No. 15-6159

In the United States Court of Appeals
for the Sixth Circuit

MONICA YAROMA,
Plaintiff-Appellant,

v.

CASHCALL, INC. AND DELBERT SERVICES CORP.,
Defendants-Appellees.

On Appeal from the United States District
Court for the Eastern District of Kentucky

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In the words of the Fourth Circuit, Western Sky's arbitration agreement—*the very same contract* that is at issue here—is nothing more than "a farce." *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 674 (4th Cir. 2016). It's not intended to resolve disputes. It's designed to shield Western Sky and its affiliates from the strictures of state and federal law and to allow them to "game the . . . system." *Id.* at 676. That, the Fourth Circuit held, cannot be permitted. *Id.*

Appellees—Western Sky affiliates, CashCall, Inc. and Delbert Services Corp.—ask this Court to create a circuit split, to reject the Fourth Circuit's careful analysis and force Ms. Yaroma to endure this "farce" of an arbitration scheme. This Court should decline their invitation.

Though it's called an "Agreement to Arbitrate," Western Sky's contract—which Appellees here seek to enforce—bears little resemblance to the "just and efficient means of dispute resolution" Congress envisioned in passing the Federal Arbitration Act (FAA). *Hayes*, 811 F.3d at 676. The contract prohibits any arbitrator from ever applying any state or federal law. And it requires that arbitration be

conducted by an arbitrator authorized by a tribe that doesn't authorize arbitrators, under consumer dispute rules that don't exist.

Appellees, of course, cannot argue that an arbitration scheme that expressly prohibits consumers from vindicating their statutory rights and requires arbitration in a forum that literally doesn't exist is enforceable. So instead, they argue that the contract doesn't mean what it says. Or that they can fix any unlawful terms simply by promising not to enforce them. But the contract means exactly what it says. And the FAA requires that an arbitration contract be enforced "in accordance with [its] terms"—not the post-hoc assurances of a party trying to avoid those terms. 9 U.S.C. § 4.

Because they cannot get around the words of the contract, Appellees spend much of their brief arguing that this Court should just ignore the agreement's problems and compel arbitration anyway. In support of their argument, Appellees rely heavily on a "stipulation" that Ms. Yaroma never actually made. They argue she waived claims she expressly raised. And they contend that Ms. Yaroma's only option for contesting their sham arbitration scheme is to bring a sham arbitration. All of these arguments are meritless.

Every court of appeals that has considered a Western Sky arbitration contract has refused to enforce it. For the reasons discussed below, this Court should do the same.

ARGUMENT

I. The Arbitration Contract Impermissibly Requires Ms. Yaroma to Prospectively Waive Her Statutory Rights.

Western Sky's arbitration contract "is little more than an attempt to achieve through arbitration what Congress has expressly forbidden"—"lending and collection practices free from the stricture of any federal law." *Hayes*, 811 F.3d at 676. The contract's "brazen" proclamation that no state or federal law shall apply to it is "plainly forbidden." *Id.* at 675-76. Indeed, in just the time since the opening brief was filed in this appeal, three federal courts have held that Western Sky's arbitration contract—the very same version that is at issue here—is unenforceable. *Id.* at 676; *Parnell v. CashCall, Inc.*, Order, RE 70, No. 4:14-cv-00024-HLM (N.D. Ga. Mar. 14, 2016); *Smith v. W. Sky Fin., LLC*, No. CV 15-3639, 2016 WL 1212697, at *7 (E.D. Pa. Mar. 4, 2016).

CashCall argues that this Court "must honor" the arbitration agreement's provisions forbidding the assertion of state and federal law because parties are permitted to agree that the law of a particular

jurisdiction will govern their arbitration contract. Appellees' Br. 18. But as the Fourth Circuit explained in *Hayes*, although "parties are free within bounds to use a choice of law clause in an arbitration agreement to select which local law will govern the arbitration, ... a party may not underhandedly convert a choice of law clause into a choice of no law clause—it may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject." *Hayes,* 811 F.3d at 675; *see also Graham Oil Co. v. ARCO Prods.*, 43 F.3d 1244, 1247 (9th Cir. 1994) (refusing to enforce an arbitration agreement that "purport[ed] to forfeit certain important statutorily-mandated rights or benefits").[1]

That is precisely what Western Sky's arbitration contract has done. "Instead of selecting the law of a certain jurisdiction to govern the agreement, as is normally done with a choice of law clause, this arbitration agreement uses its 'choice of law' provision to waive all of a potential claimant's federal rights." *Hayes,* 811 F.3d at 675. And as CashCall itself admits, that is exactly what the Supreme Court has held an arbitration contract may not do. Appellees' Br. 18 ("[A]n agreement

[1] Unless otherwise specified, this brief refers to Appellees collectively as "CashCall."

to arbitrate is unenforceable only when it provides for the 'prospective waiver of a party's right to pursue statutory remedies,' such as where the agreement 'forbids the assertion of certain statutory rights.'" (alterations omitted) (quoting *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013)); *Hayes*, 811 F.3d at 674-75 (explaining that CashCall's "outright prohibition" on the application of state and federal law "goes well beyond the more borderline cases" and flagrantly disregards the Supreme Court's rule against "substantive waivers of federal rights").[2]

