UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:13-CV-897

JAMES DILLON, on Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

BMO HARRIS BANK, N.A., FOUR OAKS BANK & TRUST, a North Carolina-Chartered Bank, BMO FEDERAL CREDIT UNION, and BAY CITIES BANK, a Florida State-Chartered Bank,

Defendants.

PLAINTIFF'S RESPONSE IN OPPOSITION TO BMO HARRIS BANK, N.A.'S MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Plaintiff James Dillon ("Plaintiff") and thousands like him are victims of illegal payday lending. Defendant BMO Harris Bank, N.A. ("BMO") knowingly "originates" debits on the Automated Clearing House Network ("ACH Network") for payday loans that are illegal in certain states, including North Carolina. BMO knowingly provides ACH Network access to these illegal payday lenders, in violation of ACH Network rules and state law duties, and in disregard of the warnings and guidance issued by the Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC"). Without the assistance of financial institutions like BMO, online payday lenders could not debit loan payments from customers' bank accounts in states where the loans are illegal.

BMO argues that it should be allowed to enforce arbitration provisions in illegal and unenforceable contracts to which it is not even a signatory. Alternatively, it argues that Plaintiff should be equitably estopped from avoiding those contractual provisions—even though Plaintiff's claims in no way rely on the contract in question. Both arguments fail.

STATEMENT OF FACTS

Plaintiff is a citizen of North Carolina. (Doc. 1, ¶ 11). Payday loans are illegal in North Carolina, 12 other states, and the District of Columbia. (Doc. 1, ¶ 4). Certain payday lenders make use of the Internet to circumvent these prohibitions and offer payday loans to consumers residing in these states (the "Illegal Payday Lenders"). (Doc.

1, ¶ 5). Illegal Payday Lenders' ability to defy state law rests on the cooperation of financial institutions hidden from the borrowers like BMO that knowingly "originate" illicit payday loan debits and credits on the ACH Network. (Doc. 1, ¶ 6).

These banks, known as Originating Depository Financial Institutions ("ODFIs") act as middlemen between illicit Illegal Payday Lenders and the mainstream electronic payments system. (Doc. 1, ¶ 6). BMO knows that it is debiting consumers' accounts for unlawful purposes because it knows it is acting at the request of Illegal Payday Lenders and that the entries it originates on the ACH Network will debit funds in states in which the Illegal Payday Lenders' loans are illegal and unenforceable. BMO is required by federal banking regulations and the rules of the ACH Network to know the identities of the entities for which it originates transactions and to assure itself that such transactions do not violate state or federal law. (Doc. 1, ¶¶ 7-9).

Great Plains Lending, LLC ("Great Plains") is an entity purportedly operating as a tribal online payday lender organized and existing under the laws of the Otoe-Missouria Tribe of Oklahoma. (Doc. 36-1, p.2). Great Plains is in the business of making and collecting "unlawful debts" under 18 U.S.C. § 1961(6) in that the loans that it makes and collects from borrowers are: (i) unenforceable because of state or federal laws against usury; (ii) incurred in connection with the business of lending money at an usurious rate; and (iii) the usurious rate was at least twice the enforceable rate. (Doc. 1, ¶ 16(c)).

On or about December 10, 2012, Plaintiff received a payday loan in the amount of $500 from Great Plains by completing an application on Great Plains' website. As part of

the application process, Plaintiff authorized Great Plains to debit his checking account with Wells Fargo in order to repay the loan. (Doc. 1, ¶ 81). BMO was not identified in the agreement setting forth the terms of the usurious loan with Great Plains ("Loan Agreement 1"). On or about January 2, 2013, January 15, 2013, and January 29, 2913, BMO originated a debit transaction on behalf of Great Plains of $109.05 from Plaintiff's checking account in North Carolina through the ACH Network. (Doc. 1, ¶ 82). On or about February 12, 2013, BMO originated an additional debit transaction on behalf of Great Plains of $564.11 from Plaintiff's checking account in North Carolina through the ACH Network. (Doc. 1, ¶ 83). As a result, Plaintiff paid $891.26 in a period of approximately 9 weeks to satisfy a $500 loan. Thus, the annual percentage rate on the loan was in excess of 400%.[1] (Doc. 1, ¶ 84).

