UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:13-CV-897

JAMES DILLON, on Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

BMO HARRIS BANK, N.A., FOUR OAKS BANK & TRUST, a North Carolina-Chartered Bank, GENERATIONSFEDERAL CREDIT UNION, and BAY CITIES BANK, a Florida State-Chartered Bank,

Defendants.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION TO COMPEL DISCOVERY AGAINST DEFENDANT GENERATIONS FEDERAL CREDIT UNION

I. Introduction

Pursuant to Federal Rule of Civil Procedure 37 and the Court's Order for arbitration-related discovery (Doc. 158), Plaintiff James Dillon ("Plaintiff"), by and through his attorneys of record, hereby moves for an order compelling defendant Generations Federal Credit Union ("Generations") to respond to Plaintiff's Request for Production ("RFPs") served on August 14, 2015.

Since the commencement of this action, several courts of appeal have had occasion to consider the enforceability of arbitration agreements comparable or identical to the ones Defendants seek to enforce here. *See Jackson v. Payday Fin., LLC,* 764 F.3d 765 (7th Cir.

2014*) cert. denied sub nom. W. Sky Fin. v. Jackson*, 135 S. Ct. 1894 (2015) (refusing to enforce identical Western Sky arbitration agreement); *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014) *cert. denied*, 135 S. Ct. 1735, 191 L. Ed. 2d 701 (2015) (same). *See also, Moses v. CashCall, Inc.*, 781 F.3d 63, 67-68 (4th Cir. 2015) ("Courts that have considered loan agreements similar to the one at issue here have found that the Cheyenne River Sioux Tribe has no laws or facilities for arbitration and that the arbitration procedure specified is a 'sham from stem to stern.'"). Plaintiff wishes to challenge the arbitration agreements here using the same arguments the Seventh, Eleventh and Fourth Circuits found persuasive. Those arguments however, require the development of a factual record. *See, e.g., Brown v. W. Sky Fin., LLC*, 2015 WL 413774 at *11 (M.D.N.C. 2015) ("When deciding not to enforce the forum selection clause in *Inetianbor*, the Eleventh Circuit had the benefit of a record of the plaintiff's actual attempt to arbitrate within the directives of his loan agreement. In coming to its decision in *Jackson*, the Seventh Circuit relied on the course of events in Inetianbor and a record of additional findings after limited remand.") The discovery Mr. Dillon has propounded on Generations seeks to establish that record.

In an attempt to spare this Court the inconvenience of dealing with unnecessary discovery disputes, Plaintiff's counsel have expended significant effort explaining to Defendants the need for the discovery Plaintiff is seeking and to resolve objections lodged to the discovery propounded. Even before this Court entered its Order for arbitration-related discovery, Plaintiff took the affirmative step on July 23, 2015 of providing Defendants with a detailed single-spaced seven page letter explaining its planned legal and factual defenses to the enforcement of the arbitration agreements and why discovery was

necessary. (See Exhibit B). Plaintiff's counsel then met and conferred by telephone with Defendants' counsel on the following day and further discussed and explained what discovery would be sought and the relevancy of that discovery to Plaintiff's defenses. Plaintiff's counsel's letter and the meet-and-confer session resulted in a Joint Stipulated Motion to Engage in Arbitration-Related Discovery (Doc. 157): a motion which this Court granted on August 3, 2015.

Pursuant to the Court's Order, Plaintiff served his discovery requests on Defendants and attempted service of subpoenas on numerous third-parties on August 14, 2015. Plaintiff's discovery request sought only documents from Generations and confined his requests to 19 discrete categories of relevant documents (as compared to a combined 90 discovery requests Generations served on Mr. Dillon). On August 28, 2015, Generations served eight single-spaced pages of objections to the RFPs. Following service of the objections, the parties met and conferred via telephone on September 3, 2015. While some progress was made, Generations stood by its numerous objections and was not prepared to specify what documents it had in its possession or what responsive documents it was withholding based on its objections.[1] Unlike BMO and Bay Cities, Generations refused to modify or withdraw its "general objections" or indicate when documents would be made available or even if documents were being withheld, despite the imminence of the

[1] To the extent Generations made oral representations that it would amend certain responses; Plaintiff specifically requested on two occasions that any amendments be made in writing and that Plaintiff would interpret a failure to do so as standing by defendants' original objections. *See* Exs. C, D, discussed *infra*.