Perhaps recognizing the weakness of its contention that a company may use arbitration to exempt itself from state and federal law, CashCall seeks to prevent this Court from even considering the issue. The company argues that the Court cannot consider whether Ms. Yaroma can effectively vindicate her rights in arbitration until *after* she

[2] Despite its acknowledgment that an arbitration agreement is unenforceable if it "forbid[s] the assertion of certain statutory rights," CashCall suggests that the Supreme Court cases which establish that principle are no longer good law. Appellees' Br. 16, 18 (internal quotation marks omitted, alteration in original). That's incorrect. To the contrary, as CashCall itself seems to recognize, the Supreme Court in *American Express* recently reaffirmed the principle that arbitration contracts may not prohibit parties from effectively vindicating their statutory rights. Appellees Br. 18 (citing *Am. Express*, 133 S.Ct. at 2310).

has already tried (and inevitably failed) to do so. Appellees' Br. 19-20. That is not the law.

As the cases CashCall cites make clear, if an arbitration contract is *ambiguous* as to whether a party can pursue her statutory remedies, the proper course is to compel arbitration—to give the arbitrator a chance to interpret the contract in a way that permits the vindication of rights. *See, e.g.*, *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 (2003). But if an arbitration contract *unambiguously* forecloses a party's right to vindicate her statutory claims, a court need not require the party to undergo a futile arbitration just to prove that the contract means what it says—it may simply refuse to enforce the contract. *See Scovill v. WSYX/ABC*, 425 F.3d 1012, 1019 (6th Cir. 2005) (explaining that where a "provision is clear as to its application," a court, not an arbitrator, decides whether it prevents effective vindication of a party's statutory rights); *Kristian v. Comcast Corp.*, 446 F.3d 25, 45 (1st Cir. 2006) (where there is no ambiguity in the contract, the issue is for a court, not an arbitrator, to decide); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 29-30 (2007) (same); *see also McMullen v. Meijer, Inc.*,

355 F.3d 485, 494 (6th Cir. 2004) (rejecting similar argument in the context of an arbitration contract that was "fundamentally unfair").

The arbitration contract here is not ambiguous. It explicitly and repeatedly prohibits the application of state and federal law. Mot. Dismiss, Ex. A, RE 3-1, PageID 57, 59, 61. This Court should not hesitate to strike it down. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (explaining that if an arbitration contract acts "as a prospective waiver of a party's right to pursue statutory remedies," the Supreme Court "would have little hesitation in condemning the agreement").[3]

In a last-ditch effort to persuade this Court not to review its contract, CashCall argues that Ms. Yaroma waived the argument that her claims could not be effectively vindicated in arbitration. Appellees' Br. 17. Oddly, CashCall contends that Ms. Yaroma somehow both failed to raise the issue at all before the district court *and* that she addressed

[3] CashCall suggests that perhaps "adequate protections" are available through Tribal law. Appellees' Br. 19. But even if the availability of comparable Tribal law could compensate for a company's outright prohibition on the application of federal law, there is no such comparable law here. We have not found—and CashCall has not identified—any Tribal analogues to the statutes under which Ms. Yaroma brings her claims: the Fair Debt Collections Practices Act, the Fair Credit Reporting Act, and the Kentucky Consumer Protection Act.

the issue in district court proceedings but stipulated that she could, in fact, effectively vindicate her rights. *Id.* Neither is true.

The argument that the arbitration agreement does not permit Ms. Yaroma to effectively vindicate her claims is not new—it's what Ms. Yaroma has argued all along. In her district court brief, Ms. Yaroma argued that the arbitration scheme is "illusory" and a "sham," and that if the contract is enforced, she "will be for all practical purposes . . . deprived of [her] day in court"—in other words, that the agreement prevents her from effectively vindicating her rights. Pl.'s Resp. Mot. Dismiss, RE 20, PageID 167 (internal quotation marks omitted). And the district court ruled on the issue CashCall claims was waived—whether the exclusive choice of Tribal law renders the arbitration contract unenforceable. Op., RE 38, PageID 332-33. There is no reason this Court may not consider this issue on appeal.[4]

[4] At most, Ms. Yaroma's briefing on appeal provides new arguments in support of the same claim she raised in the district court—that Western Sky's arbitration scheme is unenforceable. This Court has repeatedly "recognized a distinction between failing to properly raise a claim before the district court and failing to make an argument in support of that claim." *Leonor v. Provident Life & Acc. Co.*, 790 F.3d 682, 687 (6th Cir. 2015). So long as an appellant "raised a claim" before the district court, she "can make any argument [she] wishes in support of that claim" on

In addition to arguing that Ms. Yaroma never raised the issue before the district court, CashCall also contends that Ms. Yaroma *did* address the issue and that when she did so, she "stipulated" that the arbitration contract does not forbid the use of federal law. Appellees' Br. 17. This contention is false.

