No. 16-11369

In the United States Court of Appeals
for the Eleventh Circuit

JOSHUA PARNELL,
Plaintiff-Appellee,

v.

CASHCALL, INC.,
Defendant-Appellant.

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

APPELLEE JOSHUA PARNELL'S BRIEF

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June 3, 2016

CERTIFICATE OF INTERESTED PERSONS AND COPORATE DISCLOSURE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 26.1 AND ELEVENTH CIRCUIT RULE 26.1-1

Appellee Joshua Parnell is an individual and, therefore, there is no parent corporation or publicly held corporation owning 10% or more of Appellee's stock. The following is a list of trial judges, attorneys, person, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of a party's stock, and other identifiable legal entities related to a party:

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STATEMENT REGARDING ORAL ARGUMENT

No oral argument is necessary in this case. Defendant-Appellant CashCall, Inc., asks this Court to compel arbitration and break with every other court of appeals decision addressing the Western Sky arbitration scheme at issue here—called a "farce" by the Fourth Circuit, *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 674 (4th Cir. 2016), and a "sham from stem to stern" by the Seventh Circuit, *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 779 (7th Cir. 2014). Indeed, this Court has already held that an earlier iteration of the Western Sky agreement could not be enforced because it requires arbitration in a forum that, simply put, does not exist. *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014). Nor, *Inetianbor* held, could arbitration be salvaged by application of § 5 of the Federal Arbitration Act. *Id.* at 1350-53. Here, in a lengthy decision, the district court followed the reasoning of these decisions and refused to enforce the Western Sky arbitration agreement.

Because decision after decision has already explained, in detail, why the Western Sky arbitration agreement is not enforceable, oral argument is not necessary to rehash those issues. This Court should

refuse CashCall's invitation to create a circuit split and affirm the decision of the district court.

INTRODUCTION

The Western Sky arbitration agreement Appellant CashCall, Inc., seeks to enforce is a uniquely transparent attempt to protect usurious and otherwise illegal consumer lending practices from the scrutiny of state or federal law. The agreement does so by requiring arbitration before a nonexistent arbitrator and expressly prohibiting that arbitrator from applying any state or federal law. As the Fourth Circuit held in *Hayes v. Delbert Services Corp.*, the precise arbitration agreement at issue here is unenforceable because it is a "farce": "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." *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 673-74 (4th Cir. 2016).

CashCall posits a number of technical or precluded arguments in an attempt to persuade this Court to nevertheless compel arbitration and create a circuit split. But none of CashCall's protestations overcome the fundamental problems with the Western Sky agreement recognized by the district court: It expressly prohibits the application of any state or federal law, and it purports to send disputes to an arbitration scheme

that does not exist. For those reasons, neither the delegation clause, nor the arbitration agreement as a whole, are enforceable.

STATEMENT OF THE ISSUES

1. The arbitration agreement states that disputes "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," but permits AAA, JAMS, or another arbitration organization to *administer* the arbitration. (Emphasis added). This Court has already held, in *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014), *cert. denied* 135 S. Ct. 1735 (2015), that the Tribe does not authorize representatives to conduct arbitrations and has no consumer dispute rules. Should this Court create a circuit split and hold that an arbitration contract that requires consumers to prospectively waive all state and federal rights and mandates that arbitration be conducted by in a nonexistent forum is saved if it may be administered by a legitimate arbitration organization?

2. Can this Court overturn its decisions in *Inetianbor*, 768 F.3d at 1350, and *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217,

1222 (11th Cir. 2000), holding that § 5 of the Federal Arbitration Act (FAA) does not apply where the choice of arbitral forum is integral to the agreement to arbitrate?

3. Can this Court reach a different conclusion here than it did in *Inetianbor*, which held that § 5 of the FAA did not permit a court to write tribal involvement out of an earlier iteration of the Western Sky agreement on the basis that it was "clear" that tribal involvement was "integral?" *Inetianbor*, 768 F.3d at 1350-53.

