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

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

CASHCALL, INC.'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION
AND STAY OR DISMISS PROCEEDINGS

Plaintiff Joshua Parnell ("Plaintiff") brings this putative class action to challenge his Loan Agreement with Defendant Western Sky Financial, LLC under Georgia's Payday Lending Act ("GPLA"). However, the Agreement has an Arbitration Clause requiring that all disputes arising out of it be resolved in binding arbitration. Moreover, as the Eleventh Circuit stated in its decision remanding this case, because "the Loan Agreement contains a delegation provision, [this Court] only retain[s] jurisdiction to review a challenge to that particular provision." *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1148 (11th Cir. 2015). Plaintiff has failed to mount "a proper challenge to the delegation provision," instead

erroneously arguing that the ***entire*** Loan Agreement is unconscionable under Georgia law. *Id.* at 1149. As the Supreme Court has repeatedly held, a court cannot void an arbitration clause on the ground that the entire contract containing that clause is unenforceable. Only the arbitrator can decide whether the entire contract is invalid.

Plaintiff's claims are subject to the same Arbitration Clause, which provides that the borrower can select the American Arbitration Association ("AAA") or JAMS as the arbitrator, and to the same delegation clause that have been examined by six other federal district courts. As discussed below at Part II, section C, all six federal courts have enforced the Loan Agreement and required the parties to arbitrate:

- *Yaroma v. CashCall, Inc.*, No. CV 15-08-GFVT, 2015 WL 5475258, at *4-6, *8 n.8 (E.D. Ky. Sept. 16, 2015);
- *Kemph v. Reddam*, No. 13-cv- 6785, 2015 WL 1510797 (N.D. Ill. Mar. 27, 2015);
- *Williams v. CashCall, Inc.*, 92 F. Supp. 3d 847 (E.D. Wis. 2015);
- *Hayes v. Delbert Servs. Corp*., No. 3:14-cv-258, 2015 WL 269483 (E.D. Va. Jan. 21, 2015);
- *Chitoff v. CashCall, Inc.*, No. 0:14-cv-60292, 2014 WL 6603987 (S.D. Fla. Nov. 17, 2014); and

- *Narula v. Delbert Servs. Corp.*, No. 2:13-cv-15065, 2014 WL 3752797, at *2 (E.D. Mich. July 30, 2014).

The outcome here should be no different: this Court should compel arbitration as to the entire case.

While Plaintiff's Second Amended Complaint ("SAC") generally references the delegation provision (SAC ¶¶ 117-128), the SAC alleges no facts upon which this Court could conclude that the delegation provision is invalid based on "'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010). Instead, Plaintiff rests on his conclusory allegation that the delegation clause is "void and unenforceable," and focuses on a portion of the loan agreement discussing the application of tribal law. (SAC ¶¶ 117-128.) When doing so, however, Plaintiff omits the operative preceding and subsequent language that permits the parties to use the AAA or JAMS. His conclusion that "[t]he delegation provision requires arbitration in an exclusive and non-existent [tribal] forum and is therefore unenforceable," is not supported by the actual language contained in the Loan Agreement (SAC ¶ 124.)[1]

[1] Plaintiff also attempts to misapply the vindication of rights doctrine, a narrow exception to the Federal Arbitration Act ("FAA") reserved for claims brought under certain ***federal*** statutes. When, as here, Plaintiff is exclusively pursuing a ***state*** statutory claim, federal courts "have no earthly interest (quite the

For the reasons set forth more fully below and in Defendant CashCall, Inc.'s ("CashCall") prior motion to compel arbitration briefing (ECF Nos. 3-1, 19-1, 24), this Court should compel arbitration of the parties' dispute pursuant to Sections 3 and 4 of the FAA, 9 U.S.C. §§ 3, 4 and stay or dismiss the current civil action.

