CHOCTAW TRIBAL SUPREME COURT
OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

JULIA KETCHER, FRANK KETCHER and BOBBY SAM — **APPELLANTS**

vs. — **SC 2014-01**

UNION FINANCE MS, LLC — **APPELLEE**

Per Curiam

OPINION

These consolidated cases came on to be heard in the Choctaw Tribal Supreme Court on November 20, 2014. Julia and Frank Ketcher ("Ketcher") and Bobby Sam ("Sam") signed arbitration agreements with Union Finance MC, LLC ("Union Finance") providing that all claims and disputes involving more than $5,000.00 would be submitted to an arbitrator, regardless of who the party was that brought the action. The trial court found the arbitration agreements valid and granted Union Finance's motions to compel arbitration. We affirm.

FACTS

On April 9, 2012, Appellant Ketcher entered into contract with Union Finance for a loan of $300.00. To obtain the loan, Ketcher signed three separate documents: a "Disclosure Statement, Promissory Note and Security Agreement," an "Important Notice to Borrowers," and an "Arbitration Agreement." On June 28, 2012, Union Finance filed suit against Ketcher in tribal court to collect an overdue balance on Ketcher's account that was under $2,000.00. On November 14, 2012, Ketcher filed a counterclaim against Union Finance charging fraud/pattern and practice of fraudulent conduct; misrepresentation; breach of covenant of good faith and fair dealing; intentional, gross, and/or negligent infliction of emotional distress; and violation of statute -- all arising out of or related to the Contract.

Ketcher claimed damages over $5,000.00 and requested attorney's fees.

On February 3, 2012, Appellant Sam entered into contract with Union Finance for a loan of $800.00. To obtain the loan, Sam signed three separate documents: a "Disclosure Statement, Promissory Note and Security Agreement," an "Important Notice to Borrowers," and an "Arbitration Agreement." On July 17, 2012, Union Finance filed suit against Sam in tribal court to collect an overdue balance, an amount under $3,000.00, on Sam's account. On November 14, 2012, Sam filed a counterclaim against Union Finance charging fraud/pattern and practice of fraudulent conduct; misrepresentation; breach of covenant of good faith and fair dealing; intentional, gross, and/or negligent infliction of emotional distress; and violation of statute -- all arising out of or related to the Contract. Sam claimed damages over $5,000.00 and requested attorney's fees.

On or about December 5, 2012, Union Finance asserted its rights under the arbitration agreements and filed separate motions against Ketcher and Sam to compel arbitration and stay proceedings in the trial court. On December 3, 2012, Defendants Ketcher and Sam petitioned the trial court to consolidate their cases. On November 27, 2013, the trial court granted Union Finance's motion to compel arbitration. On that same day, Appellants filed a joint notice of appeal with this Court.

This matter was heard before the Court on November 20, 2014.

DISCUSSION

Appellants Julia and Frank Ketcher and Bobby Sam (hereinafter "Appellants") appeal the trial court's order granting Union Finance's motion to compel arbitration and stay proceedings in this court. The issues on appeal are (1) whether the arbitration agreement itself is valid under tribal customary law of *ilitibapesa,* and, if valid, (2) whether the arbitration agreement is procedurally and/or substantively unconscionable.

The Court is governed by laws in the Mississippi Band of Choctaw Indians Tribal Code (CTC). Under CTC §1-1-4, the Court shall:

> In all civil actions . . . apply applicable laws of the United States and authorized regulations of the Secretary of the Interior, and ordinances, customs, and usages of the Tribe. Where doubt arises as to the customs and usages of the Tribe, the court may request the advice of persons generally recognized in the community as being familiar with such customs and usages. Any matter not covered by applicable federal law and regulations or by ordinances, customs and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi.