BMO, in its role as an ODFI in the ACH Network, originated debit entries on the ACH Network at the request of Illegal Payday Lenders that BMO knew routinely violate state law; and originated debit entries that BMO knew were in violation of state law, the NACHA Operating Rules and FDIC and OCC guidelines. (Doc. 1, ¶ 119).

[1] The maximum allowable rate of interest on consumer loans of $25,000 or less for a 31-day loan is the greater of sixteen percent (16%), or six percent (6%) above the latest published noncompetitive rate for U.S. Treasury bills with a six-month maturity. N.C. Gen. Stat. § 24-1.1.

ARGUMENT

I. BMO's Exhibit "A" Is Inadmissible Hearsay.

The sole support for BMO' Motion to Compel Arbitration is Exhibit "A" that BMO claims to be the "Loan Agreement" between Plaintiff and Great Plains. The Loan Agreement does not bear Plaintiff's signature and BMO fails to offer any explanation as to how it came into possession of the Loan Agreement or whether it is authentic. BMO provides no declaration under Fed. R. Evid. 803(6) or certification under Fed. R. Evid. 902(11) to support the admission into evidence of the Loan Agreement. The Loan Agreement is therefore inadmissible hearsay and may not be considered in support of BMO' motion.[2]

II. The Broadness of the Arbitration Clause and the Liberal Scope Of The FAA Have No Applicability To A Non-Signatory.

BMO spends a considerable portion of its brief reciting the broad arbitration provision in the Loan Agreement and the liberal arbitration policy of the FAA. (*See* Doc. 36, pp. 8-10, 12-15). BMO even invokes *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) to drive home its point about the breadth of the FAA. But the scope of the arbitration provision and the FAA have no applicability to BMO until it can *first* establish it has the right to enforce the agreement as a non-party under traditional principles of state law.[3]

---

[2] Plaintiff is asserting its evidentiary objections in its memorandum opposing the motion to dismiss rather than filing a motion to strike.

[3] The "[t]raditional principles of state law" determine whether a "contract [may] be enforced by or against nonparties to the contract." *Arthur Andersen LLP v. Carlisle*,

It is black-letter law that the liberal federal policy regarding the scope of arbitrable issues does not apply where, as here, the question is whether a non-signatory to the agreement is even *covered* by the arbitration provision. *See, e.g., Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) ("While federal policy broadly favors arbitration, the initial inquiry is whether the parties agreed to arbitrate their dispute.") (citing *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985)); *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013) (where the question is "not whether a particular issue is arbitrable, but whether a particular *party* is bound by the arbitration agreement . . . the liberal federal policy regarding the scope of arbitrable issues is inapposite.") (quotations omitted and emphasis in original). Congress did not intend for the FAA to force parties who had not agreed to arbitrate into a non-judicial forum, and therefore, federal courts must first decide whether the parties entered into an agreement to arbitrate their disputes. *See, e.g., Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989) ("we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so"). Because BMO cannot enforce the Loan Agreement under traditional principles of state law, the scope of the FAA and arbitration provision have no bearing on non-signatory BMO.

---

556 U.S. 624, 631 (2009). Accordingly, the liberal federal policy regarding the scope of arbitrable issues has no applicability to BMO until it establishes it has the right to enforce the Loan Agreement as a non-signatory under state law.

III. Because The Loan Agreement Is Illegal And BMO Is A Non-Signatory, This Court Should Not Enforce The Arbitration Clause Against Plaintiff.