STATEMENT OF THE CASE

1. Western Sky and CashCall's Illegal Lending Scheme. Beginning in 2009, Western Sky Financial, LLC, marketed its "small dollar, short-term, high-interest installment loans," *F.T.C. v. PayDay Fin. LLC*, 989 F. Supp. 2d 799, 807 (D.S.D. 2013) ("*FTC II*"), online and on television, *F.T.C. v, Payday Fin., LLC*, 935 F. Supp. 2d 926, 930 (D.S.D. 2013) (*"FTC I*). Though Western Sky purports to be affiliated with the Cheyenne River Sioux Tribe of South Dakota, its advertising was aimed at consumers throughout the country—consumers who resided outside of South Dakota and were unaffiliated with the Tribe—

who, like Mr. Parnell, were facing financial difficulties. *See FTC I*, 935 F. Supp. 2d at 932.

But, despite its national reach, Western Sky is not licensed to operate as a consumer lender in any state. And with good reason: Its small dollar loans come at an extremely high cost, including massive up-front fees and triple-digit interest rates. *See* Doc. 70, at 14 (Western Sky initial fees range from $75 to $500 and its interest rates range from 140% to 343%); *see also Moses v. CashCall, Inc.*, 781 F.3d 63, 66 (4th Cir. 2015) (the loan had an effective interest rate of over 230%).

This high-cost lending scheme is "clearly illegal" under state and federal law. *Moses*, 781 F.3d at 66; *FTC II*, 989 F. Supp. 2d at 805. But Western Sky and CashCall claim to be immune from such laws: Western Sky loan agreements purport to be governed "solely [by] the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe," and state that "no other state or federal law or regulation shall apply to this Loan Agreement." Doc. 54-2, at 2.

But no court has ever endorsed the loan agreements' claims that they are not governed by any state or federal law. Meanwhile, Native American advocacy groups have condemned Western Sky's attempt to

take advantage of tribal sovereign immunity, explaining that Western Sky "does not operate under tribal law or abide by tribal regulatory bodies and is not wholly-owned by a federally-recognized tribe."[1]

Because of Western Sky's usurious interest rates and its insistence that it is exempt from state and federal law, the Western Sky lending scheme—and CashCall's role in it—has come under intense scrutiny from both federal and state regulators. The Federal Trade Commission (FTC) brought an enforcement action against Western Sky and other affiliated high-cost lending operations, claiming that they engaged in unfair and deceptive trade practices, violated the Electronic Fund Transfer Act, and used illegal debt collection practices, including unlawful wage garnishment. *See FTC II*, 989 F. Supp. 2d at 804.

Likewise, the Consumer Financial Protection Bureau (CFPB) brought an enforcement action against Western Sky's collection agents—including CashCall. Am. Compl., *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. 13-cv-12167 (D. Mass. Mar. 21, 2014). The CFPB

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[1] NAFSA Applauds New York Attorney General Decision to File Suit Against Lender Circumventing Tribal Law (Aug. 12, 2013), http://www.prnewswire.com/news-releases/nafsa-applauds-new-york-attorney-general-decision-to-file-suit-against-lender-circumventing-tribal-law-219341571.html.

complaint alleges that Western Sky itself is essentially a shell: Though Western Sky purports to make loans in its name, the loans are actually "marketed by CashCall, financed by WS Funding," and "almost immediately sold to WS Funding, and then serviced and collected by CashCall, Delbert, or both." *Id.* ¶¶ 19, 21.

As the New Hampshire Banking Department explained in a Cease and Desist Order, "Western Sky is nothing more than a front to enable CashCall to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive business practices from prosecution by state and federal regulators." Doc. 12-1 (*In re CashCall, Inc.*, New Hampshire Banking Department Order to Cease and Desist, June 4, 2013). Among other things, CashCall provided website hosting and support for Western Sky's lending, provided Western Sky with its toll-free telephone number, reimbursed Western Sky for many of its administrative expenses, and engaged in marketing—including television and print advertising—for Western Sky loans. Doc. 48, at 8-9. CashCall reviews applications for Western Sky loan and, by agreement, is required to purchase the loans made by Western Sky. Doc. 48, at 10. In return, CashCall paid Western Sky a

monthly fee as well as a small net percentage of the value of loans made. Doc. 48, at 11. Unlike Western Sky, which is owned by a member of the Tribe, CashCall itself has no claim of tribal affiliation or ownership.

