IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

USCA Case No. 13-13822
United States District Court, Southern District of Florida
Case No.: 13-cv-60066-Cohn/Seltzer

ABRAHAM INETIANBOR,

Plaintiff/Appellee,

v.

CASHCALL, INC.,

Defendant/Appellant.

PRINCIPAL BRIEF OF APPELLANT CASHCALL, INC.

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USCA Case No. 13-13822

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Inetianbor v. CashCall, Inc.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE PURSUANT TO FRAP 26.1 AND 11TH CIR. R. 26.1-1

Pursuant to F.R.A.P. 26.1 and 11th Cir. R. 26.1-1, Appellant, CASHCALL, INC., by and through its undersigned counsel, hereby discloses the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock:

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2. Barofsky, Neil M. (Appellate Counsel for Defendant/Appellant)
3. Carver, Christopher (Trial and Appellate Counsel for Defendant/Appellant)
4. CashCall, Inc. (Defendant/Appellant)
5. Cheyenne River Sioux Tribe (Designated Venue for Arbitration)
6. Cohn, James I. (District Court Judge)
7. Fenske, Daniel T. (Appellate Counsel for Defendant/Appellant)

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Inetianbor v. CashCall, Inc.

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18. Seltzer, Barry S. (District Court Chief Magistrate Judge)

19. Shapiro, Andrew M. (Trial Counsel for Defendant/Appellant)

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22. Wallace, Mona Lisa (Trial Counsel for Plaintiff/Appellee)

USCA Case No. 13-13822

United States District Court, Southern District of Florida
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Inetianbor v. CashCall, Inc.

23. Warwick, Brian William (Trial Counsel for Plaintiff/Appellee)

24. Western Sky Financial, LLC (Lender for the Underlying Loan)

25. Williams, Cathy Anne (Trial Counsel for Plaintiff/Appellee)

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Eleventh Circuit Rules 28-1(c) and 34-3(c), Appellant CashCall, Inc. requests oral argument. The issues in this case involve whether the district court erred by granting reconsideration of, and vacating, its prior order compelling arbitration, reopening the case, and concluding that: (**1**) the contractual arbitral forum was an "integral part" of the arbitration clause in this case, (**2**) it could not enforce the arbitration clause because the arbitral forum was integral to the agreement, notwithstanding that Section 5 of the Federal Arbitration Act ("**FAA**") requires courts to appoint a substitute forum and contains no exception for an "integral" arbitral forum, and (**3**) the contractual forum was unavailable to conduct the arbitration in this case. CashCall respectfully submits this Court's decisional process will be aided by oral argument addressing these issues.

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STATEMENT OF JURISDICTION

The district court had federal question jurisdiction under 28 U.S.C § 1331 over Mr. Inetianbor's claim under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. (Doc 33 at 4.) The district court had supplemental jurisdiction under 28 U.S.C. § 1367 over Mr. Inetianbor's state law defamation and usury claims because those claims "arise out of the same nucleus of operative facts as the FCRA claim." (Doc. 33 at 4.)

The district court vacated its previous order granting CashCall's motion to compel arbitration and ordered the case to be reopened on August 19, 2013. (Doc. 90 at 11.) CashCall timely filed its notice of appeal on August 22, 2013. (Doc. 92.) This Court has jurisdiction over CashCall's appeal under Section 16 of the FAA, 9 U.S.C. § 16, because it is an appeal from an order denying arbitration.

STATEMENT OF THE ISSUES

I. Whether the district court erred in concluding (**A**) that the contractual arbitral forum was an "integral part" of the arbitration clause, and (**B**) that it could not enforce the arbitration clause because the arbitral forum was integral to the clause, notwithstanding that Section 5 of the FAA requires courts to appoint a substitute forum and contains no exception for an "integral" arbitral forum.

II. Whether the district court erred in concluding that the contractual forum was unavailable to conduct the arbitration in this case.

STATEMENT OF THE CASE

Nature Of The Case

In this case, Abraham Inetianbor ("**Mr. Inetianbor**") alleged CashCall, Inc. ("**CashCall**") defamed his character, violated Florida's usury statutes, and violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, in servicing a loan Mr. Inetianbor had taken out from non-party Western Sky Financial, LLC ("**Western Sky**"). As described in detail below, the district court ultimately denied CashCall's motion to compel arbitration under the FAA. This is an appeal under Section 16 of the FAA. 9 U.S.C. § 16.

Course of Proceedings

Mr. Inetianbor initially filed his complaint in Florida state court. (Doc. 1 Exhs. A, B.) CashCall removed the case to the Southern District of Florida. (Doc. 1.) CashCall then sought to compel arbitration with the Cheyenne River Sioux Tribe ("**Tribe**" or "**CRST**") pursuant to the terms of the underlying loan agreement (the "**Loan Agreement**" or "**Agreement**"). Through a series of orders, the district court first stayed this case, finding arbitration was appropriate (Doc. 33 at 8-9); then reversed itself, finding arbitration was not appropriate (Doc. 45 at 9); then reversed itself again, finding arbitration was appropriate (Doc. 59 at 8-9); then affirmed that decision, denying Mr. Inetianbor's motion for reconsideration (Doc. 70 at 7); and then, after Mr. Inetianbor filed a renewed motion for reconsideration,

reversed itself again, denying CashCall's motion to compel arbitration. (Doc. 90 at 11). The decisions involved whether the contractually designated forum for arbitration was available, and, even if not, whether a substitute arbitral forum should be appointed. In the order under review—which is the final order in this series of inconsistent orders—the district court ordered the litigation to proceed through the district court rather than through arbitration.[1]

Statement of Facts

Mr. Inetianbor entered into the Loan Agreement with non-party Western Sky on January 5, 2011. (Doc. 53, Exh. 2.) CashCall was the servicer, handler, and collector of the loan. (Doc. 16, Exh. 4 at 2.) The Loan Agreement contains a broad provision requiring that any disputes arising out of the Agreement be resolved by arbitration. (Doc. 53, Exh. 2 at 5.)

