Case No. 14-12082-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOSHUA PARNELL,

Plaintiff/Appellee,

v.

CASHCALL, INC., Defendant/Appellant, and WESTERN SKY FINANCIAL, LLC, and MARTIN A. ("BUTCH") WEBB, Defendants.

On appeal from the United States District Court
for the Northern District of Georgia
Case No. 4:14-cv-0024-HLM

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

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

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Eleventh Circuit Rules 28-1(c) and 34-3(c), defendant-appellant CashCall, Inc. ("CashCall") requests oral argument. This case presents multiple issues relating to the enforceability of an arbitration clause under the Federal Arbitration Act ("FAA"). CashCall submits that oral argument will assist the Court in resolving this appeal.

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STATEMENT OF JURISDICTION

The district court has subject matter jurisdiction over plaintiff-appellee Joshua Parnell's state-law claims under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2). (Doc. 1 at 2.)

The district court issued its order denying CashCall's renewed motion to compel arbitration on April 28, 2014. (Doc. 25.) CashCall timely filed its notice of appeal on May 9, 2014. (Doc. 29.) This Court has jurisdiction over CashCall's appeal under Section 16 of the FAA, 9 U.S.C. § 16, because it is an appeal from an order denying a motion to compel arbitration.

CashCall is the only defendant over which the district court obtained jurisdiction. Mr. Parnell also named as defendants Western Sky Financial, LLC ("Western Sky") and its owner, Martin A. Webb, but Mr. Parnell never served them, and so neither participated in the proceeding below and neither is an appellant here. (*See, e.g.*, Doc. 18 at 1 n.1; Doc. 18-1 at 2 n.2; Doc. 19 at 1 n.1; Doc. 19-1 at 2 n.2.)

STATEMENT OF THE ISSUES

I. Whether the district court (A) erred by addressing Mr. Parnell's claim that the arbitration clause is unconscionable despite the existence of a valid delegation provision that commits such a decision solely to the arbitrator; or (B) alternatively, even absent the delegation provision, erred by invalidating the arbitration clause on unconscionability grounds.

II. Whether the district court misinterpreted the parties' contract in concluding that the designated arbitral forum and associated procedural rules were not available.

III. Whether the district court (A) erred by deciding that the arbitration clause could not be enforced because the allegedly unavailable forum was "integral" to the clause, where the arbitration clause contained a severability provision and other provisions making clear that the parties intended to enforce the balance of the arbitration clause if any portion of it could not be implemented; or (B) alternatively, erred in applying an "integral part" test where FAA § 5 contains no such exception to its mandate that courts appoint a substitute arbitrator if for "any . . . reason" there is a lapse in naming the arbitrator, such as because the method or forum designated by an arbitration agreement is not available.

STATEMENT OF THE CASE

This appeal challenges an order refusing to enforce an arbitration clause on the ground that the designated method for arbitrating in the parties' contract was not available, which in the district court's view rendered the arbitration clause unconscionable.

Course of Proceedings

Mr. Parnell initially filed his complaint in Georgia state court in December 2013. (Doc. 1-3.) Defendants timely removed the case to the Northern District of Georgia on February 12, 2014. (Doc. 1.) CashCall then moved to dismiss the case[1] or to compel arbitration. (Docs. 2, 3.) Mr. Parnell responded with an Amended Complaint. (Doc. 12.) CashCall then filed renewed motions to dismiss or to compel arbitration. (Docs. 18, 19.) The district court denied both motions. (Doc. 25.) CashCall filed a notice of appeal under the FAA from the denial of its motion to compel arbitration. (Doc. 29.) CashCall also moved the district court: (1) to stay the case pending that appeal; and (2) to certify its denial of the motion to dismiss under 28 U.S.C. § 1292(b) for an interlocutory appeal. (Docs. 30, 31.) The district court granted both motions. (Doc. 36.) CashCall then petitioned this Court for permission to appeal the denial of its motion to dismiss, asked the Court to consolidate both appeals, and moved in this case for an extension of time to file

[1] The motion to dismiss was based on the alternative grounds of *forum non conveniens* and the doctrine of tribal exhaustion.

its opening brief until 40 days after this Court ruled on the petition. *See* CashCall, Inc.'s Petition for Permission to Appeal and Motion to Consolidate Appeals, *Parnell v. Western Sky Fin., LLC*, No. 14-90010 (11th Cir. June 9, 2014); Joint Motion to Extend Time to File Opening Brief, *Parnell v. Western Sky Fin., LLC*, No. 14-12082 (11th Cir. June 9, 2014). On June 19, 2014, Judge William Pryor granted the motion for extension of time. Order, No. 14-12082 (June 19, 2014). A motions panel subsequently denied CashCall permission to appeal the denial of the motion to dismiss. Order, No. 14-90010 (July 23, 2014). On September 8, 2014, Judge Tjoflat granted a motion for further of extension of time. Order, No. 14-12082 (Sept. 8, 2014).

Statement of Facts

I. Plaintiff's Loan Agreement.

A. Mr. Parnell's Western Sky Loan.

In June 2012, Mr. Parnell applied for a Western Sky loan from his computer in Georgia. (Doc. 12 ¶¶ 77, 79.) Western Sky is solely owned by Mr. Webb, an enrolled member of the Cheyenne River Sioux Tribe ("CRST"). (Doc. 25 at 4, 16.) Operating solely on the Cheyenne River Indian Reservation (the "Reservation"), Western Sky conditionally approved Mr. Parnell for a $1,000 unsecured installment loan, and he electronically signed the contract governing his loan (the "Loan Agreement"). (Doc. 12 ¶¶ 80-81, 86; Doc. 3-2.) In large font, the first page of the Loan Agreement provided the annual percentage rate (232.99%),

finance charge ($3,905.56), amount financed ($1,000.00), and total of payments ($4,905.56) for Mr. Parnell's loan. (Doc. 12 ¶¶ 83-84; Doc. 3-2 at 2.) After conducting a final underwriting review, Western Sky then approved Mr. Parnell's loan and caused the funding of the loan from the Reservation. (Doc. 18-5 ¶¶ 4-5.) Pursuant to separate contractual agreements between Western Sky and a CashCall affiliate, WS Funding, LLC, Western Sky later sold Mr. Parnell's loan to WS Funding, and CashCall became the loan's servicer. (Doc. 12 ¶ 87.)

B. The Loan Agreement's Arbitration Clause.

Mr. Parnell's Loan Agreement contains a comprehensive arbitration clause ("Arbitration Clause"):

1. *Jury Trial Waiver and Arbitration*. The Arbitration Clause begins:

> **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. (Doc. 3-2 at 4.)

2. *"Disputes" Subject to Arbitration.* 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.) "A Dispute includes, by way of example and without limitation, any claim based upon marketing or solicitations to obtain the loan and the handling or servicing of my account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law." (*Id.*)

3. *Challenges to the Arbitration Clause Delegated to the Arbitrator.* The Arbitration Clause also contains a provision delegating to the arbitrator the exclusive authority to decide any Dispute as to "the validity, enforceability, or scope of this loan *or the Arbitration agreement*." ("Delegation Provision") (*Id.* (emphasis added).)

4. *Parties Subject to Arbitration.* The Agreement requires arbitration of "any controversy or claim between you and Western Sky or the holder or servicer of the Note." (*Id.*) CashCall is the loan "servicer." (Doc. 12 ¶ 53.)

5. *Specified Arbitral Fora.* The Arbitration Clause defines the arbitral fora the parties may use. Mr. Parnell could select arbitration before either (a) an

authorized representative of the CRST or (b) an arbitrator selected using AAA, JAMS, or another mutually agreeable arbitration organization. (Doc. 3-2 at 5.) The Arbitration Clause provides that, "except as provided below," 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." (*Id.* at 4-5.) But the paragraph below provided Mr. Parnell the right, "[r]egardless of who demands arbitration," to choose as administrator either the American Arbitration Association, JAMS, "or an arbitration organization agreed upon by [Mr. Parnell] and the other parties to the Dispute." (*Id.* at 5.) The Arbitration Clause further stated that "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[.]" (*Id.*)

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 [Mr. Parnell's] residence, at [his] choice." (*Id.*)

6. *Class Action Waiver.* The Arbitration Clause 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.*)

7. *Right to Opt-Out*. Under a heading stating in bold "**Right to Opt Out**," the Arbitration Clause provides: "If you do not wish your account to be subject to this Arbitration Agreement, you must advise us in writing at P.O. Box 370, Timber Lake, South Dakota, 57565, or via e-mail at info@westernsky.com" and that such an opt-out decision is effective if "[w]e . . . receive your letter or e-mail within sixty (60) days after the date your loan funds[.]" (*Id.* at 6.) Mr. Parnell never opted-out of the Arbitration Clause. (Doc. 19-1 at 6.)

