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

JOSHUA PARNELL,	)	
	)	
Plaintiff,	)	
	)	
	)	**Civil Action Number:**
v.	)	
	)	**4:14-CV-00024-HLM**
WESTERN SKY FINANCIAL, LLC, d/b/a Western Sky Funding, Western Sky, WesternSky.com; MARTIN A. ("Butch") WEBB; & CASHCALL, INC.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO CASHCALL, INC.'S RENEWED MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY ACTION

COMES NOW, Plaintiff Joshua Parnell, and files this, his Response in Opposition to Defendant CashCall Inc.'s ("CashCall") Renewed Motion to Compel Arbitration and Dismiss or Stay Action, and shows this Honorable Court the following:

PROCEDURAL HISTORY

Plaintiff Joshua Parnell filed this action as a putative class action against Western Sky Financial, LLC, CashCall, and Martin Webb in the Superior Court of

Whitfield County, Georgia on December 6, 2013. CashCall's counsel has stated that he will acknowledge service on behalf of CashCall, however, at this time, counsel for Plaintiff has not received the executed acknowledgement. CashCall filed its motion to compel arbitration and dismiss on February 19, 2014. Concurrently therewith, CashCall also filed its motion to dismiss due to *forum non conveniens*.

INTRODUCTION

Here, Defendants seek to enforce a purported arbitration provision that cannot possibly be enforced because its essential and integral terms do not exist. Through uneven bargaining power, Defendants misled Plaintiff into believing that: (1) the Cheyenne River Sioux Tribal Nation conducts arbitrations, (2) the Cheyenne River Sioux Tribal Nation has consumer rules, and (3) the purported arbitration provision was made pursuant to a transaction involving the Indian Commerce Clause of the Constitution. None of those things are true, and they cannot be true because: (1) the Cheyenne River Sioux Tribal Nation does not conduct arbitrations, (2) the tribe does not have consumer rules, and (3) the transaction could not be subject to the Indian Commerce Clause because it was not made by an Indian tribe—it was made by a South Dakota limited liability company

(LLC) owned by one person. Simply put, Defendants cannot enforce the purported arbitration provision because it is impossible to perform under its terms.

FACTUAL BACKGROUND

This litigation is one of dozens of civil actions against these same Defendants pending throughout the United States.[1] Plaintiff has generally detailed the nature of the Western Sky/CashCall consumer loans scheme in his Complaint (and even further in his Amended Complaint); additionally, the United States District Court for the Northern District of Illinois adopted a volume of documents and transcripts produced as part of the other actions as fact, submitted herewith as Exhibit A. The following is a brief summary of the facts contained in the Amended Complaint and Exhibit A.

Consumers apply for small loans or payday loans through a call center, CashCall's website, or www.westernsky.com (no longer operational). Amended

[1] See Heldt v. Payday Financial, LLC; Western Sky Financial, LLC; Martin A. Webb; and CashCall, Inc., (D. S.D. 3:13-CV-3023-RAL); Jackson v. Payday Financial, LLC; Western Sky Financial, LLC; Martin A. Webb; and CashCall, Inc., (N.D. Ill. Eastern Div. 11-C-9288); Inetianbor v. CashCall, Inc., (S.D. Fla. 13-60066); Brown v. Western Sky Financial, LLC *et al.*, (M.D. N.C. 1:13-CV-255-WO-JLW); Scherr v. Western Sky Financial, LLC *et al.,* (N.D. Ill. Eastern Div. 1:13-CV-1841-RWG); Spuller v. Delbert Svcs. Corp. and CashCall, Inc., (E.D. N.C. 5:13-CV-806-D); Teager *et al.* v. CashCall, Inc., (Ill. Cir. Ct. 2011-CH-07808) (complaint available at 2011 WL 921787). This is not a comprehensive list. A PACER search under the names of "Western Sky" or "CashCall" reveal many more actions against these entities.