I. RELEVANT FACTUAL BACKGROUND

A. Plaintiff's Second Amended Complaint.

Plaintiff alleges that in June 2012, he applied for a Western Sky loan from his computer in Georgia. (SAC ¶¶ 77, 79.) Plaintiff was approved for a $1,000 loan, and he electronically signed the contract providing the terms of the loan (the "Loan Agreement" or "Agreement", attached hereto as **Exhibit A**). (*Id*. at ¶¶ 80-81, 86.) In large font, the first page of the Loan Agreement provides the annual percentage rate, finance charge, amount financed, and total of payments for Plaintiff's loan. (*Id.* at ¶¶ 83-84; Ex. A at 1.[2]) Western Sky then approved and caused the funding of the loan from the Cheyenne River Indian Reservation. CashCall subsequently became the loan's servicer. (SAC ¶ 87.)

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contrary) in vindicating that [state] law." *Am. Express Co. v. Italian Colors Rest*., 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

[2] Citations to Exhibit A refer to page numbers contained in the Agreement itself.

Plaintiff alleges that his loan violates several provisions of the GPLA, including its 16% interest rate cap. (*Id.* at ¶¶ 129-50.) He also claims that the Loan Agreement (***but not***, specifically, the arbitration clause or the delegation clause) is unconscionable under Georgia law. (*Id.* at ¶¶ 149-50.) On behalf of a purported class, Plaintiff seeks compensatory and statutory damages, injunctive relief, and disgorgement from Defendant as to all money collected on loans that Plaintiff alleges violate the GPLA. (*Id.* at Prayer for Relief.)

B. Plaintiff's Arbitration Clause.

Plaintiff's Loan Agreement contains a comprehensive Arbitration Clause:

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

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

> holder of the Note and will not be part of a class-wide or consolidated Arbitration proceeding.

(Ex. A at 3.)

2. *"Disputes" Subject to Arbitration Defined Broadly.* The Loan Agreement defines the "Disputes" subject to mandatory arbitration in the "broadest possible" way as "any controversy or claim between you and Western Sky or the holder or servicer of the Note," including "all claims or demands . . . based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief)." (*Id.* at 4.)

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

4. *Broad Set of Parties Subject to Arbitration.* The Agreement broadly defines the parties against whom Plaintiff must arbitrate. The Agreement requires arbitration of "any controversy or claim between you and Western Sky or the holder or servicer of the Note," and defines the term "holder" to include "Western Sky or the then-current note holder's employees, officers, directors, attorneys, affiliated companies, predecessors, and assigns, as well as any marketing,

servicing, and collection representatives and agents." (*Id.*) CashCall is the loan "servicer." (SAC ¶ 53.)

5. *Specified Arbitral Fora.* The Agreement gives Plaintiff the right to select arbitration before an authorized representative of the Cheyenne River Sioux Tribe ("CRST"), or, "the [AAA] . . . ; JAMS . . . ; or an arbitration organization agreed upon by [Plaintiff] and the other parties to the Dispute." (Ex. A at 3-4.) The Agreement states that, "*except as provided below*," any arbitration is to be "conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative" using "its consumer dispute rules and the terms of this Agreement." (*Id.* at 3-4 (emphasis added).) In a subsequent paragraph, titled "Choice of Arbitrator," the Agreement expressly provides exceptions to arbitration by the CRST, and specifically authorizes any party, including the borrower, to select arbitration by the AAA, JAMS, or another reputable organization. (*Id.*at 4.) The Arbitration Clause further states 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 Arbitration Clause obligates CashCall to "pay the filing fee and any costs or fees charged by the arbitrator regardless of which party initiates the Arbitration," and "[a]ny arbitration under this Agreement may be conducted either on tribal land or within thirty miles of [Plaintiff's] residence, at [his] choice." (*Id.*)

6. *Right to Opt-Out.* The Agreement affords Plaintiff the right to opt out of arbitration entirely by notifying Western Sky in writing or via email within sixty days of receiving his loan funds (*id.* at 5), which Plaintiff did not do.

7. *Severability and Survival Clauses*. The Arbitration Clause states: "If any of this Arbitration [Clause] is held invalid, the remainder shall remain in effect[.]" (*Id.* at 5.)

* * * *

Ignoring both the clear Arbitration Clause and unambiguous Delegation Clause, Plaintiff filed this action in court. Further, notwithstanding the parties' agreement to arbitrate before the AAA, JAMS, or another organization, Plaintiff premises his arbitration challenge solely on the option to arbitrate before the CRST. Given the Delegation Clause, this Court should stay or dismiss this action and, consistent with the FAA, allow the arbitrator to decide all issues, including arbitrability.

