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

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

PLAINTIFF'S RESPONSE TO MOTION TO DISMISS FOR IMPROPER VENUE AND TO COMPEL ARBITRATION

With no objectively reasonable basis in fact or law, Defendant asks the Court to compel Plaintiff to arbitrate a dispute that has already been arbitrated. The result of that arbitration was the binding declaration that the entire loan agreement is void *ab initio*.[1] By operation of that determination, there is no longer any agreement between the parties. There is no arbitration clause; no class waiver; and no basis whatsoever to compel Plaintiff back into arbitration. Any other conclusion would require the Court to ignore the binding arbitration award and the express provisions of the Federal Arbitration Act.

[1]The final Award is attached hereto as Exhibit 1.

Arrowhead spends the entirety of its brief citing cases addressing the enforceability of an arbitration clause. But enforceability is not an issue here. The arbitration clause has been enforced and arbitration process has been exhausted. Arrowhead must live with the result. The cases cited by Arrowhead reinforce this point. They confirm that it is the arbitrator, not the Court, who has the authority to decide the validity of a contract containing an arbitration clause in the first instance. That has already happened. The arbitrator has decided the issue of validity and Arrowhead does not get a "do over" simply because it disagrees with that decision.

What happens next is dictated by the Federal Arbitration Act, which requires the confirmation of the award (Section 9) and makes clear that, save for the narrow path for vacating or modifying the award under Sections 10 and 11 (which Arrowhead chose not to pursue), the award is binding on the parties "as if it had been rendered" by the Court (Section 13). Thus, the award declaring the entirety of the contact void *ab initio*, including all of the dispute resolution provisions, must be confirmed and enforced as law of the case exactly as if the Court had made the same determination.

The next step in this litigation is not another arbitration. It is the confirmation of the award and the continued adjudication of Plaintiff's claims in light of the conclusions reached by the arbitrator. Because that included the cancellation of that

agreement containing the arbitration clause, there is no basis for any further arbitration or for Arrowhead's claim that Plaintiff is compelled to repeat the process.

A. The Arbitration Proceeding and the Award

This Court may consider the course of events in arbitration and the relevant documents in rendering its decision on the merits in this case and on this motion. The Court is not limited to the four corners of the Plaintiff's complaint. *See Liles v. Ginn-La West End, Ltd*., 631 F.3d 1242, 1244 n.5, 1249 n.13 (11th Cir. 2011) (noting that a court can consider extrinsic evidence in a motion to change venue and that a motion to compel arbitration is essentially a specialized motion to change venue). The Court may consider documentary evidence here, and, because the Court must apply a "summary-judgment-like" standard to factual disputes on a motion to compel arbitration, the Court must view the evidence in the light most favorable to the Plaintiff. That evidence, of course, is the AAA Award holding void the Defendant's loan agreements and thus rendering void, as well, the arbitration clause (and everything else) in those agreements. (Exhibit 1). The facts leading up to that award are also pertinent.

Defendant peddles high-interest small loans on the internet. It is not licensed by the State of Alabama to do so. (Complaint, ¶ 48). It claims to be a tribal entity shielded from Alabama law by sovereign immunity. Between August 10, 2018, and

November 26, 2019, Defendant made ten (10) separate usurious loans to Plaintiff. The loan amounts varied from $200 to $950 and the annual interest rates varied from 595% to 650%. The average rate was 623%. *Id*., ¶ 11.

The Alabama Small Loans Act ("ASLA") caps rates charged on small loans to 36% and renders the extension of small loans without a state-issued license a crime. Ala. Code § 5-18-14(l) and 4(d). The ASLA expressly declares any small loan contract extended by an unlicensed lender to be void. Ala. Code § 5-18-4(d). It also states that the unlicensed lender "shall have no right to collect, receive, or retain any principle, interest or charges whatsoever." *Id*.

Each of the loan contracts signed by Plaintiff contained dispute resolution provisions which declared that Defendant was subject to sovereign immunity as a tribal entity, designated tribal law the exclusive source of controlling law and included an arbitration clause.

