IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LILLIAN EASLEY and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:21-cv-00049**
WLCC II D/B/A ARROWHEAD ADVANCE,	)	
Defendants.	)	

DEFENDANT'S OBJECTIONS TO REPORT & RECOMMENDATION

Wakpamni Lake Community Corporation ("WLCC" or "Defendant")[1], by counsel, pursuant to Doc. 13, submits the following Objections to the Report & Recommendation (the "Report") recommending that WLCC's Motion to Dismiss for Improper Venue and to Compel Arbitration (Doc. 2) be denied.

[1] WLCC is an arm of the Oglala Sioux Tribe. By filing this Objection, WLCC expressly preserves its defense of sovereign immunity. No court has jurisdiction over WLCC and thus WLCC does not consent to jurisdiction or waive its immunity. A defendant does not submit to the jurisdiction of a court by filing a motion to dismiss. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995, 1000 (W.D. Wis. 2004) ("[Sovereign] entities may intervene for a limited purpose such as moving to dismiss the lawsuit for failure to join an indispensable party without waiving their sovereign immunity."); *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir.1989) ("[T]erms of [a sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (quoting *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

I. SPECIFIC OBJECTION

The Report concluded on p. 5-6 that "the arbitrator's determination that the loan agreements were void in their entirety extends to the arbitration agreements contained in those loan agreements," and as a result, the Report recommends that WLCC's Motion be denied. As set out below, the finding and recommendation is factually and legally incorrect.

II. INTRODUCTION

The procedural history of this dispute shows the flaw in the Report's conclusion and why WLCC's Motion should be granted. Plaintiff initiated an arbitration proceeding against WLCC—pursuant to the arbitration provision in her loan agreements with WLCC—seeking to declare the agreements void under Alabama's Small Loans Act, Ala. Code §§ 5-18-1, *et seq*. (the "Act"). The arbitrator, exercising the authority conferred upon him by the arbitration agreements, issued a ruling finding that Plaintiff's loan agreements with WLCC were void under the Act. Plaintiff then initiated this action, seeking to confirm the arbitration award that Plaintiff's loans were void but also asserting a new claim under the Act—not asserted in the arbitration—seeking money damages on behalf of herself and a class of Alabama residents who have loan agreements with WLCC. As this new class claim should have been dealt with in the prior arbitration, WLCC moved to compel arbitration of the new claim.

The Report recommends WLCC's Motion be denied because the arbitrator determined that Plaintiff's loan agreements with WLCC were void in their entirety, and thus the arbitration agreements included in the loan agreements are unenforceable. The Report, however, does not address the fact that Plaintiff did not challenge the enforceability of the arbitration agreements; rather Plaintiff confirmed their enforceability when she initiated arbitration against WLCC. Instead, the Report relies on *Macon Cty. Greyhound Park, Inc. v. Hoffman*, 226 So. 3d 152 (Ala. 2016), which held that the arbitration agreements in gambling contracts were unenforceable because the contracts themselves were inherently illegal because the consideration (gambling) was illegal.

But *Macon County* is inapposite for two primary reasons. First, the plaintiffs in *Macon County* challenged the enforceability of the arbitration agreements from the outset, whereas Plaintiff here *invoked* and *enforced* the arbitration agreements. Second, unlike the gambling contracts in *Macon County*, the loan agreements at issue here are not inherently illegal, and the consideration—the loan proceeds provided to Plaintiff—was not illegal. In fact, *Macon County* explicitly recognizes that arbitration agreements in loan agreements that allegedly charged usurious interest are enforceable even if the loan agreements themselves are void. The Report ignores this key finding in *Macon County*.

Simply put, the Report erroneously relies on the arbitrator's authority to rule that Plaintiff's loan agreements are void, while at the same time recommends that the arbitration agreements are unenforceable, thereby destroying any ability for the arbitrator to rule on anything. If Plaintiff's loan agreements—including the arbitration agreements therein—are entirely void because they were inherently illegal, as the Report concludes, the arbitrator had no authority to determine the validity of the loan agreements, and his award has no effect.

At bottom, Plaintiff is trying to leverage the arbitrator's ruling by baiting the Court into ignoring Plaintiff's prior enforcement of the arbitration agreements so that she can impermissibly split her claims. But just as Plaintiff sought to arbitrate her prior claims, she must also arbitrate her new class claim.