CashCall does not identify the proceeding in which Ms. Yaroma made this supposed stipulation, let alone provide a quotation. The only citation CashCall provides for its assertion is a single sentence in the district court opinion, which states—without citation—that "[w]here any gaps exist in the CRST's [the Tribe's] law, the parties agreed that either federal law or the rules of the organization conducting the arbitration could be used instead." Op., RE 38, PageID 332.

But Ms. Yaroma never made any such agreement. Nowhere in the transcript of the hearing before the district court or in Ms. Yaroma's brief opposing arbitration—or anywhere else in the record—does she state that the arbitration agreement allows the use of federal law to fill gaps or for any other reason. It's possible that the district court meant that *CashCall and Delbert* had agreed that gaps in Tribal law could be

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appeal—even if that argument was not made in the district court. *Id.* (internal quotation marks omitted).

filled by federal law or the rules of a legitimate arbitration organization and used the word "parties" imprecisely or by mistake. *See* Hearing Tr., RE 47, PageID 12 (CashCall and Delbert's attorney stating that "[w]hat doesn't exist is consumer—arbitration consumer dispute rules, but those are filled pursuant to the terms of the arbitration agreement, that gap is filled by the AAA rules or the JAMS rules"). But Ms. Yaroma was certainly not a party to that agreement. CashCall cannot rest its argument on a stipulation that Ms. Yaroma never made.

II. The Arbitration Contract Requires Arbitration in a Nonexistent Forum.

A. The Contract Exclusively Requires Tribal Arbitration.

Unlike CashCall, we begin with the text of the contract. The provision entitled "Agreement to Arbitrate" states in full: "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." Mot. Dismiss, Ex. A, RE 3-1, PageID 60 (emphasis added). The word "shall," of course, is "mandatory." *See In re Revco D.S., Inc.*, 898 F.2d 498, 501 (6th Cir. 1990). By its terms, then, the contract requires that arbitration be

conducted by a Tribal arbitrator under Tribal rules. There is no serious dispute that these requirements are impossible to fulfill.

In response, CashCall's main argument is that the contract doesn't mean what it says. Despite the arbitration agreement's insistence that any arbitration "*shall* be conducted by the Cheyenne River Sioux Trib[e]," CashCall contends that this requirement is purely optional. The company seizes on the fact that the contract permits the parties to choose a legitimate arbitration organization like the American Arbitration Association (AAA) or JAMS to "administer the arbitration." Appellees' Br. 25. "Administer," CashCall argues, is just another word for "conduct." *Id.* at 29. So if AAA "administers" the arbitration, CashCall contends, it also "conducts" it—no Tribal involvement needed.

But as AAA itself makes clear, "administer[ing]" an arbitration and "conduct[ing]" it are not, in fact, the same. "The administrator's role is to manage the *administrative* aspects of the arbitration . . . . *not* [to] decide the merits of a case or make any rulings." AAA Consumer Arbitration Rules, at 39 (emphasis added). Those tasks—that is, the tasks of actually conducting the arbitration—are the province of

arbitrators, "who are not employees of the AAA." *Id.* at 39-40; *see* Appellant's Br. 36-37 (explaining the distinction).[5]

Indeed, even under CashCall's own preferred definition, to administer an arbitration is not actually to conduct the arbitration, but instead to "*manage* or *supervise* the . . . conduct of" the arbitration. Appellees' Br. 27 (internal quotation marks omitted and emphasis added); *see also Parnell*, No. 4:14-cv-24-HLM, at 62-63 (concluding that an identical agreement "only allows a choice of administrator for the arbitration and requires the involvement of authorized representatives of the Cheyenne River Sioux Tribe"); *Parm v. Nat'l Bank of Cal.*, No. 4:14-cv-00320-HLM, Order, RE 46, at 58 (N.D. Ga. May 20, 2015) (same); *Williams v. CashCall, Inc.*, 92 F. Supp. 3d 847, 852 (E. D. Wisc. 2015) ("Providing that an organization like the AAA or JAMS will administer an arbitration is not necessarily the same as providing that an arbitrator from that organization will conduct the arbitration.").

CashCall suggests that because this Court has previously enforced arbitration contracts that provide only that AAA is to "administer[ ]"

[5] AAA's Consumer Arbitration Rules are available online at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased.

the arbitration, the words "administer" and "conduct" must mean the same thing. Appellees' Br. 28 (internal quotation marks omitted). The company's argument on this point is not entirely clear. Its contention seems to be that if a contract specifies solely an arbitration administrator, that administrator must also conduct the arbitration, because otherwise there would be nobody to conduct it. But that's not actually the case. If the parties have not selected an arbitrator, that doesn't mean that the arbitration administrator will conduct the arbitration itself. It means that the administrator—as part of its administrative duties—will help the parties hire an arbitrator. *See, e.g.*, AAA Consumer Rules, at 18. It is that arbitrator—not the administrator—who will then conduct the arbitration. *See id.* at 39-40. The cases CashCall cites do not hold otherwise.[6]

Indeed, the arbitration agreement wouldn't make any sense if it used the words "conduct" and "administer" to mean the same thing. If