Compl. ¶ 29. Pursuant to an agreement between Western Sky and WS Funding, CashCall provides website hosting and support services for Western Sky. Amended Compl. ¶ 30. Additionally, CashCall reimburses Western Sky for all costs of maintenance, repair and/or update costs associated with Western Sky's server. Amended Compl. ¶ 30. Each Defendant plays a different role in the operation, but Defendant CashCall is the ringleader. CashCall also reimburses Western Sky for its office, payroll, and postage and provides Western Sky with a toll free telephone and fax number. Amended Compl. ¶ 31. CashCall also provides an array of marketing services to Western Sky, including but not limited to creating and distributing print, internet, television, and radio advertisements and other promotional materials. Amended Compl. ¶ 32.

Once a consumer application for a small or payday loan is received *via* the call center, CashCall's website, or www.westernsky.com, CashCall reviews the application for underwriting requirements. Amended Compl. ¶ 33. When an application is approved, Western Sky executes a promissory note and debits a so-called "Reserve Account" to fund the promissory note. Amended Compl. ¶ 34. The Reserve Account is a demand-deposit bank account set up in the name of Western Sky which carries a balance equal to the full value of two days promissory notes calculated on the previous month's daily average. Amended Compl. ¶ 35.

Under an agreement between Western Sky and WS Funding, CashCall is required to set up, fund, and maintain the balance in the Reserve Account. The initial balance in the Reserve Account must be $100,000. Amended Compl. ¶ 36. After the loan is funded, CashCall is obligated by agreement to purchase the promissory note from Western Sky. Amended Compl. ¶ 37.

Western Sky does not accept payments from consumers. Amended Compl. ¶ 40. Western Sky does not make loan decisions. Western Sky does not market the loan product. Western Sky does not service the loan. Western Sky does not fund the loan with its own money. Western Sky earns money by receiving a percentage of the value of each loan from CashCall. Amended Compl. ¶¶ 42, 43. Defendants have made substantial efforts to conceal the business scheme from consumers and regulators. Amended Compl. ¶ 46. Western Sky does not identify its relationship with CashCall in any marketing materials, and the loan agreements identify Western Sky as the "lender." Amended Compl. ¶¶ 47, 48. Consumers believe they are dealing with a tribal entity called Western Sky but, in reality, they are dealing with a California corporation that specializes in payday loans. Amended Compl. ¶¶ 49, 50.

The scheme allows CashCall to make and fund high-interest loans that violate every usury law in the country by laundering them through Western Sky—

the "front-end" sham organization. This lawsuit challenges the legality of a California corporation falsely-claiming to operate on Tribal land for the sole purpose of executing a loan agreement. The only contact that any of the consumer loans have with the Cheyenne River Sioux Tribal Nation is that an employee of Western Sky clicks a button to execute the loan on a computer server located in California.

Various regulatory agencies from states throughout the country have already shut Defendants' operations down in their states—and many others are in the process of doing so. In addition to the Federal Trade Commission's action against these same Defendants pending before U.S. District Court of South Dakota, Central Division (FTC v. Payday Financial, LLC et al., 11-3017-RAL), judicial notice should be taken of the fact that in recent years more than ten states have filed lawsuits and issued various administrative findings of fact and cease and desist orders against Defendants for similar lending activity as the Plaintiff in this case alleges.[2] Those investigations have uniformly uncovered the same set of

[2] See State of Georgia, Ex Rel., Samuel S. Owens, Attorney General of the State Of Georgia v. Western Sky Financial, LLC; Martin A. Webb; and CashCall, Inc., (Fulton County, GA Superior Court, 2013CV234310 (filed July 26, 2013)), The complaint is available at http://law.ga.gov/sites/law.ga.gov/files/related_files/press_release/WESTERN%20SKY%20COMPLAINT.pdf. The North Carolina Attorney General filed a similar action on December 16, 2013. See

circumstances, usurious lending practices, shell-game funding and lack of tribal immunity related to these same Defendants. Beginning in late August 2013, Western Sky has laid off most of its employees at its locations in Timber Lake and