The arbitration provisions of the loan agreement apply to claims against Western Sky or the current holder of the note. (Doc. 53, Exh. 2 at 5.) A "holder"

[1]The Loan Agreement also contains a forum selection clause requiring that, to the extent any proceedings occur in court rather than arbitration, those proceedings must occur in the Cheyenne River Sioux Tribal Court. (Doc. 53, Exh. 2 at 3.) Although the district court acknowledged that clause, the court did not address it in the final order denying the motion to compel arbitration. This Court only has appellate jurisdiction over the denial of the motion to compel arbitration. *See, e.g.*, *United States v. Snipes*, 512 F.3d 1301, 1302 (11th Cir. 2008) (per curiam) (collateral order doctrine does not allow immediate appeal of motion to dismiss for improper venue in criminal case); *Turi v. Main St. Adoption Servs., LLP*, 633 F.3d 496, 502 (6th Cir. 2011) (applying that rule in civil context). Should this Court rule that the district court properly denied CashCall's motion to compel arbitration, CashCall will move to dismiss the case for improper venue on remand.

of the note includes "Western Sky or the then-current note holder's employees, officers, directors, attorneys, affiliated companies, predecessors, and assigns, as well as any marketing, servicing, and collection representatives and agents." (*Id.* at 6.) Because CashCall is the loan servicer, the arbitration provisions apply to it. (Doc. 33 at 6.)

The Loan Agreement also defined how the arbitration process should proceed. The Agreement stated that any arbitration is to be conducted by an "authorized representative" of the Tribe, in accordance with the Tribe's "consumer dispute rules." (*Id.*) The Agreement directed that the arbitration is to be conducted by either a single "Tribal Elder" or "three (3) members of the Tribal Council," and gave Mr. Inetianbor the right to select between those two options. (*Id.* at 6.) Under the Agreement, the selection right was transferred to the adverse party if Mr. Inetianbor failed to exercise it. (*Id.*) The Agreement contained a severability clause which states that "[i]f any of this Arbitration Provision is held invalid, the remainder shall remain in effect." (*Id.* at 7.) The Agreement did not prohibit another forum from being appointed if the contractual forum was found to be unavailable to conduct the arbitration. (*See id.*) In addition, the Agreement gave Mr. Inetianbor the unilateral and unfettered right to opt out of the arbitration clause entirely by simply emailing the lender within sixty days of receiving his loan funds. (*Id.*) Mr. Inetianbor did not opt out. (Doc. 26 at 4-5.)

Nevertheless, Mr. Inetianbor filed suit in Florida state court on July 12, 2012, claiming CashCall defamed him by misrepresenting his creditworthiness to the credit bureaus and violated both Florida's usury statute and the federal Fair Credit Reporting Act. (Doc. 1, Exhs. A, B.) CashCall removed the case to the district court for the Southern District of Florida on January 11, 2013. (Doc. 1.)

CashCall filed a motion to compel arbitration and dismiss or stay the case on January 24, 2013, pursuant to the terms of the Loan Agreement. (Doc. 16.) CashCall argued that the language of the arbitration clause was very broad, and any dispute concerning the underlying loan—including disputes with the servicer over the manner in which it serviced the loan—must be submitted to arbitration. (*Id.* at 1.) CashCall argued that the FAA required dismissal or a stay of the action in favor of arbitration. (*Id.*)

Mr. Inetianbor filed a response on January 28, 2013, in which he raised several arguments. (Doc. 19.) He argued the arbitration provision did not apply because the arbitral forum was biased in favor of CashCall, the Tribe lacked jurisdiction to conduct the arbitration, and the underlying contract was unenforceable. (*Id.* at 2-3)

CashCall filed a reply on February 7, 2013, and argued Mr. Inetianbor's challenges regarding the enforceability of the contract as a whole are issues to be resolved by the arbitrator and are irrelevant to whether the dispute should be

subject to arbitration in the first place. (Doc. 26 at 4-6.) CashCall further argued Mr. Inetianbor expressly assented to the jurisdiction of the Tribe by agreeing to the terms of the loan, and CashCall did not waive its right to arbitration. (*Id.* at 6-10.)

The district court held that the plain language of the arbitration clause makes clear that the dispute must be settled through arbitration, and so compelled arbitration. (Doc. 33 at 6, 8.)

Mr. Inetianbor filed a motion to reopen the case on March 12, 2013, arguing that the contractual forum was unavailable for arbitration. (Doc. 37 at 1.) Mr. Inetianbor relied on a letter he received from a magistrate/mediator of the Tribal Court, which stated the Tribe did not authorize arbitration as defined by the American Arbitration Association. (*Id.* at 5.) CashCall responded by explaining that arbitration could still be conducted by Tribal elders in accordance with the arbitration clause. (Doc. 39 at 4.) CashCall also offered to conduct the arbitration before an alternative venue (the AAA or JAMS) if the contractual forum was not available. (Doc. 39 at 4-5.) The court determined the arbitral forum was unavailable. (Doc. 45 at 5.) The court also *sua sponte* found the choice of forum was "integral" to the arbitration clause and that the choice of arbitrator was as important a consideration as the agreement to arbitrate itself, even in light of Mr. Inetianbor's claim that the specified forum was impermissibly biased against him. (*Id.* at 7.) On that basis, the court refused to appoint a substitute arbitrator under

Section 5 of the FAA, 9 U.S.C. § 5. (*Id.*) As a result, the court found the arbitration clause was void and reopened the case. (*Id.* at 9.)

On April 3, 2013, Mr. Inetianbor filed his second amended complaint. (Doc. 48.) The second amended complaint added no new substantive claims, but Mr. Inetianbor substantially increased his claimed damages (by almost tenfold) and reiterated his allegation that the contractual arbitration forum is not available because the Tribal Court does not directly conduct arbitrations. (*Id.* at 2, 10.)