II. ARGUMENT AND CITATIONS OF AUTHORITY

A. The Federal Arbitration Act ("FAA") Applies.

Federal law heavily favors arbitration and requires the Court to compel arbitration in accordance with the parties' agreement. Specifically, under the FAA, written agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 664 (2010) (central purpose of the FAA "is to ensure that private agreements to arbitrate are enforced according to their terms.") (internal quotations and citation omitted); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995). The United States Supreme Court has explained that the FAA enunciates a "strong federal policy in favor of enforcing arbitration agreements" that requires courts to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 221 (1985); *see also DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015). That federal policy applies "notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "construe[ing] . . . the contract language itself." *Id*. at 24-25.

"[C]ourts must place arbitration agreements on equal footing with other contracts, [ ] and enforce them according to their terms . . . ." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (citation omitted). "[W]henever enforcement of an arbitration agreement is requested, this Court is required to send the parties to arbitration 'upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration.'" *Southland Health Servs., Inc. v. Bank of Vernon*, 887 F. Supp. 2d 1158, 1164 (N.D. Ala. 2012). 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" covered by an arbitration agreement. *Dean Witter Reynolds*, 470 U.S. at 218.

B. The Delegation Clause Is Enforceable And Requires That All Disputes About The Arbitration Clause Be Resolved Only By The Arbitrator.

1. Plaintiff's Delegation Clause Argument Fails.

The Loan Agreement contains a broad Arbitration Clause that requires resolution through binding arbitration of *all* disputes arising out of the Loan Agreement. (Ex. A at 3-5.) The Arbitration Clause contains a Delegation Clause, which, as Plaintiff concedes, delegates to an arbitrator "disputes as to the validity, enforceability, or scope of the Arbitration agreement." (SAC ¶¶ 120, 126.) In the seminal case, *Rent-A-Center, West, Inc. v. Jackson*, the Supreme Court approved

the use of such delegation clauses, and made clear that, except in very rare circumstances not present here, they must be enforced. 561 U.S. 63 (2010). In *Rent-A-Center*, the parties' arbitration agreement contained a delegation clause requiring an arbitrator to "resolve any dispute relating to the interpretation, applicability, enforceability or formation of" the arbitration agreement. *Id.* at 66. The Supreme Court held that, unless a party "challenge[s] the delegation provision specifically, [courts] must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the [arbitration] Agreement as a whole for the arbitrator." *Id.* at 72. There, the plaintiff failed to successfully challenge the delegation provision specifically and, therefore, the Supreme Court stated that "we must treat it as valid," thereby "leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.*

In the instant case, the Eleventh Circuit found that the delegation clause at issue "unambiguously commits to the arbitrator the power to determine the enforceability of the agreement to arbitrate." 804 F.3d at 1148. "Because the Loan Agreement contains a delegation provision, [this Court] only retain[s] jurisdiction to review a challenge to that particular provision." *Id.* Thus, under *Rent-A-Center* and the Eleventh Circuit's decision in this case, Plaintiff's only avenue to invalidate the Delegation Clause is to show that the clause itself—as opposed to

the Arbitration Clause or the Loan Agreement—is "invalidated by [a] generally applicable contract defense[], such as fraud, duress, or unconscionability." *Rent-A-Ctr.*, 561 U.S. at 68 (quotations and citation omitted). Plaintiff has failed to show that the Delegation Clause is invalid.

Plaintiff does not allege fraud or duress related specifically to the Delegation Clause, and his underwhelming unconscionability arguments pertain only to the entire Loan Agreement.[3] (SAC ¶ 150.) Plaintiff's conclusion that the Delegation Clause is "void and unenforceable" (SAC ¶ 128) does not satisfy the exceedingly difficult standard required to void a delegation provision. Thus, all challenges to the Arbitration Clause (as well as the merits of Plaintiff's claims) must be resolved exclusively by an arbitrator (from the AAA, JAMS, CRST, or other organization), and this Court cannot entertain any challenges to the remainder of the Arbitration Clause or to the Loan Agreement generally.