8. *Severability and Survival Clauses*. The Arbitration Clause states: "If any of this Arbitration [Clause] is held invalid, the remainder shall remain in effect." (Doc. 3-2 at 5.) It also states: "This Arbitration [Clause] will survive: (i) termination or changes in this Agreement, the Account, or the relationship between us concerning the Account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of my Note, or any amounts owed on my account, to any other person or entity." (*Id.*) The Arbitration Clause also provides that it "survives any termination, amendment, expiration, or performance of any transaction between you and us and continues in full force and effect unless you and we otherwise agree in writing." (*Id.*)

9. *Acknowledgement.* When signing the Loan Agreement, Mr. Parnell

checked a box that confirms: "YOU HAVE READ AND UNDERSTAND THE ARBITRATION SECTION OF THIS NOTE AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THAT SECTION." (*Id.* at 7.)

II. Plaintiff's Suit.

Mr. Parnell brought a putative class-action suit in Georgia state court in December 2013 alleging that the defendants violated the Georgia Payday Lending Act ("GPLA") by originating and servicing Mr. Parnell's Western Sky loan. In particular, Mr. Parnell alleged that (1) the interest rate on his loan is usurious because it exceeds the 16% interest rate limit in the GPLA; (2) the Loan Agreement's choice-of-law clause, designating CRST law, is contrary to Georgia public policy; (3) the Loan Agreement's forum-selection clause, designating the CRST court for any in-court litigation, would deprive Mr. Parnell of his day in court; (4) arbitration would be prohibitively expensive; and (5) the Arbitration Clause improperly forbids class-action proceedings. (Doc. 1-3 at 20-25.) In challenging the contractual provisions designating the law governing his loans and the appropriate fora for any disputes relating to them, Mr. Parnell invoked certain provisions of the GPLA that address such clauses in certain consumer loan agreements. (*Id.* ¶¶ 98-101 (citing O.C.G.A. §§ 16-17-2(c)(1), (2).)[2]

[2] CashCall notes that a special master who was appointed in a Georgia state court regulatory action recently concluded that the loans originated by Western Sky are not subject to any provisions of the GPLA because the loans are

Mr. Parnell also claimed that the Loan Agreement is unconscionable under Georgia law. (*Id.* ¶¶ 101-02.) He sought to certify a class of all Georgia borrowers who took out loans from Western Sky and requested compensatory and statutory damages, as well as injunctive and other equitable relief. (*Id.* at 25-26.)

After the defendants timely removed the case to the district court (Doc. 1) and CashCall moved to dismiss or compel arbitration of Mr. Parnell's original complaint (Docs. 2, 3), Mr. Parnell filed an Amended Complaint (Doc. 12). The Amended Complaint did not add any new claims, but (relying extensively on an *ex parte* New Hampshire Banking Department cease and desist order) added new allegations about CashCall's business relationship with Western Sky. (Doc. 12 ¶¶ 28-65.)

"interstate" and therefore by the GPLA's own plain terms are beyond the statute's purview. *See Special Master Opinion of Former Attorney General of Georgia Michael J. Bowers*, at 8-9, No. 2013-CV-234310 (Ga. Super. Ct., Fulton Cnty., June 16, 2014). Although this ruling is not dispositive of the present appeal, given that the merits of Mr. Parnell's claims (which rest entirely on alleged violations of the GPLA) must ultimately be decided by an arbitrator, the special master's ruling, if adopted by the Georgia state courts, nonetheless will preclude any relief for Mr. Parnell. (*See* Doc. 18-1 at 7-8 (raising this same argument in CashCall's Motion to Dismiss).)

III. CashCall's Motion To Compel Arbitration Of Mr. Parnell's Amended Complaint.

In response to the Amended Complaint, CashCall filed its Renewed Motion to Compel Arbitration and Dismiss or Stay Action ("Motion to Compel") pursuant to the Arbitration Clause in Mr. Parnell's Loan Agreement. (Doc. 19.)[3]

In its Motion to Compel, CashCall argued that the language of the Arbitration Clause was very broad, and required arbitration of any disputes concerning the underlying loan. (Doc. 19-1 at 7-8.) CashCall also argued that, under well-established U.S. Supreme Court precedent, any claim by Mr. Parnell that the entire Loan Agreement is unconscionable (and thus unenforceable) must be decided by the arbitrator—and not by a court. (*Id.* at 9-10.) Additionally, to the extent a court could interpret Mr. Parnell's arguments in his Amended Complaint as claiming that the Arbitration Clause itself was unconscionable, the Delegation Provision requires that the arbitrator also must decide those claims. (*Id.* at 11-12.)

[3] CashCall also filed its Renewed Motion to Dismiss Based on *Forum Non Conveniens* ("Motion to Dismiss"), which sought to dismiss the Amended Complaint pursuant to the Loan Agreement's forum-selection clause designating the CRST courts and pursuant to the tribal exhaustion doctrine. (Doc. 18.) The district court subsequently denied the Motion to Dismiss, and certified that decision for interlocutory review under 28 U.S.C. § 1292(b). (Doc. 36 at 5-11.) This Court denied CashCall permission to appeal the denial of its Motion to Dismiss on July 23, 2014. *See CashCall, Inc. v. Parnell*, No. 14-90010 (11th Cir. July 23, 2014). In that order, this Court stated: "We leave to the panel in Appeal No. 14-12082 [this case] whether we may review any legal questions raised in the district court's order as a matter of pendent appellate jurisdiction, and do not express or imply any opinion on that subject." *Id.*

That clause also requires that the arbitrator must decide any dispute as to the "validity, enforceability, or scope of . . . the Arbitration agreement"—and the Supreme Court has held that Courts must enforce such delegation provisions as they would any other arbitration agreement. (*Id.* (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772 (2010).)

CashCall also contended that even if the district court could consider Mr. Parnell's unconscionability claims, they would fail because the specific state law defenses Mr. Parnell invoked are preempted by the FAA under the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and similar cases. (Doc. 19-1 at 12-20.) Further, CashCall argued that the Arbitration Clause simply is not unconscionable, because it provides that the arbitration may occur within 30 miles of Mr. Parnell's residence, and obligates CashCall to pay the filing fee and any arbitrator fees. (*Id.* at 20-23.)

CashCall also demonstrated that the designated arbitral forum and its related procedural rules are available because the Clause allows Mr. Parnell to select the AAA or JAMS or any other mutually agreed organization (and their corresponding consumer dispute rules) for the arbitration. (*Id.* at 23-24.) But CashCall argued that, even if a designated forum or rules were unavailable, that would not affect the enforceability of the Arbitration Clause because FAA § 5 requires courts to appoint

a substitute arbitrator or forum in the event that the method designated in the parties' agreement is unavailable. *See* 9 U.S.C. § 5. (*Id.* at 24-25.)

In his opposition to the Motion to Compel, Mr. Parnell never attacked the Delegation Provision specifically, but rather contended that the "contract in general" is unenforceable. (Doc. 21 at 8.) Mr. Parnell also argued that the Arbitration Clause itself was unconscionable on the ground that arbitration would be prohibitively expensive and inconvenient, and also because the specified arbitral forum and rules are "nonexistent." (*Id.* at 20-21.) Mr. Parnell further claimed that the Loan Agreement's tribal choice-of-law clause was unenforceable, but never explained why that issue was relevant to the question of arbitration. (*Id.* at 9.)

In its reply brief, CashCall argued that the district court should enforce the Delegation Provision because Mr. Parnell never challenged it specifically. (Doc. 24 at 1-2.) CashCall also argued that the choice-of-law issues Mr. Parnell raised in his opposition brief are, under binding Supreme Court precedent, questions for the arbitrator to decide in the first instance. (*Id.* at 2 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541, 115 S. Ct. 2322, 2330 (1995).) CashCall further argued that the Arbitration Clause could not be voided on unconscionability grounds because Mr. Parnell had not provided a generally applicable contract law defense that would render the Arbitration Clause

unenforceable (*id.* at 3-7), and in any event the Arbitration Clause is not unconscionable (*id.* at 7-9).

IV. The District Court's Decision.

On April 28, 2014, the district court denied the Motion to Compel Arbitration. (Doc. 25.)[4] The district court agreed that Mr. Parnell's suit was a "Dispute" subject to mandatory arbitration under the Arbitration Clause, and that the FAA governed the enforceability of the Clause. (*Id.* at 64-65.) The district court thus noted that "if the arbitration provision is valid, then Plaintiff ordinarily would have to proceed to arbitration." (*Id.* at 65.)

In assessing the validity of the Arbitration Clause, the district court agreed with CashCall that most of Mr. Parnell's unconscionability arguments were directed towards the Loan Agreement as a whole and thus improper. (*Id.* at 70-72.) The court still denied the Motion to Compel Arbitration on the grounds that the *Arbitration Clause* is unconscionable, however, because the CRST court "would not have subject matter jurisdiction to entertain this action," and "the failure of the chosen forum precludes arbitration." (*Id.* at 73.) The district court did not explain why the fact that the tribal *court* would not have jurisdiction somehow affected the

[4] The court also denied CashCall's Motion to Dismiss in the same order. (Doc. 25 at 25-52.)

availability of the distinct *arbitral* fora designated in the agreement.[5] The district court also found that because the CRST "consumer dispute rules do not exist, the arbitral forum is unavailable, and the arbitration provision is unenforceable." (*Id.* at 75.)