III. ARGUMENT

A. *Macon County* is distinguishable and not controlling.

The Report relies on the Alabama Supreme Court's decision in *Macon County* in concluding that "it would be unconscionable for a court to enforce any provision in a contract that is based on illegal conduct and that is void as a matter of law." Report at 5 (citing *Macon County*, 226 So. 3d at 169). The Report's reliance on *Macon County* is misplaced because the underlying facts and the procedural posture in *Macon County* are entirely distinguishable from this case.

1. Plaintiff did not challenge the enforceability of her arbitration agreements with WLCC.

The plaintiffs in *Macon County* filed suit against Macon County Greyhound Park asserting numerous claims arising from their experiences playing electronic bingo. When Macon County moved to compel arbitration, the plaintiffs challenged the arbitration provision on several grounds, including "that the arbitration provision is void because the contracts in question were illegal gambling contracts." *Macon Cty.*, 226 So. 3d at 156.

Here, Plaintiff never made any threshold challenge to the arbitration agreements in her loan agreements with WLCC. Plaintiff never put the "making of the arbitration agreement" in issue. She did not argue that her arbitration agreements with WLCC were unconscionable and void. Instead, she took the exact opposite approach, *relied* on the enforceability of the arbitration agreement, and affirmatively *invoked* the arbitration process to seek to have the loan agreements declared void *ab initio*—a result she ultimately obtained. *See* Doc. 2-1, pp. 125-26 (email from Plaintiff's counsel providing Plaintiff's Demand for Arbitration with the American Arbitration Association), 130-31 (Demand for Arbitration), 137-38 (portion of Plaintiff's loan agreement with WLCC attached to the Demand for Arbitration that includes arbitration provision).

Plaintiff invoked arbitration as a mechanism to challenge the validity of her loan agreements, and the arbitrator's decision on that issue was appropriately within

the arbitrator's scope of authority. *See, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) ("Unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."); *see also, Zinn v. Renal Care Grp.*, No. CV-06-BE-0688, 2006 U.S. Dist. LEXIS 118102, at *5 (N.D. Ala. Oct. 4, 2006) ("Plaintiffs argue that, because Defendant entered into the Medical Director Services Agreement before obtaining a Certificate of Authority from the Alabama Secretary of State, the contract as a whole is unenforceable under Alabama's 'Door Closing Statute,' Ala. Code § 10-2B-15.02.3 Plaintiff's argument, however, is foreclosed by . . . *Buckeye Check Cashing* . . . . Because Plaintiffs have challenged the contract as a whole and not the arbitration clause specifically, Buckeye requires that the arbitration clause is severed from the contract as a whole and is enforceable.").

2. Plaintiff's loan agreements are not inherently illegal, and thus their arbitration agreements are not void.

Macon County involved contracts to play electronic bingo. "Section 8-1-150(a), Ala. Code 1975, provides: '[a]ll contracts founded in whole or in part on a gambling consideration are void.'" *Id.* at 157. The Alabama Supreme Court found that the gambling contracts at issue were "indisputably contracts based on criminal conduct that are thus unenforceable and invalid." *Id.* at 163. Accordingly, the arbitration provision in those gambling contracts were void as well because the provision was "at least in part, based on illegal gambling consideration." *Id.* at 167.

Simply put, the illegal consideration in *Macon County* infected the entirety of the contracts and made them illegal. The same is not true here.

Here, Plaintiff's loan agreements with WLCC are not inherently illegal, and therefore, the arbitration agreements in them are not void. *Macon County* expressly found "distinguishable" allegedly usurious loan agreements, which are inherently *legal*, and gambling contracts, which are inherently *illegal*. *Id*. (the "nature" of the gambling contracts in *Macon County* "are inherently different" from the nature of loan agreements) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), which involved an arbitration provision in an allegedly usurious payday loan). The fact that a contract is void or voidable does not make it *illegal*. "The subject matter of the contract[] involved in *Buckeye Check Cashing* was an inherently legal activity – … a contract to lend money." *Id*. at 168. The valuable consideration that Plaintiff received under each of her loan agreements with WLCC (the loan proceeds) was not inherently illegal and does not render the arbitration agreements therein void.[2] As a result, all of Plaintiff's claims against WLCC, including her new class claim, are subject to arbitration notwithstanding the arbitrator's ruling regarding the enforceability of Plaintiff's loan agreements.

[2] The Arbitrator did not find that the arbitration agreements in the loan agreements are void. Indeed, his citation to the *Macon County* case related to a conflicts of laws analysis, not a finding about the severable arbitration agreements here. *See* Award, Doc. 6-1, at 6.