The Agreement that BMO seeks to enforce—with its disclosed interest rate of 437.24% (Doc. 36-1, p. 2)—is indisputably illegal under the law of North Carolina.[4] Even assuming that BMO had a credible argument for compelling arbitration based on a contract it did not sign, which it does not, BMO's motion fails because the arbitration clause is contained in an illegal contract, which this Court may not enforce. As a general rule, a federal court cannot enforce an otherwise valid contract that is "made in derogation of statutes designed to protect the public." *Smithy Braedon Co. v. Hadid*, 825 F.2d 787, 790 (4th Cir.1987) (citing 6A A. Corbin, Corbin on Contracts § 1512, at 711 (1962)). The North Carolina General Assembly has been steadfast that: "It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws." N.C. Gen. Stat. § 24-2.1(g). Moreover, "[i]n case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, ***nor will they enforce any alleged right directly springing from such contract*** . . . ." *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899) (emphasis added).

[4] Payday lending violates North Carolina's usury statutes, N.C. Gen. Stat. § 24–1, *et seq.*, the North Carolina Consumer Finance Act, N.C. Gen. Stat. § 53–164, *et seq.*, and the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75–1.1, *et seq.*, among others. *See, e.g.*, *Goleta Nat. Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 713 (E.D.N.C. 2002).

It is true that subsequent to the seminal decision of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), there have been many reported decisions in which courts have compelled arbitration of claims *as between signatories* where the underlying contract was illegal. *See*, *e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator). But the same cannot be said of allowing a *non-signatory* to enforce an arbitration agreement contained in an illegal contract. Here, BMO did not sign the Loan Agreement, and instead seeks the assistance of this Court to strip Plaintiff of his right to adjudicate his claims by imposing arbitration. As such, an entirely different analysis applies: "[b]ecause arbitration is a matter of contract, exceptional circumstances must apply before a court will allow a non[-]contracting party to impose a contractual agreement to arbitrate." *Denney v. Jenkens & Gilchrist*, 412 F. Supp. 2d 293, 297 (S.D.N.Y. 2005).[5]

[5] BMO's linkage of the ACH authorization with the agreement to arbitrate (Doc. 36, p. 18) creates issues of fact which this court must resolve in order to determine whether the arbitration agreement is enforceable. The inclusion of an ACH authorization directly within the Loan Agreement strongly suggests that Great Plains is actually conditioning loans on consumers preauthorizing debits from their accounts via ACH notwithstanding language to the contrary in the Loan Agreement. Conditioning a loan on a preauthorized electronic fund transfer such as an ACH debit is a violation of the Electronic Funds Transfer Act (EFTA), including 15 U.S.C. § 1693k and Regulation E promulgated by the Board of Governors of the Federal Reserve System. Section 1693k(1) states in pertinent part: "No person may . . . condition the extension of credit to a consumer on such consumer's repayment by means of preauthorized electronic fund transfers. . .". By connecting the potentially illegal ACH authorization with the arbitration provision, BMO concedes that the authorization bears "some substantial relationship" to "the arbitration clause in particular." *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 667 (2d Cir. 1997).

As a non-signatory to the Loan Agreement, BMO can only compel arbitration with the assistance of the Court. In so doing, BMO is asking the Court to enforce illegal contracts and in particular, "an alleged right directly springing from such contract[s]" *McMullen*, 174 U.S. at 654, and the express public policy of North Carolina. This Court may not lend its assistance to BMO' efforts.

IV. BMO May Not Employ Equitable Estoppel To Compel Arbitration.

As a preliminary issue, BMO cannot proceed under an equitable estoppel theory because it has not met its burden to show that equitable estoppel is available under the law governing the Loan Agreements. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009) (holding a non-signatory to an arbitration agreement can only compel parties to arbitrate under the FAA when "the relevant state contract law allows him to enforce the agreement."). BMO does not even attempt to argue that the law governing the Loan Agreement—the law of the Otoe-Missouria Tribe of Oklahoma (Doc. 36-1, pp. 2, 6) (or any other arguably applicable law)—permits it to invoke equitable estoppel as an exception to the general rule that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 582 (1960). For purposes of this opposition, Plaintiff takes no position on the applicability of tribal law other than to note that BMO has not even attempted to meet its burden under *Arthur Andersen* to show the law governing the Loan Agreement permits it to invoke equitable estoppel. Accordingly, the inquiry ends there.

