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.	)	

REPLY IN FURTHER SUPPORT OF
CASHCALL, INC.'S RENEWED MOTION TO DISMISS
BASED ON *FORUM NON CONVENIENS*

Plaintiff proceeds as if the question before this Court is whether his loan is unlawful or which jurisdiction's laws govern the loan. It is not. The only issue before this Court is *who gets to decide those questions*. CashCall demonstrated in its opening brief that under the forum-selection clause and tribal exhaustion doctrine, only the tribal courts—to the extent any court can hear this case given the broad arbitration clause—can answer those questions. Further, contrary to Plaintiff's repeated hyperbole, a tribal forum will give Plaintiff an adequate opportunity to present his claims, including his claim that this case need not be arbitrated (addressed in a separate reply brief filed contemporaneously), that the choice-of-law provision is not

enforceable, and that the Loan Agreement is illegal under Georgia law. And even if the tribal courts reject those arguments—as CashCall will urge the tribal courts to do—CRST law provides Plaintiff an adequate remedy.

At bottom, then, Plaintiff's argument rests on the false assumption that the CRST operates kangaroo courts that will give Plaintiff no chance at redress. That false assumption has been rejected by the Supreme Court. This Court should reject those arguments, too, and enforce Plaintiff's contractual agreement to bring any in-court dispute only in the CRST courts.

I. The Forum-Selection Clause Is Not The Result of Fraud.

Plaintiff argues that this Court can refuse to enforce the forum-selection clause because what Plaintiff calls the "Loan Agreement Facts" are "patently false." (Opp. 11-13.) In its opening brief, CashCall explained that Plaintiff's allegation that the Loan Agreement contains false factual statements is simply not true. (Op. Br. 13-14 & n.7.) Plaintiff's decision to simply repeat those allegations without citing any evidence to support them speaks volumes of the merits of Plaintiff's claims.

In any event, Plaintiff proceeds as if the question when asking whether the forum-selection clause was procured by fraud is whether that clause is part of a scheme to, in Plaintiff's words, "fraudulently avoid regulation." (Opp. 12.) It is not, as such a claim relates to the legality of the Loan Agreement as a whole, not just the

forum-selection clause. "A forum selection clause is viewed as a separate contract that is severable from the agreement in which it is contained." *Rucker v. Oasis Legal Fin., L.L.C.*, 632 F.3d 1231, 1238 (11th Cir. 2011). To prevail, Plaintiff cannot rest on general allegations of fraud; he must "specifically allege that the clause was included in the contract because of fraud." *Id.* at 1236. "A forum-selection clause is understood not merely as a contract provision, but as a distinct contract in and of itself—that is, an agreement between the parties to settle disputes in a particular forum—that is separate from the obligations the parties owe to each other under the remainder of the contract." *Marra v. Papandreou*, 216 F.3d 1119, 1123 (D.C. Cir. 2000). This Court could not evaluate whether provisions of the Loan Agreement other than the forum-selection clause contain false statements without derogating the forum-selection clause itself—which commits those questions exclusively to the tribal courts. And because there is no evidence, let alone allegations, that the forum-selection clause itself was the product of fraud, Plaintiff's attack fails *ab initio*.

Applying the proper standard, two federal courts have recently held that the forum-selection clause at issue here is not fraudulent. As CashCall demonstrated in its opening brief, Chief Judge Dever recently enforced the forum-selection clause, finding that the plaintiff there "ha[d] not plausibly alleged that [the defendants] obtained the forum selection clause by fraud or overreaching." (Op. Br., Ex. 1,

Spuller v. CashCall, Inc., No. 5:13-CV-806-D (M.D.N.C. Mar. 18, 2014).)

Similarly, and after CashCall filed its opening brief, Judge Lange of the District of South Dakota rejected any argument that the forum-selection clause here was the result of "fraud or overreaching." *See Heldt v. Payday Fin., LLC*, No. 3:13-cv-3023-RAL, slip op. at 12 (D.S.D. Mar. 31, 2014), attached as **Ex. 1**. The *Heldt* plaintiffs advanced the same arguments that Plaintiff makes—that the Loan Agreement was a fraudulent scheme to evade state usury laws. *Heldt* rejected those arguments because "[t]o avoid enforcement of a forum-selection clause based on fraud, a plaintiff must do more than merely allege that the contract was procured by fraud; a plaintiff must show that 'the forum selection clause was itself a product of fraud.'" *Id.* (quoting *M.B. Rests., Inc. v. CKE Rests., Inc.*, 183 F.3d 750, 752 (8th Cir. 1999)). Plaintiff provides the Court no reason to reach a different result from *Spuller* and *Heldt.*