---

http://www.ncdoj.gov/getdoc/0c087145-6dc7-4911-958a-705a8d75ddf4/CashCall-Complaint-Final-12-16-2013.aspx. See also The People of the State of California v. CashCall, Inc., a California Corporation, No. BC420115 (Superior Court, Los Angeles County, State of California); State of Colorado ex rel. John W. Suthers, Attorney General v. Western Sky Financial, No. 11-cv-638 (District Court, Denver County, State of Colorado); In re Western Sky Financial, LLC, No. 13-CC-265 (Illinois Department of Financial and Professional Regulation, Division of Financial Institutions); Commissioner of Financial Regulation v. CashCall and Reddam, No. CFR-EU-2209-184 (State of Maryland); Maryland Commissioner of Financial Regulation v. Western Sky Financial, LLC et al., No. CFR- FY-2011-182 (State of Maryland); Maryland Commissioner of Financial Regulation v. Western Sky Financial, LLC, et al., No. 1:11-cv-00735 (D. Md.); In re CashCall, Inc. and WS Funding, LLC, Docket No. 2013-010 (State of Massachusetts); State of Missouri v. Webb, No. 4:11-cv-1237-AGF (E.D. Mo. Mar. 27, 2012); In re CashCall, Inc., John Paul Reddam, President and CEO of CashCall, Inc., and WS Funding LLC, No. 12-308 (State of New Hampshire Banking Department); In re Western Sky Financial, LLC, No. I-12- 039 (Department of Consumer Business Services for the State of Oregon); Washington State Department of Financial Institutions Statement of Charges, dated Oct. 18, 2012; West Virginia v. CashCall, Inc., 605 F.Supp.2d 781 (S.D.W. Va. 2009); State of West Virginia ex rel. McGraw v. Payday Loan Resource Center, LLC, et al., No. 10-MISC-372 (Circuit Court, Kanawha County, State of West Virginia); Federal Trade Commission v. PayDay Financial, LLC, No. 3:11-cv-03017-RAL; State of Minnesota, by its Attorney General, Lori Swanson and its Commissioner of Commerce, Michael Rothman v. CashCall, Inc., et al., No. 27-cv-13-12740 (District Court, Hennepin County, State of Minnesota). See also Find the Loan Behind the Loans, Gretchen Morgenson, The New York Times, Sept. 7, 2013, http://www.nytimes.com/2013/09/08/business/find-the-loan-behind-the-loans.html?smid=pl-share (last visited March 2, 2014).

Eagle Butte, South Dakota. "Western Sky will only have 17 employees left after it closes the Eagle Butte office." Western Sky Laying Off Nearly All Its Workers, Ben Dunsmoor, Aug. 23, 2013, http://www.keloland.com/newsdetail.cfm/western-sky-laying-off-nearly-all-its-workers/?id=152343 (last visited March 2, 2014).

The question this lawsuit seeks to resolve is whether such a scheme can legally circumvent Georgia's usury laws. Plaintiff believes the answer is no, and that, additionally, the scheme violates this state's consumer protection efforts by concealing the nature of the enterprise to consumers. In opposition to Defendant's Motion to Compel Arbitration, Plaintiff challenges the legality of the entire loan agreement, and particularly the portion that purportedly requires them to arbitrate disputes arising out of the Indian Commerce Clause in Tribal arbitration conducted pursuant to Tribal consumer dispute rules. Plaintiff believes that the proffered arbitration provision is void and nothing more than another of Defendant's efforts to avoid liability for making usurious loans.

ARGUMENT AND CITATION OF AUTHORITIES

Plaintiff's attack on the Loan Agreement is that the contract in general is unconscionable, illegal and unenforceable, which under Georgia law or federal law, is an inquiry for the Court to make.

