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

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

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

COMES NOW, Plaintiff Joshua Parnell, and files this, his Response in Opposition to Defendant CashCall Inc.'s ("CashCall") Motion to Compel Arbitration and Stay or Dismiss Proceedings [*Doc 54-1*], and shows this Honorable Court the following:

FACTS

Throughout the two years of litigation this case has already been through, the facts about the lending scheme engaged in by Defendant have been well documented

and repeated many times in briefs to this Court. Because these facts and the loan agreement which is the subject of this action ("Loan Agreement") have been recited so many times, Plaintiff will not recite the entire sections of the Loan Agreement here, but merely remind the Court of certain key sections.[1]

The Loan Agreement states that "any dispute [the borrower] ha[s] with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration." [*Doc 3-2*]. A dispute is defined as "any claim . . . including any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement." Id. Arbitration will 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. (emphasis added). Another provision states that the agreement is "made pursuant to a transaction involving the Indian Commerce Clause of the Constitution of the United States of America, and ***shall be governed by the law of the Cheyenne River Sioux Tribe. The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement.***" Id. (emphasis added). The Loan Agreement is "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne

[1] Plaintiff incorporates by reference all of the facts described in ¶¶ 1-120 in Plaintiff's Second Amended Complaint.

River Indian Reservation," and "shall be subject to and construed in accordance ***only*** with the provisions of the laws of the Cheyenne River Sioux Tribe." Id. (emphasis added). No United States state or federal law applies to the Loan Agreement. Id.

Therefore, any challenge to the agreement, whether it be to "validity, enforceability, or scope" of the arbitration agreement, or the Arbitration Agreement as a whole, or the servicing of the loan would proceed in the same manner under the same process. That process is the same regardless of the dispute, and that process requires arbitration which: 1) is conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative[2]; 2) conducted in accordance with the consumer dispute rules of the Cheyenne River Sioux Tribe; 3) conducted by the terms of the Loan Agreement; 4) conducted by an arbitrator who will apply the law of the Cheyenne River Sioux Tribe; and 5) conducted by an arbitrator who will apply the terms of the Loan Agreement, including the express sole reliance upon the laws of the Cheyenne River Sioux Tribe, and the express disregard of any state or federal law.

The Loan Agreement also contains an option for the borrower, and only the borrower, to select either the American Arbitration Association ("AAA") or JAMS to "administer" the arbitration. This AAA/JAMS administration option provides

[2] The term "authorized representative" is never defined in the Loan Agreement.

that 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. (emphasis added) The "limitations on the arbitrator below" is the clause which states the agreement is "made pursuant to a transaction involving the Indian Commerce Clause of the Constitution of the United States of America, and shall be governed by the law of the Cheyenne River Sioux Tribe. The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement." Id.

So, even if the borrower elects to have AAA or JAMS administer the arbitration, we return full circle to the limitations imposed above. Regardless of whether the dispute is about the loan servicing, the arbitration agreement as a whole, or pertains to the "validity, enforceability, or scope" of the arbitration agreement, the AAA or JAMS arbitrator must administer an arbitration which: 1) is conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative; 2) conducted in accordance with the consumer dispute rules of the Cheyenne River Sioux Tribe; 3) conducted by the terms of the Loan Agreement; 4) conducted by an arbitrator who will apply the law of the Cheyenne River Sioux Tribe; and 5)

conducted by an arbitrator who will apply the terms of the Loan Agreement, including the express sole reliance upon the laws of the Cheyenne River Sioux Tribe, and the express disregard of any state or federal law. These are the requirements of the Loan Agreement, the Arbitration Agreement, and the so-called Delegation Clause. To the extent any AAA or JAMS rules potentially conflict with these conditions of arbitration, the AAA or JAMS rules acquiesce to five conditions prescribed by the plain written language of the Loan Agreement.