The district court held that the provision of the Arbitration Clause providing for arbitration before the AAA, JAMS, or any other mutually acceptable organization did not save the Arbitration Clause. (*Id.* at 76-77.) The district court ruled that "the provision does not allow a choice of arbitrator—only a choice of an arbitration administrator." (*Id.* at 76.) In addition, the district court focused on the fact that under the Arbitration Clause, the "chosen arbitration organization's rules and procedures will apply only '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.'" (*Id.* (quoting Doc. 3-2 at 5).) The district court found that there is "no access" to CRST law, and thus "there is no way one could determine whether" those organizations' "rules contradict Cheyenne River Sioux Tribal law." (*Id.* at 77.) In finding that CRST law is not accessible, the district court did not consider the fact that CashCall submitted pertinent portions of CRST

[5] For the reasons CashCall explained in its Motion to Dismiss, the district court did not have authority under the tribal exhaustion doctrine to decide in the first instance whether tribal jurisdiction exists here. (Doc. 18-1 at 21-23; Doc. 23 at 5-9.) But that issue is not before this Court because this Court denied CashCall permission to appeal the denial of the Motion to Dismiss. (*See* p. 11 n.3 above.)

law to the district court. (*Id.* at 75 n.8.) Finally, the district court rejected CashCall's argument that, whether the designated arbitral forum or rules were available or not, the Arbitration Clause is still enforceable because of the availability of a substitute arbitrator appointed under FAA § 5. (*Id.* at 73-74.) In so holding, the district court cited *Inetianbor v. CashCall, Inc.*, No. 13-cv-60066, 2013 WL 1325327, at *3-4 (S.D. Fla. Apr. 1, 2013), in concluding that the terms of the Arbitration Clause that the Court found the parties could not implement were so "integral" that the court could not enforce the Arbitration Clause in their absence. (Doc. 25 at 73.)

V. CashCall's Appeal.

On May 9, 2014, CashCall filed a notice of appeal from the denial of the Motion to Compel. (Doc. 29). On the same day, CashCall filed a motion to stay the case pending that appeal under *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004) ("*Blinco I*"), which requires the district court to stay a case pending an appeal of a denial of a motion to compel arbitration so long as the appeal is not frivolous. (Doc. 30.) On May 29, 2014, the district court granted that motion, concluding that CashCall was entitled to a stay because the Motion to Compel "presented close questions for the Court." (Doc. 36 at 4.)

SUMMARY OF THE ARGUMENT

This Court should reverse the district court for three principal reasons.

First, the district court erred in voiding the Arbitration Clause on unconscionability grounds. *See* Section I below. As a threshold matter, the Loan Agreement contains a Delegation Provision committing to the *arbitrator* the authority to determine "the *validity*, *enforceability*, or scope of . . . the Arbitration agreement." (Doc. 3-2 at 5 (emphasis added).) Under the Supreme Court's decision in *Rent-A-Center*, the FAA requires courts to enforce delegation provisions, like this Delegation Provision, in which the parties "agree[] to arbitrate the very issue of 'arbitrability.'" *Martinez v. Carnival Corp.*, 744 F.3d 1240, 1246 (11th Cir. 2014) (quoting *Rent-A-Ctr.*, 561 U.S. at 79, 130 S. Ct. at 2783). A district court may invalidate such a provision only if the party opposing arbitration meets its burden to attack the delegation provision *specifically* (not the broader arbitration agreement). Yet Mr. Parnell never challenged the Delegation Provision, and the district court did not—and could not—find that the Delegation Provision was unconscionable. *See* Section I.A below.

Even if the district court properly could have considered whether the Arbitration Clause was unconscionable, that defense would fail because: (1) the FAA preempts that argument, as the Supreme Court held in *Concepcion*; and (2) the arbitral forum's unavailability would not render the Arbitration Clause unconscionable in any event. *See* Section I.B below.

Second, the district court misinterpreted the Loan Agreement in concluding that the contractual forum is unavailable. *See* Section II below. Put simply, the Arbitration Clause designates as an appropriate arbitral forum the AAA, JAMS, or any other arbitration organization upon which the parties agree, and states that the arbitration will be conducted under the rules applicable to consumer disputes of the selected organization. There is no dispute that those fora and their rules are available. *See* Section II.A below. In light of that fundamental misreading of the Arbitration Clause, the district court's reasons for holding the designated forum and associated rules unavailable do not withstand scrutiny. *See* Section II.B below.

Third, even assuming *arguendo* that the arbitral forum and rules were unavailable, the district court still erred by refusing to compel arbitration before a substitute arbitrator appointed under FAA § 5 on the ground that the designated forum and rules were an "integral part" of the Arbitration Clause. *See* Section III below. While some courts have held that § 5 does not allow a court to appoint a substitute arbitral forum if the contractual details of the arbitration were an "integral part" of the arbitration provision, that is not a proper ground to ignore § 5's mandate. But this Court need not reach that question because here the designated forum or rules were clearly not integral to this Arbitration Clause. The parties included severability and survival provisions in the Arbitration Clause (which show their intention to arbitrate elsewhere if the contractual method is

unavailable), and the parties also agreed that they could arbitrate before AAA or JAMS or any other organization they mutually agreed upon (which shows that no particular arbitral forum or rules were essential to the parties' agreement). The Arbitration Clause is thus enforceable even under the district court's test. *See* Section III.A below. However, if the Court agrees with the district court that the designated forum or rules were integral to the Arbitration Clause, it should still reverse and hold that FAA § 5 does not allow a court to excuse a party from its contractual obligation to arbitrate on the ground that the designated forum was integral to the arbitration clause. *See* Section III.B below.

For these reasons, and as detailed below, this Court should reverse the district court's order and direct this entire case to arbitration.

STANDARD OF REVIEW

This Court reviews the district court's decision not to compel arbitration *de novo*. *See Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877 (11th Cir. 2005) (reversing district court's denial of motion to compel arbitration). This Court reviews *de novo* questions of law, including the district court's interpretation of the contract and whether the language of that contract indicates that the forum or rules are an integral part of the arbitration clause. *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) (holding that a substitute arbitrator was properly appointed pursuant to FAA § 5). This Court

reviews the district court's factual findings for clear error. *Hart v. Yamaha-Parts Distribs., Inc.*, 787 F.2d 1468, 1472-73 (11th Cir. 1986) (reversing district court's findings as clearly erroneous). "A trial court's finding of fact is clearly erroneous if it is without substantial evidence to support it, or the district court misapprehended the effect of the evidence." *Rewis v. United States*, 445 F.2d 1303, 1304 (5th Cir. 1971) (reversing district court factual finding).

ARGUMENT

The district court erred by invalidating Mr. Parnell's agreement to arbitrate all disputes relating to his Loan Agreement. The FAA provides that a written arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. It "reflects an emphatic federal policy in favor of arbitral dispute resolution,"[6] "forecloses . . . judicial hostility towards arbitration," and "declare[s] a national policy favoring arbitration."[7] "The [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25-26 (2011) (Court's emphasis).

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[6] *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (quotations omitted).

[7] *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 503 (2012) (quotations omitted).

Courts therefore must resolve any doubts regarding the arbitrability of claims in favor of arbitration. *See United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 1353 (1960); *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 312 F.3d 1349, 1358 (11th Cir. 2002). Courts "should not" deny arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Warrior & Gulf Navigation*, 363 U.S. at 582-83, 80 S. Ct. at 1353.

The decision below does not adhere to these principles. The district court should have compelled arbitration in accordance with the parties' Loan Agreement. Indeed, the Loan Agreement makes pellucidly clear that "the last place where the parties intended this dispute to be adjudicated is in court before a jury." *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1323 (11th Cir. 2002).

I. The District Court Erred By Voiding The Arbitration Clause On Unconscionability Grounds.

A. The Delegation Provision Prohibited The District Court From Considering Whether the Arbitration Clause Is Unenforceable.

The district court held that the Arbitration Clause is unconscionable, but erred by even considering that question. As CashCall maintained below (Doc. 3-1 at 12-13; Doc. 19-1 at 11-12; Doc. 24 at 1-3; Doc. 30-1 at 4-5), Mr. Parnell's Loan Agreement contains a Delegation Provision requiring that all disputes about the

enforceability of the Arbitration Clause be decided by an arbitrator—not the courts. Under the Supreme Court's decision in *Rent-A-Center*, 561 U.S. 63, 130 S. Ct. 2772, a delegation provision is presumed valid unless the plaintiff asserts a defense directed specifically at the delegation provision and demonstrates that the defense is meritorious. Here, however, Mr. Parnell never attacked the Delegation Provision itself, and the district court did not address it. The FAA thus required the district court to enforce the Delegation Provision and compel arbitration.

