IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

JOSHUA PARNELL, **Plaintiff,**	)	
v.	)	**Civil Action File No.:**
WESTERN SKY FINANCIAL, LLC, d/b/a Western Sky Funding, Western Sky, WesternSky.com; MARTIN A. ("Butch") WEBB; & CASHCALL, INC.,	)	**4:14-cv-00024-HLM**
Defendants.	)	

MEMORANDUM OF LAW
IN SUPPORT OF CASHCALL, INC.'S RENEWED MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY ACTION[1]

In this dispute, Plaintiff Joshua Parnell brings a putative class action seeking to challenge his Loan Agreement with Defendant Western Sky Financial LLC under Georgia's Payday Lending Act ("GPLA"). But the Loan Agreement's Arbitration

[1] CashCall is contemporaneously filing a renewed motion to dismiss on the grounds of *forum non conveniens*. CashCall has filed renewed motions because the filing of Plaintiff's Amended Complaint has mooted CashCall's previous motions to dismiss and compel. *See Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241, 1243 (11th Cir. 2007); *Jones Creek Investors, LLC v. Columbia Cnty., Ga.*, No. CV111–174, 2012 WL 694316, at *3 n.5 (S.D. Ga. Mar. 1, 2012).

Because that motion presents a threshold issue, CashCall requests that the Court not address the instant motion to compel arbitration unless the motion to dismiss due to *forum non conveniens* is denied. CashCall also reserves the right to challenge Plaintiff's claims in separate motions to dismiss addressing merits issues, if necessary, at the appropriate time.

Clause requires that all disputes arising out of it be resolved in binding arbitration. Defendant CashCall, Inc. ("CashCall")[2]—the current servicer of Plaintiff's loan—therefore moves to compel arbitration and dismiss or stay this case.

In his Amended Complaint, Plaintiff takes the erroneous position that the entire Loan Agreement, including its Arbitration Clause, is unconscionable under Georgia law. But the Supreme Court has repeatedly held that a court cannot void an arbitration clause on the ground that the entire contract containing that clause is unenforceable. Only the arbitrator can decide whether the entire contract is invalid.

In any event, even if the Amended Complaint could be construed as challenging only the Arbitration Clause, that challenge would fail for several reasons. *First*, the Arbitration Clause contains a delegation provision, which states that any question as to whether the Arbitration Clause itself is enforceable must be arbitrated. The Supreme Court has squarely held that such a delegation clause is enforceable. *Second*, under recent Supreme Court cases like *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Federal Arbitration Act ("FAA") preempts state laws—such as the unconscionability doctrine(s) Plaintiff invokes here—that purport to curtail

[2] This matter's other two Defendants, Western Sky and Martin A. Webb, have not been served with the Complaint or Amended Complaint, and in any event, they are not subject to personal jurisdiction in this Court. Consequently, the current motion is not filed on their behalf and should not be construed as an appearance in this litigation by either.

contractual arbitration agreements. *Third*, and contrary to Plaintiff's contention, the Arbitration Clause here is not unconscionable. *Fourth*, contrary to Plaintiff's argument, the arbitral fora designated by the Arbitration Clause are available, and even if they were not, the FAA requires a court to appoint a substitute forum rather than void the Arbitration Clause entirely.

For these reasons, which are set forth more fully below, this Court should dismiss or stay the current civil action and compel arbitration of the parties' dispute pursuant to Sections 3 and 4 of the FAA, 9 U.S.C. §§ 3, 4, and Federal Rule of Civil Procedure 12(b)(6).

I. RELEVANT FACTUAL BACKGROUND

A. Plaintiff's Amended Complaint.

Plaintiff alleges that in June 2012, he applied for a Western Sky loan from his computer in Georgia. (Am. Compl. at ¶¶ 77, 79.) Plaintiff was approved for a $1,000 loan, and he electronically signed the contract providing the terms of the loan (the "Loan Agreement" or "Agreement"). (*Id.* at ¶¶ 80-81, 86.) In large font, the first page of the Loan Agreement provided the annual percentage rate, finance charge, amount financed, and total of payments for Plaintiff's loan. (*Id.* at ¶¶ 83-84; Dkt. 3-2 at 2.) Western Sky then approved and caused the funding of the loan from the Cheyenne River Indian Reservation. Plaintiff's loan was later sold to WS Funding,

LLC (a subsidiary of CashCall), and CashCall became the loan's servicer. (Am. Compl. at ¶ 87.)