ARGUMENT AND CITATION OF AUTHORITY

Defendant's Motion to Compel Arbitration asks this Court to send the question of whether Plaintiff's claims are subject to arbitration to an arbitrator due to the so-called "Delegation Clause" in the underlying Loan Agreement. Parties may give arbitrability questions to an arbitrator, but it requires clear and unmistakable evidence that the parties have chosen to give arbitrability questions to an arbitrator. See Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 69 (2010). When an arbitration agreement contains a delegation provision and the plaintiff raises a challenge to the contract as a whole, the federal courts may not review his claim because it has been committed to the power of the arbitrator, but if the plaintiff challenges the delegation provision specifically, a federal court may review the issue of arbitrability. See Parnell v. CashCall, Inc., 804 F.3d 1142, 1146 (11th Cir. 2015).

In Plaintiff's Second Amended Complaint, Plaintiff inserted one new section entitled "THE ARBITRATION PROVISION IS VOID AND UNENFORCEABLE" along with another new section entitled "THE DELEGATION PROVISION IS VOID AND UNENFORCEABLE." [*Doc. 48, ¶¶ 107-128*]. Plaintiff alleges certain facts in the Second Amended Complaint which support the claim that the arbitration provision is void and unenforceable. [*Doc 48, ¶¶ 1-116*]. Plaintiff alleges certain facts in the Second Amended Complaint which support the claim that the so-called Delegation Clause is void and unenforceable. [*Doc. 48, ¶¶ 1-106, 117-128*].

Defendant moves this Court to compel arbitration on the issue of arbitrability on the basis that Plaintiff has not challenged the Delegation Clause. Defendant's argument rests on the fact that Plaintiff raised issues in the general arbitration agreement as a whole whilst attacking the Delegation Clause. Defendant's argument is a curious and circular one to be sure, given that the plain language of the Loan Agreement requires challenges to the issue of the enforceability and validity of the arbitration agreement to proceed in the *exact same manner* as any other dispute designated for arbitration. Thus, arbitration of arbitrability is required to proceed under the rules laid out in the arbitration agreement as a whole, but Defendant's defense to Plaintiff's attack on the Delegation Clause is that Plaintiff challenged

portions of the arbitration agreement as a whole. This Court should decline to reward this circular and illogical defense.

Defendant also claims that Plaintiff made mere conclusory allegations in its attack on the Delegation Clause. In fact, Plaintiff's Second Amended Complaint raised sufficient factual basis to attack the delegation clause on several applicable contract defenses including fraud, breach of good faith and fair dealing, as well as unconscionability.

Defendant's other arguments are based upon the insertion of a clause which allows AAA or JAMS to administer any arbitration, but this administrative elixir fails. This Court would have to ignore the plain language of the contract and rewrite it on behalf of the drafter in order to reach the conclusion Defendant desires. Simply put, there are problems with these arbitration procedures which cannot be overcome by the insertion of AAA/JAMS administration.

Finally, Defendant claims that Plaintiff's invocation of the vindication of rights doctrine are flawed because the doctrine only applies to federal statutory rights, not state statutory rights. Defendant's arguments about the vindication of rights exception under the FAA are incorrect and potentially moot in this case because Plaintiff has filed a motion to amend the complaint and include claims under the federal Electronic Funds Transfer Act. [*See Doc. 55*].

I. The Delegation Clause is Void under Applicable Contract Defenses, and Therefore, Unenforceable under § 2 of the FAA.

Under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. ("FAA"), written agreements to arbitrate a dispute arising out of a transaction involving commerce are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Id. § 2. However, "[t]he FAA allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically." Bess v. Check Express, 294 F.3d 1298, 1306 (11th Cir. 2002). Thus, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686–87 (1996). Plaintiff has pleaded a sufficient basis for this Court to find the parties did not clearly and unmistakably agree to arbitrate the issue of arbitrability because the Delegation Clause is the product of fraud, breach of good faith and fair dealing, and unconscionability.