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[3] Plaintiff does not allege that he was coerced into assenting to the Delegation Clause, rushed through his opportunities to review it, was denied answers to questions about the meaning of the delegation provision, or was prevented from making a free and willing choice to accept the Loan Agreement's terms, including the Delegation Clause. On the contrary, the SAC demonstrates that Plaintiff initiated and signed the loan application from the comfort of his own home and had the opportunity to change his mind. (SAC ¶¶ 79-86.) Moreover, Plaintiff could have declined the arbitration route altogether by exercising his right to opt-out. (Ex. A at 5.)

2. The Loan Agreement Permits the Borrower to Select the AAA or JAMS as the Arbitral Forum.

The crux of Plaintiff's argument is that delegation is impossible because it requires the CRST to conduct the arbitration with non-existent CRST consumer dispute rules. (SAC ¶¶ 107-09, 120-22.) Plaintiff then concludes that because "[t]he delegation provision requires arbitration in an exclusive and non-existent forum" (*id.* at ¶ 124), the Delegation Clause is "void and unenforceable." (*Id.* at ¶ 128.) Whether Plaintiff frames his theory as grounded in unconscionability, unenforceability, or unavailability, his argument fails because it relies on a fundamental "misreading of th[e] language" in the Arbitration Clause as requiring the CRST to be involved in any arbitration. *Yaroma v. CashCall, Inc.*, No. CV 15-08-GFVT, 2015 WL 5475258, at *4-6, *8 n.8 (E.D. Ky. Sept. 16, 2015) (considering plaintiff's argument that the CRST must be involved in arbitration pursuant to an identical Arbitration Clause and concluding that the AAA or JAMS can conduct the arbitration in lieu of a CRST representative). Plaintiff's contention falls apart upon simple examination of the full text of the Arbitration Clause.[4]

[4] In the SAC, Plaintiff incorporates by reference ECF No. 3-2 (re-attached here as Exhibit A), which contains the Arbitration Agreement in its entirety. (SAC ¶ 81.) When, as here, "the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205-06 (11th Cir. 2007).

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." (Ex. A at 3-4 (emphasis added).) The phrase "except as provided below" refers, *inter alia*, to a subsequent paragraph titled "**Choice of Arbitrator**," which provides in part:

> Regardless of who demands arbitration, you shall have the right to select any of the following arbitration organizations to administer the arbitration: the American Arbitration Association (1-800-778-7879) http://www.adr.org; JAMS (1-800-352-5267) http://www.jamsadr.com; or an arbitration organization agreed upon by you and the other parties to the Dispute. The arbitration will be governed by the chosen arbitration organization's rules and procedures applicable to consumer disputes, to the extent that those rules and procedures do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate, including the limitations on the Arbitrator below.

(*Id*. at 4.)

The plain language of the Arbitration Clause compels a simple interpretation: it allows arbitration before the CRST, but also permits arbitration before the AAA or JAMS using those two organizations' rules. The AAA and JAMS are *alternatives* to tribal arbitration. Pursuant to the AAA and JAMS rules governing consumer disputes, those organizations select arbitrators exclusively from their national rosters of arbitrators, and those arbitrators use the rules of the

AAA or JAMS to conduct the arbitration.[5] Thus, Plaintiff can have his claims heard by the AAA or JAMS arbitrators, using AAA or JAMS rules. No tribal participation is required nor must the arbitration be conducted in accordance with the CRST's consumer dispute rules and, therefore, the " non-existent forum" theory necessarily fails.[6]

As Judge Van Tatenhove held in *Yaroma*, the Arbitration Clause here is "very different" from the arbitration clause addressed in cases like *Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303, 1305 (S.D. Fla. 2013) *aff'd*, 768 F.3d 1346 (11th Cir. 2014), and *Jackson v. Payday Financial, LLC.*, 764 F.3d 765, 776-81

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[5] The AAA's and JAMS' rules provide methods for appointing their own arbitrator. *See* AAA, Consumer-Related Disputes: Supplementary Procedures, C-4 (2005) ("[T]he AAA will appoint an arbitrator."); AAA Consumer Arbitration Rules, R-15 (2014), *available at* http://tinyurl.com/q4k6cjq; JAMS Comprehensive Arbitration Rule 15 (2014), *available at* http://tinyurl.com/nlvh8b2 ("Arbitrator Selection, Disclosures and Replacement"); JAMS Streamlined Arbitration Rule 12 (same).