This rule flows from a series of Supreme Court cases holding that parties may avoid an arbitration clause—and a delegation provision is just an arbitration clause directed to a specific issue—only by attacking the arbitration clause *itself*. Parties may not avoid an arbitration clause by alleging that the contract as a whole containing the clause is subject to a valid defense or that other provisions of the contract are unenforceable. Those are questions for the arbitrator.

The Supreme Court established this rule almost fifty years ago in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S. Ct. 1801, 1806 (1967). There, the plaintiff argued that it was not bound by an arbitration clause because the entire contract containing that clause was subject to a fraudulent inducement defense. *Id.* at 403-04, 87 S. Ct. at 1806. The Supreme Court held that the FAA "does not permit the federal court to consider claims of fraud in the inducement of the contract generally." *Id.* at 404, 87 S. Ct. at 1806. Rather, the

Court held, "in passing upon [an] application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate," not issues relating to the entire contract. *Id.*

Subsequent cases have cemented that holding. In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204 (2006), the U.S. Supreme Court applied that rule to a claim similar to Mr. Parnell's in a case that arose in Florida's state courts. The Florida Supreme Court had refused to enforce an arbitration clause in a loan agreement that was allegedly "void for illegality" because the loan contained an interest rate that was usurious under Florida law. *Id.* at 442, 126 S. Ct. at 1207. The Florida Supreme Court "reason[ed] that to enforce an agreement to arbitrate in a contract challenged as unlawful could breathe life into a contract that not only violates state law, but also is criminal in nature." *Id.* at 443, 126 S. Ct. at 1207 (quoting 894 So. 2d 860, 862 (2005)).

The U.S. Supreme Court reversed. "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract" and thus "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Id.* at 445-46, 126 S. Ct. at 1209. The U.S. Supreme Court therefore reiterated that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449, 126 S. Ct. at 1210. The

Prima Paint rule extends to any contract defense that goes beyond the particular arbitration clause at issue, including the same unconscionability defense the district court invoked below. For example, in *Jenkins*, this Court relied on *Prima Paint* to reverse a district court's finding that an arbitration clause was substantively and procedurally unconscionable. *Jenkins*, 400 F.3d at 877; *see also Benoay v. Prudential-Bache Sec., Inc.*, 805 F.2d 1437, 1441 (11th Cir. 1986).

Crucially, the *Prima Paint* rule also requires enforcement of the precise kind of arbitration clause that Mr. Parnell's Loan Agreement contains: a "delegation provision," in which the parties agree to have the arbitrator decide whether the arbitration clause itself is valid and enforceable. In *Rent-A-Center*, the parties' 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. 561 U.S. at 66, 130 S. Ct. at 2775. After surveying *Prima Paint*, *Buckeye*, and similar cases, the Supreme Court held that they apply fully to delegation provisions: 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." 561 U.S. at 72, 130 S. Ct. at 2779. *Rent-A-Center* thus permits parties to "agree[] to arbitrate the very issue of 'arbitrability.'" *Martinez*, 744 F.3d at 1246 (quoting *Rent-A-Ctr.*, 561 U.S. at 79,

130 S. Ct. at 2783). Western Sky and Mr. Parnell did precisely that in their Arbitration Clause here.

The district court erred by failing to follow this clear authority, which CashCall invoked throughout its briefing below. (Doc. 3-1 at 12-13; Doc. 19-1 at 11-12; Doc. 24 at 1-3; Doc. 30-1 at 4-5.) The district court properly acknowledged that the arbitrator had to decide Mr. Parnell's arguments that the entire Loan Agreement is invalid (Doc. 25 at 68-72), but overlooked the Delegation Provision entirely, holding that Mr. Parnell's "arguments relating to the unconscionability of the *arbitration provision* itself, however, fare better" (*id.* at 73).

Further, Mr. Parnell's failure to directly attack the Delegation Provision provides an independent ground for reversal. (*See* Doc. 12 (Amended Compl.) ¶¶ 127-28; Doc. 21 (opposition to CashCall's Motion to Compel Arbitration).) By failing to attack the Delegation Provision below, Mr. Parnell doomed any challenge to that Clause in two ways.

First, Mr. Parnell bore the burden of showing that the Delegation Provision was unenforceable. As the Supreme Court noted in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2315 (2013), a party "seek[ing] to invalidate an arbitration agreement" bears the burden of showing it is unenforceable. Mr. Parnell could not possibly have met this burden because he failed even to *mention* the Delegation Provision.

Second, Mr. Parnell forfeited any right to challenge the Delegation Provision. As this Court has held, where a party does "not challenge the delegation provision [in] her unconscionability argument before the district court, . . . [this Court] will not consider it on appeal." *In re Checking Account Overdraft Litig. MDL No. 2036*, 674 F.3d 1252, 1256 (11th Cir. 2012). Similarly, the district court's local rules obligated the court to treat the validity of the Delegation Provision as uncontroverted because Mr. Parnell failed to attack it directly. *See* N.D. Ga. L.R. 7.1(B) (failure to file a response to a motion "shall indicate that there is no opposition to the motion"). Applying this Local Rule in *Bernstein v. Georgia Dep't of Education*, 970 F. Supp. 2d 1340, 1354 (N.D. Ga. 2013), the Northern District of Georgia held: "Plaintiff failed to address this portion of Defendant's argument in her Response [and] Defendant's Motion . . . is therefore unopposed" on that issue because "Plaintiff's silence is dispositive as to this argument." The district court erred by relieving Mr. Parnell of his burden on this issue, which he had forfeited by failing even to raise.

In sum, the district court should have enforced the Delegation Provision. The district court erred by even considering whether the Arbitration Clause was unconscionable.

B. Delegation Provision Aside, The District Court Erred By Invalidating The Arbitration Clause Due To Unconscionability.

Even if the district court could have considered Mr. Parnell's claims that the Arbitration Clause is unconscionable, the court still erred by voiding the Arbitration Clause on that ground.

First, the Supreme Court's landmark decision in *Concepcion* forbids use of state-law unconscionability doctrine to void an arbitration clause, because such state law would "be preempted by the FAA." *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1234 (11th Cir. 2012). In both *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1212-13 (11th Cir. 2011), and *Pendergast*, 691 F.3d at 1234-36, this Court applied *Concepcion* to affirm rulings compelling parties to arbitrate in the face of state law unconscionability challenges. Similarly, the Fourth Circuit recently held that *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).

This Court and the Fourth Circuit have reached this conclusion because holding that an arbitration clause is substantively unconscionable requires courts to make a judgment that other policy concerns trump the parties' agreement to arbitrate. But the FAA preempts even "common-law principles" when they are "based on a policy hostile to arbitration." *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1170 (10th Cir. 2014). The FAA thus preempts the

unconscionability defense on which the district court relied in denying CashCall's Motion to Compel.

Second, the district court never explained why mere unavailability of the arbitral forum would render the Arbitration Clause unconscionable. (Doc. 25 at 65-67.) The unavailability of the forum would apply equally to both parties, so there can be no claim that the Clause is so one-sided as to be substantively unconscionable. *See Jenkins*, 400 F.3d at 876. Other provisions of the Arbitration Clause confirm it is not unconscionable. The Arbitration Clause requires that CashCall pay all arbitrator and filing fees, and allows Mr. Parnell to require the arbitration to occur within thirty miles of his residence. (Doc. 3-2 at 5.) So there can be no claim that the arbitration will be too inconvenient or expensive for Mr. Parnell to even bring his claims. Further, the Arbitration Clause gave Mr. Parnell the right to opt-out of arbitration entirely by emailing the lender within sixty days of receiving his loan funds. (*Id.* at 6.) Those provisions demonstrate that the Arbitration Clause is not one-sided at all, much less so one-sided as to be unconscionable.

Further, Mr. Parnell has never claimed that the Arbitration Clause was procedurally unconscionable. The district court's order never connected the distinct concepts of forum unavailability and unconscionability. If mere unavailability automatically rendered an arbitration clause unconscionable, then

FAA § 5, discussed below in Part III, would be rendered completely meaningless. Section 5 requires courts to appoint a substitute arbitrator whenever the called-for arbitral forum is unavailable. Hence, the district court erred by concluding that the arbitral forum's unavailability automatically rendered the Arbitration Clause unconscionable.

C. The Seventh Circuit's Decision In *Jackson* Is Irrelevant And Incorrect.

The Seventh Circuit's decision in *Jackson v. Payday Financial, LLC*, No. 12-2617, 2014 WL 4116804 (7th Cir. Aug. 22, 2014), which held unconscionable a significantly different arbitration clause, is irrelevant to this appeal and, in any event, is unpersuasive.

Jackson is irrelevant here because the arbitration clause in *Jackson* differs crucially from Mr. Parnell's Arbitration Clause. The arbitration clause in *Jackson* stated that arbitration would occur before "(i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council" using CRST "consumer dispute rules." *Jackson*, 2014 WL 4116804, at *1. The clause did *not* contain the AAA/JAMS provision that Mr. Parnell's Arbitration Clause contains. *Id.* *Jackson* was concerned that the parties had agreed to arbitrate before a tribal forum that "does not exist," using tribal consumer dispute rules that likewise did not exist. *Id.* at *6. Those concerns are not present here because Mr. Parnell's Arbitration Clause permits arbitration before AAA or JAMS, using those organizations' rules. (Doc.