A. Plaintiff's Claims are Not Intertwined with the Contracts.

Even if this Court considers the issue under precedent of this Circuit, however, the doctrine of equitable estoppel only allows a non-signatory to compel arbitration in two circumstances: (1) when the signatory to a written agreement containing an arbitration clause must "'rely on the terms of the written agreement in asserting [its] claims'" against the nonsignatory; and (2) "'when the signatory [to the contract containing the arbitration clause] raises allegations of ... substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.'" *Brantley v. Republic Mortgage Ins. Co.*, 424 F.3d 392, 396 (4th Cir. 2005) (citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999). Plaintiff's claims implicate neither circumstance.

First, Plaintiff Dillon's allegations are independent of the Loan Agreement, and in no way seek to enforce any obligation contained in the Loan Agreement. In *Brantley*, the plaintiff homeowners financed the cost of their new home through a mortgage lender. Their mortgage lending agreement contained an arbitration clause and required plaintiffs to obtain private mortgage insurance. *Id*. at 394. Plaintiffs ultimately sued the insurance company for violations of the Fair Credit Reporting Act ("FCRA") and the defendant attempted to compel arbitration as a non-signatory, arguing that plaintiffs' claims derived from the underlying mortgage loan agreement and were thus "intertwined." The Fourth Circuit disagreed:

> Although the mortgage insurance relates to the mortgage debt, the premiums of the mortgage insurance are separate and wholly independent

> from the mortgage agreement. The district court correctly found that the mere existence of a loan transaction requiring plaintiffs to obtain mortgage insurance cannot be the basis for finding their federal statutory claims, which are wholly unrelated to the underlying mortgage agreement, to be intertwined with that contract.

424 F.3d at 396.

Similarly, in *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n,* 384 F.3d 157 (4th Cir. 2004), a case about home construction defects, the court held that even where a plaintiff "could have asserted a claim against [a signatory] for breaching the general contract, that does not mean the [plaintiff] cannot bring a case based on extra-contractual duties that South Carolina law imposes on a [non-signatory]." *Id*. at 163.

The Fourth Circuit's decision in *American Bankers Insurance Group., Inc. v. Long*, 453 F.3d 623, 626 (4th Cir. 2006), cited by BMO, confirms this analysis. In that case, plaintiffs purchased a promissory note from a company called TLP that turned out to be worthless, in part because non-signatory defendant ABIG designed and structured the note to benefit it. *Id*. The court ordered that equitable estoppel is applied where "'in substance [the signatory's underlying] complaint [is] based on the [nonsignatory's] alleged *breach* of the obligations and duties assigned to it in the agreement[.]'" *Id*. at 628 (emphasis added) (citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir.1993)). In that case, Plaintiffs' causes of action all centered on the *breach* of, or interference with, promises in the note. *Id*. at 625-26. That is not the case here. *See also DP Solutions, Inc. v. Help Desk Now, Inc.*, 1:08 CV 104, 2008 WL 4543785 at *4

(M.D.N.C. Oct. 9, 2008) (refusing to compel arbitration where plaintiffs' claims did not "rely on" or "arise from" the contract).

BMO cities to *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 636 (4th Cir. 2002) to support its argument that Plaintiff's claims "relate directly to" the Loan Agreement here. (Doc. 36, at 17). But the court in *Snowden* simply compelled arbitration of claims *as between signatories* even where the underlying contract was illegal. First, as discussed above at Section III, that rule does not even apply to non-signatories. Second, *Snowden* says nothing at all about equitable estoppel. BMO's reliance on *Clerk v. First Bank of Del.*, 735 F.Supp.2d 170 (E.D. Penn. 2010), is also misplaced. That case involved claims against the payday lender by the borrower–both of whom were signatories to the agreement containing the arbitration provision. *Id.* at 173. It has no application here.