B. Based on the Report's rationale, the arbitrator would not have had jurisdiction to issue the arbitration award.

The Report's conclusion that the arbitration agreement is void effectively renders the arbitrator's award, which Plaintiff seeks to confirm in this case, unenforceable, as the arbitrator did not have authority to issue the award. *See, e.g.*, *Great Am. Trading Corp. v. I.C.P. Cocoa, Inc.*, 629 F.2d 1282, 1288 (7th Cir. 1980) ("[I]f no arbitration agreement exists the arbitration award and judgment entered thereon is void.").

Plaintiff cannot have it both ways. Either the arbitration agreement is void and the award is invalid and cannot be confirmed, or the arbitration agreement is enforceable, and Plaintiff's new class claim must be compelled to arbitration, consistent with well-established law. *See Buckeye Check Cashing*, 546 U.S. at 445-46; *Mesa Operating Ltd. v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 244 (5th Cir. 1986) (If a contract is void *ab initio*, if the making of the arbitration agreement is not called into question, the arbitration agreement contained within the void contract remains separate and enforceable); *Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 528-29 (1st Cir. 1985); *Passa v. City of Columbus*, No. 2:03-CV-81, 2008 U.S. Dist. LEXIS 18604, at *36 (S.D. Ohio Mar. 11, 2008); *Belship Navigation v. Sealift*, No. 95 Civ. 2748 (RPP), 1995 U.S. Dist. LEXIS 10541, at *13-14 (S.D.N.Y. July 27, 1995); *Timberton Golf, L.P. v. McCumber Const., Inc.*, 788 F. Supp. 919, 922 (S.D. Miss. 1992). The Report did

not address this important point or even address the plethora of case law supporting this principle.

Because Plaintiff did not challenge the arbitration agreement and instead invoked it by seeking an award declaring the underlying loan agreements void, the arbitration provision necessarily had to survive in order for an award to be issued. Therefore, WLCC's Motion should be granted.

C. The Report is inconsistent with *res judicata* principles and the prohibition against claim-splitting.

Once *Macon County* is distinguished and *Buckeye Check Cashing* is followed, the facts of this case clearly fit within the confines of *res judicata*. Plaintiff already elected to arbitrate her claim against WLCC and sought certain relief. She cannot now, after obtaining an award, come to this Court and seek different relief that arises out of the exact same facts that were at issue in the arbitration.

As discussed in WLCC's Reply Brief (Doc. 10), there is broad agreement among the circuit courts that the effect of an arbitration award on future relief is properly resolved through arbitration and not through the Court. *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1132 (9th Cir. 2000) ("[A] *res judicata* objection based on a prior arbitration proceeding is a legal defense that, in turn, is a component of the dispute on the merits and must be considered by the arbitrator, not the court."); *U.S. Fire Ins. Co. v. Nat'l Gypsum Co.*, 101 F.3d 813, 817 (2d Cir. 1996) ("[T]he issue-preclusive effect of a prior arbitration is arbitrable and so must

be arbitrated."); *see also Courier-Citizen Co. v. Bos. Electrotypers Union No. 11*, 702 F.2d 273, 280 (1st Cir. 1983); *Indep. Lift Truck Builders Union v. NACCO Materials Handling Grp., Inc.*, 202 F.3d 965, 968 (7th Cir. 2000) ("[T]he preclusive effect of the first arbitrator's decision is an issue for a later arbitrator to consider.") (internal quotation marks omitted); *Oil, Chem. & Atomic Workers Int'l Union, Local 4-367 v. Rohm & Haas, Tex. Inc.*, 677 F.2d 492, 494 (5th Cir. 1982) (per curiam).

Likewise, the Eleventh Circuit has held that application of *res judicata* is a procedural matter that is a question for the arbitrator, in the absence of an agreement to the contrary between the contracting parties. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109 (11th Cir. 2004). Based on this precedent, the preclusive effect of Plaintiff's original arbitration is an issue that should be sent to the arbitrator.

IV. CONCLUSION

For the reasons above, Defendant respectfully requests that the Court overrule the Report and grant WLCC's Motion and compel Plaintiff's new claims to arbitration. WLCC also asks for all additional relief in its favor that is just and proper.

Dated: August 25, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2021, a copy of the above and foregoing was filed with the United States District Court for the Southern District of Alabama using the CM/ECF system which sent notification to all counsel of record, including:

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