3-2 at 5.) As discussed below in Part II.A, there is no doubt that AAA and JAMS, as well as their procedures, are available for consumer disputes such as this one.

Further, *Jackson* is unpersuasive because it erred in refusing to the enforce the arbitration clause in that case. Despite the existence of a statutory scheme addressing the validity of arbitration clauses (the FAA), *Jackson* nevertheless applied a common-law "unreasonableness" test to evaluate whether the clause there was unconscionable, based on the Supreme Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907 (1972). *Id.* at *6-7. In doing so, *Jackson* overlooked *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), which held that when a statute "speaks directly to the question at issue" it displaces federal common law. *Id.* at 2537 (alterations omitted). The law in the Eleventh Circuit is clear that the federal common law reasonableness standard does not apply to cases under the FAA: such an "attack falters on its initial premise that the *Bremen* unreasonableness test is applicable to arbitration clauses. Rather, [this Court holds] that the enforceability of the arbitration clause at issue is governed *exclusively by the explicit provisions of the Federal Arbitration Act*." *Sam Reisfeld & Son Import Co. v. S. A. Eteco*, 530 F.2d 679, 680-81 (5th Cir. 1976) (emphasis added). In any event, *Jackson* erred in applying an outdated common law test that the Supreme Court substantially modified in

Atlantic Marine Construction Co. v. United States District Court for Western District of Texas, 134 S. Ct. 568, 582 (2013).

The common-law test that *Jackson* relied upon is inconsistent with the FAA. By their very nature, doctrines hostile to forum-selection clauses inherently favor litigation in court, as the default when such clauses are invalidated is to allow suit in any proper court. *Concepcion* thus precludes applying such doctrines to arbitration clauses, as in that case the Supreme Court held that the FAA forbids courts from voiding arbitration clauses using defenses that "have a disproportionate impact on arbitration agreements," even if the doctrine "appl[ies] to contracts [regarding] litigation as well." *Concepcion*, 131 S. Ct. at 1747. Indeed, even before *Concepcion*, the federal courts of appeals that addressed the question held that the FAA precludes reliance on legal doctrines hostile to forum-selection clauses to void an arbitration clause because such doctrines do not apply to "contracts generally," *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 2527 n.9 (1987). *See, e.g.*, *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 889-90 (9th Cir. 2001); *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (5th Cir. 2001); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50-51 (1st Cir. 1999); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998).

Finally, to the extent the *Jackson* court held that the arbitration clause there was unreasonable because it was unconscionable, the court erred because the FAA preempts such an unconscionability defense. *See* Section I.B above. As to this point, *Jackson* is also distinguishable on its facts because the arbitration clauses at issue in *Jackson* did not provide for arbitration before the AAA/JAMS (unlike here) and did not allow arbitration within thirty miles of the borrower's residence (unlike here).[8] (Doc. 3-2 at 5.)

II. The District Court Erred By Concluding That The Designated Forum And Rules Are Unavailable.

The district court misinterpreted the Arbitration Clause in holding that the arbitral forum and associated procedural rules are unavailable. The Arbitration

[8] Earlier today, this Court released its decision in *Inetianbor*, and affirmed the denial of the motion to compel arbitration there. *Inetianbor* is irrelevant to the issues before this Court. Like *Jackson*, *Inetianbor* did not contain a provision explicitly permitting arbitration before AAA or JAMS, or any other arbitrator agreed-upon by the parties. *See Inetianbor*, No. 13-13822, slip op. at 3. (Doc. 3-2 at 5.) In *Inetianbor*, this Court concluded that the arbitration clause there required the use of tribal arbitration in all cases, and that the tribal forum was both "integral" and unavailable—and therefore the district court had properly refused to compel arbitration. *Id.* at 13, 16. Unlike *Inetianbor*, the Arbitration Clause here expressly permits arbitration before any organization the parties choose, and expressly mentions AAA and JAMS as options. *See id.* at 3. (Doc. 3-2 at 5.) The explicit agreement among the parties here to arbitrate before any available organization makes clear that no forum here is integral to the Clause, as shown in Section III.A below, even under the *Inetianbor* Court's reasoning. Further, Mr. Parnell's Arbitration Clause permits arbitration to occur within 30 miles of his residence, unlike in *Inetianbor*. (Doc. 3-2 at 5.) These clauses make clear that an adequate forum exists here, as called for by the Arbitration Clause, in which Mr. Parnell can press his claims, and also that it would certainly not be unconscionable to compel such arbitration here. *See id.* at 17 (Restani, J., concurring).

Clause allows Mr. Parnell to select the AAA, JAMS, or any other arbitral organization the parties agree upon. There is no dispute that the AAA and JAMS are available—nor is there any dispute that *some* reputable arbitration organization is available, which is all the Clause requires. The district court contorted the Arbitration Clause to hold otherwise, interpreting every provision in the Clause in a manner designed to render it unenforceable. That conflicts with bedrock principles of federal arbitration law, under which arbitration clauses must be interpreted in a manner that *favors* arbitration if the contractual text allows. The district court's reasons for holding the designated forum unavailable thus do not withstand scrutiny.

A. A Specified Arbitral Forum Is Available Because The Arbitration Clause Permits Arbitration Before The AAA, JAMS, Or Any Organization Upon Which The Parties Agree.

The Arbitration Clause provides that "except as provided below," 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." (Doc. 3-2 at 4-5.) The paragraph following "below" then "provided" Mr. Parnell the right, "[r]egardless of who demands arbitration, . . . to select . . . the American Arbitration Association . . . ; JAMS . . . ; or an arbitration organization agreed upon by [Mr. Parnell] and the other parties to the Dispute." (*Id.* at 5.) "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[.]" (*Id.*)

The Arbitration Clause therefore allowed Mr. Parnell to select arbitration before either (a) an authorized representative of the CRST or (b) an arbitrator selected using AAA, JAMS, or any other mutually agreeable arbitration organization. (*Id.*) The Arbitration Clause also requires the parties to use the rules of the arbitration organization that Mr. Parnell selects. There was thus no basis for the district court's conclusion that "the failure of the chosen forum precludes arbitration."[9] (Doc. 25 at 73.) There was no such failure.

B. The District Court's Reasons For Holding The Designated Fora To Be Unavailable Do Not Withstand Scrutiny.

The district court gave several reasons for its ruling that the arbitral forum was unavailable, but each fails.

[9] There is no doubt that AAA and JAMS, as well as their procedural rules, are available. *See, e.g., Brown*, 211 F.3d at 1223-24 (requiring district court to appoint substitute arbitrator using JAMS); *Supply Basket, Inc. v. Global Equipment Co.*, No. 1:13-CV-3220-RWS, 2014 WL 2515345, at *3 (N.D. Ga. June 4, 2014) (compelling arbitration before AAA); *Wallace v. Rick Case Auto, Inc.*, 979 F. Supp. 2d 1343, 1352-53 (N.D. Ga. 2013) (same); *FusionStorm, Inc. v. Presidio Networked Solutions, Inc.*, 871 F. Supp. 2d 1345, 1356-57 (M.D. Fla. 2012) (compelling arbitration before JAMS).

1. Whether The CRST Tribal Court Would Have Jurisdiction Is Irrelevant.

In denying CashCall's Motion to Compel, the district court referred to its earlier discussion of the Motion to Dismiss (which is not presently on appeal), and held that "the Cheyenne River Sioux Tribal Court would not have subject matter jurisdiction to entertain this action." (Doc. 25 at 73.) In the next sentence, the court then noted that "[t]he choice of forum in the arbitration provision certainly is an integral part of that provision" and that "the failure of the chosen forum precludes arbitration." (*Id.*) The district court thus tied its holding that the arbitral forum is unavailable directly to its separate holding that the tribal court does not have jurisdiction.

That reasoning fails. The tribal court does not conduct the arbitration, and so its subject matter jurisdiction has nothing to do with whether an arbitral forum is available. Even if the tribal court did lack jurisdiction, that would not render the Arbitration Clause unenforceable. Rather, FAA § 4 provides that the Arbitration Clause would still be enforceable by "any United States district court which, save for such agreement, would have jurisdiction." 9 U.S.C. § 4. Accordingly, the tribal court's jurisdiction is simply irrelevant to whether the district court could enforce the Arbitration Clause.

2. The Fact That The Arbitration Clause Does Not Identify The Arbitrator In Advance Is Irrelevant.

The district court refused to compel arbitration under the provision allowing the use of the AAA, JAMS, or any other arbitral organization because that "provision does not allow a choice of arbitrator—only a choice of an arbitration administrator." (Doc. 25 at 76.) The district court erred in voiding the Arbitration Clause on this basis for two reasons. First, the AAA and JAMS rules specify how parties are to select arbitrators to conduct AAA or JAMS arbitrations. Second, the unspoken premise of the district court's conclusion is that an arbitration clause is enforceable only when it specifies precisely who the parties may choose as the arbitrator. Yet the FAA does not require parties to designate in advance who their arbitrator will be.