Here, Plaintiff does not attempt to hold BMO to the terms of the Loan Agreement, and he does not allege that BMO breached the Loan Agreement. His claims do not rely on the terms of the agreement and there are no benefits of the contract of which Plaintiff would like to avail himself. Likewise, there are no duties under the contract to which Plaintiff would like to hold BMO—it cannot because BMO has no duties *under the contract*. As such, Plaintiff does not "rely on" the contract to assert his claims, and seeks no "direct benefit" from it. Therefore, non-signatory BMO's rationale for compelling arbitration via equitable estoppel cannot satisfy the purpose of the doctrine for which it was created: "to prevent one party from *holding another to the terms of an agreement*

while simultaneously avoiding the same agreement's arbitration clause." *R.J. Griffin*, 384 F.3d at 165.

Second, Dillon's allegations of conspiracy do not, on their own, give rise to the "interdependent conduct" needed to justify equitable estoppel. That is because, as above, his claims and allegations do not depend on, or arise from, the contract. In similar circumstances, the court in *Brantley* denied arbitration, finding there was no "interdependent conduct," since plaintiffs' "statutory claims" were "wholly unrelated" to the contract. *Brantley*, 424 F.3d at 396.

BMO cites *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 373-74 (4th Cir. 2012), but that case supports Plaintiff's position here. The *Aggarao* court held that "at a minimum, there must be allegations of 'coordinated behavior between a signatory and a nonsignatory' defendant, *and that the claims against both the signatory and nonsignatory defendants must be 'based on the same facts,' be 'inherently inseparable,' and 'fall within the scope of the arbitration clause*.'" *Id*. at 374 (citing *MS Dealer*, 177 F.3d at 947–48) (internal quotation marks omitted and emphasis added). First, as discussed *supra*, Plaintiff's claims here do not even fall within the scope of the arbitration provisions. Second, the court in *Aggarao* found "interdependent" conduct only because plaintiff alleged both signatory and non-signatories were his "employer," and where he "essentially alleged the *same* claims against [both signatory and non-signatory]… employing the *same* allegations as the bases for liability[.]" *Id*. Here, the Illegal Payday Lenders are not defendants, and Plaintiff's allegations against BMO do not form "the

bases for liability" against the Illegal Payday Lenders. But even if they were, Plaintiff's allegations against BMO are in its unique role as an ODFI, not as a lender, and such claims do not form the same "the bases for liability" against the Illegal Payday Lenders.

In *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 528 (5th Cir. 2000), also cited by BMO, the court employed the Eleventh Circuit's "intertwinedness" test to apply equitable estoppel where a plaintiff's claims "rel[ied] on the terms of the agreement in asserting their claims." *Id.* (citations omitted). Indeed, the claims in *Grigson* turned on an interpretation of a particular contract provision: "that the *good faith judgment* of [defendant]… shall be binding and conclusive upon [plaintiffs]." *Id.*, 529. As above, Plaintiff's claims do not rely on a contract breach, or even on an interpretation of any contract provision. As such, even applying the Eleventh Circuit test used by the *Grigson* court, there is no "intertwinedness" and thus no basis to apply equitable estoppel.

Moreover, cases from other circuits agree that concerted misconduct alone is not enough to invoke equitable estoppel. For example, the Eleventh Circuit has specifically rejected the argument that the allegation of a RICO conspiracy between a non-signatory defendant and a signatory non-defendant supports a finding of equitable estoppel:

> A plaintiff's allegations of collusive behavior between the signatory and nonsignatory parties to the contract do not automatically compel a court to order arbitration of all of the plaintiff's claims against the nonsignatory defendant; rather, such allegations support an application of estoppel only when they "establish[ ] that [the] claims against [the non-signatory are] intimately founded in and intertwined with the obligations imposed by the [contract containing the arbitration clause]."