A. Fraud

"No one appears to seriously dispute that Western Sky's payday loans violated a host of state and federal lending laws" and "a quick glance at Western Sky's loan agreement suggests that Western Sky was keenly aware of the dubious nature of its trade." Hayes v. Delbert Services Corp., ___F.3d.--- (4th Cir. Decided Feb. 2, 2016),

[*Doc 56-1 Ex. A, p. 3*]. The Loan Agreement's "very atypical and carefully crafted" provisions are designed for the sole purpose of "lull[ing] the loan customer into believing that" any dispute would be resolved "under the aegis of a public body" – the Cheyenne River Sioux Tribal Nation, but the reality is the proscribed arbitration procedures are nothing more than an illusory attempt to escape federal and state lending laws. Jackson v. Payday Fin., LLC, 764 F.3d 765, 781 (7th Cir. 2014). The Tribe itself has stated that it does not authorize anyone to conduct arbitrations, and the Tribe has admitted it has no consumer dispute rules. See Inetianbor v. CashCall, Inc., F. Supp. 2d 1303, 1309 (S.D. Fla. 2013). Defendant CashCall "acknowledged that the arbitral forum and associated procedural rules set forth in the loan agreement are not available." Williams v. CashCall, Inc., 92 F.Supp.3d 847, 851-52 (E.D.Wis. 2015), appeal docketed, No. 15-2699 (7th Cir. Aug. 12, 2015). Fraud renders contracts voidable at the election of the injured party. OCGA § 13-5-5.

When Plaintiff applied for his loan and signed the Loan Agreement, he did so in reliance that he was receiving a loan which was legal in the state of Georgia and one that was drafted to include dispute procedures which were included in good faith. Yet, the dispute procedures which are proscribed for any challenge to the validity or enforceability of the arbitration agreement require an arbitration to which strict adherence is fundamentally impossible.

The arbitration of the validity of the arbitration agreement is required by the strict terms of the agreement to: 1) be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative; 2) conducted in accordance with the consumer dispute rules of the Cheyenne River Sioux Tribe; 3) conducted by the terms of the Loan Agreement; 4) conducted by an arbitrator who will apply the law of the Cheyenne River Sioux Tribe; and 5) conducted by an arbitrator who will apply the terms of the Loan Agreement, including the express sole reliance upon the laws of the Cheyenne River Sioux Tribe, and the express disregard of any state or federal law.

Right off the bat, the first and second requirements are impossible. Both the tribe and Defendant have admitted that there are neither authorized representatives of the Cheyenne River Sioux Tribe who conduct arbitrations nor any applicable consumer dispute rules. The inclusion of these fictional arbitration procedures are only included as a part of an elaborate scheme to escape state and federal lending laws, specifically to block the redress of any disputes a borrower may have about the scheme. The arbitration procedures required for any borrower to attempt to challenge the validity or enforceability of the arbitration agreement are a carefully crafted, circular maze from which the borrower will never escape.

How can any borrower "clearly and unmistakably" agree to arbitration procedures for the issue of the validity and enforceability of the arbitration agreement when those very procedures are impossible to perform? It is illogical to find that somebody can clearly and unmistakably agree to perform something that is impossible. The fraud is completed when the borrower believes they have agreed to an agreement which provide a process for redress, but the procedures for redress are neither currently available nor ever were available.

B. Inserting fictional rules constitutes a breach of the contractual duty of good faith and fair dealing.

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. Restatement 2d of Contracts, § 205 (2nd 1981). Good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement (Second) of Contracts § 205 cmt. a. Good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999).

An arbitration agreement that specifies a set of governing rules that do not exist or cannot be known is no agreement at all. As the Seventh Circuit explained in Jackson, "it hardly frustrates the FAA" to refuse enforcement of an arbitration agreement which "contemplates a proceeding for which the entity responsible for

conducting the proceeding has no rules, guidelines, or guarantees of fairness." 764 F.3d at 779. Without rules, guidelines, or guarantees of fairness, there is "no prospect of a meaningful and fairly conducted arbitration." Id.

In Hooters, the Fourth Circuit examined a specific set of rules which were unknowable – they could be unilaterally and silently changed at any point. 173 F.3d at 939. The Court held that Hooters had acted in bad faith by evading the "spirit of the bargain" and abusing its "power to specify terms." Id at 940. When a party agrees to resolve disputes in arbitration, they expect the "prompt and economical resolution" of their claims, and "legitimately expect that arbitration would not entail procedures so wholly one-sided as to present a stacked deck." Id.