When the parties to a contract do not designate in advance who will serve as the arbitrator, they may choose to designate the procedural rules by which they will select the arbitrator in the future. Here, the parties did just that by providing for arbitration under the procedural rules of the AAA or JAMS. (Doc. 3-2 at 5.) Those rules provide methods for appointing an arbitrator, and thus it is irrelevant that the parties did not specify precisely which person would ultimately serve as the arbitrator. *See* AAA, Consumer-Related Disputes: Supplementary Procedures, No. C-4 ("Appointment of Arbitrator") ("[T]he AAA will appoint an

arbitrator.")[10]; JAMS, Comprehensive Arbitration Rule 15 ("Arbitrator Selection, Disclosures and Replacement")[11]; JAMS, Streamlined Arbitration Rule 12 (same).[12] The Court may take judicial notice of those rules. *Robbins v. B & B Lines, Inc.*, 830 F.2d 648, 651 n.6 (7th Cir. 1987). Given the broad usage of the arbitration services of AAA and JAMS, there is no dispute (nor could there be) about the fairness of the arbitrator selection process under those rules. *See* Part II.A above.

Additionally, nothing in the FAA requires an arbitration clause to identify in advance potential arbitrators. As CashCall noted below (Doc. 24 at 8), this Court has rejected the argument that an "arbitration clause is unenforceable because it does not specify the identity of the arbitrator[.]" *See Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312-13 (11th Cir. 2005) ("*Blinco II*"), *abrogated on other grounds*, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31, 129 S. Ct. 1896, 1902 (2009).

Parties may leave arbitrator selection entirely to *ad hoc* negotiations between themselves, without using procedural rules, except to rely on FAA § 5 to break an impasse: "Section 5 of the Federal Arbitration Act provides courts with the

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[10] *Available at* http://tinyurl.com/o6uq2jv (last visited Oct. 1, 2014).

[11] *Available at* http://www.jamsadr.com/rules-comprehensive-arbitration/ (last visited Oct. 1, 2014).

[12] *Available at* http://www.jamsadr.com/rules-streamlined-arbitration/ (last visited Oct. 1, 2014).

authority to identify an arbitrator for parties who cannot agree upon one." *Blinco II*, 400 F.3d at 1313. "The [FAA] expressly requires the court, at the behest of either party, to name an arbitrator when the parties' agreement has not named one. That arbitrator then acts with the same authority as if he had been designated by the parties' contract." *See Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 716 (7th Cir. 1987) (citation omitted). In *Schulze*, for example, the Court upheld an arbitration clause that simply stated that "all disputes under this transaction shall be arbitrated in the usual manner." *Id.* at 711. The Court rejected the argument that the clause was "too vague to be enforced," even though there was no "usual manner" for arbitrating between the parties. *Id.* at 715. Although the clause "did not provide such implementing details as who the arbitrators would be, where arbitration would take place, and what procedures would govern[, . . .] the district court was able to supply those details," rendering the clause valid. *Id.* at 716.

That is the uniform view among the federal courts of appeals. In *United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Industry of the United States & Canada, Local Union No. 342 v. Bechtel Construction Co.*, 128 F.3d 1318, 1322-24 (9th Cir. 1997), for example, the Ninth Circuit rejected the argument "that identity of the arbitrator is so great an uncertainty that the agreement to arbitrate must be treated as a mere agreement to agree, void as a

contract because uncertainty as to a material term prevented mutual assent." In *Bethlehem Mines Corp. v. United Mine Workers of America*, 494 F.2d 726, 730-31 (3d Cir. 1974), the Third Circuit enforced a clause that "called for final arbitration by an umpire selected by mutual agreement of the parties" where, when "the parties were unable to agree on the selection of an umpire, the Court set forth the procedure to be followed in the selection of an arbitrator." *Accord Deaton Truck Line, Inc. v. Local Union 612*, 314 F.2d 418, 422-23 (5th Cir. 1962).

Accordingly, the Arbitration Clause is still enforceable even though the parties did not specify in advance the exact person who would be their arbitrator.

3. The Arbitration Clause Does Not Require The Parties To Use CRST "Consumer Dispute Rules."

The district court also held that the fact that the CRST does not have "consumer dispute rules" renders the designated forum unavailable. (Doc. 25 at 75.) This was error.

The Arbitration Clause does not require the parties to use the CRST consumer disputes rules. Rather, 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." (Doc. 3-2 at 4-5 (emphasis added).) The paragraph below provides

that Mr. Parnell may choose arbitration before the AAA, JAMS, or "an arbitration organization agreed upon by you and the other parties to the Dispute." (*Id.* at 5.)

Critically, the Arbitration Clause also states that "[t]he arbitration will be governed by *the chosen arbitration organization*'s rules and procedures applicable to consumer disputes[.]" (*Id.* (emphasis added).) Because the Arbitration Clause plainly allows the parties to use the consumer dispute rules of the "chosen *arbitration organization*," *id.* (emphasis added), rather than the CRST, the question whether the CRST has consumer dispute rules is irrelevant.

4. The District Court's Finding That CRST Law Is Inaccessible Is Both Irrelevant And Incorrect.

The district court also erred by concluding that arbitration under AAA and JAMS is unavailable because CRST law supposedly is "inaccessible." (*See* Doc. 25 at 76-77.) The district court appears to have reasoned as follows: (1) the Arbitration Clause permits arbitration to occur using the rules of the AAA, JAMS, or another arbitral organization "to the extent that those [organizations'] rules and procedures do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate," (Doc. 3-2 at 5); (2) CRST is law is inaccessible, rendering it impossible to tell if the arbitral forum's rules contradict CRST law; and (3) the inability to ensure that the arbitral forum's rules do not contradict CRST law bars arbitration before that forum. (Doc. 25 at 76-77.) That reasoning has three fatal flaws:

First, "'procedural' questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S. Ct. 588, 592 (2002) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S. Ct. 909, 918 (1964)). The question of which rules govern the conduct of the arbitration are "questions of procedure that should be resolved by the arbitrator." *Aluminum Brick & Glass Workers Int'l Union v. AAA Plumbing Pottery Corp.*, 991 F.2d 1545, 1550 (11th Cir. 1993). The potential conflict between CRST law and the rules of the arbitral forum are thus for the arbitrator to resolve, not the district court.

Second, the district court erred in holding that CRST law is inaccessible. The district court cited no evidence in support of its holding; rather, it quoted a single sentence from Mr. Parnell's brief that itself cited no authority. (Doc. 25 at 77 (quoting Doc. 21 at 19-20).) The record evidence refutes that finding. For example, the district court on remand in *Jackson*, which Mr. Parnell submitted to the Court below and which also involved a Western Sky loan, found that CRST law is accessible. (Doc. 21-1, District Court's Response to Court of Appeals

Remand for Findings of Fact, at 2, *Jackson v. Payday Fin., LLC*, No. 1:11-cv-9288 (N.D. Ill. Aug. 28, 2013).)[13]

Further, CashCall submitted portions of CRST law to the district court in response to Mr. Parnell's argument of inaccessibility. (*See* Doc. 23 at 13-14 n.6; Doc. 23-2.) CashCall also cited published cases from the CRST Court of Appeals that are available in the Indian Law Reporter, a publication that is available in many law libraries throughout the country and whose indices are available online. *See* Indian Law Reporter: Tribal Court Cases Index, http://www.narf.org/nill/ilr/ (last visited Oct. 1, 2014). The district court declined to consider CashCall's CRST law submission, stating that "CashCall offers no excuse for its failure to submit that document with its initial brief, and the Court consequently [did] not consider it." (Doc. 25 at 75 n.8.) But CashCall submitted copies of tribal cases with its initial brief. (Docs 18-3, 18-4.) Further, Mr. Parnell carried the burden to provide evidence as to why the Delegation Provision and Arbitration Clause are

[13] The district court here also quoted the *Jackson* district court's "finding" that the "promise of a meaningful and fairly conducted arbitration is a sham and an illusion." (Doc. 25 at 78.) But, as discussed above at pp. 29-30, Mr. Parnell's Arbitration Clause gives him the right to select the AAA or JAMS in lieu of a tribal-member arbitrator, unlike the clause in *Jackson*. The *Jackson* finding is further irrelevant because any attack on the fairness or integrity of an arbitration proceeding can be made only after the arbitration occurs. *See, e.g.*, *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980) (holding that courts "cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award"); *Gulf Guar. Life Ins. v. Conn. Gen. Life Ins.*, 304 F.3d 476, 490 (5th Cir. 2002) (same); *see also Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311-12 (2013).

not enforceable; it was not CashCall's duty to show why they *are* enforceable. CashCall's submission in reply to Mr. Parnell's attempt to meet that burden in his brief in opposition to CashCall's Motion to Compel was thus timely and appropriate.