CashCall filed a renewed motion to compel arbitration and dismiss or stay the case on April 23, 2013, contending that the contractual arbitral forum was available. (Doc. 53 at 3.) As proof, CashCall attached a letter from the Tribal magistrate/mediator who had written the previous letter stating the Tribe did not conduct arbitrations. (*Id.* Exh. 3.) This second letter clarified that arbitration was in fact permitted by the Tribe, but the Tribal Court itself could not conduct it. (*Id.*) CashCall also demonstrated that the Tribal Courts have directly overseen arbitrations of civil disputes in prior cases. (Doc. 53, Exh. 4 (example of arbitration award issued under Tribal Court authority).) Finally, CashCall filed a letter from a Tribal Elder—Mr. Robert Chasing Hawk—which stated he was available and willing to conduct the arbitration. (Doc. 57 Exh. A.) Based on these facts, the district court again ordered the case to be sent to arbitration. (Doc. 59 at 8-9.)

The case then proceeded to arbitration. (Doc. 73, Exh. 22.) As described above, the Agreement gave Mr. Inetianbor the right to select the arbitrator, but provided that if he failed to do so, the other side could appoint the arbitrator. Because Mr. Inetianbor failed to exercise his contractual right to choose the arbitrator, CashCall asked Mr. Chasing Hawk to serve. (Doc. 57, Exh. A.)

Shortly after the arbitration began, Mr. Inetianbor again filed a motion asking the district court to reconsider its decision to compel arbitration on May 21, 2013. (Doc. 61.) Mr. Inetianbor asserted reconsideration was warranted because Mr. Chasing Hawk was biased in favor of CashCall. (*Id.* at 1.) Mr. Inetianbor's allegations of bias stemmed from his assertion that Mr. Chasing Hawk's daughter was employed by Western Sky (the non-party lender). (*Id.* at 1-2.) Mr. Inetianbor also alleged that a subsidiary of Western Sky had allegedly prepared Mr. Chasing Hawk's letter reporting his availability to serve as the arbitrator. (*Id.*; Doc. 67 at 2, 7.) Contrary to Mr. Inetianbor's allegations, there was nothing sinister about the letter. Mr. Chasing Hawk never tried to hide the fact that the letter was written by an affiliate of Western Sky, as he simply forwarded the letter to Mr. Inetianbor in a manner that made it clear who drafted it. (Doc. 67 at 7.) Further, the drafting of the letter was a purely ministerial act to document that Mr. Chasing Hawk did not have a relationship with either party. (Doc. 57, Exh. 1.) The district court denied reconsideration, finding that arbitrator bias was an issue that could be addressed

after—and not before—a final arbitration decision had been made. (Doc. 70 at 6-7.)

The parties then returned to arbitration before Mr. Chasing Hawk. (Doc. 73, Exh. 22.) At a preliminary arbitration hearing, and when asked by Mr. Inetianbor whether the Tribe was aware of the process by which Mr. Chasing Hawk was chosen to serve as arbitrator, Mr. Chasing Hawk responded that the Tribe "has nothing to do with any of this business." (*Id.* at 18.) Mr. Inetianbor subsequently filed yet another motion with the district court on July 16, 2013. (Doc. 72.) In this "renewed" motion, Mr. Inetianbor asked the court to again reconsider its order compelling arbitration. (*Id.*) He claimed that the most recent statement made by Mr. Chasing Hawk showed he was not an authorized representative of the Tribe for purposes of the arbitration. Mr. Inetianbor also argued that the Tribe does not have "consumer dispute rules," which the Agreements state should be used to govern the arbitration. (Doc. 72, Exh. 1 at 2.)

CashCall responded, arguing Mr. Chasing Hawk is a valid arbitrator for purposes of the arbitration clause. (Doc. 81 at 8-9.) CashCall further argued there are several other Tribal Elders available and willing to conduct the arbitration if Mr. Chasing Hawk is unable to do so. (*Id.* at 9.) CashCall also asserted that all arguments being made by Mr. Inetianbor had already been considered and rejected by the district court in its previous orders. (*Id.* at 5-8.)

Even though the motion contained issues previously presented and rejected, the district court granted it. (Doc. 90 at 11.) The court found that: Mr. Chasing Hawk is not an "authorized representative" of the Tribe; CashCall had not shown that any of the other Tribal Elders named by CashCall as possible arbitrators would be serving as authorized representatives of the Tribe; and the Tribe does not have "consumer dispute rules" to apply to the dispute. (*Id.* at 8-10.) Therefore, the district court concluded that the contractual forum was unavailable because the Tribe itself would not participate in the arbitration. (*Id.*)

Rather than appointing another forum for the arbitration as mandated by Section 5 of the FAA, the district court voided the entire arbitration clause. (*Id.* at 11.) The court's conclusion was based on one of its previous orders—which by that point the court had already reversed—in which it held, *sua sponte*, that the selection of the Tribe as the arbitral forum was "integral" to the agreement. (*Id.* at 3) (citing Doc. 45). Deeming the forum "integral" and unavailable, the district court concluded the entire arbitration clause was void and reopened the case. (Doc. 90 at 11.)

CashCall filed a timely notice of appeal on August 22, 2013. (Doc. 92.)

Standard Of Review

The district court's decision not to compel arbitration is reviewed *de novo*. *See Hough v. Regions Fin. Corp. (In re Checking Account Overdraft Litig.)*, 672 F.3d 1224, 1228 (11th Cir. 2012); *Tays v. Covenant Life Ins. Co.*, 964 F.2d 501, 502 (5th Cir. 1992).

The district court's factual findings are reviewed under the clearly erroneous standard. *Billings v. Unum Life Ins. Co. of Am.*, 459 F.3d 1088, 1092 (11th Cir. 2006) (citation omitted). "A trial court's finding of fact is clearly erroneous if it is without substantial evidence to support it, or the district court misapprehended the effect of the evidence." *Rewis v. United States*, 445 F.2d 1303, 1304 (5th Cir. 1971).

Questions of law, including the district court's interpretation of the contract and whether the language of that contract indicates that the forum is an integral part of the arbitration clause, are reviewed *de novo*. *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1221-22 (11th Cir. 2000).

Mixed questions of law and fact are reviewed *de novo*. *Brownlee v. Haley*, 306 F.3d 1043, 1058 (11th Cir. 2002); *In re Grand Jury Matter No. 91-01386*, 969 F.2d 995, 997 (11th Cir. 1992).