[6] As we explained in our opening brief, the organization that "manage[s] or supervise[s]" the arbitration is required to do so in accordance with the terms of the contract. Appellant's Br. 39-40. Here, the contract specifies that the arbitrator must be authorized by the Cheyenne River Sioux Tribe. So even if AAA or JAMS helped the parties hire an arbitrator, they could not hire any arbitrator they wanted; the arbitrator would still be required to be an authorized representative of the Tribe.

the two words were really synonymous here, the agreement would have one provision requiring an arbitrator authorized by the Cheyenne River Sioux Tribe and another provision—completely in conflict with the first—permitting the parties to choose any arbitrator they want. That can't be right. The only way to make sense of a contract that (1) requires arbitration to be "conducted" by the Tribe and (2) allows arbitration to be "administer[ed]" by a non-Tribal organization is if the words "conducted" and "administered" mean two different things. *See Local 377 Chauffeurs, Teamsters, Warehousemen, & Helpers of Am. v. Humility of Mary Health Partners*, 296 F. Supp. 2d 851, 859 (N.D. Ohio 2003) ("[I]t is a well-settled principle of contract interpretation that a contract must be interpreted when possible as a whole in a manner which gives reasonable meaning to all its parts and avoids conflict or surplusage of its provisions.").

CashCall tries to rescue its tortured interpretation of the arbitration contract by torturing the rules of grammar. It argues that the contract expressly allows the parties to disregard its requirement of Tribal involvement in arbitration because the agreement states that "any Dispute, *except as provided below*, will be resolved by Arbitration,

which shall be conducted by the Cheyenne River Sioux Tribal Nation." Appellees' Br. 27 (emphasis added). The provision allowing for a choice of arbitration administrator, CashCall notes, is below the requirement that arbitration shall be conducted by the Tribe. But the phrase "except as provided below" modifies the word dispute, not the requirement that arbitration be conducted by a Tribal arbitrator. If the phrase "except as provided below" were truly meant to modify who could conduct the arbitration, as CashCall contends, it would be placed in the part of the provision that describes how arbitration is to be conducted, not the part that states which disputes should be arbitrated.

That's not just common sense—it's a grammatical rule (and a rule of contract interpretation). The "last antecedent rule" provides that "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Crestwood Farm Bloodstock v. Everest Stables, Inc.*, 751 F.3d 434, 446 (6th Cir. 2014) (internal quotation marks omitted). Here, the phrase "except as provided below" immediately follows—and therefore only modifies—the noun "dispute."

This makes perfect sense in the context of the rest of the arbitration agreement: Other provisions of the contract (also situated below the Agreement to Arbitrate) provide that some disputes, such as small claims, need not be arbitrated. Mot. Dismiss, Ex. A, RE 3-1, PageID 61. So this phrase prevents a conflict between the Agreement to Arbitrate—which, without the phrase, would require that *all* disputes be arbitrated—and the remainder of the agreement, which exempts certain disputes from arbitration. CashCall's interpretation—in which this phrase does not modify dispute, but instead modifies how arbitration is to be conducted—would create an unnecessary conflict within the agreement.

Furthermore, if Western Sky wanted to make the Tribe's involvement in arbitration optional, it could easily have done so. All the agreement would need to say is that arbitration may, but need not, be conducted by an authorized representative of the Tribe. Alternatively, it could state that the parties may choose between Tribal arbitration and arbitration conducted by a non-Tribal arbitrator appointed by AAA or JAMS. In fact, there are probably infinite ways the company could phrase such a provision that would make clear that arbitration need not

be conducted by the Cheyenne River Sioux Tribe. But stating that arbitration "*shall* be conducted by the Cheyenne River Sioux Tribal Nation" is not one of them.

CashCall attempts to escape the terms of the agreement by repeating platitudes about the federal policy in favor of arbitration. But the policy in favor of arbitration encourages the formation—and mandates the enforcement—of *valid* arbitration agreements. It does not require courts to enforce *invalid* contracts, solely because they invoke arbitration. *See* 9 U.S.C. § 2 (permitting the revocation of an arbitration contract "upon such grounds as exist at law or in equity for the revocation of any contract"). Nor does it permit courts to "'reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated.'" *Albert M. Higley Co. v. N/S Corp.*, 445 F.3d 861, 863 (6th Cir. 2006) (quoting *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002)).

CashCall's interpretation of Western Sky's arbitration contract isn't really an *interpretation* at all. In reality, CashCall seeks to rewrite the contract—to pretend that its requirement of Tribal arbitration simply isn't there. But as much as CashCall might prefer otherwise, the

FAA requires courts to enforce arbitration contracts "in accordance with the[ir] terms." 9 U.S.C. § 4; *see Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). If those terms are unenforceable, they cannot be unilaterally rewritten during litigation to make them more palatable. The contract simply cannot be enforced. *See Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 472-73 (1989) (arbitration is defined by the parties' contract). *Cf. Morrison v. Circuit-City Stores, Inc.*, 317 F.3d 646, 678 (6th Cir. 2003) (arbitrator may not depart from the "agreed-upon procedures" found in the parties' contract).