[6] If the CRST were the only arbitration forum provided for in the parties agreement, which it is not, FAA Section 5 would require the Court to appoint an arbitrator since there would "a lapse in the naming of an arbitrator." 9 U.S.C. § 5; *see also Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1313 (11th Cir. 2005), *abrogated by Lawson v. Life of S. Ins. Co.*, 648 F.3d 1166, 1171 (11th Cir. 2011). Moreover, if this Court concludes that the Loan Agreement requires arbitration by a non-existent tribal representative and application of non-existent tribal laws, which it does not, the Court can sever the relevant provision from the remainder of the Loan Agreement and ensure that the parties' intent to arbitrate is fulfilled. (Ex. A at 5 ("If any of this Arbitration Provision is held invalid, the remainder shall remain in effect[.]").)

(7th Cir. 2014). 2015 WL 5475258, at *5. The arbitration provision in those cases did not mention the AAA or JAMS at all. Instead, that clause required that arbitration occur, without exception, before "either (i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council"—a clause that is not present in Plaintiff's Arbitration Clause. *Yaroma*, 2015 WL 5475258, at *5 (internal quotations and citations omitted). Other federal courts have similarly distinguished the Arbitration Clause to which Plaintiff agreed from the clause in *Inetianbor* and *Jackson*. *See* Part II, section C, *infra*.

Rather than accept the straight-forward reading advanced by CashCall and accepted by numerous federal courts, Plaintiff instead fixates on the phrase "conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules." (*See, e.g.*, SAC ¶¶ 107, 117). In doing so, Plaintiff completely ignores the phrase "*except as provided below*," (*see* Ex. A at 3), which refers to a subsequent paragraph that permits the borrower to select arbitration before the AAA or JAMS. *See, e.g.*, *Yaroma*, 2015 WL 5475258, at *4-6. By contrast, a plain reading of the Arbitration Clause harmonizes all of its language and also ensures that arbitration can occur in a neutral forum, using neutral rules. Plaintiff's argument that the Delegation Clause is unenforceable fails and, therefore, all of his claims, including challenges to the

Arbitration Clause itself, must be decided in arbitration. *See Parnell*, 804 F.3d at 1149.[7]

3. The Language of the GPLA Does Not Alter the Analysis.

The Second Amended Complaint contains conclusory references to the GPLA's unconscionability defense—a state law remedy applicable only to "arbitration clause[s] in payday loan contract[s]," O.C.G.A. § 16-17-2(c)(2), not to contracts generally. (SAC ¶¶ 149-150.) Under binding Supreme Court precedent applying FAA Section 2, the FAA preempts the unconscionability defense because "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Likewise, the FAA preempts any state laws that "derive their meaning from the fact that an agreement to arbitrate is at issue," or that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the FAA. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 343 (2011) (quotations omitted).

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[7] Under the Supreme Court's pro-arbitration canons of construction, any ambiguities in the language of the Arbitration Clause must be construed in favor of arbitration. *See DIRECTV, Inc.*, 136 S. Ct. at 471 (2015) (invoking the rule that courts must "give 'due regard … to the federal policy favoring arbitration"); *Moses H. Cone*, 460 U.S. at 24-25 ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "construe[ing] . . . the contract language itself.").

The GPLA directs a court addressing unconscionability, to consider four specific factors, each of which is preempted by the FAA. *See* O.C.G.A. § 16-17-2(c)(2); *see also* SAC ¶ 149. A complete discussion as to why the GPLA factors do not invalidate arbitration here is contained in CashCall's briefing on its Renewed Motion to Compel Arbitration (ECF No. 19-1 at 13-18) (incorporated herein by reference). The GPLA is preempted and, accordingly, fails to provide a basis to deny this motion.[8]

C. Other Federal Courts Construing The Exact Same Arbitration Clause Have Compelled Arbitration.

This Court need not plow new ground because the other federal courts reviewing similar challenges to the exact same language have found that the Arbitration Clause enables the borrower to arbitrate with the AAA or JAMS *without any participation by the CRST*. In *Yaroma*, for example, Judge Van Tatenhove concluded that the AAA and JAMS could appoint their own arbitrators to hear the parties' disputes. *Yaroma*, 2015 WL 5475258, at *4-6 ("a proper arbitral forum exists, and therefore the arbitration provisions are enforceable and will not deprive Yaroma of a meaningful way of resolving her dispute.").