December 1, 2015 amendment to Rule 34 which will prohibit these practices in responding to discovery requests.

On September 4, 2015, Plaintiff's counsel again wrote to Defendants' counsel highlighting the remaining areas of dispute and summarizing Plaintiff's agreement to narrow certain of his RFPs. (*See* Exhibit C, Plaintiff's September 4 Meet and Confer Follow-Up Letter). On September 9, 2015, the parties met and conferred via telephone for a third time. Plaintiff's counsel followed-up that conference with an e-mail agreeing to withdraw certain requests, including Requests to Generations Nos. 10 and 14, and reiterated Plaintiff's position that objections to discovery requests or withdrawals of previously-made objections should be memorialized in writing and that Plaintiff would interpret a failure to do so as defendants standing by their initial responses and objections. (*See* Exhibit D, Moore September 9 E-mail). Despite Plaintiff's efforts to secure some reasonable agreement from Generations on withdrawal of its numerous ill-founded objections and a commitment to produce necessary, relevant documents, Generations has refused to amend its responses and objections. Accordingly, Plaintiff has no alternative but to move to compel.

II. Legal Standard

"The purpose of discovery is to provide a mechanism for making relevant information available to the litigants." Fed. R. Civ. P. 26, advisory committee's note. A party is entitled to discovery on "any nonprivileged matter that is relevant to any party's claim or defense . . . . Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R.

Civ. P. 26(b)(1). "[R]elevancy at discovery is a far different matter from relevancy at trial. At discovery, relevancy is more properly considered synonymous with 'germane' as opposed to competency or admissibility." *ATI Indus. Automation, Inc. v. Applied Robotics, Inc.*, 1:09CV471, 2014 WL 3729408 at *1 (M.D.N.C. July 25, 2014) (M.D.N.C. July 25, 2014) (citation omitted). The federal discovery rules are construed broadly and liberally. *See, e.g., Herbert v. Lando*, 441 U.S. 153, 177 (1979). Consistent with the foregoing principles, the Fourth Circuit has declared that "[d]iscovery under the Federal Rules of Civil Procedure is broad in scope and freely permitted." *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003).

III. Generations' Use of General Objections and "Subject To" Objections are Improper and Should be Overruled.

In its responses to Plaintiff's document requests, Generations engages in the discouraged practice of prefacing its responses with a number of "general objections" that are to be deemed incorporated into each specific discovery response. Many courts have recognized that asserting "general objections" is inconsistent with the Federal Rules because there is no attempt to show the application of each objection to the particular request and it is impossible to know whether information is being withheld on the basis of the objections. *See, e.g., Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 660-61 (D. Kan. 2004) (general objections are "worthless for anything beyond delay of the discovery. Such objections are considered mere hypothetical or contingent possibilities, where the objecting party makes no meaningful effort to show the application of any such theoretical objection to any request for discovery."). As succinctly stated by one court:

> General objections such as the ones asserted by [Defendant] are meaningless and constitute a waste of time for opposing counsel and the court. In the face of such objections, it is impossible to know whether information has been withheld and, if so, why. This is particularly true in cases like this where multiple 'general objections' are incorporated into many of the responses with no attempt to show the application of each objection to the particular request.

Weems v. Hodnett, No. 10–cv–1452, 2011 WL 3100554, at *1 (W.D. La. July 25, 2011). *See also Heller v. City of Dallas*, 303 F.R.D. 466, 484 (N.D. Tex. 2014) ("Counsel should cease and desist from raising these free-standing and purportedly universally applicable 'general objections' in responding to discovery requests. Deploying these general objections in this manner is . . . inconsistent with the Federal Rules and is not warranted by existing law."). And, as this Court's sister district has recognized, preservation of the objections is not a valid justification. *See, e.g., Anderson v. Caldwell Cty. Sheriff's Office*, No. 1:09cv423, 2011 WL 2414140, at *3 (W.D.N.C. June 10, 2011) ("there is no provision in the Federal Rules that allows a party to assert objections simply to preserve them. Instead, the Federal Rules require that objections be specific.").[2]

Indeed, "magistrate judges in at least five district courts in the Fourth Circuit have declared boilerplate objections to discovery requests, including for documents, invalid." *Kinetic Concepts, Inc. v. ConvaTec Inc*., 268 F.R.D. 226, 241 (M.D.N.C. 2010).