B. The Tribal Arbitration the Contract Requires is a Sham.

As we explained in our opening brief, numerous courts have held—and CashCall itself has admitted—that the Tribal arbitration called for in Western Sky's arbitration agreement is impossible. *See* Appellant's Br. 20-26; *Williams*, 92 F. Supp. 3d at 851-52 (CashCall "acknowledge[d] that the arbitral forum and associated procedural rules set forth in [the plaintiff's] loan agreement are not available"). Nevertheless, CashCall contends that Ms. Yaroma is required to re-create the wheel and prove that for herself. But Ms. Yaroma need not

prove what CashCall has already admitted. And in any case, as we argued in our opening brief, CashCall is collaterally estopped from contending that the Tribe authorizes arbitrators or promulgates consumer dispute rules. *See* Appellant's Br. 24-26. A court of competent jurisdiction—the Southern District of Florida in *Inetianbor*—has already determined that it does not. *Inetianbor v. CashCall*, 962 F. Supp. 2d 1303 (S.D. Fla. 2013).

CashCall does not dispute that it had a full and fair opportunity to litigate the issue before that court. Nor does it claim that there is new evidence that would demonstrate that the court's finding is no longer valid. Instead, the company quibbles that *Inetianbor* involved a different version of the arbitration agreement than the one at issue here. But the question whether Tribal arbitration is possible has nothing to do with what version of the arbitration agreement is at issue. Either the Cheyenne River Sioux Tribe authorizes arbitrators or it doesn't. Either it has consumer dispute rules or it doesn't. The *Inetianbor* court found that the Tribe neither authorizes arbitrators nor has consumer dispute rules. That conclusion was upheld by the Eleventh Circuit, and the Supreme Court refused to review it.

Inetianbor, 768 F.3d 1346 (11th Cir. 2014), *cert. denied,* 135 S. Ct. 1735 (2015). CashCall has provided no reason why it should not be binding here.[7]

C. FAA Section 5 Cannot Salvage the Contract.

CashCall's half-hearted, one-sentence suggestion that this Court can solve the numerous problems in the arbitration contract simply by appointing an arbitrator of its choice is meritless. Section 5 of the FAA does permit courts to appoint a substitute when there has been a "lapse in the naming of an arbitrator." 9 U.S.C. § 5. But like the rest of the FAA, this provision is limited by the Act's fundamental purpose: to "give effect to the intent of the parties." *Stolt-Nielsen*, 559 U.S. at 684. Therefore, a court may only appoint a substitute arbitrator where the parties would have intended it to do so. Where, as here, the arbitrator provided by the contract is integral to the agreement, no substitute can

[7] In the district court, Ms. Yaroma requested the opportunity to seek discovery if the court required further evidence of the impossibility of arbitrating before the Cheyenne River Sioux Tribe. Pl.'s Resp. Mot. Dismiss, RE 20, PageID 171-73. The court denied that request. If this Court concludes that Ms. Yaroma is required to provide her own evidence of the Tribal forum's unavailability—despite the fact that numerous courts have found (and CashCall has admitted) that Tribal arbitration is impossible—she requests that this Court order the district court to grant her discovery request and give her an opportunity to do so on remand.

be appointed. *See Smith v. ComputerTraining.com, Inc.*, 531 F. App'x 713, 716-17 (6th Cir. 2013) (Rosenthal, J., concurring) ("Section 5 is the FAA's mechanism for filling such a lapse in the arbitrator when . . . the parties' specified choice of arbitrator is not integral to their Arbitration Agreement."); *Inetianbor*, 768 F.3d at 1350 ("The failure of the chosen forum precludes arbitration whenever the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern." (brackets and internal quotation marks omitted)).

As both the Seventh and Eleventh Circuits have held, the participation of the Cheyenne River Sioux Tribe is integral to Western Sky's arbitration contract. *See Jackson*, 764 F.3d at 780-81; *Inetianbor*, 768 F.3d at 1350-51. The parties "did not agree to arbitration under any and all circumstances, but only to arbitration under [the] carefully controlled circumstances [specified in the contract]—circumstances that never existed and for which a substitute can never be constructed." *Jackson*, 764 F.3d at 781. Tribal arbitration allowed Western Sky and its affiliates to "lull the loan consumer into believing" that a fair and efficient dispute resolution system was available "under the watchful eye of a legitimate governing tribal body"—all while avoiding state and

federal law. *Id.* at 779, 781. That was the whole point. *See Hayes*, 811 F.3d at 676. The "only way" to effectuate the parties' intent, therefore, is "to compel arbitration before the Tribe." *Inetianbor*, 768 F.3d at 1352. But that, of course, is impossible.

Furthermore, even if the Court could somehow substitute a legitimate arbitrator without violating the parties' intent, the arbitration agreement would still be unenforceable. The agreement doesn't just require a nonexistent arbitrator. It also requires nonexistent consumer dispute rules. And it prohibits *any* arbitrator from applying state or federal law. These problems cannot be solved simply by swapping in a new arbitrator.