In his Amended Complaint, Plaintiff alleges that his loan violates several provisions of the GPLA, including its 16% interest rate cap. (*Id.* at ¶¶ 107-28.) He also claims that the Loan Agreement, including its arbitration clause, is unconscionable under Georgia law. (*Id.* at ¶¶ 127-28.) On behalf of a purported class, Plaintiff seeks compensatory and statutory damages, injunctive relief, and seeks to disgorge from Defendants all money collected on loans that Plaintiff alleges violate the GPLA. (Am. Compl., Prayer for Relief.)

B. Plaintiff's Arbitration Clause.

Plaintiff's Loan Agreement contains a comprehensive Arbitration Clause:

1. *Jury Trial Waiver and Arbitration Requirement.* In his Loan Agreement, Plaintiff expressly waived a jury trial and obligated himself to arbitrate this dispute. The Loan Agreement provides:

> **WAIVER OF JURY TRIAL AND ARBITRATION.**
>
> **PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY.** Unless you exercise your right to opt-out of arbitration in the manner described below, any dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to have a jury, to engage in discovery (except as may be provided in the arbitration rules), and to participate in a class action or similar proceeding. In Arbitration, a dispute is resolved by an arbitrator instead

> of a judge or jury. Arbitration procedures are simpler and more limited than court procedures. Any Arbitration will be limited to the dispute between yourself and the holder of the Note and will not be part of a class-wide or consolidated Arbitration proceeding. (Dkt. 3-2 at 4.)

2. *"Disputes" Subject to Arbitration Defined Broadly.* The Loan Agreement defines the "Disputes" subject to mandatory arbitration in the "broadest possible" way as "any controversy or claim between you and Western Sky or the holder or servicer of the Note," including "all claims or demands . . . based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief)." (*Id.* at 5.)

3. *Challenges to the Arbitration Clause Delegated to the Arbitrator*. The Agreement also delegates to the arbitrator the authority to decide any Dispute as to "the validity, enforceability, or scope of this loan or the Arbitration agreement." (*Id.*)

4. *Broad Set of Parties Subject to Arbitration.* The Agreement broadly defines the parties against whom Plaintiff must arbitrate any Dispute. The Agreement requires arbitration of "any controversy or claim between you and Western Sky or the holder or servicer of the Note," and further defines the term "the holder" as including "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.*) CashCall is the loan "servicer." (Am. Compl. at ¶ 53.)

5. *Specified Bodies to Arbitrate Plaintiff's Claim.* The Agreement gives Plaintiff the right, "[r]egardless of who demands arbitration, . . . to select . . . the American Arbitration Association . . . ; JAMS . . . ; or an arbitration organization agreed upon by [Plaintiff] and the other parties to the Dispute." (Dkt. 3-2 at 5.) "[E]xcept as provided" in the paragraph authorizing arbitration by the AAA, JAMS, or another organization (*id.* at 4), the Arbitration Clause also states that the arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative" using "its consumer dispute rules." (*Id.* at 4-5.) Plaintiff had the right to opt out of arbitration entirely by emailing the lender within sixty days of receiving his loan funds to exercise his opt-out right (*id.* at 6), which Plaintiff did not do.

The Agreement obligates CashCall to "pay the filing fee and any costs or fees charged by the arbitrator regardless of which party initiates the Arbitration," and "[a]ny arbitration under this Agreement may be conducted either on tribal land or within thirty miles of [Plaintiff's] residence, at [his] choice." (*Id.* at 5.)