A number of other states have also sought to protect their citizens from Western Sky, CashCall, and their constellation of associated organizations.[2]

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[2] *See, e.g.*, *In re CashCall, Inc.*, DFI No. C-11-0701-14-FO1 (Wash. Dep't Fin. Insts. May 30, 2014), *available at* http://www.dfi.wa.gov/sites/default/files/consumer-services/enforcement-actions/C-11-0701-14-FO01.pdf; *In re Western Sky Fin., LLC*, (Nev. Dept. Bus. & Indus. June 28, 2013), *available at* http://fid.state.nv.us/Notices/2013/2013-07-01_Order_CDWesternSkyFinancial.pdf; *Colorado ex rel. Struthers v. Western Sky Fin., LLC,* No. 11-cv-638, 2013 WL 9670692, at *1 (Colo. Dist. Ct. Apr. 15, 2013); *In re CashCall, Inc. & WS Funding, LLC*, No. 2013-010 (Mass. Comm'r Banks & Small Loan Licensing Apr. 4, 2013), *available at* http://www.mass.gov/ocabr/banking-and-finance/laws-and-regulations/enforcement-actions/2013-dob-enforcement-actions/cashcallwsfunding04042013.html; *In re Western Sky Fin., LLC*, No. 13 CC 265 (Ill. Dep't Fin. & Prof'l Regulation Mar. 8, 2013), *available at* https://www.idfpr.com/dfi/ccd/Discipline/WesternSkyCDOrder3813.pdf; *In re Western Sky Fin., LLC*, No. I-12-0039 (Or. Dep't Consumer & Bus. Servs. Dec. 13, 2012), *available at* http://www.oregondfcs.org/securities/enf/orders/I-12-0039.pdf; *Maryland Comm'r Fin. Regulation v. Western Sky Fin., LLC*, No. 11-cv-00735 (D. Md. Mar. 18, 2011).

2. Mr. Parnell's Western Sky Loan. Shortly after leaving military service, Mr. Parnell found himself in a "financially complicated" situation. Doc. 48, at 18. After seeing a television advertisement for Western Sky's loans in his home state of Georgia, he applied for a $1,000 loan on Western Sky's website and was approved for the loan within minutes. Doc. 48, at 18-19. Within 72 hours, the $1,000 had been deposited into Mr. Parnell's Georgia bank account. Doc. 48, at 21.

Like thousands of others, the loan that Mr. Parnell obtained from Western Sky came at an illegally high cost. To receive his $1,000 loan, Mr. Parnell was charged a whopping $500 origination fee and subjected to purported annual interest rate of 149%. Doc. 54-2, at 3. Under the terms of the loan agreement, Mr. Parnell was ultimately required to pay back $4,905.56 over the course of the loan—that's a finance charge of nearly $4,000 and an effective annual interest rate of 232.99%. Doc. 54-2, at 2. In addition to the fact that Western Sky is not licensed to operate in Georgia, the fees and interest associated with Mr. Parnell's Western Sky loan far outstrip the limits that Georgia law places on consumer loans of $3,000 or less: The stated interest rate of 149% is

exponentially greater than the Georgia cap of 10%, and the origination fee of $500 is far larger than the $64 cap Georgia law places on origination fees for loans of $1000. O.C.G.A. § 7-3-14(1) (limiting interest on face value to 10%), § 7-3-14(2) (limiting origination fee to 8% for the first $600 borrowed and to 4% thereafter); *see* § 16-17-2 (prohibiting the making of small-dollar loans unless the limits in § 7-3-14 are complied with).