[2] In some cases, Generations' "general objections" are not objections at all, but rather instructions on how objections should be interpreted. *See, e.g*., Ex. A, Generations' General Objection No. 1 ("The following responses are based on discovery available as of the date of this response. It is anticipated that further discovery, independent investigation and analysis may lead to the discovery of additional information and documents, supply additional facts and add meaning to known facts, and establish entirely new factual conclusions and legal contentions, all of which may lead to additions to, changes to or variations from the information in these responses.").

Although Plaintiff articulated his concern with this practice in Plaintiff's September 4 meet and confer follow-up letter (*see* Ex. C), Generations, unlike BMO and Bay Cities, has refused to modify or withdraw its general objections. Accordingly, Generations' general objections should be overruled. *See Great Plains Ventures, Inc. v. Liberty Mut. Fire Ins. Co.*, No. 14-1136-JAR, 2015 WL 404977, at *2 (D. Kan. Jan. 29, 2015) (overruling general objections where "defendant [] made *no* meaningful effort to show how *any* of the general objections apply to a specific request for production.").

Generations also responds to a number document requests by asserting objections and answering "subject to" those objections. The obvious concern with this practice is Plaintiff has no idea whether Generations is withholding documents on the basis of an objection, and if it is, what documents are being withheld on the basis of which objection. This practice has also been widely criticized by courts:

> The court recognizes that it has become common practice among many practitioners to respond to discovery requests by asserting objections and then answering "subject to" or "without waiving" their objections. This practice, however, is manifestly confusing (at best) and misleading (at worse), and has no basis at all in the Federal Rules of Civil Procedure. The court joins a growing number of federal district courts in concluding that such conditional answers are invalid and unsustainable.

Sprint Commc'ns Co., L.P. v. Comcast Cable Commc'ns, LLC, No. 11-2684-JWL, 2014 WL 545544, at *2 (D. Kan. Feb. 11, 2014). *See also Pepperwood of Naples Condo. Ass'n, Inc., v. Nationwide*, 2011 WL 4382104, *6 (M.D. Fla. Sept. 20, 2011) ("answering subject to an objection lacks any rational basis. There is either a sustainable objection to a question or request or there is not."). Moreover, as set forth in Plaintiff's September 4 letter, amended Rule 34, which will go into effect on December 1, 2015, explicitly prohibits this

practice. *See* Amended Rule 34(b)(2)(C) ("An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest."). Indeed, the comments to amended Rule 34(b)(2)(C) provide:

> This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections.

While Plaintiff proposed that all parties abide by amended Rule 34, which also requires parties to state objections "with specificity" (thus implicitly condemning the practice of using "general objections"), Generations flatly refused. Accordingly, Plaintiff requests that the Court overrule Generation's objections to Requests 1, 3, 4, 5, 9, 11, 12, 13, 17, and 18 on this basis.

IV. Generations's Objections Are Otherwise Improper and Should be Overruled.

Plaintiff propounded targeted, relevant document requests to Generation relating to the Western Sky arbitration agreement that Generations is seeking to enforce here—an arbitration agreement that has already been rejected by a number of Courts.[3] Generations' responses and objections to Plaintiff's requests are improper, as discussed in turn below.

A. Requests Seeking Origination Agreements (Request Nos. 1, 2).

[3] *See Jackson v. Payday Fin., LLC*, 764 F.3d 765, 786 (7th Cir. 2014) *cert. denied sub nom. W. Sky Fin. v. Jackson*, 135 S. Ct. 1894 (2015) (refusing to enforce Western Sky arbitration agreement); *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1354 (11th Cir. 2014) (same); *Parnell v. Western Sky Fin. LLC*, No. 4:14-cv-00024 (N.D. Ga. April 28, 2014) (same); *Parm v. Nat'l Bank of California*, No. 4:14-CV-0320 (N.D. Ga. May 20, 2015) (same).

The first two requests propounded by Plaintiff seek all Origination Agreements between Generations and Western Sky and/or CashCall, or any Third-Party Sender that initiated ACH entries on behalf of those lenders. Generations objected to these requests on the following grounds:

- Overbroad in that it is not limited in time;
- Not relevant because it seeks documents unrelated to the arbitration clause at issue before the Court and is not limited to Plaintiff or his loan agreement;
- Seeks information that is "confidential and proprietary";
- Seeks documents solely for purposes of harassment.