6. *Class Action Waiver.* The Agreement contains a class action waiver, providing that "the arbitrator has no authority to conduct class-wide proceedings and will be restricted to resolving the individual disputes between the parties." (*Id.*)

* * * *

Notwithstanding this clear Arbitration Clause, Plaintiff filed this action in Georgia state court. Defendants removed the action to this Court on February 12, 2014, under the Class Action Fairness Act. (Dkt. 1.) On February 19, 2014, CashCall filed a Motion to Dismiss Based on *Forum Non Conveniens* (Dkt. 2) and a Motion to Compel Arbitration (Dkt. 3). On March 4, 2014, Plaintiff filed the Amended Complaint, along with oppositions to CashCall's two prior motions. (Dkt. 12-14.) Although the filing of the Amended Complaint mooted CashCall's previous motions to dismiss and compel, (*see* note 1 above), Plaintiff's new pleading does not overcome the deficiencies that warranted those motions in the first instance. Accordingly, CashCall now brings this renewed motion to compel arbitration, along with its companion renewed motion to dismiss.

II. ARGUMENT AND CITATIONS OF AUTHORITY

A. The Loan Agreement Requires That This Dispute—Including The Issue Of Whether The Arbitration Clause Is Enforceable—Be Sent To Arbitration.

Section 2 of the FAA provides that written agreements to arbitrate "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. The central purpose of the FAA "is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quotations

omitted); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995). The United States Supreme Court has explained that the FAA enunciates a "strong federal policy in favor of enforcing arbitration agreements," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985), that controls "notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "construe[ing] . . . the contract language itself." *Id.* at 24-25.

Both the FAA and the plain language of the Loan Agreement require that every aspect of this case—including Plaintiff's challenge to the Arbitration Clause—be sent to arbitration. As noted above, the Loan Agreement defines the "Disputes" subject to mandatory arbitration in the "broadest possible" manner, and includes (but is not limited to) both: (a) "claim[s] based upon marketing or solicitations to obtain the loan and the handling or servicing of [Plaintiff's] account" that is " based on a . . . state . . . statute . . . or common law"; and (b) disputes about the "validity, enforceability, or scope of . . . the Arbitration agreement." (Dkt. 3-2 at 5.) These two portions of the Arbitration Clause alone cover, and therefore require arbitration of, Plaintiff's entire Amended Complaint.

B. Plaintiff's Attack On The Entire Loan Agreement Must Be Arbitrated.

Plaintiff has candidly admitted that "[i]n opposition to Defendants' Motion to Compel Arbitration, [he] challenges the legality of the *entire loan agreement*[.]" (Dkt. 13 at 8 (emphasis added).) Plaintiff does so through two related but unavailing grounds: (1) the common law unconscionability doctrine (*id.* at 9-12); and (2) the GPLA, which purports to empower courts to void arbitration clauses housed in unconscionable contracts. (Am. Compl. at ¶¶ 127-28.) This Court may not consider either ground.

The Supreme Court has held that *a court* may not void an arbitration clause based on arguments about a contract's unenforceability as a whole. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Supreme Court held that under the FAA "a federal court may consider only issues relating to the making and performance of the *agreement to arbitrate*," not defenses that go to the enforceability of the entire contract. *Id.* at 404 (emphasis added). Thus, "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006); *see also Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 998 (11th Cir. 2012) (same). The Eleventh Circuit has applied that rule to claims that the contract as a whole is unconscionable, holding that such claims must be heard by the arbitrator, not

a court. *See Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877 (11th Cir. 2005) (citing *Benoay v. Prudential-Bache Secs., Inc.*, 805 F.2d 1437, 1441 (11th Cir. 1986)). This Court therefore may not consider any argument that the Loan Agreement is unconscionable.

Similarly, the Court may not consider Plaintiff's argument that the Loan Agreement's interest rate renders the contract (and therefore the Arbitration Clause) unenforceable. (Am. Compl. at ¶ 128.) In *Buckeye Check Cashing, Inc. v. Cardegna*, the Supreme Court extended the *Prima Paint* rule to contract defenses based on the fact that a loan agreement contains an interest rate in excess of a state's usury laws. 546 U.S. at 444-46. The Court held that such a "challenge should . . . be considered by an arbitrator, not a court." *Id.* at 446. So too here.