SUMMARY OF THE ARGUMENT

The district court erred in determining that the dispute between Mr. Inetianbor and CashCall is not subject to arbitration. The FAA implements the strong federal preference for arbitration and courts are required to construe arbitration clauses in favor of arbitration if at all possible. Thus, if any reasonable interpretation of an arbitration clause exists that would warrant arbitration, the courts are obligated to adopt that interpretation. The district court failed to follow this mandate in construing the underlying agreement in this case.

First, the contractually designated forum was not an integral part of the agreement. Section 5 of the FAA requires a court to appoint an arbitrator if the designated arbitrator is unavailable for "any ... reason." 9 U.S.C. § 5. Although in a prior case this Court assumed without analysis that Section 5 does not allow a court to appoint a substitute arbitral forum if the one called for by the parties' contract was an "integral part" of the arbitration provision, Section 5 contains no such "integrality" exception. This Court's earlier decision[2] to the contrary was *dicta* because the Court ultimately found that the arbitral forum there was not integral. But even if Section 5 allows consideration of whether an arbitral forum is integral, to be integral the arbitration clause must contain an explicit statement of the forum's exclusivity that makes clear that the parties intended to nullify the

[2] *See Brown v. ITT Consumer Finance Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000).

entire arbitration clause in the event the selected forum is unavailable. No provision in the arbitration clause in this case comes close to making such a statement. To the contrary, the parties included a severability provision in the arbitration clause, which shows their intention to arbitrate elsewhere if the contractual forum is unavailable. Because the severability provision allows the arbitration clause to remain intact in the event the named arbitral forum is unavailable, the contractual forum is not integral to the agreement. In such situations, Section 5 of the FAA requires the courts to appoint a substitute arbitral forum.

Second, even if the contractually designated forum were truly "integral," that is irrelevant because Section 5 of the FAA does not allow a court to excuse a party from its contractual obligation to arbitrate on the ground that the designated forum is integral to the arbitration clause. The line of cases holding to the contrary are all based on *dicta* from a single decision of the Northern District of Illinois. But the Seventh Circuit recently rejected that *dicta* as a legitimate basis for the "integral part" exception to Section 5. *Green v. U.S. Cash Advance*, 724 F.3d 787, 791 (7th Cir. 2013). Although this Court previously evaluated whether an arbitral forum was an integral part of an arbitration clause (finding it was not) in *Brown*, the Court merely assumed without analysis that Section 5 contains an "integral part" exception based upon the same Northern District of Illinois case that *Green*

subsequently rejected. As *Green*'s detailed analysis makes clear, the "integral part" inquiry is in direct conflict with the text of Section 5 and contradicts Congressional intent. *Brown*'s statements to the contrary were *dicta* because the Court ruled that the arbitral forum was not integral and so had no need to adopt the integral part exception to reach its holding. *Brown* therefore does not bind this panel, which should adopt the persuasive reasoning of *Green* and reject the "integral part" test.

Finally, the district court committed legal and factual error in concluding that the contractual forum is unavailable. The district court misinterpreted the Loan Agreement in holding that Mr. Chasing Hawk (or any Tribal Elder) does not meet the contract's requirement that the arbitrator be an "authorized representative" of the Tribe. Although CashCall acknowledges the phrase "authorized representative" is ambiguous, when read in the context of the entire Agreement, the best interpretation is that "authorized representative" simply means that arbitration must be "authorized" under Tribal law and that the arbitrator(s) must be either a Tribal Elder or a panel of three Tribal Council members. Under federal arbitration law, moreover, any contractual ambiguity must be resolved in favor of—and not against—the reading that would require arbitration. Thus, because Tribal law authorizes private arbitration, any Tribal Elder (or panel of three Tribal Council members) meets the contractual requirements.

The district court also committed clear error in interpreting Mr. Cashing Hawk's statement that "the Tribe has nothing to do with any of this business." In context, that statement merely shows the Tribe is not involved in the arbitrator selection process, and does not undermine remotely the key considerations under the arbitration clause: Mr. Chasing Hawk's Tribal Elder status and Tribal law's authorization of private arbitration.

The lack of consumer dispute rules also has no effect on the forum's availability. Courts treat arbitral forum and arbitration rules questions separately. A forum may conduct arbitration pursuant to any rules the parties wish. Therefore, the availability of the rules is unrelated to the availability of the forum.

The district court's order should be reversed.

ARGUMENT

I. The District Court Erred In Refusing To Compel Arbitration Because (A) The Arbitral Forum Is Not Integral To The Arbitration Clause, And (B) The District Court's Inquiry Into Whether The Arbitral Forum Was An "Integral Part" Of The Agreement Was Improper.

The district court erred in determining that the dispute between Mr. Inetianbor and CashCall was not subject to arbitration. The FAA provides that a written arbitration provision "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. *See also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1210 (11th Cir. 2011).

The FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution." *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (internal quotations and citations omitted). The FAA is "the supreme Law of the Land" which "forecloses … judicial hostility towards arbitration" and "declare[s] a national policy favoring arbitration." *Nitro-Lift Tech., LLC v. Howard*, 133 S. Ct. 500, 503 (2012) (internal quotations and citations omitted). "The [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25-26 (2011) (emphasis in original).

A party seeking to escape its arbitration agreement must identify express statements showing the dispute cannot be arbitrated to overcome the heavy presumption in favor of arbitration. *See Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionary Workers Union, AFL-CIO*, 430 U.S. 243, 255 (1977). Thus, any doubts regarding the arbitrability of claims must be resolved in favor of arbitration. *See United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960); *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 312 F.3d 1349, 1358 (11th Cir. 2002). Arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is

not susceptible of an interpretation that covers the asserted dispute." *Warrior & Gulf Navigation*, 363 U.S. at 582-83.

The district court erred by failing to apply these mandates. As explained below, because it cannot be said with "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute," the district court should have ordered Mr. Inetianbor to comply with its previous order compelling arbitration. *Id.* In particular, the district court should have ordered arbitration to continue before either Mr. Chasing Hawk or another Tribal Elder, or it should have appointed a substitute forum as required by Section 5 of the FAA.