First, Defendants' objections to breadth are unfounded because Plaintiff agreed to limit his requests to a period of four years from the filing of the Complaint, October 8, 2009 through present. *See* Ex. C, fn.1.

Second, these documents are extremely relevant as they go directly to whether Generations is entitled to enforce the lender's loan agreement. Indeed, Generations argues in its second renewed motion to compel that it is a "servicer" under Plaintiff's loan agreement and a "third-party beneficiary" of that agreement. *See* Doc. 153 at 7, 9, 10. The Origination Agreement, which sets forth the legal relationship between Generations and Western Sky/CashCall or its Third-Party Sender relating to initiating entries on the ACH network, would likely prove or disprove these claims (for example, the agreement may demonstrate that Generations' contractual duties are not that of a servicer or disclaim Generations' relationship to the lending business or loan agreements). These documents go to a core enforceability issues and must be produced. Tellingly, BMO and Bay Cities did not object to producing their Origination Agreements with the payday lenders or their third-party senders—but Generations alone refused to provide them.

Third, Generations' conclusory objections to "confidentiality" [4] and "harassment" are completely devoid of any supporting facts. It is well-established in this Court that objections not made with specificity are invalid and deemed waived. *See Kinetic*, 268 F.R.D. at 241, 247 (quotations omitted) ("boilerplate objections to discovery requests, including documents, [are] invalid.").

B. Requests Seeking Documents Supporting Generations' Purported Status as a Servicer or Third-Party Beneficiary (Request Nos. 3, 4).

Document Requests 3 and 4 seek all documents and communications supporting Generations' argument that it is a third-party beneficiary of Plaintiff's loan agreement and "servicer" of Plaintiff James Dillon's loan with Western Sky. Generations objects to Request 3 on the grounds of attorney-client and work-product privileges, but states that it will produce documents "subject to" that objection. Generations objects to Request 4 on privilege grounds and "on the ground that Plaintiff has previously admitted that Generations processed transactions under his Loan Agreement as set forth in Plaintiff's Class Action Complaint."

First, with respect to the privilege objections, "a party must expressly assert it in response to the particular discovery request involved and serve with its discovery responses a privilege log in conformance with Rule 26(b)(5)(A)." *Rohlik v. I-Flow Corp*., No. 7:10-CV-173-FL, 2012 WL 1596732, at *4 (E.D.N.C. May 7, 2012). A failure to do so may result in waiver. *See Travelers Indemnity Co. v. Allied Tube & Conduit, Corp*., No. 1:08-

[4] Whatever "confidentiality" concerns Generations has should be addressed by a forthcoming protective order that is in the process of being negotiated by the Parties.

CV-548, 2010 WL 272579, at *1 (W.D.N.C. Jan. 15, 2010) ("A party simply cannot claim privilege and refuse to provide a privilege log; indeed, some courts have found that doing so results in waiver of the privilege."). Plaintiff requests that Defendants produce a privilege log no later than 10 days after the Court's order on this motion as was already requested in Plaintiff's September 4 letter. *See* Ex. C.

Second, Generations' second objection is an improper factual argument that has no bearing whatsoever on whether Generations has responsive documents (and certainly does not serve as a justification not to produce them). Although Generations states it will produce documents subject to its objection, Plaintiff has no idea whether Generations is withholding documents on the basis of this improper objection. The objection should be overruled or deemed waived and Generations should be compelled to produce any responsive documents.

C. Requests Seeking Documents and Communications Between Generations and Western Sky/CashCall or its Third-Party Sender Relevant to Arbitration (Request Nos. 5, 6, 7, 8, 9, 11).

These requests seek documents and communications *between* Generations and Western Sky/CashCall or its Third-Party Sender relating to (a) arbitration and/or the arbitration procedures in Western Sky's consumer loan agreements (Req. 5); (b) application of state or federal law to Western Sky's operations and/or consumer loan agreements (Req. 6); (c) class action lawsuits, including but not limited to class action lawsuits involving Western Sky, CashCall, and/or the Cheyenne River Sioux tribe (Req. 7); (d) Plaintiff James Dillon and/or Dillon's consumer loan agreement with Western Sky (Req. 8); (e) the preparation and content of the Declaration of Jean Kohles, Customer

Service Manager for CashCall (Req. 9); and (f) the Indian Commerce Clause of the Constitution of the United States of America. (Req. 11). Plaintiff will address each of Generations' objections to these requests in turn.