Finally, even if not preempted, the GPLA simply does not apply to Plaintiff's Loan Agreement. The introduction to the GPLA states that its provisions "*do[] not encompass loans that involve interstate commerce*." O.C.G.A. § 16-17-1(d) (emphasis added). Plaintiff's Loan Agreement "involve[s] interstate commerce." Plaintiff concedes, for example, that his payments have crossed state lines, and the payments he seeks now to avoid would also cross state lines. *See United States v. Williams*, 121 F.3d 615, 619 (11th Cir. 1997) ("Appellant's obligation to pay child support . . . involves interstate commerce because Appellant's obligation to pay

money crossed state lines."). (Am. Compl. ¶¶ 7, 8, 22, 79.) As a result, the GPLA does not apply here, and Plaintiff may not seek to use § 16-17-2(c)(2) to avoid arbitration even if the FAA did not preempt that state statute.

C. Plaintiff's Claim That The Arbitration Clause Is Unconscionable Provides No Ground For This Court To Void The Clause.

To the extent Plaintiff's Amended Complaint is read generously to include a challenge to the Arbitration Clause *itself* as unconscionable, that challenge fails. *First*, the Supreme Court has extended *Prima Paint* to contracts that delegate to the arbitrator the authority to decide whether the Arbitration Clause is enforceable, and the Loan Agreement contains just such a delegation. *Second*, even if Plaintiff could challenge the Arbitration Clause here, the Georgia unconscionability defenses on which he relies are preempted by the FAA. *Third*, in any event, the Arbitration Clause is not unconscionable under Georgia law.

1. The Court Must Enforce The Delegation Clause.

The Arbitration Clause vests in the arbitrator the sole authority to decide whether the Arbitration Clause is enforceable. In particular, the clause defines the "Disputes" subject to mandatory arbitration to include any claim as to the "validity, enforceability, or scope of . . . the Arbitration agreement." (Dkt. 3-2 at 5.)

The Supreme Court has held that courts must enforce such delegation provisions. In *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), the

arbitration agreement contained a delegation provision requiring the arbitrator to "resolve any dispute relating to the interpretation, applicability, enforceability or formation of" the arbitration agreement. *Id.* at 2775, 2777. Applying *Prima Paint*, the Supreme Court held that unless a party "challenge[s] the delegation provision specifically, [courts] must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the [arbitration] Agreement as a whole for the arbitrator." *Id.* at 2779.

Plaintiff does not challenge the "delegation provision specifically," *id.*, as he alleges only the unenforceability of the entire Loan Agreement and (perhaps) the Arbitration Clause itself. (Am. Compl. at ¶¶ 127-28; Dkt. 13 at 14-21.) This Court must enforce the delegation provision and compel arbitration.

2. Even If Plaintiff Could Challenge The Arbitration Clause As Unconscionable, That Challenge Fails.

Nonetheless, even if the Court could consider an argument that the Arbitration Clause is unconscionable, that argument would fail. Under the FAA, Plaintiff bears the burden to show that the Arbitration Clause is invalid, with all doubts resolved in favor of arbitration. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315 (11th Cir. 2002). Were the question properly before this Court, the FAA would require the Court to enforce the Arbitration Clause for multiple reasons.

a. FAA Section 2 Preempts § 16-17-2(c)(2) Because That Statute Applies Only To Arbitration Agreements.

Plaintiff contends that the Arbitration Clause is unenforceable under the unconscionability defense provided by O.C.G.A. § 16-17-2(c)(2). (Am. Compl. ¶ 127; Dkt. 13 at 19-20.) The Supreme Court's landmark decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), forecloses this argument.

By requiring courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, the FAA "places arbitration agreements on an equal footing with other contracts." *Rent-A-Ctr.*, 130 S. Ct. at 2776. "Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (court's emphasis). And even where a party purports to invoke a generally applicable contract law defense, the FAA preempts that defense if it "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue" or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the FAA. *Concepcion*, 131 S. Ct. at 1746, 1753 (quotations omitted).