In re Humana Inc. Managed Care Litig., 285 F.3d 971, 975 (citation omitted). *See also, e.g., Murphy v. DirectTV*, 724 F.3d at 1231-32 ("Mere allegations of collusion are insufficient to trigger equitable estoppel"; the allegations "must also establish that the plaintiff's claims against the non[-]signatory are intimately founded in and intertwined with the ***obligations imposed by the contract*** containing the arbitration clause") (emphasis added); *In re Wholesale Grocery Products Antitrust Litig.*, 707 F.3d 917, 923 (8th Cir. 2013) (equitable estoppel only where plaintiff's claims "arose directly from violations of the terms of a contract containing an arbitration clause."). BMO cannot estop Plaintiff from litigating his claims before this Court.

B. BMO' Unclean Hands Bars it From Utilizing Equitable Doctrines to Enforce Clauses Contained in the Loan Agreement.

Finally, even if BMO could satisfy each prong of the equitable estoppel test discussed above and show the law governing the agreement permits it to invoke equitable estoppel, it is a fundamental principle of law that "he who seeks equity must do equity" and he must "come into a court of equity with clean hands." *DO Haynes & Co. v. Druggists' Circular*, 32 F.2d 215, 217 (2d Cir. 1929). "The 'unclean hands' doctrine 'closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.'" *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 329–30 (1994). A court may invoke the doctrine of unclean hands "when there is a close nexus between a party's unethical conduct and the transactions on which that party seeks

relief." *In re Uwimana*, 274 F.3d 806, 810 (4th Cir. 2001) *abrogated by Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013).

Here, the inequitable conduct is clear from the face of the Loan Agreement. BMO collected on debts that were illegal under the law of North Carolina and 12 other states and then sought to rely on the same illegal contract in order to compel arbitration. At the very least, BMO's inequitable, bad faith actions in both collecting on illegal debts and then attempting to enforce rights springing from an illegal contract "has immediate and necessary relation to the equity that [BMO] seeks in respect of the matter in litigation." *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933). The doors of equity are therefore closed to BMO's use of equitable doctrines such as equitable estoppel to enforce clauses contained in the agreements for those very same illegal loans. *See Hawkins v. KPMG LLP*, 423 F. Supp. 2d 1038, 1052 (N.D. Cal. 2006) (doctrine of unclean hands precludes court from applying equitable estoppel to compel arbitration of claims against non-signatory based on fraudulent agreement).[6]

V. BMO Cannot Enforce the Arbitration Provision as a Third-Party Beneficiary.

Even if this Court were willing to enforce illegal agreements, BMO cannot show that the illegal payday lenders and Plaintiff intended BMO to be a third-party beneficiary of the Loan Agreement.

[6] BMO also argues that it may enforce the class action waivers in the loan agreement by equitable estoppel. That argument fails for all the same reasons its argument for arbitration by equitable estoppel fails.

BMO has not come close to demonstrating that the language in the Loan Agreement expresses the intent of Great Plains *and* Plaintiff to create contractual rights for BMO, as is its burden. In North Carolina, for a third-party beneficiary to have a right of action under a contract, it bears the burden of showing "(1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the [third party]." *Pearson v. Gardere Wynne Sewell LLP*, 814 F. Supp. 592, 601 (M.D.N.C. 2011) (citing *Holshouser v. Shaner Hotel Grp. Props., One Ltd. P'shp.*, 134 N.C. App. 391, 400, 518 S.E.2d 17, 25 (1999)). With regard to the third element, "[t]he most significant factor as to the rights of a third-party beneficiary is that *both* contracting parties intended that a third party should receive a benefit that might be enforced in the courts. It is not enough that only one of the parties to the contract and the third party intended that the third party should be a beneficiary." *Blis Day Spa, LLC v. Hartford Ins. Grp.*, 427 F. Supp. 2d 621, 637 (W.D.N.C. 2006) (citing *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 651, 407 S.E.2d 178, 181 (1991)).