A. The Arbitral Forum Is Not Integral To The Arbitration Agreement In This Case.

The district court erred in finding, *sua sponte*, that the arbitral forum is integral to the arbitration clause in this case. Section 5 of the FAA requires the court to appoint a substitute arbitral forum if the one called for by the agreement is unavailable for "any … reason." 9 U.S.C. § 5. Under Section 5, "courts [have] the authority to identify an arbitrator for parties who cannot agree upon one." *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1313 (11th Cir. 2005), *overruled on other grounds by Lawson v. Life of The South Ins. Co.*, 648 F.3d 1166, 1171 (11th Cir. 2011).

Some courts, including this one, have suggested that courts may not appoint a substitute arbitrator under Section 5 if the contractually designated forum is an

"integral part" of the arbitration agreement. *See, e.g.*, *Brown*, 211 F.3d at 1222. CashCall explains below why that is not correct. *See* Part I.B below.

But under the cases applying an integral part exception, a contractual forum is integral only if the agreement contains an explicit statement of the designated forum's exclusivity. *See Reddam v. KPMG, LLP*, 457 F.3d 1054, 1060-61 (9th Cir. 2006), *overruled on other grounds by Atlantic Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 940 (9th Cir. 2010). In *Reddam*, the Ninth Circuit held that courts should not treat "the selection of a specific forum as exclusive of all other fora, unless the parties have expressly stated that it was." *Id.* Absent an express statement in the contract about the forum's exclusivity, therefore, a court may not treat the unavailability of the selected forum as grounds for voiding the entire arbitration clause. Here, no such statement exists.

Although the district court relied on *Reddam*, it misapplied that decision. (Doc. 45 at 3-4; Doc. 90 at 3.) The district court did not consider whether the Agreement contained an "express[] state[ment]" of exclusivity regarding the arbitral forum. Instead, the district court stated that the references to the Tribe's role and Tribal law in the arbitration clause showed that the choice of arbitrator was "as important a consideration as the agreement to arbitrate itself." (Doc. 45 at 7.) But whether the choice of arbitrator is "important" is not the issue. The

question is whether the parties expressly stated that the designated arbitrator was to be the *only* permissible arbitrator. Here, as the Agreement shows, they did not.

References to the Tribe in the arbitration clause simply are not "express[] state[ments]" of the contractual forum's exclusivity as an appropriate arbitral forum. The Agreement's arbitration clause states that arbitration is to be conducted by an authorized representative of the Tribe and in accordance with the Tribe's consumer dispute rules. (Doc. 53, Exh. 2 at 5.) However, it never states that arbitration may only be conducted in that manner, or that the parties intended the arbitration clause to be void if the contractual forum was unavailable. (*See id.*) Such an express statement would be required to reach the decision the district court reached in this case. *See Reddam*, 457 F.3d at 1060-61. Because the agreement does not "indicate the parties' unambiguous intent not to arbitrate their disputes if [the selected forum] is unavailable," the contractual forum is not integral. *Khan v. Dell, Inc.*, 669 F.3d 350, 357 (3d Cir. 2012).

The absence of the specified arbitration rules is also immaterial. In *Green*, the Seventh Circuit stated that even if an inquiry into integrality were appropriate, the fact that the court-appointed arbitrator might "employ different rules" from what the contract contemplates is immaterial because the rules are not integral. 724 F.3d at 791. Which rules will govern does not "affect the desirability of arbitration, from either a lender's perspective or a customer's." *Id.* at 790.

Similarly, in *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 716 (7th Cir. 1987), the Seventh Circuit enforced an arbitration clause that did not say "who the arbitrators would be, where arbitration would take place, and what procedures would govern" because the court could "supply those details."

Further, it is not as if the absence of consumer dispute rules means that no law will govern the arbitration. The Loan Agreement states that Tribal law governs any dispute relating to the Agreement. (Doc. 53 Exh. 2, at 1, 4.) Thus, the arbitrator will have to apply Tribal law to adjudicate these claims. The lack of consumer dispute rules only go to the *procedure* the arbitrator will follow. The parties are free to agree to any procedure they wish or to adopt an alternative procedure (such as using the AAA's consumer dispute rules) to resolve the case. In *Green*, for example, the Seventh Circuit ordered the parties to arbitrate before an alternative forum, but still directed that the forum use the rules of the National Arbitration Forum. 724 F.3d at 793. Consistent with that case law, CashCall offered here to conduct the arbitration under the rules of an alternative forum (the AAA or JAMS). (Doc. 39 at 4-5.)

The parties have expressed their intent in the underlying Agreement: they agreed to arbitrate in the contractual forum if available, or in any other appropriate forum if not. The parties made this intent clear by including a severability clause. (Doc. 53 Exh. 2 at 7.) When an arbitration clause contains a severability provision,

"[t]he severance provision indicates that the intention was not to make the [entity named as arbitral forum in the agreement] integral, but rather to have a dispute resolution process through arbitration." *Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1167 (D.S.D. 2010). This Court has held that if an arbitration clause contains a severability provision, "the underlying claims are to be arbitrated regardless of the validity of" other provisions of the arbitration clause. *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1032 (11th Cir. 2003).

Here, the severability provision states that "[i]f any of this Arbitration Provision is held invalid, the remainder shall remain in effect." (Doc. 53 Exh. 2 at 7.) If this severability provision is to have any meaning at all, it must mean the agreement to arbitrate will remain valid even if a part of the arbitration clause—such as the designation of the arbitral forum or the use of designated procedural rules—is held invalid. The existence of a severability clause makes clear that the contractually designated forum is not integral. *Anders*, 346 F.3d at 1032; *Green*, 724 F.3d at 789-90; *Jones*, 684 F. Supp. 2d at 1167.

Here, if the contractual forum is found to be unavailable—which it is not—the contractual language adopting that forum should be severed from the rest of the arbitration clause. The remainder would still require arbitration. In such a situation, Section 5 of the FAA acts to fill the gap by requiring the court to appoint

an appropriate substitute arbitral forum. *See Green*, 724 F.3d at 793. This same analysis applies to the lack of arbitration rules. *See id.* at 791.