In the present case, the borrowers did not agree to arbitrate "under any and all circumstances, but only to arbitration under carefully controlled circumstances – circumstances that never existed." Jackson, 764 F. 3d at 781. How can a lender maintain faithfulness to an agreed common purpose and consistency with the justified expectations of the borrower when the lender inserted rules and procedures which they knew were fictional? The borrower believes they are agreeing to a legitimate process for resolving disputes such as whether the arbitration agreement is valid or enforceable, yet the lender who drafted the contract is inserting rules and

procedures which never existed. This is a failure to engage in good faith and fair dealing.

Again, a borrower cannot "clearly and unmistakably" agree to arbitrate the issue of the validity of arbitration if the fictional procedures laid out for that dispute were inserted by the drafter in violation of good faith and fair dealing.

C. Unconscionability

Under Georgia law, "[T]he basic test for determining unconscionability is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.' " NEC Techs., Inc. v. Nelson, 267 Ga. 390 (1996) (quoting U.C.C. § 2–302 cmt. 1). Georgia law recognizes both procedural and substantive unconscionability. Id. "Procedural unconscionability addresses the process of making [a] contract, while substantive unconscionability looks to the contractual terms themselves." Id.

A non-inclusive list of some factors courts have considered in determining whether a contract is procedurally unconscionable includes the age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness and comprehensibility of the contract language, the

oppressiveness of the terms, and the presence or absence of a meaningful choice. As to the substantive element of unconscionability, courts have focused on matters such as the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns. Id. at 392. See also Dale v. Comcast Corp., 498 F.3d 1216, 1219 (11th Cir. 2007).

When one looks at the bargaining power of the parties who agreed to the arbitration agreement and the procedures it lays out for all disputes including those to the validity and enforceability of the arbitration agreement itself, it is unquestionably one-sided. Borrowers submit personal information in a loan application online without any chance to see the terms in advance. Upon approval, a boilerplate agreement is sent to the borrower with no chance for revision of the procedures. The borrowers have little practical bargaining power. The procedures for processing disputes are misleading, fictional, and designed to deter claims by borrowers. With no actual dispute forum, consumer dispute rules, or authorized representatives actually existing, it is difficult to imagine a more oppressive agreement or one containing any less meaningful choice.

As for the substantive unconscionability factors, the Defendant's arguments similarly fails to pass scrutiny. The procedures for resolving "Disputes" a defined

by the Loan Agreement cannot possibly be found to be commercially reasonable when they are non-existent. It is existentially impossible for procedures which never existed to be found as "commercially reasonable;" simply put, something that never existed and is impossible to perform cannot be commercially reasonable. The purpose and effect of the terms is that the terms were inserted solely to deter a borrower's ability to seek redress.

In Defendant's Motion to Compel, Defendant attempts to rehash its argument that § 2 of the FAA prevents the defense of unconscionability to arbitration agreements. This Court already rejected their argument once and Plaintiff hereby incorporates its response to this argument in Doc 21, pp. 9-26.

Additionally, Plaintiff would add the Eleventh Circuit reviewed CashCall's arbitration clause last year and reached its own conclusion that this agreement was a sham and unconscionable. See Inetianbor v. CashCall, Inc., 768 F.3d 1346, 1355 (11th Cir. 2014). The Eleventh Circuit ruled:

> The forum selection provision in the agreement to arbitrate between Mr. Inetianbor and CashCall is both procedurally and substantively unconscionable. It is procedurally unconscionable, not just because of unequal bargaining power, but because of CashCall's actions. Mr. Inetianbor had no ability or opportunity to understand the forum selection clause. See Pendergast v. Sprint Nextel Corp., 592 F.3d 1119 at 1135 (11th Cir. 2010). The record establishes that no set rules or procedures for conducting arbitrations exist within the Tribe. And the Tribe

expressly said that it does not select or approve arbitrators. When faced with a substantially similar forum selection provision, the Seventh Circuit noted, "it was not possible for the Plaintiffs to ascertain the dispute resolution processes and rules to which they were agreeing." Jackson v. Payday Fin. LLC, 764 F.3d 765, 778 (7th Cir. 2014). Because the processes and rules were non-existent, it was impossible for Mr. Inetianbor to understand the provision of the agreement to arbitrate specifying the Tribe, together with its set of rules, as the arbitral forum. See id.