The intention of both parties is determined by looking at the "circumstances surrounding the transaction as well as the actual language of the contract, which must be construed strictly against the party seeking enforcement." *Blis Day Spa, LLC*, 427 F. Supp. 2d at 637 (quoting *Chem. Realty Corp. v. Home Fed. Sav. & Loan*, 84 N.C. App. 27, 34, 351 S.E.2d 786 (1987)). *See also In re Stonebridge of Mint Hill, LLC*, 10-31578, 2010 WL 3943764 (Bankr. W.D.N.C. Oct. 7, 2010) (recognizing that to show intent, "the

question is whether the third-party beneficiary is named or otherwise identified in the [c]ontract."). The Loan Agreement does not indicate that Plaintiff intended the arbitration provisions to apply to BMO or even the general class of ODFIs. It was not an objectively reasonable expectation of Plaintiff that the provisions would benefit BMO or ODFIs.

Nor does the existence of a broad arbitration provision create a direct benefit to BMO which entitles it to enforce the Loan Agreement. The Fourth Circuit addressed this exact issue in *Brantley*, wherein the plaintiff mortgagors entered into an extraordinarily broad arbitration agreement with their mortgage lender, which provided:

> Any claim, dispute, or controversy (whether in contract, tort, or otherwise) arising from or related to the loan evidenced by the Note shall be resolved . . . by binding arbitration . . . Such claims which shall be arbitrated include, but are not limited to, all: statutory and regulatory claims; any claim, dispute or controversy that may arise out of or is based on the relationships which result from the Borrower's application to the broker or lender for the loan, the closing of the loan, or the servicing of the loan; or any dispute or controversy over the applicability or enforceability of this arbitration agreement or the entire agreement between Borrower and Broker or between Borrower and Lender (collectively "claim").

424 F.3d at 394-95.

The agreement further provided that the agreement would apply "no matter by whom or against whom a claim is made." *Id*. at 394-395.[7]

The mortgagors then sued their mortgage insurer, Republic, alleging violations of the FCRA. Arguing that it was a third-party beneficiary of the arbitration agreement between the mortgagors and the lender, Republic moved to compel arbitration and dismiss the action. The district court denied the motion after finding Republic was not a

[7] The language from *Brantley* is arguably *broader* than the arbitration clause here.

third-party beneficiary. The Fourth Circuit affirmed following the district court's observation that "the underlying contract makes no reference to Republic, nor does it mention the mortgage insurance transaction . . . . Republic is not entitled to third-party beneficiary status because 'the language of the [contract] does not clearly indicate that, at the time of contracting, the parties intended to provide [Republic] with a direct benefit.'" *Id*. at 396-97 (quotations omitted).

Here, as in *Brantley*, BMO is not a third-party beneficiary to the Loan Agreement because "the language of the contract[s] does not clearly indicate that, at the time of contracting, the parties intended to provide [BMO] with a direct benefit." Indeed, BMO has no rights under the Loan Agreement. *See Pearson*, 814 F. Supp. at 601 ("It is not enough that the contract, in fact, benefits the [third party], if, when the contract was made, the contracting parties did not intend it to benefit the [third party] directly."). Contrary to BMO' assertion, the arbitration provisions nowhere make mention of, or even implicitly incorporate, any reference to the ACH debit transactions, thus negating BMO's attempt to connect the ACH component of the Loan Agreement to the arbitration provisions.

Compare this situation to the facts in *Stewart v. Legal Helpers Debt Resolution, LLC*, 2:11CV26, 2012 WL 1969624 (W.D.N.C. June 1, 2012), where the court found a defendant's status as a third-party beneficiary entitled it to compel arbitration where the parties' contractual intent was explicit—indeed, where, the a non-signatory was expressly provided benefits in the contract at issue: the contract "obligates the Plaintiff to pay [the

non-signatory] a percentage of the total scheduled debt…This contractual provision clearly demonstrates the signatories' intent to provide a benefit to [the non-signatory] under the Agreement." *Id*. at *4. As noted above, the contact at issue nowhere even mentions BMO or ODFIs in general—much less provide those entities with any benefits.