In *Concepcion*, the Supreme Court held that FAA Section 2 preempts an unconscionability defense indistinguishable from the one contained in O.C.G.A. § 16-17-2(c)(2). The California doctrine at issue in *Concepcion* purported to invalidate

consumer arbitration agreements containing class action waivers when the dispute involved a contract of adhesion, "small amounts of damages," and "a scheme to cheat customers" by a party with "superior bargaining power." 131 S. Ct. at 1746, 1750. The Supreme Court reasoned that this state law "st[ood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and was thus "preempted by the FAA," given that those criteria would effectively void arbitration agreements in most consumer contracts. *Id.* at 1753 (quotations omitted). *Concepcion* affirmed that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.*

Section 16-17-2(c)(2) is indistinguishable from the California unconscionability standard that *Concepcion* held preempted by the FAA.

First, the GPLA provides that "[a]n *arbitration clause* in a payday loan contract shall not be enforceable if the contract is unconscionable." O.C.G.A. § 16-17-2(c)(2) (emphasis added). By its own terms, therefore, § 16-17-2(c)(2) applies only to arbitration clauses (and only to those in one particular kind of contract), not all contracts. But "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs.*, 517 U.S. at 687. Because § 16-17-2(c)(2) does not apply to "contracts generally," it is preempted by the FAA. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

Second, § 16-17-2(c)(2)'s other provisions confirm that it embodies the very "hostility towards arbitration that prompted the FAA." *Concepcion*, 131 S. Ct. at 1747. Most problematically, it provides that to determine unconscionability, a court is required to:

> consider the circumstances of the transaction as a whole, including but not limited to: (A) The relative bargaining power of the parties; (B) Whether arbitration would be prohibitively expensive to the borrower in view of the amounts in controversy; (C) Whether the contract restricts or excludes damages or remedies that would be available to the borrower in court, including the right to participate in a class action; (D) Whether the arbitration would take place outside the county in which the loan office is located or any other place that would be unduly inconvenient or expensive in view of the amounts in controversy; and (E) Any other circumstance that might render the contract oppressive.

O.C.G.A. § 16-17-2(c)(2). Each of the four specific factors listed in the statute are preempted by the FAA, either under express rulings of the Supreme Court or because they do not apply to contracts generally under Georgia law.

- *"The relative bargaining power of the parties."* O.C.G.A. § 16-17-2(c)(2)(A). By invoking the "relative bargaining power of the parties," § 16-17-2(c)(2) openly antagonizes arbitration clauses in consumer adhesion contracts. But as "the Supreme Court has recognized, '[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are'" unenforceable. *Hough v. Regions Fin. Corp.*, 672 F.3d 1224, 1229 (11th Cir. 2012) (alterations in original) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)). Further,

because the FAA requires states to treat arbitration agreements the same as any other contract, arbitration clauses in consumer contracts such as the Loan Agreement "must be enforced unless states would refuse to enforce all off-the-shelf package deals." *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004). But "[c]ontracts of adhesion, where the buyer must take it or leave it by acquiescing to the imposed conditions, are legal in Georgia." *W. Pac. Mut. Ins. Co. v. Davies*, 267 Ga. App. 675, 681 n.5, 601 S.E.2d 363, 369 n.5 (2004). Because Georgia law generally enforces consumer adhesion contracts—which by definition involve unequal bargaining power—the FAA requires this Court to enforce arbitration clauses that are also allegedly adhesive.

- *"Whether the contract restricts or excludes damages or remedies that would be available to the borrower in court, including the right to participate in a class action."* O.C.G.A. § 16-17-2(c)(2)(C). The Loan Agreement does not exclude any "damages or remedies" available to consumers who bring claims under the Loan Agreement. Thus, the only potentially applicable ground for invoking this section of the GPLA is the Loan Agreement's class action waiver. In *Concepcion*, however, the Supreme Court squarely held that a court cannot void an arbitration clause simply because it contains a class action waiver. *Concepcion*, 131 S. Ct. at 1753. And in any

event, there is only one plaintiff currently in this case (Mr. Parnell), and thus his own damages and remedies are not affected by the class action waiver.

- *"Whether arbitration would be prohibitively expensive" or the location of the arbitration would be "unduly inconvenient or expensive in view of the amounts in controversy."* O.C.G.A. § 16-17-2(c)(2)(B), (D). The Supreme Court has held that a court cannot refuse to enforce an arbitration clause because the arbitration process itself is expensive (subsection B), or the expense and inconvenience associated with the necessary travel for the arbitration would render arbitration impracticable "in view of the amounts in controversy" (subsection D).