Accordingly, the clause is procedurally unconscionable. The terms of the agreement to arbitrate are substantively unconscionable because the forum selection clause, written by CashCall, explicitly chose a non-existent arbitral forum and set of rules, with an aura of governmental legitimacy. For essentially the reason stated by the District Court and the majority I also conclude the contract does not permit any tribal member or tribal elder to act as an arbitrator without Tribal approval. The District Court also found, however, that the Tribe did not select or approve arbitrators, that there were no tribal consumer dispute rules, and that there were no procedures for conducting arbitrations under the auspices of the Tribe. Although the District Court here did not go as far as the Court in Jackson, which concluded that "there simply was no prospect of a meaningful and fairly conducted arbitration" and that the forum selection provision was "a sham and an illusion," Jackson at 778 (internal quotation marks omitted), the record before us would compel any factfinder to reach the same result.

Substituting an arbitrator under 9 U.S.C. § 5 of the FAA would be an insufficient antidote to the egregious actions of defendant CashCall. In evaluating a substantially similar agreement, the Seventh Circuit reasoned that because the agreement provided for any hypothetical dispute to be decided under the auspices of "a legitimate

> governing tribal body" it was unconscionable in that no dispute could be decided under that body. Id. at 779. Further, the Seventh Circuit noted that even if the court substituted an arbitrator under § 5 of the FAA, it would not cure the agreement's failings because there would be no adequate substitute. Id. at 780. The Court characterized the contract as "contain[ing] a very atypical and carefully crafted arbitration clause designed to lull the loan consumer into believing that, although any dispute would be subject to an arbitration proceeding in a distant forum, that proceeding nevertheless would be under the aegis of a public body and conducted under procedural rules approved by that body." Id. at 781. Substitution under § 5 of the FAA would have left the loan consumer "without a basic protection and essential part of his bargain—the auspices of a public entity of tribal governance." Id. Thus, because "[t]he loan consumer[] did not agree to arbitration under any and all circumstances, but only to arbitration under carefully controlled circumstances—circumstances that never existed and for which a substitute cannot be constructed," the agreement was unconscionable. Id. The same reasoning applies here.

Id.

It is difficult for Plaintiff to put the unconscionability analysis in any better crafted words. The clauses which govern how "Disputes" under the arbitration agreement should proceed is both procedurally and substantively unconscionable. Therefore, this Court should deny Defendant's Motion to Compel Arbitration.

II. The Court Would Have to Ignore the Plain Language of The Contract and Rewrite It on Behalf of the Drafter in Order to Compel Arbitration.

It is a basic principle of arbitration law that arbitration must follow the rules of the contract regardless of who administers it. Stolt-Nielson S.A. v Animal Feeds Int'l Corp., 559 U.S. 662, 681 (2010). Courts must rigorously enforce arbitration agreements according to their terms. Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013).

Defendant's previous loan agreements did not contain an option for the borrower to select AAA or JAMS to administer any arbitration. Courts across the country roundly rejected the absurdity of the tribal arbitration scheme, so the company began inserting the aforementioned AAA/JAMS administration clause. Unfortunately for Defendant, this solution failed to solve the numerous ailments of the sham system for resolving disputes.

The arbitration process, regardless of who administers it, still requires an arbitration which is conducted: 1) by the Cheyenne River Sioux Tribal Nation by an authorized representative; 2) in accordance with the consumer dispute rules of the Cheyenne River Sioux Tribe; 3) by the terms of the Loan Agreement; 4) by an arbitrator who will apply the law of the Cheyenne River Sioux Tribe; and 5) by an arbitrator who will apply the terms of the Loan Agreement, including the express

sole reliance upon the laws of the Cheyenne River Sioux Tribe, and the express disregard of any state or federal law.