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

In *Kemph v. Reddam*, No. 13-cv- 6785, 2015 WL 1510797 (N.D. Ill. Mar. 27, 2015), Judge Aspen of the Northern District of Illinois considered a challenge to the same Arbitration Clause brought by another Western Sky borrower. Judge Aspen concluded that "since Plaintiffs' loan agreements permit arbitration to be administered by a third party such as AAA or JAMS pursuant to that organization's consumer dispute rules, the concerns in *Jackson* are inapplicable." *Id.* at *5, *7. Judge Aspen held that, "[u]nlike in *Jackson*, where there was 'no prospect of a meaningful and fairly conducted arbitration,' the loan agreements here provide the possibility for an unbiased and fair dispute resolution process." *Id.* at *5.

In *Williams v. CashCall, Inc.*, 92 F. Supp. 3d 847 (E.D. Wis. 2015), Judge Duffin from the Eastern District of Wisconsin concluded that the "most reasonable" reading of the borrower's loan agreement allows the borrower "the option of choosing to arbitrate any claims that he has relating to his agreement before the AAA, JAMS, or another mutually acceptable organization, applying the consumer dispute rules of the selected administering organization and conducted by an arbitrator from the selected organization's system." *Id*. at 854. Because this clause "provid[es] the option of using the consumer dispute rules of the AAA or JAMS" and "allow[s] the parties to use an arbitrator from either the AAA or JAMS

systems," it eliminates the "concerns that the *Jackson* court had about using a Tribal member as the arbitrator." *Id.* at 853-54.[9] For these reasons, Judge Duffin compelled arbitration after analyzing the very same language at issue here.

In *Hayes v. Delbert Servs. Corp*., No. 3:14-cv-258, 2015 WL 269483 (E.D. Va. Jan. 21, 2015), Judge Gibney of the Eastern District of Virginia found that the reference to the AAA and JAMS "saves the arbitration agreement from meeting the same fate as those in *Inetianbor* and *Jackson*. The plaintiffs are not limited to the illusory 'authorized representatives' of the CRST and its . . . 'consumer dispute rules'" because under the Arbitration Clause "the parties have recourse to well-recognized arbitration organizations and their procedures." *Id.* at *4.

Similarly, in *Chitoff v. CashCall, Inc.*, No. 0:14-cv-60292, 2014 WL 6603987 (S.D. Fla. Nov. 17, 2014), Judge Rosenberg of the Southern District of Florida found that an arbitration clause identical to that at issue "only requires that a tribal representative administer arbitration *except as otherwise provided*, and a subsequent portion of the agreement allows for arbitration to be administered by

[9] *Williams* is especially persuasive because Judge Duffin (1) was bound by the Seventh Circuit's decision in *Jackson*, and (2) had both versions of the arbitration clause before it (*i.e.*, the AAA/JAMS version that Plaintiff signed, as well as the tribal version from *Jackson* and *Inetianbor*). Specifically, the court in *Williams* enforced the Arbitration Clause at issue in this case while not enforcing the earlier version of the provision that did not include the AAA or JAMS as an option.

the [AAA] or by [JAMS]." *Id.* at *1. Consequently, Judge Rosenberg compelled arbitration. *Id.* at *2.

And finally, Judge Edmunds of the Eastern District of Michigan compelled arbitration in a case challenging the very same arbitration clause, because "Arbitration may be conducted by the AAA, JAMS, or any other mutually agreeable arbitration organization." *Narula v. Delbert Servs. Corp.*, No. 2:13-cv-15065, 2014 WL 3752797, at *2 (E.D. Mich. July 30, 2014).

The rulings in *Yaroma*, *Kemph*, *Williams*, *Hayes*, *Chitoff*, and *Narula*, each compelling arbitration based on ***identical*** arbitration language, provide strong persuasive support for the conclusion that arbitration must be compelled here.