III. The Arbitration Contract is Unconscionable.

As Ms. Yaroma's opening brief explains in detail, the Western Sky arbitration agreement is unconscionable: The contract makes it impossible for consumers to ascertain the nature of the (nonexistent) dispute resolution process; it includes false and contradictory terms; and the Tribal dispute resolution procedure it purports to provide is nothing more than "a sham and an illusion," *Jackson*, 764 F.3d 778-79. Appellant's Br. 29-34. It's clear that the sole purpose of the agreement

is to "manufacture a parallel universe" in which consumers' claims "are avoided entirely." *Smith*, 2016 WL 1212697, at *6; *see Hayes*, 811 F.3d at 676. The agreement is unfairly surprising, one-sided, and oppressive—in short, unconscionable.

Given the oppressive nature of the arbitration contract, it is unsurprising that CashCall has little to say about the substance of Ms. Yaroma's unconscionability arguments. Instead, CashCall focuses on marginal issues that do nothing to overcome the agreement's odious nature. First, CashCall contends that Ms. Yaroma "did not argue the arbitration provision was unconscionable" before the district court. Appellees' Br. 33. But that's simply not true.

Ms. Yaroma explicitly—and repeatedly—argued that the arbitration agreement is unconscionable. *See* Pl.'s Resp. Mot. Dismiss, RE 20, PageID 158 ("[T]he arbitration clause is both procedurally and substantively unconscionable."); *id.* at PageID 171 ("[T]he arbitration clause in the Western Sky consumer loan [is] unenforceable and unconscionable."); *id.* at PageID 170-71 (quoting at length from the Northern District Court of Georgia's decision in *Parnell*, which held that an identical Western Sky arbitration agreement was

unconscionable, and arguing that the agreement in this case is also unconscionable). Given how clearly Ms. Yaroma raised the unconscionability issue below, CashCall's contention that she waived it is perplexing—and flat-out wrong.[8]

Second, CashCall wrongly contends that its unconscionable arbitration scheme is saved because the arbitration contract allowed Ms. Yaroma to opt out of arbitration within sixty days of signing the contract. Ms. Yaroma had no way of knowing when she signed the contract—or even sixty days thereafter—that the arbitration scheme was a sham. She only found that out years later, when she wanted to contest her illegal loan and the unlawful collection practices used to try to recover it—long after the window for opting out had expired.

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[8] CashCall also implies that Ms. Yaroma somehow waived her unconscionability argument because she discussed the district court's decision in *Parnell*, and that decision has since been reversed on appeal on other grounds. Appellees' Br. 33-34. Obviously, if anything, that argument goes to the strength of Ms. Yaroma's argument, not whether she made it. That aside, CashCall ignores the actual holding of the Eleventh Circuit when it reversed the district court. The appellate court did not address the district court's unconscionability ruling, but instead stated that the plaintiff had failed to properly challenge the delegation clause and remanded to the district court to give the plaintiff an opportunity to do so. *Parnell v. CashCall*, 804 F.3d 1142, 1149 (11th Cir. 2015). On remand, the district court *again* held that the Western Sky arbitration agreement is unconscionable—a decision CashCall neglects to mention. *Parnell*, No. 4:14-cv-24-HLM, Order, RE 70, at 74.

Furthermore, opting out of arbitration would merely have subjected Ms. Yaroma to a different unavailable forum. Pursuant to the contract's forum-selection clause, any disputes that are not arbitrated must be resolved in Cheyenne River Sioux Tribal Court. Defs.' Mot. Dismiss, Ex. A, RE 3-1, PageID 57, 61. But as the Seventh Circuit explained in *Jackson*—and as Ms. Yaroma argued below—this forum-selection clause is itself unenforceable because the Tribal court lacks jurisdiction over Ms. Yaroma's claims. *Jackson*, 764 F.3d at 776; Pl.'s Resp. Mot. Dismiss, RE 20, PageID 162-64. Indeed, both appellate courts that have considered the question have refused to enforce Western Sky's forum-selection clause. *Hayes*, 811 F.3d at 676 n.3; *Jackson*, 764 F.3d at 786.

Because opting out of arbitration would simply trade one unenforceable dispute resolution mechanism for another, it cannot remedy the fundamentally unconscionable arbitration agreement. *See Hayes*, 811 F.3d at 676 (describing Western Sky's contract as an "'integrated scheme to contravene public policy'") (quoting E. Allan Farnsworth, *Farnsworth on Contracts* § 5.8, at 70 (1990)).

IV. CashCall's Contention that the FAA Requires this Court to Compel Arbitration—Even Though the Arbitration Contract Is Blatantly Unenforceable—is Meritless.

Western Sky's arbitration contract impermissibly requires consumers to waive their statutory rights; it requires arbitration before an arbitrator that doesn't exist under rules that don't exist; and it is procedurally and substantively unconscionable. But CashCall argues that the FAA requires this Court to compel arbitration anyway. In doing so, CashCall makes yet another spurious waiver argument. And it contends that whether the arbitration contract is enforceable should be decided by the nonexistent arbitrator, not this Court. The FAA does not require such a "farce." *Hayes*, 311 F. 3d at 674.