Generations objects to Request 5 on the following grounds:

- Attorney-client and work product privilege;
- Overbroad in that it is not limited in time;
- Not relevant because it seeks documents unrelated to the arbitration clause at issue before the Court and is not limited to Plaintiff or his loan agreement;
- Seeks information that is "confidential and proprietary";
- Seeks documents solely for purposes of harassment.

First, on their face there is no valid basis to assert an attorney-client or work-product privilege[5] because the requests seek documents and communications *between* defendants and third parties, not attorneys and clients.[6]

[5] Under federal common law, the essential elements of the attorney-client privilege are: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except if the protection is waived. *Sprint Commc'ns Co*., 2014 WL 545544, at *4. Documents and communications responsive to the requests at issue cannot possibly satisfy this privilege because communications are not made between an attorney and client.

[6] Unlike Defendants Bay Cities and BMO, Generations did not assert objections based on the "common interest or joint defense privilege." Notwithstanding its inapplicability as set forth in Plaintiff's Memorandum in Support of its Motion to Compel against Bay Cities, by not asserting the "common interest are joint defense privilege" in its response, Generations has waived any privilege it had on that basis. *See, e.g., Neighbors Law Firm, P.C. v. Highland Capital Mgmt., L.P*., No. 5:09-CV-352-F, 2011 WL 761480, at *3 (E.D.N.C. Feb. 24, 2011) ("litigants waive objections not raised under Rule 34 "absent extraordinary circumstances") (citing *Wilhelm v. Cain*, No. 3:10–cv–109, 2011 WL 128568, at *4 (N.D. W.Va 14 Jan. 2011) ("As a general rule, untimely objections to discovery requests are waived."); *Mainstreet Collection, Inc. v. Kirkland's, Inc*., 270 F.R.D. 238, 240 (E.D.N.C. 2010) (noting that the Advisory Committee notes to Rule 34 state that "[t]he procedure provided in Rule 34 is essentially the same as that in Rule

Second, this request is directly relevant because it requests documents and communications about arbitration and/or the arbitration procedures in Western Sky's consumer loan agreements. Clearly if Generations is communicating with the lenders about arbitration procedures in the Western Sky contract, and seeks to compel Plaintiff James Dillon to arbitrate pursuant to those procedures, Plaintiff has a right to discover the documents and communications between the parties discussing those procedures and their application. For example, if there are documents and communications from Western Sky indicating that no tribal arbitration procedures exist, that would also be directly relevant to the enforceability of the contract. *See, e.g.*, *Jackson*, 764 F.3d at 779 (7th Cir. 2014) ("The arbitration clause [in the Western Sky agreement] here is void not simply because of a strong possibility of arbitrator bias, but because it provides that a decision is to be made under a process that is a sham from stem to stern.").

The remaining objections propounded by Generations fail for the same reason set forth above with respect to Requests 1 and 2. Although Generations states it will produce documents subject to its objections, Plaintiff again has no idea whether Generations is withholding documents on the basis of these objections.

Generations objects to Requests 6, 7, and 8 on the following grounds:

- Attorney-client and work product privilege;
- Overbroad in that it is not limited in time;
- Not relevant because it seeks documents unrelated to the arbitration clause at issue before the Court and is not limited to Plaintiff or his loan agreement

33"); *Cappetta v. GC Servs. Ltd. Pship*, No. 3:08CV288, 2008 WL 5377934, at *4 (E.D. Va. 24 Dec. 2008) ("Where a party has taken no precautions to properly assert the privilege, and has allowed time to pass without clarifying the basis for its assertion of privilege, waiver of the privilege may be an appropriate sanction.")).

Generations' assertion of privilege fails for the same reasons stated above with respect to Request 5. Request 6 is relevant because the Western Sky agreement expressly disclaims application of state or federal law to the loan agreement. Plaintiff is therefore seeking documents and communications discussing the validity of this disclaimer and/or whether the purported disclaimer of the Federal Arbitration Act or other relevant laws could have some bearing on the arbitration proceedings sought by Generations.