The CRST has a Constitution, By-Laws, a Law and Order Code, a version of the Uniform Commercial Code, and Rules of Civil Procedure. For the Court's convenience, CashCall has submitted copies of these materials in an Appendix filed contemporaneously with this brief. *See* Fed. R. App. P. 32.1(b). This Court may take judicial notice of such legal materials. *See, e.g.*, *N. Cnty. Community Alliance, Inc. v. Salazar*, 573 F.3d 738, 746 n.1 (9th Cir. 2009) (taking judicial notice of tribal ordinance); *see also Continental Technical Servs., Inc. v. Rockwell Int'l Corp.*, 927 F.2d 1198, 1199 (11th Cir. 1991) ("[F]ederal courts take judicial notice of the laws of every state in the Union . . . ."); *Menendez v. Perishable Distribs., Inc.*, 763 F.2d 1374, 1381 n.2 (11th Cir. 1985) ("[A] federal court may take judicial notice of foreign law . . . ." (quotations omitted)). Additionally, a treatise on CRST law written by the Chief Justice of the CRST Court of Appeals is available online. *See* Frank Pommersheim, South Dakota Tribal Court Handbook (rev. ed. 2006), *available at* http://ujs.sd.gov/media/docs/IndianLaw%20Handbook.pdf. CRST law is thus readily available.

Third, even if CRST procedural law were inaccessible, there could be no demonstrated conflict with CRST procedural law and the forum's rules. Without such a conflict, the Arbitration Clause says that the forum's rules *do* apply. Nothing suggests that the parties intended for the Arbitration Clause to be rendered a nullity if the parties were unable to compare the forum's rules to the CRST's. Indeed, as discussed below, the parties included a severability provision making clear that if any portion of the Arbitration Clause could not be implemented, they still wished to arbitrate. *See* Section III.A.1 below.

In short, the district court's ruling that tribal law is inaccessible is not only incorrect, but is also irrelevant to the whether the Arbitration Clause must be enforced.

C. Courts Must Resolve Any Contractual Ambiguity In Favor Of Arbitration.

As discussed above, each of the district court's reasons for holding the arbitral forum unavailable conflicts with the plain language of the Arbitration Clause. But even if that Clause were ambiguous as to those points, the district court still would have erred by refusing to enforce the Arbitration Clause.

The FAA directs that arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Warrior & Gulf Navigation*, 363 U.S. at 582-83, 80 S. Ct. at 1353. Thus, "any doubts concerning the scope of

arbitrable issues should be resolved in favor of arbitration," including when "constru[ing] . . . the contract language itself." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983). Under that pro-arbitration canon of construction, if an arbitration provision can be read in two ways, one that requires arbitration and one that does not, this Court must "resolve th[e] ambiguity *in favor* of arbitration." *Khan v. Dell Inc.*, 669 F.3d 350, 356 (3d Cir. 2012) (Court's emphasis).

If the Arbitration Clause were ambiguous on any of the points upon which the district court relied (and for the reasons discussed above, it is not), the FAA would require the district court to resolve that ambiguity *in favor* of arbitration, not against it. The district court erred by failing to heed that admonition, ruling at one point that one of CashCall's arguments "does not make the arbitration provision enforceable." (Doc. 25 at 77.) The district court effectively presumed the Arbitration Clause invalid, precisely the opposite of how federal courts must interpret arbitration agreements subject to the FAA's strong federal policy in favor of arbitration agreements. This Court need go no further to reverse the district court with instructions to compel arbitration in accord with the parties' agreement.

III. Even If The Forum or Rules Were Unavailable, No "Integral Part" Ground Warrants Voiding The Entire Arbitration Clause.

Even if the arbitral forum and rules were both unavailable, the FAA would still require the district court to compel arbitration. FAA § 5 requires a court to

appoint a substitute arbitrator if "for any . . . reason there shall be a lapse in the naming of an arbitrator." 9 U.S.C. § 5. (Doc. 19-1 at 23-25.) FAA § 5 gives "courts the authority to identify an arbitrator for parties who cannot agree upon one." *Blinco II*, 400 F.3d at 1313. The federal courts of appeals that have considered the question, including this Court, have held unanimously that § 5 directs a court to appoint a substitute arbitrator if the details of arbitration spelled out in the parties' contract cannot be implemented. *See id.*; *Brown*, 211 F.3d at 1222; *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787,791-93 (7th Cir. 2013); *Khan*, 669 F.3d at 356; *Reddam v. KPMG, LLP*, 457 F.3d 1054, 1060-61 (9th Cir. 2006), *overruled on other grounds by Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 940 (9th Cir. 2010).

This same reasoning applies when an arbitration clause's designated *procedures* are unavailable. *See Green*, 724 F.3d at 791-93. Section 5 allows courts to "supply" the "procedures [that] would govern" arbitration when necessary to effectuate an arbitration agreement. *Schulze & Burch Biscuit Co.*, 831 F.2d at 716; *see also Chattanooga Mailers' Union, Local No. 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1315 (6th Cir. 1975) ("[T]he arbitrator may determine his procedures if the parties cannot agree."), *overruled on other grounds, Bacashihua v. U.S. Postal Serv.*, 859 F.2d 402 (6th Cir. 1988).

Some courts, including this one, have suggested that courts may not appoint a substitute arbitrator or rules under § 5 if the contractually designated forum or rules are an "integral part" of the arbitration agreement. *See, e.g.*, *Brown*, 211 F.3d at 1222. *But see In re Checking Account Overdraft Litig. MDL No. 2036*, 685 F.3d 1269, 1283 n.20 (11th Cir. 2012) (applying § 5 with no mention of integrality). CashCall explains below why that is not correct. *See* Section III.B below. But the Court need not reach that issue because even assuming there is an "integrality" exception to § 5, the designated forum and rules are not integral here.

A. The Designated Forum And Rules Are Not Integral To The Arbitration Clause.

Two reasons demonstrate that none of the Arbitration Clause's details—including its designated fora or rules—is so integral to the Clause that its unavailability would allow the district court to void the Arbitration Clause entirely. *First*, the Arbitration Clause contains a severability provision stating expressly that the parties did not view any of the Clause's details as integral to the Clause. *Second*, the Arbitration Clause does not contain an express statement of the forum or rules' exclusivity, but rather contains the antithesis of such an express statement: a provision allowing the parties to use any organization they wish to oversee the arbitration.

1. The Severability Provision Precludes Any Finding That The Forum Or Rules Were Integral To The Arbitration Clause.

The Arbitration Clause's severability provision ("Severability Provision") defeats any argument that the parties viewed the contractually-designated forum or rules as integral to that Clause.[14] The Severability Provision states that "[i]f any of this Arbitration [Clause] is held invalid, the remainder shall remain in effect." (Doc. 3-2 at 6.) The Severability Provision thus answers the question before this Court: if any provision of the Arbitration Clause cannot be implemented (including the use of a particular arbitral forum), "the remainder shall remain in effect." (*Id.*) That "remainder" includes the overarching agreement stated in the first sentence of the Arbitration Clause: "[A]ny dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration." (*Id.* at 4.)

As this Court has held, "a severability provision . . . evidences the parties' intention to enforce the remainder of the [arbitration] agreement in the event any portion of it is deemed invalid." *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1031 (11th Cir. 2003). Following that principle, the *Anders* Court ordered the parties to arbitrate notwithstanding that the arbitration clause contained an unenforceable exculpatory clause. *Id.* at 1031-32. This Court has consistently

[14] For simplicity's sake, CashCall will largely refer only to the designated "forum" for the remainder of this brief. But any arguments about the forum apply equally to designated procedural rules.

enforced severability provisions in arbitration agreements under generally-applicable contract law, excising the invalid portion and enforcing the rest. *In re Checking Account Overdraft*, 685 F.3d at 1283 (South Carolina law); *Jackson v. Cintas Corp.*, 425 F.3d 1313, 1317 (11th Cir. 2005) (Georgia law).[15]

That is the uniform view among the federal courts of appeals that have addressed severability provisions in arbitration clauses. As the D.C. Circuit explained, "[c]ompelling [the plaintiff] to arbitrate with the bar on punitive damages severed is entirely consistent with the intent to arbitrate he manifested in signing the employment agreement in the first place," which contained a severability provision. *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83-84 (D.C. Cir. 2005) (Roberts, J.). The reason is that "'severance of the provision limiting punitive damages [does not] diminish [the plaintiff's] contractual intent to arbitrate because excluding the provision only allows her the opportunity to arbitrate her claims under more favorable terms than those to which she agreed.'" *Id.* at 84 (quoting *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 682-83 (8th Cir. 2001)).