Before beginning our analysis under the Federal Arbitration Act (FAA) and the laws of the State of Mississippi, we must first address Appellants' claim that under the Choctaw customary law of *ilitibapesa,* the arbitration agreement is invalid. Appellants seek to apply the Choctaw customary law of *ilitibapesa* to show there was no agreement to arbitrate due to their lack of clear understanding of the arbitration agreement itself. In *Cotton v. Beneficial Corporation, et al.,* No. SC-2005-1 (Supreme Court of the Mississippi Band of Choctaw Indians), (Feb. 17, 2010), this Court found the arbitration agreement invalid because *ilitibapesa* was missing between the parties. *Ilitibapesa* requires that the contracting parties have a "meeting of the minds" with a preference for face-to-face meetings. *Id.* at 3. In *Cotton*, a corporation doing business within the territorial jurisdiction of the Mississippi Band of Choctaw Indians entered into a contract with Ms. Cotton, who was a non-English speaking Choctaw. She was aided by her granddaughter translating from English to Choctaw. The contract was entered into at the home of Ms. Cotton. The corporation then sought to change the terms of the original contract by mailing an arbitration agreement (written in English) that included language that it would be binding on the parties, if not rejected within 30 days. Cotton maintained that she did not receive the arbitration agreement and therefore could not have accepted or rejected the terms of the agreement. The Court found a lack of *ilitibapesa* between the parties because under Choctaw common law, Cotton had developed the reasonable expectation of continued face-to-face dealings for any changes to the original contract. *Id.* at 4.

In this present case, Appellants claim there was no *ilitibapesa* between the parties to enter into the arbitration agreement because "the term 'arbitration' was never mentioned to me at the time I took out my loan with Union Finance. It was

never explained to me in what it means . . . I was simply told to sign in different places to receive the loan." (F. Ketcher Aff., J. Ketcher Aff,., and Sam Aff.). However, the arbitration agreements purportedly signed by the Appellants are both two-page documents entitled "**ARBITRATION AGREEMENT.**" The first sentence of the Arbitration Agreement states: "**READ THIS ARBITRATION AGREEMENT CAREFULLY, IT LIMITS YOUR RIGHTS TO USE THE COURT SYSTEM TO ADDRESS CLAIMS AND DISPUTES.**" The paragraph immediately following the first sentence reads:

> In consideration of the mutual promises made in this agreement, you and we agree that either you or we have an absolute right to demand and require that any dispute involving more then $5,000.00, which arises from or relates in any way to the above-referenced loan transaction be submitted to binding arbitration in accordance with this agreement. If either you or we file a lawsuit, counterclaim, or other action in court involving more than $5,000.00, the other party has the absolute right to demand and require arbitration following the filing of such action and to have the lawsuit stayed or dismissed.

The next paragraph defines arbitration and makes applicable the FAA: "**ARBITRATION:** Arbitration is a method of resolving disputes between parties without going to court. [....] The parties agree [. . .] that the Federal Arbitration Act applies [. . . .] The parties to this agreement understand that, under this agreement, they lose their right to a jury trial [. . .]."

Appellants do not dispute that they signed the Arbitration Agreements at the same time as they signed the original loan documents. Appellants do not allege, nor does the record show, any extenuating circumstances that would have prevented Appellants from reading or understanding the Agreements and their terms. There is nothing in the record alleging that Union Finance failed to answer questions about the meaning or practicable effect of the arbitration agreement. Further, and a material departure from the fact situation in *Cotton*, the contract and the associated accompanying Arbitration Agreement were entered into by the parties in an office of Union Finance, which is located in Union, Mississippi, and outside of the territorial jurisdiction of the MBCI. Though

not necessarily always dispositive of this issue, the facts in *Cotton* are therefore distinguishable from the facts in this case. Appellants' reliance on the Choctaw customary law of *Ilitibapesa* is misplaced.

Appellants also seek to apply the customary laws referenced in *Green Tree Servicing, LLC v. Duncan,* No. SC-CV-46-05 (Supreme Court of the Navajo Nation) (August 18, 2008), by which the Navajo Supreme Court found an arbitration agreement entered into as part of the financing for a mobile home invalid. The Navajo Court in that case placed great emphasis on the importance in Navajo thought and culture of a home.

A review of the record fails to identify the specific Choctaw customs consistent with the Navajo customs relied upon in *Green Tree Servicing, LLC.* That review reveals only the affidavit of Harold Comby who states "[w]hile each tribe celebrates their unique differences, their values and customs of traditional life are basically the same. Specifically, the Navajo terms and customs expressed in *Green Tree,* while we may call them something different in Choctaw Culture, are consistent with the same terms and customs the Choctaw Culture embraces." (Comby Aff. ¶ 4). While the Court does not dispute the words of Mr. Comby, the Court is unable to ascertain from the record the specific Choctaw customary law(s) and their usage and/or meanings as referenced by Mr. Comby. Further, the facts of the case in *Green Tree Servicing, LLC,* are significantly different from the case at hand. In regard to *Green Tree Servicing, LLC.*, the Navajo Supreme Court summed up its analysis – "this case ultimately concerns the repossession of a mobile home, and the ability to keep the home may depend on the availability of a home owner's counterclaims against a finance company seeking to take the home." *Green Tree Servicing LLC*, at p. 12. The case before this Court does not involve an arbitration agreement associated with the financing of a home or other property central to the identity of the Choctaw. This case involves a strictly monetary loan. The Court declines to apply the customary laws in *Green Tree Servicing, LLC.*