Request 7 is relevant because Western Sky and/or CashCall have been subject to numerous class action lawsuits wherein its arbitration agreement has been struck down as unenforceable, and the parties' discussion of those rulings in the context of this case could give insight on whether they believe a different finding is warranted here, or conversely, whether they internally agree the arbitration agreement is unenforceable as applied to Plaintiff.

Request 8, seeking documents and communications between Generations and the lenders relating to Plaintiff James Dillon and/or Dillon's consumer loan agreement with Western Sky, goes to the heart of this discovery. These communications could contain any number of admissions that would tend to show that Mr. Dillon never signed his loan agreement, the arbitration procedures in Mr. Dillon's loan agreement are a sham, or Western Sky and Cash Call were not able to properly authenticate Mr. Dillon's loan agreement. Any of these types of admissions could weigh strongly against enforceability of the arbitration agreement. But even tamer documents and communications discussing how Mr. Dillon's arbitration would operate under the terms of the agreement would be

relevant to the issues before the Court. Generations has outright refused to produce these exceedingly relevant documents and should be compelled to do so.

Request 9 seeks documents relating to the preparation and content of the Declaration of Jean Kohles, Customer Service Manager for CashCall. These documents are relevant to gauge the credibility of Ms. Kohles' who submitted an affidavit in this case at Doc. 153-1. While Generations does not object to this request per se, it does state that "[s]ubject to Generations' objections, and without waiver of same, Generations will produce any reasonably responsive, non-privileged documents at a mutually agreeable time and place." First, Plaintiff is entirely unclear as to which objections the response is purportedly subject to (other than perhaps the improper general objections), and whether Generations is withholding any documents on the basis of such objections. Moreover, Generations only agrees to produce "non-privileged" documents, but never asserts privilege as an objection to this request. As stated above, documents and communications between Generations and Western Sky and/or CashCall are not protected by an attorney-client privilege so it is entirely unclear what Generations is prepared to produce or withhold.

Generations objects to Request 11 on the following grounds:

- Overbroad in that it is not limited in time;
- Not relevant because it seeks documents unrelated to the arbitration clause at issue before the Court and is not limited to Plaintiff or his loan agreement

The request is not overbroad for the same reasons given with respects to Requests 1 and 2. Documents and communications relating to "the Indian Commerce Clause of the Constitution of the United States of America" are relevant because the Western Sky agreement states that it is "governed by the Indian Commerce Clause of the Constitution of

the United States of America." Accordingly, Plaintiff has a right to discover whether the parties have discussed governance of the Indian Commerce Clause in the context of arbitration proceedings under the agreement.

D. Requests Seeking Documents Involving Laws Applicable to the Western Sky Arbitration Agreement (Request Nos. 12, 13, 17, 18).

These requests seek documents and communications in Generations' possession, custody or control relating to (a) application of state or federal law to Western Sky's consumer loan agreements (Req. 12); (b) the Cheyenne River Sioux tribal court and/or tribal court procedures (Req. 13); (c) the laws and/or jurisdiction of the Cheyenne River Sioux tribe (Req. 17); and (d) law and rules of the Cheyenne River Sioux tribe that would be applicable to an arbitration between Plaintiff and any other person or entity premised in whole or in part on claims arising from his loans from Western Sky (Req. 18). Generations objects to these requests on the following grounds:

- Attorney-client and work product privilege;
- Overbroad in that it is not limited in time;
- Not relevant because it seeks documents unrelated to the arbitration clause at issue before the Court and is not limited to Plaintiff or his loan agreement

To the extent Generations is asserting attorney-client and work product privilege, Generations must provide a privilege log in conformance with Rule 26(b)(5)(A) as set forth above with respect to Requests 3 and 4. The requests are not overbroad because Plaintiff agreed to limit his requests to a period of four years from the filing of the Complaint, October 8, 2009 through present. These requests are each relevant for the same reason: responsive documents and communications could give insight on how the convoluted arbitration procedures set forth in the Western Sky are intended to apply. For example, the

agreement provides that "[t]he arbitrator will make written findings and the arbitrator's award may be filed in the Cheyenne River Sioux Tribal Court, which has jurisdiction in this matter." Plaintiff has every right to discover from Generations documents relating to potentially applicable tribal court procedures. Likewise, the loan agreement and its arbitration provision purport to be "governed by the law of the Cheyenne River Sioux Tribe." If Generations has in its possessions the laws and rules of the Cheyenne River Sioux tribe that would be applicable to a consumer arbitration, to the extent such laws and rules actually exist, Plaintiff is entitled to those documents.