Pursuant to the arbitration clause, Plaintiff initiated an arbitration proceeding against Arrowhead with the American Arbitration Association ("AAA") on March 25, 2020. Plaintiff asserted that the loan agreements violated state law and were void.[2]

[2]Mrs. Easley filed her claim in arbitration despite her (later successful) claim that the entirety of all the loan agreements should be rendered void *ab initio* for illegality because she was aware that federal courts have held that where a contract contains an arbitration clause, a challenge to the enforceability of the contract as a whole must be first presented to the arbitration forum. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

The Defendant filed a Motion to Dismiss the Arbitration on May 12, 2020 (copy attached as Exhibit 2), asserting that Plaintiff's state law claims were barred by operation of the loan agreements. Defendant asked the arbitrator to dismiss the arbitration with prejudice and declare that "no arbitration be had." (Exhibit 2). On June 18, 2020, the appointed arbitrator entered his Report of Preliminary Management Hearing and Scheduling Order, in which he disallowed dispositive motions pursuant to the AAA Consumer Rules. Mrs. Easley filed her specific Statement of Claim before the AAA on June 15, 2020. (A copy is attached as Exhibit 3). On June 26, 2020, Arrowhead filed its Answer with the AAA.

After submissions from both sides, the arbitrator issued the final Award on October 8, 2020 (Exhibit 1). The arbitrator found that any sovereign immunity otherwise held by Defendant had been waived, that Alabama law applied and that, by operation of Alabama law (including the ASLA) the loan agreements are entirely void *ab initio.* (Exhibit 1). For this reason:

- Defendant is entitled to no sovereign immunity;
- The choice of law provisions are void;
- Alabama law applies to the loans;
- The arbitration clause in the contracts is void.
- The class action waiver clause in the contracts is void.
- The repayment terms in the contracts are void.

Arrowhead took no action to have the Award modified or vacated. Plaintiff filed this action on December 16, 2020 in Mobile County Circuit Court. Plaintiff seeks, *inter alia*, confirmation of the Award.[3]

B. Arrowhead is Bound by the Arbitration Award

It goes without saying that the arbitrator award is binding on the parties to the arbitration. AAA Consumer Rule 47(c) confirms the parties' consent "that the judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." (Rule 47(c), *AAA Consumer Rules*). Section 13 of the FAA renders the effect of an award, once confirmed, the same as if entered by the Court. 9 U.S.C. § 13. As with an order of the Court, the arbitration award prevents re-litigation of the issues it addressed and resolved: the waiver of sovereign immunity, the application of Alabama law and the invalidity of the entirety of the agreement. Arrowhead is prohibited from relitigating those issues. *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc*., 579 F.3d 1268, 1272 (11th Cir. 2009); *Freecharm*

[3]Arrowhead states in a footnote that it there is no point to confirmation of the Award. (Doc. 2, n. 2). It nevertheless states that it does not object to the confirmation and that, therefore, the issue is moot. This ignores the express provisions of the FAA, as well as the nature of the Award. Confirmation of the Award is not some meaningless or optional administrative task. Confirmation is central to the arbitration procedure. Confirmation is compelled by Section 9 of the FAA and it is necessary for the award to have the force of law. That Defendant has no objection is not surprising. It already consented to the confirmation of the Award by its participation in the arbitration. Rule 47(c), *AAA Consumer Rules*. In any event, Defendant cannot by giving its consent (or through any other action) render the confirmation process moot.

Ltd. v. Atlas Wealth Holdings Corp., 499 F. App'x 941, 943 (11th Cir. 2012) (arbitration award has full *res judicata* effect of any other judgment and prevented relitigation of the same issues, even as against different defendants).

The relief requested by Arrowhead would necessarily require the Court to disregard the award, which the Court cannot do. Sections 10 and 11 of the FAA provide the exclusive mechanism for modifying or vacating an arbitration award. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584, 128 S. Ct. 1396, 1403, 170 L. Ed. 2d 254 (2008). Arrowhead chose not to pursue relief from the award under that mechanism. It is now final and binding. 9 U.S.C. § 13.