Plaintiff recognizes that under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. ("FAA"), written agreements to arbitrate a dispute arising out of a transaction involving commerce are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Id. § 2. However, "[t]he FAA allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically." Bess v. Check Express, 294 F.3d 1298, 1306 (11th Cir. 2002). Thus, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686–87 (1996). Here, not only is the Loan Agreement's arbitration provision unconscionable for numerous reasons shown *infra*, so are other provisions of the Loan Agreement, namely its choice of law provision.

I. The Choice of Law Provision of the Contract Is Unconscionable and In Violation of Georgia Law.

Under Georgia law, "[T]he basic test for determining unconscionability is 'whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.' " NEC Techs., Inc. v. Nelson, 267 Ga. 390 (1996) (quoting U.C.C. § 2–

302 cmt. 1). Georgia law recognizes both procedural and substantive unconscionability. Id. "Procedural unconscionability addresses the process of making [a] contract, while substantive unconscionability looks to the contractual terms themselves." Id.

> A non-inclusive list of some factors courts have considered in determining whether a contract is procedurally unconscionable includes the age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice. As to the substantive element of unconscionability, courts have focused on matters such as the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns.

Id. at 392. See also Dale v. Comcast Corp., 498 F.3d 1216, 1219 (11th Cir. 2007).

An examination of the "Governing Law" clause of the Loan Agreement at issue here demonstrates both procedural and substantive unconscionability. This clause reads:

> **GOVERNING LAW.** This Agreement is governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe. We do not have a presence in South Dakota or any other states of the United States. Neither this Agreement nor Lender is subject to the laws of any state of the United States of America. By executing this Agreement, you hereby expressly agree that this

> Agreement is executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation. You also expressly agree that this Agreement shall be subject to and construed In accordance only with the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law applies to this Agreement. You agree that by entering into this Agreement you are voluntarily availing yourself of the laws of the Cheyenne River Sioux Tribe, a sovereign Native American Tribal Nation, and that your execution of this Agreement is made as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation.

Doc. 3-2, p. 4.

First and foremost, as shown *supra* and in the Amended Complaint, the Loan Agreement was *not* formed under the laws of the Cheyenne River Sioux Tribe, but was rather formed with a California corporation masquerading as a Sioux Tribal business. Second, the purported owner of Western Sky, Martin Webb, is allegedly a member of the Sioux Tribe, but *not* a Tribal Elder, and therefore Western Sky does not qualify as a tribal business. Third, the "conspicuousness and comprehensibility" of the laws of the Cheyenne River Sioux Tribe are impossible to determine, as Plaintiff's counsel's search for such a body of law that would govern the parties has revealed a complete absence of such law.

Thus, from a procedural unconscionability perspective, the "Governing Law" clause was procured by fraud.

In addressing the substantive unconscionability of the choice of law provision, "the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns" must all be decided against Defendant CashCall. The interest rate of the Loan Agreement of 232.99% is clearly not a commercially reasonable rate. The purpose and effect of the contract terms, namely to avoid the usury interest rate laws of the various states – including Georgia – by masquerading as a Tribal Sovereign Nation, demonstrates in and of itself enough substantive unconscionability to set aside this Loan Agreement. "The parties to a private contract who admittedly make loans to Georgia residents cannot, by virtue of a choice of law provision, exempt themselves from investigation for potential violations of Georgia's usury laws." BankWest, Inc. v. Oxendine, 266 Ga.App. 771, 775 (2004). Finally, the public policy concerns are great, as this Loan Agreement through fraudulent statements that it is governed by Cheyenne River Sioux Tribal law (which it clearly does not) flies in the face of the *very purpose* of Georgia's Payday Loan Act. As held in Hostetler v. Answerthink, Inc., 267 Ga.App. 325, 328 (2004), "[t]he law of the jurisdiction chosen by parties to a

contract to govern their contractual rights will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or would be prejudicial to the interests of, this state." Id., (citing Convergys Corp. v. Keener, 276 Ga. 808 (2003)); Nasco, Inc. v. Gimbert, 239 Ga. 675 (1977).