Concepcion rejected the argument that courts can void an arbitration clause on the ground that the clause's requirements might functionally immunize the defendant from liability, such as by rendering arbitration prohibitively costly. 131 S. Ct. at 1753. "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.*

The Supreme Court reiterated that holding in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310-12 (2013). There, the plaintiff challenged the class action waiver in its arbitration agreement on the ground that the costs of litigating the claim would outweigh any recovery by a single plaintiff, deterring suit. *Id.* at 2308. The Supreme Court rejected that argument, holding that "the fact that it is

not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy," which is all the FAA demands to enforce an arbitration clause. *Id.* at 2311. "[T]he FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of" claims. *Id.* at 2312 n.5; *see also Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1215 (11th Cir. 2011) (holding that a state law prohibiting class action waivers in arbitration clauses in any "case involv[ing] numerous small-dollar claims by consumers against a corporation, many of which will not be brought unless the Plaintiffs proceed as a class," was "inconsistent with and thus preempted by FAA § 2"); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1235 (11th Cir. 2012). Thus, under *Concepcion*, *Italian Colors*, and similar cases, even if the cost of arbitrating is high in relation to the amount in controversy, this Court is still required to enforce the Arbitration Clause.[3]

b. FAA Section 2 Also Preempts Plaintiff's Common Law Unconscionability Defense.

To the extent Plaintiff challenges the Arbitration Clause under general common-law unconscionability principles (as opposed to O.C.G.A. § 16-17-2(c)(2)), (Dkt. 13 at 14-18), that argument is also preempted by *Concepcion*.

[3] Further, "[a]n agreement to arbitrate . . . is, in effect, a specialized kind of forum-selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Courts may no longer consider the factors specified in § 16-17-2(c) about expense or inconvenience when evaluating forum-selection clauses. *See Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.*, 134 S. Ct. 568, 582 (2013).

Plaintiff echoes § 16-17-2(c)(2)(B) and (D) in arguing that this Court can void the Arbitration Clause under general unconscionability doctrine because "proceedings in the contractual forum will be so gravely difficult and inconvenient that [Plaintiff] will for all practical purposes be deprived of his day in court." (Dkt. 13 at 14 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 632 (1985) (quotation omitted)).) That argument is not viable in light of subsequent Supreme Court cases. As already discussed above, in *Concepcion* and *Italian Colors* the Supreme Court held that the FAA's requirement to enforce arbitration clause "trumps" any state interest in allowing parties to bring claims. *See* pp. 17-18 above.

Further, the Eleventh Circuit has held that *Concepcion* prohibits resort to state unconscionability doctrines to void arbitration clauses. For example, in *Cruz*, a decision involving a class action waiver, the court held that, in light of *Concepcion*, the plaintiffs' challenge to the arbitration agreement was preempted by the FAA. 648 F.3d at 1212-13; *see also Pendergast*, 691 F.3d at 1234; *Hough*, 672 F.3d at 1229.

And as the Fourth Circuit recently held, *Concepcion* "plainly prohibit[s] application of the general contract defense of unconscionability to invalidate an otherwise valid arbitration agreement." *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 180 (4th Cir. 2013). Those courts reason that common law unconscionability claims applied to arbitration agreements in consumer adhesion contracts will almost

always subject an arbitration clause to a stricter test than is imposed on contracts generally, which the FAA forbids. *See, e.g.*, *Perry*, 482 U.S. at 492 n.9.

Finally, Plaintiff relies heavily upon *Mitsubishi Motors* in arguing the arbitration clause is unconscionable, but that case did not deal with unconscionability doctrine. Instead, *Mitsubishi Motors* applied a limited exception to the FAA where enforcing an arbitration agreement would prevent a party from "effectively . . . vindicat[ing]" *federal* claims. 473 U.S. at 637. The effective vindication exception cannot apply to the *state* law claims Plaintiff asserts here. In *Mitsubishi Motors*, *Italian Colors*, and other Supreme Court cases addressing the effective vindication exception, the statutory claims were based on federal, not state, law. *See also Green Tree Fin.*, 531 U.S. at 90. Congress has the authority to exempt federal statutory claims from the FAA, but under the Supremacy Clause, States do not. For that reason, a "state law [cannot] possibly implicate the effective vindication rule." *Italian Colors*, 133 S. Ct. at 2320 (Kagan, J., dissenting); *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 n.2 (9th Cir. 2012) (same).

c. The Parties' Arbitration Clause Is Not Unconscionable Under Either § 16-17-2(c)(2) Or Common Law.