Having found no violation of the tribal customary law of *ilitibapesa,* this Court will review *de novo* the lower court's granting of the motion to compel

arbitration. The parties agree that the Federal Arbitration Act (FAA) applies to this case and that Mississippi state law governs.

Mississippi has adopted the strong federal policy of favoring arbitration, which resolves "any doubts concerning the scope of arbitrable issues ... in favor of arbitration." *Caplin Enterprises Inc. v. Arrington,* No. 2011-CT-01332-SCT 1,6 (Miss. 2014) (citations omitted). "This strong federal policy favoring arbitration [also] places upon the party opposing arbitration the burden of establishing any alleged defense to the enforcement of the arbitration provision." *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 175 (Miss. 2006) (citing *American Heritage Life Ins. Co. v. Lang,* 321 F.3d 533, 539 (5th Cir. 2003).

To determine whether an arbitration agreement should be enforced under the FAA, we apply a two-pronged test: (1) "whether the parties have agreed to arbitrate the dispute" and (2) "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims." *Arrington,* at 7 (quoting *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney,* 950 S.2d 170,173 (Miss. 2007)(citation omitted).

To determine whether there is a valid arbitration agreement under the first prong, the Court must find that the parties agreed to arbitrate the dispute and that the parties' dispute is within the scope of the agreement. *Id., at* 7 (*Blakeney,* 950 S.2d at 173 (citation omitted). The evidence shows that that Appellants and Union Finance signed the arbitration agreements. The arbitration agreements specifically list the disputes covered: "**all** claims and disputes arising out of, in connection with, or relating to: Your loan from us today; any previous loan you obtained from us [. . . .] any claim or dispute based on the allegation of fraud or misrepresentation, including fraud in the inducement of this or any other agreement; and any claim or dispute based on federal or state statutes or regulations; and any claim or dispute based upon an alleged tort such as breach of fiduciary duty, breach of the duty of good faith and/or fair dealing, negligence, and any demand for punitive damages or attorney's fees." Appellants counter-claims are for fraud/pattern and practice of fraudulent conduct; misrepresentation; breach of covenant of good faith and fair dealing; intentional,

gross, and/or negligent infliction of emotional distress; and violation of statute and for attorney fees.

Appellants provide no arguments that their claims against Union Finance do not fall within the scope of the agreement. A review of Appellants' claims show that they arise out of or relate to the loan agreement. In fact, the agreement on its face specifically lists the majority of the claims made by the Appellants as being subject to the agreement. The Court finds a valid arbitration agreement between the parties and that the claims fall within the scope of the arbitration agreement.

Under the second prong, we must consider "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims." *Arrington,* at 8 (quoting *Blakeney*, 950 So.2d 170, 173 (Miss. 2007) (citations omitted). Under Mississippi contract law, the defenses available to invalidate an arbitration agreement include "fraud, duress, [and] unconscionability." *Id.*, at 9 (quoting *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713) (citations omitted). Appellants allege unconscionability in the arbitration agreement.

Unconscionability is defined as "an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." *MS Credit Center, Inc. v. Horton,* 926 So.2d 167, 177 (Miss., 2006) (quoting *Taylor*, 826 S.2d at 715 (citations omitted). There are two types of unconscionability of contract: procedural and substantive. *Arrington,* at 9 (citing *Taylor*, 826 So.2d at 713-15 (citations omitted). Appellants assert that the arbitration agreement is both procedurally and substantively unconscionable.

PROCEDURAL UNCONSCIONABILITY: An arbitration agreement can be found procedurally unconscionable by "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or lack of opportunity to study the contract and inquire about the contract terms." American General

Financial Services, Inc. v. Griffin, 327 F.Supp.2d 678, 685 (N.D. Miss. 2004) (citation omitted).