A. Cheyenne River Sioux Tribal Nation Has No Rational Relationship to the Parties.

As noted *supra*, the Cheyenne River Sioux Tribal Nation has no rational relationship to any of the parties to this dispute. CashCall is a California entity. Plaintiff is a Georgia domiciliary. The only tie to the Cheyenne River Sioux Tribal Nation is through Western Sky, the now-defunct "front" organization, owned and operated by a member of the Sioux tribe – but not a Tribal Elder, Martin Webb, who Plaintiff has been unable to locate and serve with process in this matter thus far. This is just one more reason Cheyenne River Sioux Tribal law should be ignored and Georgia's *lex fori* policy enforced.

As noted in Hulcher Svcs, Inc. v. R.J. Corman RR Co., LLC, 247 Ga.App. 486 (2001), Georgia conflicts of law will not follow a foreign choice-of-law where such law would contravene Georgia's public policy. As the GPLA provides for a remedy for Georgia citizens victimized by entities such as CashCall, the choice-of-law provision becomes "an unconscionable contract that is abhorrent to good morals and conscience, where one of the parties is taking a fraudulent advantage of

another, and one such as no person in their senses and not under a delusion would make on one hand, and no honest and fair man would accept on the other." F.N. Roberts Pest Control Co. v. McDonald, 132 Ga.App. 257, 260 (1974).

The scheme operated by CashCall and Western Sky is analogous to the evil that the General Assembly sought to remedy with the creation of the GPLA in 2004.

> In an attempt to circumvent state usury laws, some payday lenders have contracted with federally chartered banks or state chartered banks insured by the FDIC to take advantage of federal banking laws that allow such banks to make loans across state lines without regard to that state's interest and usury laws in "rent-a-charter" or "rent-a-bank" contracts.

USA Payday Cash Advance Centers v. Oxendine, 262 Ga. App. 632, 634 (2003). Here, CashCall attempts to transact business as a sovereign nation, out of reach of Georgia laws, by "renting" the sovereignty of the Cheyenne River Sioux, just as the in-state lenders sought to circumvent Georgia law by "renting" and out-of-state bank's charter. In 2004, the legislature addressed this practice and enacted Senate Bill 157, codified as OCGA §§ 16–17–1 *et seq*.[3] Section 2 of the Act states that "[i]t shall be unlawful for any person to engage in any business, *in whatever form transacted*, including, but not limited to, by mail, electronic, *the Internet*, or

[3] See generally Georgia Cash Am., Inc. v. Greene, 318 Ga. App. 355, 360 (2012).

telephonic means, which consists in whole or in part of making, offering, arranging, or acting as an agent in the making of loans of $3,000.00 or less[.]" 2004 Ga. Laws 440 (S.B. 157) (emphasis added, codified at OCGA § 16-17-2 – listing exceptions to which none apply to Defendant). In one of the rare instances of Georgia legislative history, Georgia's Payday Loan Act's passage was documented in Georgia State University College of Law's "Peach Sheets." Then law student, Tia Marterella, stated that the legislature included this portion to protect Georgians from out-of-state lenders who reach into the State and 'prey' on Georgians." Martarella, Tia (2004) "CRIMES AND OFFENSES . . . Georgia State University Law Review: Vol. 21: Iss. 1, Article 14, p. 7 fn. 56, available at http://scholarworks.gsu.edu/gsulr/vol21/iss1/14.

II. The Arbitration Agreement Is Unconscionable.

As the United States Supreme Court has held, an arbitration agreement "is a specialized kind of forum-selection clause," Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 630 (1985), and any contractual forum selection clause – even one selecting arbitration – can be set aside if "proceedings in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will be for all practical purposes be deprived of his day in court, id. at 632

(quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972)) (brackets in original).