Under the proper legal test, Plaintiff's allegations fall far short of showing that the forum-selection clause was procured by fraud. The Eleventh Circuit's test for this issue—which Plaintiff never mentions—asks "whether the clause was reasonably communicated to the consumer …, tak[ing] into account the clause's physical characteristics and whether the plaintiff[] had the ability to become meaningfully informed of the clause and to reject its terms." *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009). Under that standard, the Eleventh Circuit has

enforced forum-selection clauses in consumer adhesion contracts provided they were disclosed to the consumer. *See id.*; *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1245-46 (11th Cir. 2012) (enforcing forum-selection clause disclosed on the 131st page of a cruise-line brochure). As CashCall has demonstrated, the forum-selection clause was prominently disclosed to Plaintiff on the first page of his Loan Agreement in clear, plain-English prose. (Op. Br. 13.) Because that clause was "not hidden or ambiguous," it "was not signed as a result of fraud or overreaching." *Krenkel*, 579 F.3d at 1281, 1282.

II. The Tribal Exhaustion Doctrine Bars This Court From Considering Plaintiff's Argument That The Forum-Selection Clause Was The Result of Overreaching.

Plaintiff argues that the forum-selection clause was the result of "overreaching" because Plaintiff claims the tribal courts do not have jurisdiction. (Opp. 13-17.) But as CashCall has demonstrated, the tribal exhaustion doctrine bars this Court from considering that argument because there is a "colorable" or "plausible" claim that jurisdiction exists. (Op. Br. 21.) Under those circumstances, Plaintiff is required to exhaust his remedies in tribal court before this Court can address whether tribal jurisdiction exists.

Tribal jurisdiction extends to a non-Indian when that person entered into a contractual agreement with a tribal member that took place on the reservation.

Montana v. United States, 450 U.S. 544, 565 (1981) ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members[.]"). Echoing CashCall's argument here that exhaustion is required whenever a colorable claim of tribal jurisdiction exists, *Heldt* recently held that exhaustion is required unless exercising tribal jurisdiction would be "'patently violative of express jurisdictional prohibitions.'" *Heldt*, slip op. at 25 (quoting *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412,1420 n.14 (8th Cir. 1999)). Under that standard, "[t]ribal courts rarely lose the first opportunity to determine jurisdiction because of an 'express jurisdictional prohibition.'" *Id.* (quoting *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1502 (10th Cir. 1997)). The *Heldt* Court therefore ordered exhaustion to occur. *Id.* at 26.[1]

Plaintiff argues that there is not even a colorable argument that tribal exhaustion applies because Western Sky is not a tribal member and because Plaintiff was physically present in Georgia when he applied for the loan. (Opp. 16.) Plaintiff is

[1] *Heldt* ordered exhaustion notwithstanding skepticism that tribal jurisdiction actually exists. *Heldt*, slip op. at 25. CashCall respectfully disagrees with *Heldt*'s skepticism. But that decision highlights the importance of requiring exhaustion even if the Court has doubts about whether jurisdiction actually exists.

wrong.[2]

As to the first point, Western Sky is considered a tribal member for purposes of the tribal exhaustion doctrine. When evaluating whether a corporate entity organized under state law is considered a tribal member, the corporate entity takes on the tribal status of its owner. (*See* Op. Br. 22 (citing *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395, 403-06 (S.D. 2003), *aff'd in part and vacated in part on other grounds*, 674 N.W.2d 314 (2004); *Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1157 (9th Cir. 2013).) Thus, Western Sky is a tribal member because its sole owner is an enrolled member of the CRST.

Plaintiff distinguishes those cases on the ground that they "deal[t] with immunity from taxes," (Opp. 17), but fails to explain why that distinction matters, presumably because it does not. Those cases held that a corporation organized under state law was nonetheless considered a tribal member. That is the exact issue here. If anything, the case for applying the rule that a tribal-owned company takes the tribal-member status of its owner is even more compelling here, where the only question is which court will decide the case, not whether the underlying conduct at issue is immune from state law. And a tribal court is best suited to determine tribal status.

---

[2] Indeed, *Heldt* ordered tribal exhaustion despite Western Sky's status as a South Dakota corporation and that the plaintiffs there were non-Indians who obtained loans while residing outside the Reservation. *Heldt*, slip op. at 25-27.

