribe"). *See L'Arbalete, Inc. v. Zaczac*, 474 F. Supp. 2d 1314, 1323 (S.D. Fla. 2007).

In *L'Arbalete*, the District Court held "Florida courts will enforce a choice of law agreement even if it is expressly designed to evade Florida usury laws." *L'Arbalete, Inc. v. Zaczac*, 474 F. Supp. 2d 1314, 1321 (S.D. Fla. 2007) (citing *Morgan Walton Properties, Inc. v. Int'l City*

[1] The Eastern District of Virginia recently held a Mobiloans arbitration provision nearly identical to the Arbitration Agreement at issue here to be enforceable. *See Gibbs v Stinson*, 2019 WL 4752792 (E.D. Va. Sep. 30, 2019)

Bank & Tr. Co., 404 So. 2d 1059, 1063 (Fla. 1981)). Furthermore, the place of a party's residence or incorporation may provide a "normal relation" to a transaction as considered in a choice of usury laws context, or is at least a compelling factor in that determination. *See Id.* at 1323.

Here, the Agreement provides that Mobiloans is "a tribal lending entity wholly owned by the Tunica-Biloxi Tribe of Louisiana, a sovereign nation located within the United States of America that is operating within the Tunica-Biloxi Reservation." Doc. 24-3 at p. 2. Therefore, pursuant to the above-decisional authority, the Arbitration Agreement's choice of law provision bears a normal relation to the Tribe and is enforceable.

IV. Additional Discovery is Not Required for This Court to Rule on the Instant Motion.

Plaintiff argues that this Court cannot compel arbitration because Plaintiff is entitled to additional discovery to resolve issues of fact regarding the Terms and Conditions attached to the Agreement and the terms and conditions in effect at the time Plaintiff applied for her Mobiloans Account. *See* Doc. 31, at p. 18-20. However, Plaintiff's arguments fail.

First, the effective Terms and Conditions establish that each time Plaintiff took out a new line of credit or made a payment new terms and conditions are established. *See* Declaration of Frank Torres dated March 30, 2020 ("Torres Dec."), ¶¶ 9-18. Plaintiff drew upon funds and made payments on her Account until July 29, 2016. *Id.* at ¶ 9. Therefore, the Terms and Conditions effective July 26, 2018 are the controlling Terms and Conditions with respect to Plaintiff's Account. Nevertheless, the arbitration agreement that was in effect at the time Plaintiff applied for her Mobiloans Account is identical to the Arbitration Agreement currently governing the Agreement. *See* Torres Dec., at ¶ 20, Ex. D-F. Second, Plaintiff erroneously argues the Torres Declaration is insufficiently authenticates the Terms and Conditions under Florida state law. However, under federal law, the Torres Declaration and GTM's routine business practices amount

to "credible, admissible, evidence to support a finding of an agreement to arbitrate." *See Gibbs v Stinson*, 2019 WL 4752792, at *22 (E.D. Va. Sep. 30, 2019).

V. Defendants Have Not Waived Their Right to Arbitration.

To determine whether the right to arbitrate has been waived, courts apply a two part test: (1) whether, "under the totality of the circumstances, the party has acted inconsistently with the arbitration right"; and (1) "whether, by doing so, that party has in some way prejudiced the other party." *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315–16 (11th Cir.2002). With respect to the first element, "[t]he key is whether there has been substantial participation in litigation "to a point inconsistent with an intent to arbitrate[.]" *Harling v. Ado Staffing, Inc.*, 2014 WL 1410519, at *6 (M.D.Fla. Feb. 21, 2014) (citing *Morewitz v. W. of Eng. Ship Owners Mut. Prot. & Indem. Ass'n*, 62 F.3d 1356, 1366 (11th Cir.1995)). In this regard, courts have held that long delays in seeking to compel arbitration and participation in discovery can amount to acting inconsistently with the right to arbitrate. *See, e.g., Garcia v. Wachovia Corp.*, 699 F.3d 1273, 1277 (11th Cir. 2012). Moreover, when a defendant merely appears in an action and files "some motions, without response and adjudication," it is not typically considered substantial participation in litigation. *Harling*, 2014 WL 1410519 at * 6 (citation omitted).

Here, Defendants have not substantially participated to a point which is inconsistent with their right to arbitrate. For example, no discovery has been exchanged, no depositions have been taken, and this instant motion is the first dispositive motion before this Court. Additionally, Plaintiff claims that she is prejudiced as she has already incurred costs and expenses related to this litigation, which the Arbitration Agreement precludes her from recovering. *See* Doc. 31, at p. 16-17. This is factually erroneous. The Arbitration Agreement provides that the arbitrator may award fees, costs, and reasonable attorneys' fees to the prevailing party in the arbitration, as provided by Tribal Law. Doc. 24-3, at p. 22; *See* Torres Dec., at ¶¶ 21-25, Ex. D-E. Specifically, the Tribe's

Arbitration Code provides that any arbitration decision is enforceable to "the extent allowable under Tribal law as set forth herein and under applicable federal law." *Id.* at Ex. D, p. 1. Moreover, the Tribe's Lending Code requires that any arbitration agreement "shall be subject, and interpreted in accordance with, Tribal Law and Federal Consumer Protection Laws." *Id.* at Ex. E, p. 18. As such, Plaintiff is not prejudiced by the Arbitration Agreement as it affords her the remedies available in the FDCPA. Therefore, Defendants have not waived their right to arbitrate.

VI. Motion for Judgement on the Pleadings

In opposition to Defendants' Motion for Judgement on the Pleadings with respect to Plaintiff's § 1692e, §1692f, and Fla. Stat. § 559.72(9) claims, Plaintiff argues that *Morgan*, *supra*, is inapplicable because online transactions, such as the one at issue here, occur in the state where the transaction is initiated. In support of this argument, Plaintiff relies on a non-binding Ninth Circuit Opinion that interpreted the UIGEA. *See* Doc. 31, at p. 23. As such, this case has no weight here and the Agreement bears a normal relation to the Tribe. *See L'Arbalete, Inc.* 474 F. Supp. 2d at 1323.

Additionally, with respect to Plaintiff's § 1692c(b) claim, this Court should not stay this issue pending the appeal of *Hunstein v. Preferred Collection and Mgmt. Servs.*, Inc., 2019 WL 5578878 (M.D. Fla. Oct. 29, 2019). In this regard, the *Hunstein* court relied heavily on Eleventh Circuit precedent and the appeal would thus require the Eleventh Circuit to reverse its prior holdings on this same issues. *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)).

CONCLUSION

Based upon the foregoing and Defendants' initial Motion, it is respectfully submitted that this Court grant Defendants' Motion to Compel, or in the alternative, Judgment on the Pleadings.

Dated: March 30, 2020

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