D. The AAA And JAMS Have Both Accepted Arbitrations Under The Language In The Arbitration Clause.

Plaintiff's conjecture that the "Loan Agreement requires arbitration in an exclusive and non-existent forum" is demonstrably false. (SAC ¶ 111.) As this brief is submitted, nearly a dozen arbitrations before the AAA or JAMS are proceeding pursuant to the exact Arbitration Clause and Delegation Clause at issue. *See* **Exhibit B** at 1-64 (evidencing ongoing arbitrations involving arbitration clause and delegation clause at issue).[10] Previously, in *Kemph*, Judge Aspen noted

[10] The Court may take judicial notice of these arbitration facts. *See* Fed. R. Evid. 201(b)(2), (c)(2).

that the AAA and JAMS have both accepted arbitrations under the language at issue here. 2015 WL 1510797, at *6.[11]

In sum, while Plaintiff theorizes that the arbitral process provided in the Delegation and Arbitration Clauses is "non-existent," (SAC ¶ 111, 124), ongoing arbitrations provide objective evidence that arbitration exists, before experienced arbitrators, pursuant to fair rules.

E. The Vindication Of Rights Exception To The FAA Is Inapplicable Here Because Plaintiff Pursues Only State Statutory Claims.

Plaintiff's remaining theory for invalidating the delegation clause rests on a flawed understanding of the so-called vindication of rights exception to the FAA. (SAC ¶¶ 126-27.) While the continued existence of the effective vindication exception has been called into question in recent years, *see, e.g.*, *DIRECTV, Inc.*

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[11] "AAA has already agreed to administer arbitration in *Chitoff v. CashCall Inc.*, which is based on a nearly identical loan agreement," *Kemph*, 2015 WL 1510797, at *6, and the appointed AAA arbitrator (Richard H. Vura) has experience in over 7,000 prior mediations, *see* Ex. B at 14-18. To that end, the arbitrator in *Chitoff* has expressly ruled that the Arbitration Clause is valid and fully subject to AAA's rules, despite the fact that the claimant made the very same arguments that Plaintiff makes here. *See* Ex. B at 19. Judge Aspen also noted that JAMS has accepted an arbitration involving the same Arbitration Clause that Plaintiff signed, *see Kemph*, 2015 WL 1510797 at *6 (citing "JAMS Notice of Intent to Initiate Arbitration in *Keehn v. CashCall, Inc.*"), and the JAMS arbitrator in that case is former federal district judge David H. Coar, *see* Ex. B at 41-42. Since *Keehn*, JAMS has accepted *eight* additional arbitrations involving this very same Arbitration Clause, with arbitrators such as former judges being appointed to hear the claims. *See id*. at 43-64.

136 S. Ct. at 476 n.3 (Ginsburg, J., dissenting) ("Although the Court in *Italian Colors* did not expressly reject this 'effective vindication' principle, the Court's refusal to apply the principle in that case suggests that the principle will no longer apply in any case.") (citation omitted), to the extent it survives, it is a narrow exception reserved for claims brought under ***federal*** statutes because it rests on the principle that other federal statutes stand on equal footing with the FAA. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985) (deriving the vindication of rights exception from "the *congressional* intention expressed in some other [federal] statute" in which "*Congress* itself has evinced an intention" to exempt federal statutory rights from arbitration) (emphases added). In that narrow context, the Supreme Court has suggested that, where a party cannot effectively vindicate a *federal statutory claim* in the arbitral forum, an inherent conflict may exist between arbitration and the underlying purpose of a *federal* statute sufficient to override the FAA's mandate. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-27, 242 (1987); *see also Am. Express Co.*, 133 S. Ct. at 2311 (discussing the effective vindication exception). Here, Plaintiff brings a single state law claim—which cannot trump a federal statute—and, therefore, the effective vindication exception does not apply.

III. CONCLUSION

For the reasons stated above, the Delegation Clause is valid and enforceable and, accordingly, the Court should compel arbitration and stay or dismiss Plaintiff's action.

Respectfully submitted this 28th day of January, 2016.

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CERTIFICATE OF COMPLIANCE

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

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

CERTIFICATE OF SERVICE

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

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