As to Plaintiff's second argument, CashCall has a more-than-colorable argument that the conduct Plaintiff asks to be regulated by Georgia law occurred on the Reservation. In support of his argument to the contrary, Plaintiff makes a number of factual assertions without citation to any supporting evidence that are simply false. For example, Plaintiff claims that "Western Sky does not make loan decisions" in support of his argument that Western Sky is just a shell for CashCall. (Opp. 6 (no citation).) But CashCall attached to its motion to dismiss an affidavit from Tawny Lawrence, a Western Sky employee, that shows that allegation is wrong. (Op. Br., Ex. 4.) Ms. Lawrence explains that Western Sky set the underwriting criteria for all Western Sky loans, conducted the final auditing review for all loan applications that Western Sky agreed to fund, and made the final decision to fund all loans from its offices on the Reservation. (*Id.* ¶ 5.) Plaintiff has submitted no contrary evidence.[3]

Plaintiff similarly fails to respond to CashCall's demonstration that the Loan Agreement was formed on the Reservation because the last act necessary to consummate the contract—Western Sky's acceptance of Plaintiff's application and its agreement to fund his loan—occurred on the Reservation. (Op. Br. 17-18, 22-23.) Plaintiff has therefore forfeited any challenge to that argument, which effectively

[3] If it becomes relevant, CashCall will demonstrate the falsity of a number of other assertions in Parnell's complaint, including the claim that Western Sky loans were available through CashCall's website. *See* Am. Compl. ¶¶ 29, 33.

concedes that the conduct at issue occurred on the Reservation. *Hudson v. Norfolk S. Ry. Co.*, 209 F. Supp. 2d 1301, 1324 (N.D. Ga. 2001) ("When a party fails to respond to an argument or … address a claim, … such argument or claim [is] abandoned.").

The fact that Plaintiff presumably applied for the loan from Georgia and received his loan funds while living there (Opp. 18-22) does not defeat tribal jurisdiction. *Heldt* properly rejected a nearly identical argument, noting that although the "borrower certainly does not enter onto a reservation, … in today's modern world of business transactions through internet or telephone, requiring physical entry on the reservation particularly in a case of a business transaction with a consent to jurisdiction clause, seems to be requiring too much" for tribal jurisdiction to exist. *Heldt*, slip op. at 24.[4] In addition, Plaintiff ignores the conduct that he asks the Georgia courts to regulate here: Western Sky's decision to offer and fund a loan to a Georgia resident. As explained above and in Ms. Lawrence's affidavit, that conduct occurred on the CRST's Reservation, regardless of where Plaintiff resided at the time.

III. The Forum-Selection Clause Must Be Enforced Under *Atlantic Marine*.

Plaintiff also argues that even if the forum-selection clause is valid, this Court may nonetheless refuse to enforce it because the public-interest factors described in

[4] *Heldt* featured the same geographic paradigm as here. The *Heldt* borrowers resided in Minnesota, Texas, and Virginia, and there were no allegations that they had ever traveled to the Reservation. *Heldt*, slip op. at 3, 24.

Atlantic Marine weigh in favor of a Georgia court hearing this case. (Opp. 18-22.) For the reasons stated below and in CashCall's opening brief, Plaintiff is wrong.

A. The Need To Apply CRST Law Strongly Favors Dismissal.

Plaintiff argues that Georgia law will apply to this suit simply because "Plaintiff filed suit under the GPLA," thus tilting the factor focusing on the "need to apply foreign law" against sending this case to the CRST courts. (Opp. 22.) Given the Loan Agreement's clear statement that it is "subject solely to the exclusive laws and jurisdiction of the" CRST, however, Plaintiff's argument only makes sense if that choice-of-law provision is unenforceable. Yet Plaintiff makes no argument that the choice-of-law provision is not enforceable under Georgia law, instead choosing to reiterate his argument that "the Tribe has no legitimate basis for personal or subject matter jurisdiction." (*Id.*) For all the reasons discussed above, under the tribal exhaustion doctrine, this Court may not consider that argument. (*See* pp. 5-10 above.)[5] The choice-of-law provision thus dictates that Plaintiff's suit must be resolved under tribal law, a factor that "mitigates strongly in favor of dismissal." *Membreno v. Costa Crociere S.p.A.*, 425 F.3d 932, 938 (11th Cir. 2005).

[5] In response to CashCall's motion to compel arbitration, Plaintiff argues the choice-of-law provision is unenforceable. CashCall has addressed that argument in its contemporaneously filed reply in support of the motion to compel. *See* Reply in Support of CashCall, Inc.'s Renewed Motion to Compel Arbitration and Dismiss or Stay Action 9-12.