Two federal district courts that have considered the arbitration provision at issue in this motion have found it to be "a sham and an illusion" and "void." After the United States Court of Appeals for the Seventh Circuit remanded the arbitration issue to the Northern District of Illinois, the District Court made the following findings of fact and law:

> It is abundantly clear that, on the present record, the answer to the [question of whether the Cheyenne River Sioux Tribe has any authorized arbitration mechanism available to the parties and whether the arbitrator and method of arbitration required under the contracts is actually available] is a resounding no. . . . The scheme described in the New Hampshire Banking Department's Cease and Desist Order[4] has been apparently devised for the purpose of evading federal and state regulation of Defendants' activities. The intrusion of the Cheyenne River Sioux Tribal Nation into the contractual arbitration provision appears to be merely an attempt to escape otherwise applicable limits on interest charges. As such, the promise of a meaningful and fairly conducted arbitration is a sham and an illusion.

Jackson v. PayDay Financial, LLC, et al., No. 11-cv-9288, slip op. at 5–6 (N.D. Ill. Aug. 28, 2013) (Exhibit A).

[4] Attached hereto as Exhibit B.

The scheme devised by the Defendants has been described by the New Hampshire Banking Department as follows:

> [I]t appears that Western Sky is nothing more than a front to enable CashCall to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive business practices from prosecution by state and federal regulators. Western Sky holds itself out to the public as a stand alone tribal entity which provides small loans and payday loans to consumers. In reality, however, CashCall creates all advertising and marketing materials for Western Sky and reimburses Western Sky for administrative costs. CashCall reviews consumer applications for underwriting requirements. CashCall funds the loans. CashCall services the loans. Western Sky does not receive any payment from consumers for the loans.

In re CashCall, Inc., N.H. Banking Dept. Order Cease and Desist Order, June 4, 2013, p. 5, attached hereto as Exhibit B.

Similarly, the United States for the Southern District of Florida made the following findings of fact and law:

> Therefore, based on the record evidence, the Court makes two findings. First, the Court finds that Mr. Chasing Hawk is not, and does not purport to be, conducting arbitration as an authorized representative of the Tribe. Second, having failed to select an arbitrator who is an authorized representative, CashCall has further failed—despite numerous opportunities—to show that the Tribe is available through an authorized representative to conduct arbitrations. Accordingly, the Court concludes that Plaintiff has provided new evidence showing that the

> agreed upon arbitral forum is not available, and that reconsideration is appropriate.

Inetianbor v. CashCall, Inc., 13-cv-60066, slip op. at 9 (S.D. Fla. Aug. 19, 2013) (attached hereto as Exhibit C). The Inetianbor Court continued:

> At the August 16, 2013 hearing, CashCall conceded that, while the Tribe has rules concerning consumer relations— e.g., usury statutes—it does not have any consumer dispute rules. Without such rules, it is obvious that arbitration cannot be conducted "in accordance with [Tribal] consumer dispute rules" as required by the arbitration agreement. Accordingly, the Court concludes that Plaintiff has provided new evidence demonstrating that 1) the arbitral forum does not exist, and 2) rules governing the purported forum do not exist. Moreover, for the reasons stated in the April 1 Order, the selection of the Tribe as an arbitrator was integral to the agreement to arbitrate.

Id. at 10.

Since the decisions in Inetianbor and Jackson, Western Sky and CashCall have apparently attempted to "soften" the blow of its arbitration clause by adding language that purportedly make alternative arbitration forums available to Plaintiff, but like everything else with these Defendants, it is also a sham and an illusion.

The Loan agreement states:

> **Agreement to Arbitrate**. 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.