As was Western Sky's standard practice, Mr. Parnell's loan was immediately sold or referred to CashCall, and Mr. Parnell successfully made all his monthly loan payments to CashCall. Doc. 48, at 21.

3. Because Western Sky Loans Are Illegal Under Georgia Law, Mr. Parnell Brings a Class-Action Suit. In December 2013, Mr. Parnell brought a class action suit on behalf of Georgians who had taken out Western Sky loans against CashCall, Western Sky, and Western Sky's owner Martin Webb in Georgia state court based on the loans' illegal fees and interest rates. Specifically, Mr. Parnell alleged that the Defendants violated the Georgia Payday Lending Act by engaging in small dollar consumer lending without a license and by charging fees and interest far in excess of Georgia limits. Doc. 1-3, at

11. In addition, Mr. Parnell alleged that the loan agreement's prohibition on the application of state law conflicted with a provision of Georgia's payday lending law requiring that all disputes be governed by Georgia law and heard in a court of competent jurisdiction in the county where the consumer resides. Doc. 1-3, at 23-24. In the complaint, Mr. Parnell specifically challenged the enforceability of the arbitration agreement contained in the Western Sky loan agreement. Doc. 1-3, at 25. On behalf of the class, Mr. Parnell sought damages and injunctive relief. Doc. 1-3, at 16. CashCall removed the case to federal district court pursuant to the Class Action Fairness Act.[3]

Once in federal court, CashCall immediately sought to shield its illegal lending scheme from scrutiny, filing both a motion to dismiss and a motion to compel arbitration. CashCall's motion to dismiss was premised on the loan agreement's forum-selection clause, which purports to require that any claims be brought in Cheyenne River Sioux Tribal court and cannot be brought in state or federal court. Doc. 25, at 32; *see* Doc. 54-2, at 1. The district court denied CashCall's motion to

[3] Western Sky and Mr. Webb have since been dismissed without prejudice and are no longer parties to this case. Doc. 70, at 2 n.1.

dismiss, holding that the tribal-court forum-selection clause was not enforceable, in part, because the tribal court would lack jurisdiction over Mr. Parnell's claims. Doc. 25, at 36.[4]

4. CashCall Seeks to Escape Scrutiny by Enforcing the Western Sky Arbitration Agreement. CashCall also sought to avoid court scrutiny by seeking to compel arbitration under the arbitration agreement in the Western Sky loan agreement. Doc. 19-1.

The arbitration clause CashCall seeks to enforce requires borrowers to relinquish their rights under federal and state law, stating that only tribal law may be applied by the arbitrator: "The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement." Doc. 54-2, at 6. If that were not clear enough, the agreement also states that, even if the consumer chooses that the arbitration take place near his or her home instead of on tribal lands, that "accommodation for you shall not be construed in any way . . . to

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[4] CashCall sought interlocutory review of the denial of its motion to dismiss. While the district court certified the issue for immediate review, this Court declined to do so, and the forum-selection clause is not at issue on this appeal. Docs. 36, 38, 70 at 3 n.3. Since, two federal courts of appeals have been asked to send consumer disputes involving Western Sky loans to tribal court, and both have declined to do so. *Hayes*, 811 F.3d at 676 n.3; *Jackson*, 764 F.3d at 781-86.

allow for the application of any law other than the law of the Cheyenne River Sioux Tribe." Doc. 54-2, at 5. Elsewhere, the agreement (again) expressly disclaims the application of any state or federal law. *E.g.*, Doc. 54-2, at 2 ("[N]o other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.").

The Fourth Circuit has recently called this aspect of the Western Sky arbitration agreement a "farce" and refused to enforce a Western Sky arbitration agreement identical to the one here on the basis that it prohibits the application of state and federal law. It explained: "The agreement purportedly fashions a system of alternative dispute resolution while simultaneously rendering that system all but impotent through a categorical rejection of the requirements of state and federal law. The FAA does not protect the sort of arbitration agreement that unambiguously forbids an arbitrator from even applying the applicable law." *Hayes*, 811 F.3d at 668.