Despite Defendant's attempts to state that AAA and JAMS involvement in the process will provide legitimacy to the sham, they fail to describe how any arbitration conducted by AAA or JAMS could be conducted in strict compliance with the terms of the contract without being conducted by an authorized representative of the Cheyenne River Sioux Tribe, or without the imaginary Tribal Dispute Rules, or without applying ANY federal or state law. The only difference is that a sham will now be administered by a legitimate arbitration provider, as long as the administrator's rules do not conflict with five conditions listed *supra*.

This is merely lipstick on a pig. The fundamental principle of arbitration law that requires the arbitration proceeding to follow strictly the rules of the contract destroys any attempt by Defendant to legitimize its scheme. Any arbitration administrator would be required administer the dispute resolution system set out in the arbitration agreement, and the one set out in the contract is designed solely "to prey on financially distressed consumers, while shielding itself from state actions to enforce consumer protection laws. Moses v. CashCall, Inc., 781 F.3d 63, 94 (4th Cir. 2015).

The Defendant claims in its motion that the AAA/JAMS insertion "harmonizes" the language in the whole contract and solves all of the problems, but that is hardly the case. This Court would not only have to *rewrite* the Arbitration Agreement and the Delegation Clause to allow for the arbitration of any "Disputes" under this Loan Agreement, but also *ignore* the five contractual requirements discussed above in order to grant Defendant's Motion to Compel. Though the law may favor a policy of arbitration, the courts shall not "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy of arbitration is implicated." E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294 (2002). This Court should decline Defendant's invitation to rewrite their contract for them just because their scam has been exposed.

III. Defendant's Arguments about the Vindication of Rights Exception under the FAA are Incorrect and Potentially Moot.

An arbitration agreement could not be enforced if, by its terms, it "prospectively waived a party's right to pursue statutory remedies." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985). While statutory claims are arbitrable unless Congress has specifically provided otherwise, agreements to arbitrate statutory claims may nonetheless be unenforceable if the terms of the agreement prevent the plaintiff from effectively vindicating his statutory rights. In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 289 (4th Cir. 2007). Both

the Delegation Clause and Arbitration Agreement used by Defendant "purportedly fashions a system of alternative dispute resolution while simultaneously rendering that system all but impotent through a categorical rejection of the state and federal law[;]" "[t]he FAA does not protect the sort of arbitration agreement that unambiguously forbids an arbitrator from even applying the applicable law." Hayes v. Delbert Services Corp., ___F.3d.--- (4th Cir. Decided Feb. 2, 2016), [*Doc 56-1 Ex. A, p. 2*]. "With one hand, the arbitration agreement offers an alternative dispute resolution procedure in which aggrieved persons may bring their claims, and with the other, it proceeds to take those very claims away. The just and efficient system of arbitration intended by Congress when it passed the FAA may not play host to this sort of farce." Id. at p. 6.

The arbitration agreement in this case expressly disavows the application of ANY state or federal laws. Therefore, it would be impossible for any borrower to achieve any statutory remedy, whether state or federal, in any arbitration which followed the rules of the arbitration agreement. Regardless of whether AAA or JAMS administered the arbitration, they would still be forbidden from applying any state or federal law. This Court would have to rewrite the plain language of the contract to allow for the application of any state or federal law by any arbitrator. The

Arbitration Agreement and Delegation Clause both forbid the application of state and federal law, so neither can be enforced.

Defendant's final argument is that Plaintiff's claim cannot be subject to the vindication of rights doctrine exception because Plaintiff makes no federal claims. Plaintiff does not concede that the vindication of rights doctrine only applies to federal law, but this argument is potentially moot as Plaintiff moved this Court to amend his complaint to add a claim under the federal Electronic Funds Transfer Act. [*See Doc 48*]. If this Court grants Plaintiff motion to amend his complaint, Defendant's argument would become moot.

CONCLUSION

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

Respectfully submitted, this 11th day of February, 2016.

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