Doc. 3-2, pp. 4-5. Then below, the Agreement states:

> **Choice of Arbitrator**. Any party to a dispute, including a Holder or Its related third parties, may send the other party written notice by certified mail return receipt requested at the address appearing at the top of this Agreement of their Intent to arbitrate and setting forth the subject of the dispute along with the relief requested, even if a lawsuit has been filed. *Regardless of who demands arbitration, you shall have the right to select any of the following arbitration organizations to administer the arbitration: the American Arbitration Association (1-800-778-7879) http://www.adr.org; JAMS (1-800-352-5267) http://www.jamsadr.com; or an arbitration organization agreed upon by you and the other parties to the Dispute. The arbitration will be governed by the chosen arbitration organization's rules and procedures applicable to consumer disputes, to the extent that those rules and procedures do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate, including the limitations on the Arbitrator below.*

Id. at p. 5 (emphasis added). The title of the paragraph – "**Choice of Arbitrator**" – has nothing to do with the contents of the paragraph itself. The paragraph states that the arbitration rules of AAA or JAMS can be chosen to govern the arbitration *only to the extent that they do not conflict with Cheyenne River Sioux Tribal law*. Thus, there is no "choice of arbitrator" allowed – only a choice of an arbitration administrator. Further, as there is no access to the alleged Cheyenne River Sioux

Tribal law, there is no way that one could determine whether AAA rules or JAMS rules in any way contradict Cheyenne River Sioux Tribal law. Once again, Defendants "choice of arbitrator" is illusory.

Defendants ask this Court to compel Plaintiff into an arbitration scheme that is nonexistent. There is no Tribal arbitration. There are no Tribal consumer dispute rules. And the transaction has nothing to do with the Tribe. Defendants ask this Court to overlook those facts as if they were minor details or drafting errors. But they are not.

Those terms are substantive and integral terms of the proffered arbitration agreements. Without the existence of the forum and the procedures, there can be no arbitration as contemplated by the proffered agreement.

As Plaintiff states in his Amended Complaint at ¶ 127, this arbitration agreement violates OCGA § 16-17-2(c)(2), which states:

> An arbitration clause in a payday loan contract shall not be enforceable if the contract is unconscionable. In determining whether the contract is unconscionable, the court shall 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.

Id. Plaintiff further states that the Loan Agreement is unconscionable because the interest rate of 232.99% of the Loan Agreement is usurious; the choice of law and jurisdiction of only the laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation is contrary to Georgia public policy and in violation of OCGA § 16-17-2(c)(1); the forum selection clause of the territory of Cheyenne River Sioux Tribe is unconscionable as such a forum deprive Plaintiff and the putative class of their day in court; arbitration would be prohibitively expensive to the Plaintiff in view of the amounts in controversy; and the Loan Agreement prohibits participation in a class action or class-wide arbitral proceeding. Amended Compl. ¶ 128.

Subsections (A) through (E) of OCGA § 16-17-2(c)(2) are the basic foundations of challenging the enforcement of a contract on grounds of

unconscionability. It is nothing more than a recitation by the General Assembly of the legal concept that an unconscionable contract – in this case, a payday loan contract – can be held unenforceable on the grounds of unconscionability. Thus, CashCall's reliance on AT&T Mobility, LLC v. Concepcion, 131 S.Ct. 1740 (2011) is misplaced.

The issue in Concepcion was primarily the Discover Bank rule, arising from the California Supreme Court's decision in Discover Bank v. Superior Court, 36 Cal.4th 148 (2005). The Discover Bank rule invalidated current class waivers incorporated in consumer contracts of adhesion involving small amounts of damages, as *per se* unconscionable. The United States Supreme Court overturned Discover Bank rule, holding that such a rule stood as an obstacle to the purposes of the FAA. This, however, is not an issue here. As stated *supra*, while the FAA will enforce written agreements to arbitrate a dispute arising out of a transaction involving commerce are "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 FAA also "allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically." Bess v. Check Express, 294 F.3d 1298, 1306 (11th Cir. 2002). OCGA § 16-17-2(c)(2) states that "[a]n arbitration clause in a payday loan contract

shall not be enforceable ***if the contract is unconscionable***." (Emphasis added). The GPLA does not declare arbitration clauses in payday loan agreements *in se* illegal. It merely restates well-established Georgia law that contracts that are unconscionable – even payday loan agreements – will not be enforced.