B. The CRST's Interest In This Case Outweighs Georgia's.

Plaintiff argues that Georgia's interest in this case outweighs the CRST's because "application of the Actual Facts to this factor cannot support the conclusion that the Tribe has any interests [sic] in this case, or that Georgia's interests are 'minimal.'" (Opp. 19.) In support, Plaintiff includes a lengthy discussion of why the Georgia legislature passed the GPLA and why, Plaintiff claims, the CRST has little interest in the case. (*Id.* at 19-21.) Plaintiff's argument fails for multiple reasons.

First, Plaintiff's reliance on the purpose of the GPLA is misplaced because that statute does not apply to the loans at issue here. As CashCall's opening brief explained (at 7-8), by its own express terms, the GPLA does not apply to "loans that involve interstate commerce," O.C.G.A. § 16-17-1(d), which Plaintiff's loan involves because he applied to a lender operating outside of Georgia and his payments cross state lines. (Op. Br. 8.) Plaintiff does not respond to that argument, again forfeiting any challenge to it for purposes of this motion. *Hudson*, 209 F. Supp. 2d at 1324.

Second, the GPLA makes clear that the Georgia legislature was focused on payday lenders operating within the state of Georgia, not those operating outside Georgia that Georgia residents voluntarily seek out. For example, in enacting the GPLA, the legislature found that "the use of agency or partnership agreements *between in-state entities and out-of-state banks*, whereby the *in-state agent* holds a

predominant economic interest in the revenues generated by payday loans made to Georgia residents, is a scheme or contrivance by which the agent seeks to circumvent" Georgia's lending statutes. O.C.G.A. § 16-17-1(c) (emphasis added). The Georgia legislature was clear, therefore, that in passing the GPLA, it was targeting lenders *operating from within Georgia* that schemed to evade Georgia law, not out-of-state lenders with no presence in the state. The lenders at issue in the very case Plaintiff cites in support of his argument "operate[d] numerous consumer cash advance and finance businesses serving citizens *throughout the State of Georgia*." *Clay v. Oxendine*, 285 Ga. App. 50, 50, 645 S.E.2d 553, 555 (2007) (emphasis added); *id.* at 51, 645 S.E.2d at 555 (noting the defendants in this case were the same as in the case Plaintiff cites (at 19), *USA Payday Cash Advance Crs. v. Oxendine*, 262 Ga. App. 632, 633, 585 S.E.2d 924, 926 (2003)).

Third, Plaintiff's argument that the CRST has little interest in this case is just wrong. CashCall detailed the CRST's great interest in this dispute in its opening brief (at 16-20), which again Plaintiff ignores. In addition, Ms. Lawrence's affidavit details the devastation that litigation involving Western Sky loans has had on the Reservation. (Op. Br., Ex. 4 ¶¶ 6-7.) The CRST is in desperate need of economic development: "The CRST is one of the most poverty-stricken Indian tribes in the United States. Over 80% of working age reservation residents are unemployed, and

nearly half of all reservation residents have incomes below the federal poverty line and rely on federal assistance to make ends meet." (*Id.* ¶ 7.) At its peak, Western Sky "employed over 100 people, many of whom are members of the CRST, making it one of the largest private employers on the Reservation." (*Id.* ¶ 6.) Thus, in addition to the CRST's compelling sovereign interest in deciding for itself whether business activity conducted on the Reservation should be allowed (Op. Br. 16-20), the CRST has a great interest in adjudicating the legality of business activities that give economic opportunity to a population badly in need of it. This Court should reject Plaintiff's attempt to belittle those interests.

Fourth, and finally, Georgia residents do not need resort to the Georgia courts to protect their interests. The Supreme Court has held that "Tribal courts have repeatedly been recognized as appropriate forums for … disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). The Indian Civil Rights Act, 25 U.S.C. § 1302, requires basic equal protection and due process protections to all litigants. Plaintiff thus can adequately protect his rights in tribal court, his claims to the contrary notwithstanding.[6] (Opp. 18.)

[6] Contrary to Plaintiff's claim (at 18), the CRST recognizes "common law causes of action in such areas as contract and tort law." Frank Pommersheim, South Dakota

C. The Administrative Burdens Favor Dismissal.

In one sentence, Plaintiff argues that "[t]he administrative burden of having a South Dakota tribal court determine the rights of Georgia residents under Georgia statutes also weighs heavily against dismissal." (Opp. 22.) That rehashes Plaintiff's argument that this case is governed by Georgia law—an argument refuted above.