Even if § 16-17-2(c)(2)'s unconscionability defense and general common-law unconscionability were *not* preempted, the Arbitration Clause still must be enforced because it is not unconscionable under either doctrine. (Am. Compl. at ¶ 128.)

As discussed above, § 16-17-2(c)(2) requires courts to consider "[w]hether arbitration would be prohibitively expensive to the borrower" and "[w]hether the arbitration would take place [anywhere] that would be unduly inconvenient or expensive in view of the amounts in controversy." O.C.G.A. § 16-17-2(c)(2)(B), (D). Those factors weigh *in favor* of enforcing the Arbitration Clause. The cost of arbitration will not be "prohibitively expensive to the borrower," *id.* § 16-17-2(c)(2)(B), because the Agreement requires CashCall to "pay the filing fee and any costs or fees charged by the arbitrator regardless of which party initiates the Arbitration." (Dkt. 3-2 at 5.) Similarly, the location of the arbitration will not be "unduly inconvenient or expensive," O.C.G.A. § 16-17-2(c)(2)(D), because the arbitration must take place "either on tribal land *or within thirty miles of [Plaintiff's] residence, at [Plaintiff's] choice*." ((Dkt. 3-2 at 5 (emphasis added).)

Further, with the exception of the class action waiver (which must be enforced under *Concepcion*), the Arbitration Clause does not "restrict[] or exclude[] damages or remedies that would be available to the borrower in court." O.C.G.A. § 16-17-2(c)(2)(C). Even with the waiver, and assuming Plaintiff is entitled to relief, Plaintiff's individual recovery is the same whether he is or is not joined with a class. In any event, Plaintiff is free to pursue all available remedies in the arbitration.

Finally, even if the Loan Agreement, as a contract of adhesion, necessarily involved some unequal bargaining power, "under Georgia law, an adhesion contract is not per se unconscionable." *Hough*, 672 F.3d at 1229. Thus, even if unequal bargaining power is a factor weighing against enforcing the Arbitration Clause, it is not sufficient under Georgia law, standing alone, to do so.

The Arbitration Clause is also not unconscionable under common law unconscionability doctrine, which is even more difficult to satisfy than § 16-17-2(c)(2)'s lowered standard. Procedural factors such as the "presence or absence of a meaningful choice" and the "conspicuousness and comprehensibility of the contract language" show that the Arbitration Clause is not unconscionable. *NEC Techs., Inc. v. Nelson*, 267 Ga. 390, 392, 478 S.E.2d 769, 772 (Ga. 1996). Plaintiff initiated and signed the loan application from the comfort of his own home and had multiple opportunities to change his mind. (Am. Compl. ¶¶ 79-86.) The Arbitration Clause comprises a significant portion of the Loan Agreement and lays out extensive details on the 'who, what, when, and where' of arbitration—these terms are certainly "conspicuous[] and comprehensib[le]." Looking to substantive factors such as the "commercial reasonableness of the contract terms" and "public policy concerns" likewise confirms the Arbitration Clause is not unconscionable. *Nelson*, 267 Ga. at 392, 478 S.E.2d at 772. The strongest evidence of this conclusion is the simple fact

that Georgia courts routinely send parties to arbitrate before AAA and JAMS, as is allowed by the Loan Agreement here. *See, e.g., Wallace v. Rick Case Auto, Inc.*, No. 1:12-cv-4271, 2013 WL 5770996, at *8 (N.D. Ga. Oct. 23, 2013); *Cash In Advance of Fla., Inc. v. Jolley*, 272 Ga. App. 282, 285, 612 S.E.2d 101, 104 (2005).

D. The Contractual Arbitral Forum Is Available, And Even If It Were Not, FAA Section 5 Requires The Court To Appoint A Substitute.