First, CashCall argues that in Ms. Yaroma's briefing before the district court, she "waived her challenges to the validity of the arbitration provision by challenging the [loan] agreement as a whole, not the arbitration provision specifically." Appellees' Br. 13 (emphasis omitted). That's blatantly false. A whole section of Ms. Yaroma's district court brief was devoted to specifically challenging the arbitration contract. Pl.'s Resp. Mot. Dismiss, RE 20, PageID 167-71. The arbitration contract, Ms. Yaroma argued, should not be enforced

because "the arbitration provisions are fraudulent, illusory, and a sham," and because "the arbitration clause is both procedurally and substantively unconscionable." *Id.* at PageID 158, 170. In fact, just one paragraph after CashCall accuses Ms. Yaroma of failing to specifically challenge the arbitration contract before the district court, CashCall admits that Ms. Yaroma did, in fact, "attack . . . the validity of the arbitration provision." Appellees' Br. 13. Any suggestion to the contrary is, by CashCall's own admission, false.[9]

Next, CashCall argues that because the arbitration contract defines arbitrable disputes to include "any issue concerning the validity, enforceability, or scope of th[e] loan or the Arbitration agreement"—that is, because it contains what the Supreme Court has called a "delegation clause"—any challenge to the arbitration contract must itself be arbitrated. Appellees' Br. 14. In CashCall's view, a consumer

[9] In the same brief, Ms. Yaroma *also* argued that the loan agreement as a whole was void. Pl.'s Resp. Mot. Dismiss, RE 20, PageID 157. But that was not in response to CashCall's contention that the case ought to be arbitrated. It was in response to CashCall's alternative argument that the loan agreement's forum-selection clause required that the case be sent to Tribal court. *See id.* The district court did not decide the forum-selection clause issue, and CashCall has not raised it here. At any rate, as noted above, both courts of appeals that have considered the argument have rejected it. *See Hayes*, 811 F.3d at 676 n.3; *Jackson*, 764 F.3d at 781-86.

can only challenge its sham arbitration scheme by bringing a sham arbitration. *Id.* Several courts have rejected this "impossible" suggestion. *Smith*, 2016 WL 1212697, at *7; *see Hayes*, 811 F.3d at 671 n.1; *Parnell*, No. 4:14-cv-00024-HLM, at 74.

CashCall doesn't address the obvious problem with requiring a party to arbitrate the contention that arbitration is impossible, nor does the company mention that multiple courts have refused to enforce its delegation clause. Instead, CashCall argues that this Court's hands are tied by the Supreme Court's decision in *Rent-A-Center*. Appellees' Br. 14-15 (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010)). The company contends that because (in CashCall's view) Ms. Yaroma didn't challenge the delegation clause "specifically" enough in the district court, *Rent-A-Center* requires this Court to treat the provision as if it were enforceable—even if it clearly isn't. Appellees' Br. 13. The Eleventh Circuit's decision in *Parnell*, CashCall argues, says the same thing. *Id.* at 15, 32 (citing *Parnell*, 804 F.3d 1142 (11th Cir. 2015)). But, in fact, neither case supports enforcement of the delegation clause here.

CashCall's error is that it has overlooked the key fact in both *Rent-A-Center* and *Parnell*: In both cases, the *defendant's* initial motion

to compel arbitration sought enforcement of the delegation clause specifically, not the arbitration contract as a whole—something CashCall, in this case, did not do.

In *Rent-A-Center*, the defendant Rent-A-Center, in its opening brief in support of its motion to compel arbitration, explicitly asked the district court to enforce its delegation clause, arguing at length that any contention that its arbitration agreement was unenforceable was for the arbitrator, not the court, to decide. *Rent-A-Ctr.*, 561 U.S. at 73; *see* Mot. Dismiss Proceedings & Compel Arbitration, *Jackson v. Rent-A-Ctr. W., Inc.*, No. 3:07-cv-00050-LRH-RAM, 2007 WL 7042563 (D. Nev. Mar. 14, 2007). The plaintiff did not respond to Rent-A-Center's delegation clause argument either in the district court or on appeal. *Rent-A-Ctr.*, 561 U.S. at 73-74. He challenged the enforceability of the arbitration contract as a whole, but none of his challenges suggested that the delegation provision itself might be unenforceable. *See id.* The Supreme Court held that because Rent-A-Center had asked the district court to enforce the delegation provision in its motion to compel arbitration and because the plaintiff had failed to make any argument that would render the delegation provision unenforceable, the Court was required

to "treat [the delegation provision] as valid" and "leav[e] any challenge to the" enforceability of the arbitration agreement as a whole to the arbitrator. *Id.* at 72.

Parnell involved a similar factual scenario: There, the defendant (CashCall) specifically asked the district court to enforce its delegation clause in its opening brief in support of its motion to compel arbitration. Mem. Supp. Renewed Mot. Compel Arbitration, *Parnell v. CashCall, Inc.*, No. 4:14-cv-00024-HLM, RE 19-1, at 11-12 (N.D. Ga. Mar. 18, 2014). But in its opposition, the plaintiff failed to explain why the delegation clause should not be enforced. *Parnell*, 804 F.3d at 1146. The Eleventh Circuit therefore remanded the case to the district court to give the plaintiff the opportunity to do so. *Id.* at 1149. On remand, the district court held that the delegation clause—like the rest of Western Sky's arbitration agreement—is unenforceable. *See Parnell*, No. 4:14-cv-00024-HLM, Order, RE-70, (N.D. Ga. Mar. 14, 2016).