The district court's integrality finding also conflicts with the parties' prior statements disclaiming any notion that the arbitration clause's requirements were integral. In his initial opposition to CashCall's motion to compel arbitration, Mr. Inetianbor argued that CashCall's motion was "simply an attempt to obtain a tribal court order (in defendant's favor) through 'Western Sky arbitration'" and that CashCall was "requesting 'arbitration' at a [Tribal] Court in South Dakota, which has no jurisdiction over this action or over the plaintiff." (Doc. 19 at 2-3 (emphasis removed).) Indeed, Mr. Inetianbor went so far as to argue that the Loan Agreements' arbitration clause was an "excuse … to scare away abused consumers that intend to litigate against Cash Call [sic]" and that the arbitration provision's terms were unconscionable. (*Id.* at 5, 8.) Mr. Inetianbor's statements make clear that the particulars of the arbitration provision were not integral to him—he has fought to avoid that provision from the outset of this case.

Both parties, moreover, suggested arbitrating before a different forum, showing that neither felt the contractual forum was integral. CashCall repeatedly offered to arbitrate before the AAA or JAMS. (Doc. 39 at 4-5; Doc. 53 at 2 n.3; Doc. 81 at 10.) Mr. Inetianbor also suggested that he might agree to arbitrate before the AAA. (Doc. 42 at 8.) The district court had no basis for ignoring the

parties' clear statements that the arbitral forum provisions were not integral to their agreement to arbitrate.

B. The District Court's Inquiry Into Whether The Arbitral Forum Was An "Integral Part" Of The Arbitration Agreement Was Improper.

Given that the district court erred in concluding that the arbitral forum and procedures specified by the arbitration provision were integral to that provision, this Court need not confront the question of whether Section 5 allows courts to refuse to appoint an arbitrator on integrality grounds. But should this Court agree with the district court's conclusion as to integrality, it must confront that question. The FAA does not allow a court to void an arbitration clause entirely on the ground that the arbitration method specified by contract was integral to the arbitration agreement.

Section 5 of the FAA makes this plain in absolute terms. It requires the court to appoint a substitute arbitral forum if the one called by the agreement is unavailable for "any … reason." 9 U.S.C. § 5 (emphasis added).

In the Seventh Circuit's recent *Green* decision, which is the first decision from a federal court of appeals to analyze the question thoroughly, the court concluded that Section 5 contains no "integral part" exception. The parties' contract in *Green* called for arbitration before the National Arbitration Forum, which no longer accepted consumer disputes when the case began. 724 F.3d 787,

789 (7th Cir. 2013). The *Green* plaintiffs argued that the contractual forum was "integral" such that the courts could not appoint a substitute. *Green*, 724 F.3d at 789.

The Seventh Circuit rejected that argument, holding that in Section 5 "Congress ... provided that a judge can appoint an arbitrator when for 'any' reason something has gone wrong." *Id.* at 791. Given that absolute language, the *Green* court was "skeptical" of any argument that "allow[s] a court to declare a particular aspect of an arbitration clause 'integral' and on that account scuttle arbitration itself." *Id.* Congress designed Section 5 to respect and enforce the parties' agreement to use "private dispute resolution," and "[c]ourts should not use uncertainty in just how that would be accomplished to defeat the evident choice." *Id.* at 793. "Section 5 allows judges to supply details in order to make arbitration work." *Id.*

Green further noted that the Supreme Court has held that courts must strictly apply the FAA's procedural rules governing arbitration. For example, in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008), the Supreme Court held that the FAA's grounds for vacating an award may not be expanded by contract. *Hall Street* "tells courts not to add to, or depart from, the standards in the" FAA, and "[a]n 'integral part' proviso to § 5 sounds like the sort of addendum that *Hall Street* forbids." *Green*, 724 F.3d at 791.

Green acknowledged the prior case law assuming that Section 5 contains an "integral part" exception, but, after thoroughly analyzing the exception's genesis, found it unpersuasive. The court explained that the entire line of cases stating forum selection could be "integral," and thus grounds for nullifying an arbitration clause, was based on *dictum* from a single district court case out of the Seventh Circuit. *Id.* (discussing *Zechman v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 742 F. Supp. 1359 (N.D. Ill. 1990)). Post-*Zechman*, some cases—including this Court's decision in *Brown*, 211 F.3d at 1222—have cited *Zechman* without further analysis for the proposition that Section 5 includes an "integral part" exception. The Seventh Circuit criticized and rejected these cases because they mistakenly "proceed as if it were an established rule of law that § 5 cannot be used to appoint a substitute arbitrator when the contractual designation [of an arbitral forum] was an 'integral part' of the bargain." *Id.* at 792.

Instead of nullifying the entire arbitration clause, the FAA requires courts to "assume that a reference to an unavailable means of arbitration is equivalent to leaving the issue open." *Id.* In such a situation, Section 5 directs the court to appoint a substitute arbitral forum. *Id.* at 793. *Green* amply demonstrates that the FAA's text and purpose do not allow courts to void an arbitration clause entirely based on a subjective extratextual "integral part" analysis.

Relying upon generally applicable contract principles, *Green* noted that an "integral part" analysis could be relevant under Section 2—but not Section 5—of the FAA in deciding whether the entire contract within which the arbitration clause rests is unenforceable. *Id.* at 791. "[I]f an error—such as the parties' mutual, but mistaken, belief that the [contractually designated forum] was available—would permit revocation of the contract under ordinary state-law principles, the district court could declare the contract *as a whole* unenforceable." *Id.* (emphasis added). Here, critically, no party has even argued that the arbitral forum provisions were so important to the Loan Agreement that the forum's unavailability voids the entire Loan Agreement, and the district court did not make any ruling to this effect ("under ordinary state-law principles" or otherwise). *Green* further makes clear that "[t]he identity of the arbitrator is not so important that the whole contract is vitiated." *Id.* at 791-92. Under *Green*'s reasoning, there is no question that the district court erred.