D. The Forum-Selection Clause Is Not "Unjust."

Perhaps recognizing that a straightforward application of the law governing forum-selection clauses requires this Court to enforce the clause, Plaintiff closes with a parade of horribles, suggesting that enforcing the clause will result in "manifest injustice." Plaintiff even goes so far as to suggest that enforcing the forum-selection clause will authorize Georgia businesses to disclaim the application of Georgia law whenever a consumer "enter[s] a business establishment." (Opp. 24.)

Tribal Court Handbook 19 (rev. ed. 2006), *available at* http://ujs.sd.gov/media/docs/IndianLaw%20Handbook.pdf ("Pommersheim"). "[P]rinciples of law and equity" are honored in addition to "the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, [and] bankruptcy." CRST Code § 16-1-103, attached as **Ex. 2**; *see also O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1147 (8th Cir. 1973) (interpreting CRST Code to grant CRST courts "power to grant injunctive relief"); *Bank of Hoven v. Long Family Land & Cattle Co.*, 32 Indian L. Rep. 6001, 6002-03 n.3 (CRST Ct. App. 2004) (stating that CRST recognizes a private cause of action for "tortious conduct") (Op. Br., Ex. 3.). Should Plaintiff prevail on these or other CRST law claims, he would be able to acquire "money damages, declaratory relief, injunctive relief, extraordinary writs, and execution." Pommersheim at 19.

Nothing could be further from the truth. This case has nothing to do with the regulation of non-tribal businesses present in Georgia. Instead, it involves a Georgia resident who voluntarily decided to do business over the internet with an out-of-state business that clearly disclosed it did not operate from Georgia. And by exempting loans made in "interstate commerce" from the GPLA, the Georgia legislature has made clear it wished to apply to interstate loans the default rule in contract law in Georgia: that parties are free to contract to require their disputes to be litigated in a non-Georgia court under non-Georgia law. *See Houseboat Store, LLC v. Chris-Craft Corp.*, 302 Ga. App. 795, 798, 692 S.E.2d 61, 64 (2010); *Commercial Credit Plan, Inc. v. Parker*, 152 Ga.App. 409, 412, 263 S.E.2d 220, 222 (1979). This Court should respect that choice, which does not authorize a business operating within Georgia to disclaim Georgia law, as Plaintiff claims to fear.

IV. CONCLUSION

The forum-selection clause is valid and must be enforced under *Atlantic Marine*. Also, as *Heldt* recently held, Plaintiff's claims are subject to tribal exhaustion because tribal jurisdiction is at least "colorable." For these reasons, the proper forum is the Cheyenne River Sioux Tribal Court, and this Court should dismiss this case under the doctrine of *forum non conveniens*.

Respectfully submitted this 18th day of April, 2014.

PARKER HUDSON RAINER & DOBBS LLP

By: */s/ William J. Holley, II*
William J. Holley, II
Georgia Bar No. 362310
Nancy H. Baughan
Georgia Bar No. 042575
Erin M. Moore
Georgia Bar No. 590819

1500 Marquis Two Tower
285 Peachtree Center Avenue, N.E.
Atlanta, Georgia 30303
Telephone: (404) 523-5300
Facsimile: (404) 522-8409

JENNER & BLOCK LLP
Katya Jestin
Admitted pro hac vice
Neil M. Barofsky
Admitted pro hac vice
Brian J. Fischer
Admitted pro hac vice

919 Third Avenue
New York, NY 10022-3908
Phone: 212-891-1600
Fax: 212-909-0608

Counsel for Defendant CashCall, Inc.

CERTIFICATE OF COMPLIANCE

In compliance with N.D. Ga. R. 7.1D, I certify that the foregoing **REPLY IN FURTHER SUPPORT OF CASHCALL, INC.'S RENEWED MOTION TO DISMISS BASED ON *FORUM NON CONVENIENS*** 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 15 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 **REPLY IN FURTHER SUPPORT OF CASHCALL, INC.'S RENEWED MOTION TO DISMISS BASED ON *FORUM NON CONVENIENS*** 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:

James W. Hurt, Jr.
Hurt Stolz, P.C.
345 W. Hancock Ave.
Athens, Georgia 30601
jhurt@hurtstolz.com

Christopher N. Armor
Armor Law, LLC
303 Perimeter Center North
Suite 300
Atlanta, Georgia 30346
chris.armor@armorlaw.com

This 18th day of April, 2014.

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