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[15] The Loan Agreement states that it must be interpreted in accord with CRST law. (Doc. 3-2 at 2, 4.) The CRST courts use "traditional contractual principles," including Restatement principles, to interpret contracts. *White Wolf v. Myers*, 34 Indian L. Rep. 6102, 6106 (CRST Ct. App. 2007); *Bank of Hoven v. Long Family Land & Cattle Co.*, 32 Indian L. Rep. 6001, 6004 (CRST Ct. App. 2004) (applying Restatement (Second) of Contracts). (Docs. 18-3, 18-4.) This Court therefore may rely upon case law from nontribal jurisdictions applying similar principles.

Other provisions underscore that, whatever happens to the balance of the parties' contract, the obligation to arbitrate survives. The Arbitration Clause has a survival provision ("Survival Provision") which states: "This Arbitration [Clause] will survive: (i) termination or changes in this Agreement, the Account, or the relationship between us concerning the Account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of my Note, or any amounts owed on my account, to any other person or entity." (Doc. 3-2 at 6.) If that were not clear enough, the Survival Provision also states that the Arbitration Clause "survives any termination, amendment, expiration, or performance of any transaction between you and us and continues in full force and effect unless you and we otherwise agree in writing." (*Id.*) Together with the Severability Provision, the Survival Provision makes clear that "the last place where the parties intended this dispute to be adjudicated is in court before a jury." *Ivax Corp.*, 286 F.3d at 1323.[16]

[16] Further, courts "must assume that the parties' arbitration agreement was drafted against the background of the FAA, which [courts] should also deem incorporated into the agreement." *Green*, 724 F.3d at 797 (Hamilton, J., dissenting). This Court therefore must assume that the parties adopted the Arbitration Clause here, including its Severability Provision, with the knowledge that FAA Section 5 would allow a court to appoint a substitute arbitrator if the arbitral forum selected by the Agreement is unavailable. In other words, the parties built the possibility of court appointment of a different forum into the Arbitration Clause here through Section 5—a possibility their Severability Provision makes explicit.

2. Because The Arbitration Clause Does Not Contain An Express Statement Of The Arbitral Forum's Exclusivity, The Forum Is Not Integral.

Those courts that have applied an "integral part" test hold that a court cannot nullify an arbitration clause on integrality grounds due to the unavailability of the contractual forum "unless the parties have expressly stated" that the forum is "exclusive of all other fora." *Reddam*, 457 F.3d at 1061. Such an express statement of exclusivity requires that the contract state unequivocally that arbitration will occur "exclusively" or "only" in a particular forum. For example, in one case the Second Circuit held that it could not appoint an alternative forum to the one designated by contract, but only because the contract said that arbitration could occur "*only* before" the designated forum. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Georgiadis*, 903 F.2d 109, 112 (2d Cir. 1990) (emphasis added).

Mr. Parnell never identified any express statement that the Loan Agreement's tribal arbitral forum was exclusive. None exists. Indeed, the Agreement expressly provides that it is not—its Arbitration Clause states that the parties can arbitrate before AAA, JAMS, or any other arbitrator they agree upon. Given this list of potential arbitrators and rules, one contractual option (tribal arbitration using CRST consumer dispute rules) cannot possibly be exclusive and

therefore integral. The district court erred by concluding that the tribal arbitral forum in the Loan Agreement was integral.[17]

In concluding that the choice of forum and rules were "integral," the district court relied solely on Judge Cohn's similar finding in *Inetianbor*. (Doc. 25 at 73.)[18] As CashCall has demonstrated to this Court in its briefing in that case, however, Judge Cohn erred for reasons similar to those that undermined the decision of the district court below.[19]

The district court erred by concluding that the details of the Arbitration Clause were so integral that a substitute arbitrator could not be appointed.

B. FAA § 5 Contains No "Integral Part" Exception.

Given that the district court erred in concluding that the arbitral forum and procedures specified by the Arbitration Clause were integral to that provision, this Court need not confront the larger question of whether courts may refuse to

[17] Further, the very fact that Mr. Parnell has fought to avoid tribal arbitration demonstrates that he did not view that designated arbitral forum as "integral" to his decision to enter into the Loan Agreement.

[18] Besides citing *Inetianbor*, the sole reason offered by Mr. Parnell as to why the Arbitration Clause details were integral was that "[w]ithout the existence of the forum and the procedures, there can be no arbitration as contemplated by the proffered agreement." (Doc. 21 at 20.) But that statement simply begs the question. Congress designed FAA § 5 to ensure that arbitration will proceed despite the fact that the specific arbitral forum "contemplated by the proffered agreement" is not available.

[19] Indeed, the case for integrality here is even less compelling than in *Inetianbor* (where it is not compelling), as here the Arbitration Clause expressly provides for arbitration before the AAA, JAMS, or any other organization both parties agree upon. The *Inetianbor* clause does not contain that provision.

appoint an arbitrator on integrality grounds. But if this Court agrees with the district court's conclusion as to integrality, it must answer this question. Today's *Inetianbor* decision answers that question in the affirmative while recognizing that its answer "is not without controversy." *Inetianbor*, No. 13-13822, slip op. at 6.

CashCall respectfully submits, however, that FAA § 5 provides the opposite answer: courts may not do so. Section 5 requires the court to appoint a substitute arbitral forum if the one called by the agreement is unavailable for "*any* . . . reason," and contains *no* "integral part" exception to that command. 9 U.S.C. § 5 (emphasis added).

Green is the first decision in which a federal court of appeals analyzed the question thoroughly, and the Seventh Circuit there concluded that § 5 contains no "integral part" exception. CashCall recognizes that *Inetianbor* declined to follow *Green*, but includes the following explanation to preserve its position. The parties' contract in *Green* called for arbitration before the rules of the National Arbitration Forum ("NAF"), which no longer accepted consumer disputes when the case began. 724 F.3d at 789. The *Green* plaintiffs argued that the contractual forum was "integral" such that the courts could not appoint a substitute. *Id.*

The Seventh Circuit rejected that argument, holding that in FAA § 5, "Congress . . . provided that a judge can appoint an arbitrator when for 'any' reason something has gone wrong." *Id.* at 791. Given that absolute language, the

Green court was "skeptical" of any argument that "allow[s] a court to declare a particular aspect of an arbitration clause 'integral' and on that account scuttle arbitration itself." *Id.* *Green* acknowledged the prior case law assuming that § 5 contains an "integral part" exception, but found it unpersuasive because it rested on *dictum* from a single unpersuasive district court case, *Zechman v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 742 F. Supp. 1359 (N.D. Ill. 1990). *Green*, 724 F.3d at 792. Congress designed § 5 to respect and enforce the parties' agreements to use "private dispute resolution," and "[c]ourts should not use uncertainty in just how that would be accomplished to defeat the evident choice." *Id.* at 793. "Section 5 allows judges to supply details in order to make arbitration work." *Id.*

The Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586, 128 S. Ct. 1396, 1404 (2008), upon which *Green* relied, reinforces this point. In *Hall Street*, one party argued that contractual parties should be allowed to expand the grounds for judicial review of arbitration awards beyond those provided by the FAA "because arbitration is a creature of contract, and the FAA is 'motivated, first and foremost, by a congressional desire to enforce agreements into which parties have entered.'" *Id.* at 585, 128 S. Ct. at 1404 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220, 105 S. Ct. 1238, 1242 (1985)). The Supreme Court rejected that argument because even though "the FAA lets parties tailor some, even many features of arbitration by contract,

. . . the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration." *Id.* at 586, 128 S. Ct. at 1404 (citation omitted). In particular, FAA Section 9 states that courts "must grant" confirmation of any arbitral award unless it is "vacated, modified, or corrected as prescribed in sections 10 and 11," which "unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions" in § 10 or § 11 applies. *Id.* at 587, 128 S. Ct. at 1405.

Section 5 contains similar mandatory language: the court "*shall* designate and appoint an arbitrator" if "for *any* … reason there shall be a lapse in the naming of an arbitrator." 9 U.S.C. § 5 (emphases added). Just as there is no exception in § 9 to its requirement that a court "must" confirm an award unless a specified ground in § 10 or § 11 allows it to refuse to do so, there is no "integral part" exception in § 5 to its requirement that a court "shall" appoint a substitute arbitrator if for "any . . . reason" there is a "lapse in the naming of an arbitrator," such as because the arbitral forum is unavailable. 9 U.S.C. § 5. *Hall Street* "tells courts not to add to, or depart from, the standards in the" FAA, and "[a]n 'integral part' proviso to § 5 sounds like the sort of addendum that *Hall Street* forbids." *Green*, 724 F.3d at 791.

CONCLUSION

CashCall respectfully requests that this Court reverse the district court's order refusing to compel arbitration and remand to the district court with

instructions that the case be sent to arbitration either (a) before AAA, JAMS, or any other arbitral forum agreed upon by the parties; or (b) before an alternative arbitral forum appointed under FAA § 5.

Respectfully submitted this 2nd day of October, 2014.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 13,564 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 2, 2014, I electronically filed the foregoing Principal Brief with the Clerk of the Court by using the CM/ECF system. I also further certify that the foregoing document was sent by United States Mail to:

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