This Court's decision in *Brown* does not preclude this panel from rejecting the integral part exception and adopting *Green*'s ruling and reasoning. The *Brown* Court did not have to confront the issue of whether Section 5 contains an integral part exception to reach its decision because the Court found the arbitral forum was

not integral. 211 F.3d at 1222.[3] Any statements in *Brown* purporting to adopt the exception were therefore *dicta* because they were not "essential to the holding in that case." *Phonometrics v. Westin Hotel Co.*, 319 F.3d 1328, 1332 (Fed. Cir. 2003).[4] *Brown* thus does not preclude this Court from analyzing that question for the first time and rejecting the integral part test.[5]

The FAA requires courts not to disregard an arbitration clause altogether but rather to appoint a substitute arbitrator any time an identified forum is unavailable.

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[3]Similarly, *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1236 n.13 (11th Cir. 2012), does not bind the panel. There, this Court "reject[ed] as meritless" in a single footnote the argument "the contract's designation of the now-defunct National Arbitration Forum as the arbitral forum was an integral component of the arbitration clause" at issue in that case. *Id.* The Court did not cite *Brown* (or any case) regarding the integral part exception, nor did it state whether it rejected the argument because the NAF was not integral or because the FAA does not contain an "integral part" exception.

[4]In their briefs, the parties in *Brown* never mentioned the "integral part" exception—the appellants there never even mentioned Section 5 as a whole—suggesting the issue was not at the center of the dispute. *See generally* Brief of Plaintiff/Appellant, *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000) (No. 99-10506), 1999 WL 33617330; Brief of Defendant-Appellant, *Brown*, 1999 WL 33617331; Reply Brief of Plaintiff/Appellant, *Brown*, 1999 WL 33616901. *Brown*'s statements regarding the integral part exception thus "constituted pure dicta, as the question was never raised by any party, was unnecessarily injected into the case by the court itself, and was therefore unnecessary to the resolution of the … appeals." *United States v. Kaley*, 579 F.3d 1246, 1261-62 (11th Cir. 2009).

[5] Should this Court deem *Brown* to hold that Section 5 contains an integral part proviso, CashCall urges the Court to *sua sponte* hear this case *en banc*. *See, e.g.*, *Turner v. Beneficial Corp.*, 242 F.3d 1023, 1024 (11th Cir. 2001); *Wilson v. Sirmons*, 549 F.3d 1267, 1267 (10th Cir. 2008).

The district court's inquiry into whether the stated forum was an "integral part" of the arbitration clause was therefore improper.

II. The District Court's Conclusion That The Arbitral Forum Was Unavailable To Conduct Arbitration Was Error.

The district court found that the contractual forum was not available based on both legal and factual error. Legally, the district court misinterpreted the arbitration provision to require that the Tribe itself participate in the arbitration. Nothing in the Agreement requires that interpretation, and federal arbitration law forecloses it to the extent that interpretation would defeat the arbitration provision entirely. Factually, the district court erred in concluding that certain statements the arbitrator made during the preliminary arbitration hearing showed that the Tribe did not authorize the arbitration. The arbitrator's statements only showed that the Tribe did not participate in the selection of the arbitrator (which is exactly as the Agreement is written), not that arbitration is unauthorized by Tribal law.

A. The District Court Committed Legal Error In Interpreting The Arbitration Agreement To Require That The Tribe Directly Participate In The Arbitration.

The district court's conclusion that the arbitral forum was unavailable was based on its erroneous ruling that the Agreement's statement that arbitration will be conducted before an "authorized representative" of the Tribe means that the Tribe itself must directly participate in the arbitration. (Doc. 90 at 7.) That is a

legal question of contractual interpretation that this Court reviews *de novo*. *Brown*, 211 F.3d at 1221-22.

The Agreement provides that any dispute "will be resolved by Arbitration, which shall be conducted by the [Tribe] by an authorized representative …." (Doc. 53, Exh. 2 at 5.) The Agreement goes on to define who may serve as the arbitrator, and in doing so gives meaning to the "authorized representative" language. The Agreement states that the "Arbitration shall be conducted in the Cheyenne River Sioux Tribal Nation by your choice of either (i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council …." (*Id.* at 6.)

CashCall acknowledges that, considered in isolation, the "authorized representative" statement could be read to impose a requirement that the Tribe directly participate in the arbitration. But "an agreement must be interpreted as a whole." *Alliance Metals, Inc. of Atlanta v. Hinely Indus., Inc.*, 222 F.3d 895, 901 (11th Cir. 2000) (internal quotations and citation omitted). Courts, therefore, "must not read a single term or group of words in isolation," but must "arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose." *American K-9 Detection Servs., Inc. v. Cicero*, 100 So.3d 236, 238-39 (Fla. 5th DCA 2012) (quotation omitted).[6]

[6]The Loan Agreement states that it must be interpreted in accord with Tribal law. (Doc. 53 Exh. 2, at 1, 4.) The Tribal Courts use "traditional contractual principles," including Restatement principles, to interpret contracts. *White Wolf v.*

Here, the Agreement as a whole makes clear that it does not require the Tribe itself to participate in the arbitration. In context, the "authorized representative" language simply refers to the later requirement that the arbitrator be a Tribal Elder or a panel of Tribal Council members, and that arbitration be "authorized" by the Tribe. There is no question that the arbitration conducted before Mr. Chasing Hawk met that requirement because (1) he is a Tribal Elder; and (2) a magistrate of the Tribal Court has made clear that "Arbitration, as in a contractual agreement, is permissible" under Tribal law, and that "parties may seek to confirm the award in Tribal Court" after an award is issued. (Doc. 53, Exh. 3 at 2.) Indeed, as CashCall pointed out to the district court, the Tribal Courts have directly overseen arbitrations of civil disputes in prior cases, showing that private arbitration is authorized by the Tribe. (Doc. 53, Exh. 4 (example of arbitration award issued under Tribal Court authority).)