Because the arbitration award renders the loan contract void *ab initio*, the AAA cannot exercise jurisdiction over any remaining aspect of the dispute relating to the Defendant's illegal loans. As one Florida appellate court has held, "[i]f there is no contract, there can be no arbitration clause of the contract." *Niven v. GFB ENTERPRISES, LLC*, 849 So. 2d 1093 (Fla. 3rd DCA 2003) (*citing Henderson v. Coral Springs Nissan, Inc*., 757 So.2d 577 (Fla. 4th DCA 2000) (no enforceable arbitration clause where the dealer rescinded the contract containing the arbitration clause); *Hymowitz v. Drath*, 567 So.2d 540 (Fla. 4th DCA 1990) (no enforceable arbitration clause when arbitrators cancel a contract during arbitration).

Similarly, in *Hearn v. Comcast Cable Communications*, LLC, Docket No. 1:19-CV-1198 (N.D. Ga. 2019), the court held a plaintiff's claim for relief under

the Fair Credit Reporting Act ("FCRA") did not relate to the service agreement between plaintiff and defendant after the plaintiff terminated the contract. And in *Klay v. All Defendants*, 389 F. 3d 1191, 1203 (11th Circuit 2004), the Court held that "[W]e cannot compel arbitration for disputes which arose during time periods in which no effective contract requiring arbitration was governing the parties." In the present case, no "effective contract" of any kind between these parties exists now, nor did such an agreement ever exist between these parties, because the AAA arbitrator found the loan agreements void *ab initio.*

Defendant is wasting this Court's time and resources with its baseless request that the Court ignore the Award, as well as the FAA, and send this back to arbitration for a "do over." The motion has no objectively reasonable basis in fact or law.

C. The Award Comprehensively Declared the Entire Contract Void. No Aspect of the Contract Survives

There is likewise no basis for any argument that the award somehow left a right to arbitrate intact. In reaching the conclusion that Alabama law voided the loan agreement, the arbitrator did not parse out specific provisions of the agreement as possibly valid while others were void. The award clearly applies the invalidity to the contract as a whole. The arbitrator concluded that the entire contract was void for two reasons: (1) the entire subject matter of the agreement was premised on illegal activity and, by operation of the doctrine laid out in *Macon Cty. Greyhound Park,*

Inc. v. Hoffman, 226 So. 3d 152, 169 (Ala. 2016), the entire contract was void; and (2) the entire contract is rendered void by the operation of the express language in the ASLA, Section 5-18-4(d).

The necessary effect of the express findings in the Award is the invalidation of the entire agreement, including the arbitration clause. Any doubt on this point is erased by the arbitrator's reliance on *Macon County*. That decision specifically addressed an argument that even though the underlying contract (premised on illegal gambling) may be void, the arbitration clause remains somehow enforceable. The *Macon County* court, in language quoted in the Arbitration Award, robustly rejected that argument. It made clear that the invalidation of a contract on grounds of illegality encompasses every aspect of that contract, including specifically the arbitration clause:

> To suggest that a court should enforce any provision in a contract that is based on illegal conduct and that is void as a matter of law, particularly when the agreement to arbitrate is itself based on gambling consideration, is unconscionable. What if the contract was for different illegal conduct, for example, the sale of an illegal controlled substance such as cocaine or a murder for hire? Surely, no court would enforce any part of such a contract by requiring an arbitrator to determine whether such contracts were illegal and void.

Macon Cty., 226 So. 3d at 169 (this passage is quoted on p. 6 of the Award).

As in *Macon County*, the arbitrator found the "entire subject matter of" Arrowhead loan agreements — unlicensed loans -- is conduct expressly determined by

the Alabama legislature to be illegal and against public policy. As such, no aspect of that agreement, including the arbitration clause, is valid. 226 So. 3d at 169.

Also, the arbitrator specifically held that the dispute resolution provisions, which required exclusive application of tribal law, were void as contrary to strong Alabama public policy banning usury. The choice of law provision is embedded in and inextricably linked to the arbitration agreement. Here is the "Agreement to Arbitrate":

> Agreement to Arbitrate. You agree that any Dispute (defined below) will be resolved by arbitration as described below and in accordance with any applicable Oglala Sioux tribal law.

The award unambiguously voided the entire contract and specifically the choice of law provision which, with the same stroke, voided the arbitration clause and the exclusive application of tribal law. There is no basis for any position that somehow a right to arbitrate still exists.