Because the Arbitration Clause is valid, this Court must order the parties to arbitrate before one of their pre-selected fora. The arbitration shall be "conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement." (Dkt. 3-2 at 4-5.) Plaintiff also has the right to select AAA, JAMS, or any arbitration organization agreed to by the parties to administer the arbitration. (*Id.* at 5.) The AAA and JAMS, as well as their procedural rules, are available. *Miller v. GGNSC Atlanta, LLC*, 323 Ga. App. 114, 120 n.11, 746 S.E.2d 680, 686 n.11 (2013).

Plaintiff has argued that this Court cannot enforce the arbitration clause because "[t]here is no Tribal arbitration" and there "are no Tribal consumer dispute rules." (Dkt. 13 at 18.) But the Arbitration Clause does not require the parties to use "Tribal arbitration" or its "consumer disputes rules." The Arbitration Clause provides: "You agree that any Dispute, *except as provided below*, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an

authorized representative in accordance with its consumer dispute rules and the terms of this Agreement." (Dkt. 3-2 at 4-5 (emphasis added).) "Provided below" that clause is the statement that Plaintiff has the right to choose the AAA, JAMS, or "or an arbitration organization agreed upon by you and the other parties to the Dispute," which will use its "rules and procedures applicable to consumer disputes" to resolve this case. (*Id.* at 5.) The Arbitration Clause thus authorizes Plaintiff to replace Tribal arbitration with arbitration under the AAA, JAMS, or another arbitral organization of the parties' choosing.[4]

In any case, even if the arbitral forum or rules required by the Arbitration Clause are not available, that is irrelevant. FAA Section 5 requires a court to appoint an arbitrator if for "any . . . reason there shall be a lapse in the naming of an arbitrator." 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 S. Ins. Co.*, 648 F.3d 1166, 1171 (11th Cir. 2011). Thus, where the contractually-designated arbitral forum is not available, Section 5 requires courts to

[4] Plaintiff attempts to rely upon the district court orders in *Jackson v. PayDay Fin., LLC*, No. 11-cv-9233 (N.D. Ill.), or *Inetianbor v. CashCall, Inc.*, No. 13-cv-60066 (S.D. Fla.)—both of which are currently on appeal—but none of the plaintiffs in those cases had arbitration clauses that permitted arbitration to occur before AAA or JAMS.

"assume that a reference to an unavailable means of arbitration is equivalent to leaving the issue open." *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 792 (7th Cir. 2013). In that situation, "Section 5 allows judges to supply details in order to make arbitration work," including by naming an arbitrator or specifying the rules the arbitrator must follow. *Id.* at 793; *see also Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 716 (7th Cir. 1987). Thus, if upon compelling arbitration the parties cannot appoint an arbitrator using the AAA or JAMS rules, the parties can petition a court to appoint a substitute.

E. The Court Should Dismiss Plaintiff's Amended Complaint.

For reasons CashCall has already explained, this Court should dismiss this case in its entirety because every claim in it must be arbitrated. (Dkt. 3-1 at 23-24.)

III. CONCLUSION

For the reasons stated above, this Court should compel arbitration and dismiss or stay Plaintiff's action.

Respectfully submitted this 18th day of March, 2014.

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CERTIFICATE OF COMPLIANCE

In compliance with N.D. Ga. R. 7.1D, I certify that the foregoing **MEMORANDUM OF LAW IN SUPPORT OF CASHCALL, INC.'S RENEWED MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY ACTION** has been prepared in conformity with N.D. Ga. R. 5.1. This memorandum was prepared with Times New Roman (14 point) type, with a top margin of one and one-half (1 ½) inches and a left margin of one (1) inch. This memorandum is proportionately spaced, and is no longer than 25 pages.

/s/ William J. Holley, II
William J. Holley, II

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically submitted the foregoing **MEMORANDUM OF LAW IN SUPPORT OF CASHCALL, INC.'S RENEWED MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY ACTION** to the Clerk of Court using the CM/ECF system which automatically sent e-mail notification of such filing to the following attorneys of record, each of whom is a registered participant in the Court's electronic notice and filing system:

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This 18th day of March, 2014.

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