Unlike in *Rent-A-Center* or *Parnell*, in this case, CashCall's opening brief before the district court did *not* ask the court to enforce its delegation clause. Nor did it argue that an arbitrator, and not the court, should decide whether the arbitration contract should be enforced. To

the contrary, CashCall explained why, in its view, Ms. Yaroma was required to arbitrate her substantive claims and asked the district court to send them to arbitration—that is, it asked the court to enforce the arbitration clause as a whole, not the delegation clause. *See, e.g.*, Mot. Dismiss, RE 3, PageID 48 (arguing that "the Arbitration Clause requires Yaroma to arbitrate *the claims raised in the Complaint*" (emphasis added)); *id.* at PageID 49 (arguing that the court should compel arbitration because Ms. Yaroma's claims against Delbert Services "are within the ambit of the Arbitration Clause"); *id.* at PageID 52 ("Therefore, Yaroma's Complaint must be compelled to arbitration.").

Courts have repeatedly held that a plaintiff is *not* required to challenge a delegation clause the defendant hasn't sought to enforce. *See, e.g.*, *Glob. Client Sols., LLC v. Ossello*, No. DA 15-0301, 2016 WL 825140, at *7 (Mont. Mar. 2, 2016) (holding that the plaintiff had not "waived her right to oppose the delegation clause" by not challenging it in her opposition to the motion to compel because the defendant did not raise the delegation clause issue until after the plaintiff had filed her opposition); *Mercadante v. Xe Servs., LLC*, 864 F. Supp. 2d 54, 56-57 (D.D.C. 2012) (holding that *Rent-A-Center* does not apply where the

party seeking arbitration did not seek to enforce its delegation clause in its opening brief before the district court); *Hartley v. Superior Court*, 196 Cal. App. 4th 1249, 1259 (2011).

Moreover, courts routinely hold that parties seeking to compel arbitration waive their right to enforce a delegation provision where, as here, they ask a district court to compel arbitration of the substantive claims, rather than seeking to enforce the delegation clause specifically. *See, e.g.*, *In re Checking Account Overdraft Litig.*, 754 F.3d 1290, 1295 (11th Cir. 2014); *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1213 (11th Cir. 2011); *Lee v. Comcast Cable Commc'ns, Inc.*, No. 7:13-CV-01288-RDP, 2015 WL 4619806, at *2 n.2 (N.D. Ala. July 31, 2015).

Furthermore, even if CashCall hadn't waived its right to enforce the delegation provision, Ms. Yaroma sufficiently challenged it before the district court, and she does so again here. In contrast to the arguments raised by the plaintiff in *Rent-A-Center*, Ms. Yaroma's argument—that it is impossible to arbitrate *any* dispute under the terms of Western Sky's arbitration contract—poses just as much of a challenge to the arbitration of enforceability disputes as it does to the arbitration of substantive disputes.

CashCall faults Ms. Yaroma for not explicitly stating that with no authorized arbitrators, no consumer dispute rules, and no authority for an arbitrator to apply state or federal law, she couldn't possibly arbitrate disputes about enforceability, just as she couldn't possibly arbitrate anything else. But *Rent-A-Center* does not require that plaintiffs state the obvious or use any particular magic words to demonstrate that a delegation clause is unenforceable. It merely requires that if a defendant seeks to enforce a delegation provision, the plaintiff must demonstrate why the clause should not be enforced. *See Felts v. CLK Mgmt., Inc.*, 149 N.M. 681, 693 (Ct. App. 2011) (holding that plaintiff's argument that arbitration before the designated arbitral forum was impossible constituted a sufficient challenge to the delegation clause); *Smith*, 2016 WL 1212697, at *7 (rejecting the contention that plaintiff had to "explicit[ly] attack" CashCall's delegation clause in the complaint despite the fact that it was clear from plaintiff's argument that enforcement of the clause was impossible, reasoning that "fidelity to the law does not require a judge to be naïve or impractical").

Ms. Yaroma demonstrated that arbitration of any dispute—including disputes about enforceability of the arbitration clause—is impossible. That is enough.

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Congress passed the FAA to encourage parties to use arbitration as a "just and efficient means of dispute resolution." *Hayes,* 811 F.3d at 676. "But rather than use arbitration" to fairly resolve disputes, CashCall "seeks to deploy it to avoid state and federal law and to game the entire system." *Id.* "[T]he FAA may not play host to this sort of farce." *Id.* at 674. This Court should refuse CashCall's attempt to force it to do so.

CONCLUSION

For these reasons, and the reasons stated in Appellant's opening brief, the judgment below should be reversed.

Respectfully submitted,

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April 21, 2016

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,957 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Century Schoolbook font.

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April 21, 2016

CERTIFICATE OF SERVICE

I certify that on April 21, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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April 21, 2016