The Appellants allege that the arbitration agreement is procedurally unconscionable because they had a complete lack of knowledge of the terms and meaning of the arbitration agreement. Specifically, Appellants' proclaim that "[t]he term 'arbitration' was never mentioned to me at the time I took out my loan with Union Finance. It was never once explained to me in what it means. The figure of Five Thousand Dollars ($5,000.00) and how it related to arbitration was never discussed." (F. Ketcher Aff., J. Ketcher Aff,, and Sam Aff.).

As shown above in the review of the language included in the arbitration agreements, the arbitration agreements could not be any more clear in their language to educate the signatory about their meaning or their purpose. Under Mississippi law "parties to a contract have an inherent duty to read the terms of a contract prior to signing; that is, a party may neither neglect to become familiar with the terms and conditions and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read and explain it." *Horton*, 926 So.2d at 177 (citing *Titan Indem. Co. v. City of Brandon, Miss.*, 27 F.Supp. 2d 693, 697 (S.D. Miss. 1997)). Appellants' claims of lack of knowledge of their agreement to arbitrate are further weakened by their signatures on a separate document entitled "Important Notice to Borrowers" that was also signed at the same time as the original loan documents. Included in this notice to borrowers was the item number "9. ARBITRATION" which states: "My loan papers include an arbitration agreement [. . . .]I have been advised to read the arbitration provision carefully before signing the loan papers." In addition, immediately preceding Appellants' signatures was the sentence: "I acknowledge that the above information was explained to me by __/s/__ and that I was given the opportunity to ask questions." Therefore, Appellants claim of lack of knowledge about the terms of the arbitration agreement is without merit.

Appellants allege there was a complete lack of voluntariness because the contract was one of adhesion. A contract of adhesion "is drafted unilaterally by

the dominant party and then presented on a 'take-it-or leave-it' basis to the weaker party who has no real opportunity to bargain about its terms." *Taylor, 826 So.2d at* 716 (quoting *Bank of Indiana, Natn'l Ass'n v Holyfield,* 476 F.Supp. 104, 108 (S.D. Miss. 1979)(quoting Restatement 2d, Conflicts, §203, Comment b). However, "contracts in which one party has minimal bargaining power, also referred to as contracts of adhesion, are *not automatically void." Taylor, 826 So.2d,* at 716 (citiations omitted). A contract of adhesion is found "procedurally unconscionable only where the stronger party's terms are unnegotiable and 'the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all." *Id.*

There is no evidence in the record that Appellants inquired about the negotiability of the arbitration agreement or any of its specific terms. Appellants simply allege that "I was simply told to sign in different places to receive the loan." (F. Ketcher Aff.., J. Ketcher Aff,, and Sam Aff.). There is also nothing in the record alleging that Appellants were
unable or prevented from securing a different loan without an arbitration provision, or with more favorable terms. Therefore, Appellants have failed to establish a lack of voluntariness in signing the agreement.

Appellant makes no allegations about unconscionability due to inconspicuous print. A review of the agreement shows that the arbitration agreement is a two-page stand alone document with font size larger than the terms found in the "Disclosure statement, promissory note and security agreement." The title and first two lines of the arbitration agreement state in bold, caps: "**ABITRATION AGREEMENT**", "**READ THIS ARBIRATION AGREEMENT CAREFULLY. IT LIMITS YOUR RIGHTS TO USE THE COURT SYSTEM TO ADDRESS CLAIMS AND DISPUTES.**" All fourteen headings used in the document, including arbitration, disputes covered, no waiver, jury trial waived, and read the above arbitration agreement carefully, are all shown in bold caps. The remaining text of the document is consistent in size. We find no evidence of inconspicuous print.

Appellants make no allegations about the use of complex legalistic language. The language of the arbitration agreement is clear – the parties agreed to arbitrate any dispute over $5,000.00 which arises from, or relates to, the loan transaction. The agreement lists in bullet point the types of disputes covered, and specifically states that both parties "waive our right to a jury trial in all legal proceedings." The language of the arbitration agreement is not unconscionable due to complex or legalistic language.