1. The FAA Does Not Preempt the GPLA

In the first legal challenge to Georgia's Payday Loan Act, plaintiffs out-of-state banks, acting as "rent-a-banks" for in-state payday lenders, argued that the GPLA was preempted by the FAA. Judge Marvin Shoob, in dismissing this argument, held:

> Plaintiffs argue that the Act conflicts with the FAA because Section 16–17–2(c)(2) creates a special standard of unconscionability that applies only to arbitration clauses in payday loan contracts. The Court disagrees. That Code section simply declares that "[a]n arbitration clause in a payday loan contract shall not be enforceable if the contract is unconscionable." OCGA § 16–17–2(c)(2). It then directs the court to consider "the circumstances of the transaction as a whole" in determining whether a particular contract is unconscionable. Up to this point, the provision focuses on the contract as a whole and does nothing more than state general principles that are applicable to any contract under Georgia law.
>
> The provision then goes on to specify a non-exclusive list of factors that the court must consider in determining whether a contract is unconscionable. If any of these factors goes beyond the grounds for determining unconscionability that are generally applicable to all

contracts in Georgia, then the provision would violate the FAA and would be preempted. Plaintiffs challenge only one of the particular factors listed.

Specifically, plaintiffs challenge Section 16–17–2(c)(2)(C), which provides that in determining whether a contract is unconscionable, the court must consider "[w]hether 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." OCGA § 16–17–2(c)(2)(C). Plaintiffs argue that because there is no general public policy right to participate in a class action under either Georgia or federal law, the Act's inclusion of a waiver of the borrower's right to participate in a class action as an indicator of unconscionability does not reflect Georgia law of general application and is therefore preempted. The Court disagrees.

In general, Georgia law recognizes that a contract's limitation of remedies, when considered in conjunction with other factors, may render the contract unconscionable. See Mullis v. Speight Seed Farms, Inc., 234 Ga.App. 27 (1998). Under the Act, whether the exclusion of a class action remedy in any given case might render a contract unconscionable depends upon the court's consideration of the "totality of the circumstances." The Act does not make all payday lending contracts with class action exclusions unconscionable. It simply directs the court to consider such an exclusion as one factor in determining whether a contract is unconscionable. Without deciding whether any particular application of this provision might be inconsistent with the FAA, the Court does not find that such a direction to the court conflicts with the FAA on its face.

Bankwest, Inc. v. Baker, 324 F. Supp. 2d 1333, 1353-54 (N.D. Ga. 2004) aff'd, 411 F.3d 1289 (11th Cir. 2005) reh'g en banc granted, opinion vacated, 433 F.3d 1344 (11th Cir. 2005) vacated, 04-12420, 2006 WL 1329700 (11th Cir. Apr. 27, 2006) and vacated, 446 F.3d 1358 (11th Cir. 2006) and vacated as moot, 446 F.3d 1358 (11th Cir. 2006).

CONCLUSION

For the foregoing facts, reasons, arguments, and citations of authority, Plaintiff requests that Defendant CashCall's renewed motion to compel arbitration and dismiss or to stay this action be DENIED.

Respectfully submitted, this 1st day of April, 2014.

HURT STOLZ, P.C.

s/ James W. Hurt, Jr.
James W. Hurt, Jr.
Georgia Bar No. 380104

345 W. Hancock Ave
Athens, Georgia 30601
(706) 395-2750
Facsimile: (866) 766-9245
jhurt@hurtstolz.com

ARMOR LAW, LLC
Christopher N. Armor
Georgia Bar No. 614061

303 Perimeter Center North
Suite 300
Atlanta, GA 30346
Phone: (678) 690-8489
Fax: (404) 592-6102

chris.armor@armorlaw.com

ATTORNEYS FOR PLAINTIFF AND PLAINTIFF CLASS MEMBERS