BMO also argues unpersuasively that it is a third-party beneficiary because "Although BMO Harris in fact is not the lender's agent, Dillon is bound by his allegation that 'BMO Harris . . . work[ed] at the request of [his lender]." (Doc. 36, p. 22, citing Doc. 1 ¶ 8). But the allegations in the Complaint do the exact opposite of alleging that BMO was an agent of the illegal payday lenders. The entire thrust of Plaintiff's Complaint is that BMO was not permitted to act as if it were an agent of illegal payday lenders, blindly complying with payment processing requests. To the contrary, NACHA operating rules made BMO a "gatekeeper" to the ACH Network and required BMO to independently evaluate and monitor the activities of Great Plains and others it allowed to access the network. (Doc 1, ¶¶ 46-54, 116). BMO is no more an agent of Great Plains than a ticket-taker is an agent of the baseball fan trying to gain entry to the ballpark.

The controlling principle in the determination of an actual agency relationship is the extent of "control and supervision" of the principal over the agent's day-to-day operations. *Thomas v. Freeway Foods, Inc.*, 406 F. Supp. 2d 610, 617 (M.D.N.C. 2005) (quoting *Hayman v. Ramada Inn, Inc.*, 86 N.C.App. 274, 357 S.E.2d 394, 397 (1987)).

Here, BMO should have controlled and supervised the actions of the Illegal Payday Lenders on the ACH Network, rather than the reverse. Indeed, BMO had duties

to the ACH Network that preempted its contractual duties to Great Plains. It was required to refuse Great Plains processing requests to the extent they violated state law, the ACH Rules or other regulatory requirements. (*See* Doc. 1, ¶¶ 46-54). The duties BMO had under NACHA Rules—to act as an independent monitor for potentially unlawful or inappropriate activity—eliminates any possibility that Great Plains controls and supervises the activities of BMO and is not compatible with an agency relationship on behalf of Great Plains.

CONCLUSION

For the foregoing reasons, BMO' arguments for compelling arbitration should be rejected.

Dated: January 30, 2014

Respectfully submitted,

/s/ F. Hill Allen
F. Hill Allen
North Carolina State Bar No. 18884
E-mail: hallen@tharringtonsmith.com
THARRINGTON SMITH, L.L.P.
P.O. Box 1151
Raleigh, NC 27602-1151
Telephone: 919-821-4711
Facsimile: 919-829-1583

STUEVE SIEGEL HANSON LLP
Norman E. Siegel
Steve Six
J. Austin Moore
460 Nichols Road, Suite 200
Kansas City, MO 64112
Tel: (816) 714-7100
Fax: (816) 714-7101
siegel@stuevesiegel.com
six@stuevesiegel.com
moore@stuevesiegel.com

CHITWOOD HARLEY HARNES LLP
Darren T. Kaplan
1350 Broadway, Suite 908
New York, NY 10018
Tel: (917) 595-3600
Fax: (404) 876-4476
dkaplan@chitwoodlaw.com

KOPELOWITZ OSTROW P.A.
Jeffrey M. Ostrow
200 S.W. 1st Avenue, 12th Floor
Fort Lauderdale, Florida 33301
Tel: (954) 525-4100
Fax: (954) 525-4300
ostrow@KOlawyers.com

TYCKO & ZAVAREEI LLP
Hassan A. Zavareei
2000 L Street, N.W.
Suite 808
Washington, D.C. 20036
Tel: (202) 973-0900
Fax: (202) 973-0950
hzavareei@tzlegal.com

Counsel for Plaintiff and the Class

Certificate of service

I hereby certify that on January 30, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

/s/ F. Hill Allen
Counsel for Plaintiff and the Class