Myers, 34 Indian L. Rep. 6102, 6106 (CRST Ct. App. 2007); *Bank of Hoven v. Long Family Land & Cattle Co.*, 32 Indian L. Rep. 6001, 6004 (CRST Ct. App. 2004) (applying Restatement (Second) of Contracts). Florida courts apply the general rule of contractual interpretation that contracts must be interpreted as a whole, and look to the same Restatement principles as Tribal Courts when applying that rule. *See Premier Ins. Co. v. Adams*, 632 So.2d 1054, 1057 (Fla. 5th DCA 1994) (citing Restatement (Second) of Contracts § 202(2) (1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.")). This Court therefore may rely upon case law from non-tribal jurisdictions such as Florida applying the general rules of contractual interpretation that Tribal Courts apply.

This reading of the Agreement gives full effect to all of its provisions while furthering—rather than frustrating—the parties' intent to arbitrate their disputes. By contrast, the district court's decision defeats rather than "accomplish[es]" the provision's "stated meaning and purpose." *American K-9 Detection Servs., Inc.*, 100 So.3d at 238-39. This Court has rejected narrow constructions of arbitration clauses that focus on isolated portions of the clause without giving effect to the broader agreement to arbitrate. For example, in *Ivax Corp. v. B. Braun of America, Inc.*, this Court held that a narrow interpretation of the arbitration clause at issue there "ma[de] little sense against the backdrop of the rest of" the Agreement because other portions of the arbitration clause made clear the parties' agreement to arbitrate the dispute at issue. 286 F.3d 1309, 1322-23 (11th Cir. 2002). Like the interpretation this Court rejected in *Ivax*, the district court's "interpretation makes little sense against the backdrop of the rest of" the arbitration clause, which broadly requires the parties to arbitrate any dispute. *Id.*

Any ambiguity on this point must be resolved in favor of arbitration. *Warrior & Gulf Navigation*, 363 U.S. at 582-83; *MedPartners*, 312 F.3d at 1358. Arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Warrior & Gulf Navigation*, 363 U.S. at 582-83. Put simply, if an arbitration provision can be read in two ways, one that requires arbitration and one

that does not, this Court must "resolve [the] ambiguity *in favor* of arbitration." *Khan*, 669 F.3d at 356 (court's emphasis).

That principle requires this Court to reject the district court's interpretation of the arbitration clause. The phrase "authorized representative" can be read either as an additional arbitral requirement beyond simply requiring that the arbitrator be a Tribal Elder or Council Member (as the district court interpreted it), or it can be read as a general reference to the particular types of tribal officials (Elders or Council members) referenced later in the Agreement that can serve as arbitrators. Because the latter interpretation would allow the parties to proceed with arbitration as called for by the Agreement, the law requires the district court to have selected that reading. *Id.* There is thus no basis for the district court's conclusion that the arbitral forum is not available because the Tribe itself will not directly participate in the arbitration.

Finally, the district court improperly placed the burden on CashCall to prove the contractual forum's availability. The district court found that CashCall had "failed … to show that the Tribe is available through an authorized representative to conduct arbitrations." (Doc. 90 at 9.) Under the FAA, the party opposing arbitration bears the burden of proving the claims are not arbitrable. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 (2000) (citation omitted). Mr. Inetianbor merely offered evidence of the manner in which Mr. Chasing Hawk was selected

as the arbitrator and evidence that the Tribe lacks consumer dispute rules. For the reasons discussed above, that evidence does not address the contractual forum's availability. Mr. Inetianbor failed to meet his burden, which the district court erroneously placed on CashCall.

B. The District Court Committed Clear Error In Finding That The Arbitrator's Statements Showed That The Arbitral Forum Was Unavailable.

The district court also committed clear error in making its factual finding that the contractual forum is unavailable to conduct arbitration in this case. A finding of fact is clearly erroneous when "the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Billings*, 459 F.3d at 1095 (citing *Childrey v. Bennett*, 997 F.2d 830, 833 (11th Cir. 1993)). This standard is met when the finding "is without substantial evidence to support it, or the district court misapprehended the effect of the evidence." *Rewis*, 445 F.2d at 1304 (citation omitted).

Mr. Chasing Hawk's statement that "the Tribe has nothing to do with any of this business" is not proof the contractual forum is unavailable. Mr. Chasing Hawk did not state that the Tribe does not authorize arbitration, nor did he is say that he is not one of the two kinds of officials who can serve as an arbitrator under the Loan Agreement (a Tribal Elder or Tribal Council member). Instead, Mr. Chasing Hawk stated the Tribe has nothing to do with the business of selecting the

arbitrator. This statement is consistent with the terms of the Agreement, which states the parties should select the arbitrator, not the Tribe. (Doc. 53, Exh. 2 at 6.) Because the Tribe is not a party, it has no role in the arbitrator selection process. The fact that it "has nothing to do with [the] business" of selecting the arbitrator is not evidence, let alone proof, of the forum's unavailability. Because the district court misapprehended the effect of Mr. Chasing Hawk's statement, its finding that this showed the contractual forum to be unavailable was clearly erroneous. *See Rewis*, 445 F.2d at 1304.[7]

[7]The district court also found that the arbitral forum's rules were unavailable and relied upon this as a ground for reconsidering its decision and refusing to compel arbitration. (Doc. 90 at 10.) As already discussed, the unavailability of the consumer dispute rules has no bearing on whether the arbitration clause is enforceable. *See* pp. 20-22 above.

CONCLUSION

CashCall respectfully requests this Court reverse the district court's order reopening the case and direct the case be sent to arbitration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 8,366 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

s/ Katherine E. Giddings
KATHERINE E. GIDDINGS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 30th, 2013, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system. I also further certify that a copy of the foregoing document was sent by United States Mail to Aaron Goss, John S. Hughes, Mona Lisa Wallace, Cathy Anne Williams, Wallace & Graham, P.A., 525 North Main Street, Salisbury, NC 238144 (agoss@wallacegraham.com, jhughes@wallacegraham.com, mwallace@wallacegraham.com, and cwilliams@wallacegraham.com) and Brian William Warwick, Varnell & Warwick, P.A., 20 LaGrande Blvd., The Villages, FL 32159-2384 (bwarwick@varnellandwarwick.com) (Attorneys for Plaintiff/Appellee).

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