Although Generations states it will produce documents subject to these objections, Plaintiff again has no idea whether Generations is withholding documents on the basis of these objections.

E. Other Requests (Request Nos. 15, 16).

Request 15 seeks all documents and communications in Generations' possession, custody or control relating to CashCall and/or Jean Kohles. Generations objects to this request on the following grounds:

- Attorney-client and work product privilege;
- Overbroad in that it is not limited in time;
- Not relevant because it seeks documents unrelated to the arbitration clause at issue before the Court and is not limited to Plaintiff or his loan agreement

First, while there could be a scenario where a limited number of documents are privileged, on its face it is difficult to see how Generations can satisfy the essential elements of the attorney-client privilege (as set forth in footnote 5) premised on CashCall and/or Jean Kohles because it seems unlikely Generations' counsel would be giving legal advice

on those subjects. As set forth above, however, Generations must prepare a privilege log for any documents being withheld on this basis.

Second, this request is relevant for the same reasons set forth with respect to Request 9, to gauge the credibility of Ms. Kohles who submitted an affidavit in this case at Doc. 153-1. Throughout this litigation, the relationship between Western Sky and CashCall has been an enigma because CashCall is not mentioned anywhere in the Western Sky loan agreement, yet Generations is submitting affidavits from employees of CashCall, rather than Western Sky, in an attempt to authenticate Mr. Dillon's loan agreement. Moreover, Mr. Dillon has responded in discovery that he has no recollection of the purported phone call he had with the CashCall representative as set forth in Ms. Kohles's affidavit. Generations' refusal to produce these documents should not be tolerated as they go directly to the credibility of an authenticating witness.

Request 16 seeks all documents and communications in Generations' possession, custody or control relating to the tribal sovereign immunity of Western Sky, CashCall or the Cheyenne River Sioux tribe. Generations objects to this request on the following grounds:

- Attorney-client and work product privilege;
- Overbroad in that it is not limited in time;
- Not relevant because it seeks documents unrelated to the arbitration clause at issue before the Court and is not limited to Plaintiff or his loan agreement

Plaintiff reiterates his response to the privilege objection as set forth with respect to Request 15. With respect to relevance, the Western Sky loan agreement states that "Any arbitration under this Agreement may be conducted either on tribal land or within thirty

miles of your residence, at your choice, provided that this accommodation for you shall not be construed in any way (a) as a relinquishment or waiver of the Cheyenne River Sioux Tribe's sovereign status or immunity, or (b) to allow for the application of any law other than the law of the Cheyenne River Sioux Tribe of Indians to this Agreement. As set forth in Plaintiff's Meet and Confer letter of July 23, 2015 (Ex. B), it is Plaintiff's position that the representations that the loan agreements and the borrowers themselves (by execution of the agreements) are subject to tribal law is false. *See Jackson v. Payday Fin., LLC*, *supra*, 764 F.3d at 783 ("a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court"). And since these false representations explicitly apply to the clauses that comprise the arbitration provisions, it is Plaintiff's position that the agreements contain material misrepresentations that render the agreement to arbitrate unenforceable. Accordingly, documents related to the tribal sovereign immunity of Western Sky, CashCall or the Cheyenne River Sioux tribe bear directly on Plaintiff's defenses to enforcement of the arbitration agreement. Further, in order even to begin to understand how the arbitration agreement would be applied here, Plaintiff needs discovery on the purported tribal immunity of parties to the contract, to say nothing of the complicated legal and factual question of whether such immunity would purport to extend to a non-signatory attempting to enforce the agreement like Generations.

V. Conclusion.

For the foregoing reasons, Plaintiff requests that the Court order Generations to comply in full with Plaintiff's requests for production as set forth herein.

Dated: September 11, 2015

Respectfully submitted,

By: /s/ F. Hill Allen

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2015, I caused a true and correct copy of the Motion to Compel Generations Federal Credit Union to Produce Documents in Response to Plaintiff's Requests for Arbitration Related Discovery and Plaintiff's Supporting Memorandum of Law to be served on Counsel for Defendants, by the ECF system.

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