Appellants allege the loans were made on "a take-it–or-leave–it–basis," thereby showing the unequal bargaining power of the parties. Appellants' affidavits all state that "the paperwork was already printed out on a form and I was simply told to sign in different places to receive the loan. It was my understanding had I not signed all the paperwork in the places I was told I would not have received the loan." (F. Ketcher Aff., J. Ketcher Aff,, and Sam Aff.) There is no evidence that Appellants tried to negotiate the terms of the agreement or to have it removed. In fact, an employee of Union Finance by Affidavit stated that if Appellants "would have refused to sign the Arbitration Agreement or suggested changes to the agreement, Union Finance, LLC would have considered their request and accepted the same upon approval of management." (Weaver Aff.¶ 1) Additionally, the record lacks any evidence of circumstances that prevented them from walking away from the loan. Therefore, we find there is insufficient evidence to find the disparity in bargaining power so great as to find the agreement unconscionable.

Appellants make no allegations or provide facts showing the lack of opportunity to study the contract and inquire about the contract terms. As a result, this Court finds no lack of opportunity to study the contract and inquire about the contract terms.

SUBSTANTIVE UNCONSCIONABILITY: Substantive unconscionability has been found in agreements that have been found to be "one-sided [and] one party is deprived of all the benefits of the agreement or left without remedy for [the other] party's non-performance or breach." *Horton,* 926 So.2d at 177 (quoting

Bank of Indiana, Nat'l Ass'n v. Holyfield, 476 F.Supp. 104, 110 (S.D. Miss. 1979) (citations omitted). "To determine whether a contract is substantively unconscionable, 'we look within the four corners of the agreement in order to discover any abuses relating to the specific terms which violate the expectations of, or cause gross disparity between the contracting parties." *Arrington at* 10 (citing *Covenant Health & Rehab of Picayune LP v. Estate of Moulds ex rel. Braddock,* 14 So. 3d 695, 699 (Miss. 2009) (citiations omitted)).

Appellants argue that the "No Waiver" language in paragraph 8[1] of the Arbitration Agreement is substantively unconscionable because it is one-sided and unfair as it allows Union Finance to bring a suit in court while retaining the right to opt out of the court's jurisdiction and move the case to arbitration if a counterclaim subject to the arbitration provision is filed. "[W]aiver of arbitration is not a favored finding, and there is a presumption against it." *Horton,* 926 So.2d at 179. Appellants cite no legal authority or facts that would suggest that this "No Waiver" provision is substantively unconscionable.

Appellants also argue that the arbitration provisions are substantively unconscionable because the $5,000.00 claim threshold is one-sided. As support for this argument, Appellants provide a review of Union Finance court filings in 2011 and 2012 that show only claims under $5,000.00. Appellants argue that this proves one-sidedness because only the Appellants' counterclaim would ever be subjected to the arbitration agreement. Mississippi law does not require both parties to be mutually bound to the same terms in an arbitration agreement. *Arrington,* at 10 (citing 21 *Williston on Contracts* §57:15 (4th ed. 2013) (citations omitted)). Nevertheless, in this case, the arbitration agreements bind both parties to the same $5,000.00 threshold and are both covered by the "No Waiver" provision in paragraph 8 of the Arbitration Agreement. In regard to the claims under $5,000.00 made by Union Finance in 2011 and 2012, this information alone does not prove a one-sided agreement. There is nothing in the record to show that Union Finance could not have claim(s) that would be subject to the

[1] "8) NO WAIVER: If either party files a lawsuit for any of the matters not covered by

agreement given the interest rate on loans and insurance fees. In fact, Union Finance states that it "currently has several customers with an outstanding balance exceeding $5,000.00." (Weaver Aff. §3). Therefore, Appellants claims that the arbitration agreements are substantively unconscionable are unfounded.

CONCLUSION

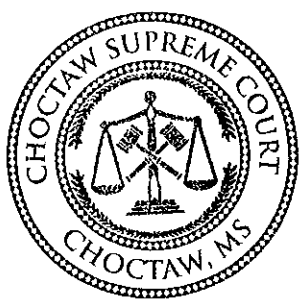
Our review yields insufficient evidence to find the Arbitration Agreements unconscionable. The Arbitration Agreement in question "merely submits the question of liability to a forum other than the courts." *Horton*, 926 So.2d at 179. On the basis of the analysis above, the trial court decision granting the motion to compel arbitration and stay the proceedings is upheld.

SO ORDERED THIS 2nd DAY OF DECEMBER 2015.

For the Court:

Brenda Toineeta Pipestem

Hon. Brenda Toineeta Pipestem
Associate Justice



CERTIFICATE OF SERVICE

I do hereby certify that I have this, the 2nd day of December, 2015 caused to be forwarded by the United States Mail, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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CHOCTAW SUPREME COURT
CHOCTAW, MS