D. Arbitrator Had Exclusive Authority to Determine Validity of Contract. Having Declared Entire Contract Void *Ab Initio*, There is No Basis for Another Arbitration.

It is boilerplate arbitration law that the arbitrator has exclusive authority to a challenge to the validity of a contract which contains an arbitration clause. *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1146 (11th Cir.

2015)("When an arbitration agreement contains a delegation provision and the plaintiff raises a challenge to the contract *as a whole,* the federal courts may not review his claim because it has been committed to the power of the arbitrator.").

The first ten pages of the Defendants' motion discuss basic Federal Arbitration Act law without reference to the procedural posture of this case and as though that arbitration had never occurred. Arrowhead then offers the bare claim that the arbitration award does not impact its right to compel another arbitration. But it never explains how or why that would be the case given the arbitrator's binding decision that the entire contract is void. It merely cites for support *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010) and *Bess v. Check Express*, 294 F.3d 1298, 1304 (11th Cir. 2002). But those cases do not address the enforceability of an arbitration award, or anything else that occurs *after* an arbitration. They address only the enforceability of arbitration clause at the front end — before there has been an arbitration. Enforceability is not an issue here. The arbitration clause has already been enforced and arbitration process has been exhausted.

Rent-A-Ctr and *Bess* reinforce the rule first established in *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967): where a party attacks the validity of a contract as a whole, as opposed to an attack specifically challenging the validity of the arbitration clause, the threshold question of contract validity is to be determined by the arbitrator. Plaintiff agrees

that the arbitrator has the authority to determine whether the contract, including the arbitration clause, is void. That's why she submitted her attack on the entirety of the contract to arbitration in the first place.

Prima Paint, *Rent-a-Center* and *Bess* foreclose exactly the relief requested by Arrowhead. Those cases expressly confirm the arbitrator's authority to do exactly what he did here: determine the threshold issue of the validity of the contract as a whole. It is the exercise of that same authority that produced the result: a binding and enforceable arbitration award declaring void *ab initio* the entirety of Arrowhead's loan agreement, including the dispute resolutions provisions. Arrowhead, by citing these cases, recognizes the arbitrator's authority to adjudicate the attack on the validity of the contract, but then it asks the Court to ignore the result. It cannot be both ways. Since the arbitrator had the authority to decide validity, that decision is binding.

Put another way, *Prima Paint* and its progeny set up a two-step process when the validity of the contract containing an arbitration clause is challenged: (1) the arbitrator decides whether the contract as a whole is valid and (2) the dispute is adjudicated in its entirety either in arbitration (if the contract is deemed valid) or in the court (if the arbitrator deems the contract in invalid). We have completed step one. There is no basis for the outlandish notion that Plaintiff is required to repeat step one until Defendant gets a better result.

CONCLUSION

Arrowhead's motion is not about enforceability of the arbitration clause; it is about forcing a repeat of an arbitration that produced a binding result Arrowhead does not like. There is no basis in fact or law for that position. The FAA does not provide a "mulligan." The parties, including the loser, are bound by the results of the arbitration; and it is frivolous to suggest, as Arrowhead does here, that the Court may simply ignore the award and compel Plaintiff to start the arbitration process all over again. For all the reasons set out above, the Defendant's Motion to Dismiss for Improper Venue and to Compel Arbitration is due to be denied.

DATED: March 12, 2021

/s/Kenneth J. Riemer
KENNETH J. RIEMER
UNDERWOOD & RIEMER, PC
One of the Attorneys for Plaintiff
2153 Airport Boulevard
Mobile, AL 36606
Telephone: (251) 432-9212
Facsimile: (251) 990-0626
Email: kriemer@alalaw.com

Of Counsel for Plaintiff:
Steven P. Gregory
ASB-0737-R73S
GREGORY LAW FIRM, P.C.
2700 Corporate Drive
Suite 200
Birmingham, Alabama 35242
Telephone 205-799-0380
email: steve@gregorylawfirm.us

CERTIFICATE OF SERVICE

I hereby certify, on this 12th day of March, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send an electronic notification of such filing to all counsel of record.

/s/Kenneth J. Riemer
COUNSEL