The key provision in the loan agreement describing the arbitration requirements states:

> **Agreement to Arbitrate.** You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance

> with its consumer dispute rules and the terms of this Agreement.

Doc. 54-2, at 4-5.

Simply put, this provision is a "sham from stem to stern," *Jackson*, 764 F.3d at 779. As this Court has already found, the arbitral forum described in the provision does not exist: Though the provision "require[s] the Tribe's involvement," the Tribe does not authorize arbitration, has no authorized representatives who do, and there are no tribal consumer dispute rules. *Inetianbor*, 768 F.3d at 1353-54. For that reason, both this Court and the Seventh Circuit refused to enforce an earlier version of the Western Sky arbitration agreement. *Id.* at 1354, *Jackson*, 764 F.3d at 776-79.

The contract here differs from the version at issue in *Inetianbor* and *Jackson* in only one respect: Mr. Parnell's contract contains a provision permitting the consumer to choose the AAA, JAMS, or some other arbitration organization to "*administer*" the arbitration. Doc. 54-2, at 5 (emphasis added). But the agreement expressly limits the role of the arbitration administrator, stating that the administrator's "rules and procedures" govern only "to the extent" that they "do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms

of this Agreement." Doc. 54-2, at 5. Meanwhile, the terms of the "Agreement to Arbitrate" provision remain exactly the same as they did in *Inetianbor* and *Jackson*: The provision still states that the arbitrator "shall" be an authorized representative of the Cheyenne River Sioux Tribe and that the arbitration "shall" be conducted under the Tribe's (nonexistent) consumer dispute rules. Doc. 54-2, at 5.

Nevertheless, CashCall argued that the Western Sky arbitration agreement should be enforced. CashCall quibbled with whether Mr. Parnell had, despite having a section of his complaint dedicated to challenging the enforceability of the arbitration agreement, in fact, challenged the arbitration agreement specifically enough. CashCall also argued that Mr. Parnell was required to specifically challenge the delegation clause, which states that the arbitrator decides whether the arbitration agreement is enforceable. Doc. 19-1, at 12. According to CashCall, Mr. Parnell failed to specifically challenge the delegation clause, and therefore, the question whether the arbitration agreement was enforceable was for the arbitrator, not the court, to decide. Doc. 19-1, at 12. CashCall also made the bold claim that all state unconscionability analysis is preempted by the FAA and contended

that, at any rate, the arbitration agreement is not unconscionable. Doc. 19-1, at 12-22. Finally, CashCall argued that regardless of its unconscionability, the district court should rewrite the arbitration agreement and send Mr. Parnell's claims to an arbitral forum that does exist. Doc. 19-1, at 23-25.

5. The District Court Twice Refuses to Enforce the Western Sky Arbitration Agreement. In the first of two decisions, the district court rejected all of CashCall's arguments as to why the Western Sky arbitration agreement is enforceable. Doc. 25. In doing so, the district court recognized that Mr. Parnell had made arguments relating to the unconscionability of the arbitration provision itself. Doc. 25, at 72-73.

In also rejecting CashCall's substantive arguments, the district court followed the district court decisions in *Inetianbor*, which were subsequently affirmed by this Court. As in *Inetianbor*, the district court held that the arbitration agreement is unenforceable because the tribal arbitration described in the agreement does not exist and, further, because tribal involvement is integral to the agreement to arbitrate, a substitute arbitrator cannot be appointed. *See* Doc. 25, at 73-75. Finally, the district court rejected the notion that the references to

administration by AAA and JAMS salvaged the otherwise unenforceable contract, explaining that the additional language merely allowed a choice of an arbitration administrator; the arbitrator still had to be authorized by the Tribe. Doc. 25, at 76.

CashCall appealed the district court's denial of its motion to compel arbitration to this Court, which reversed. This Court addressed only the questions whether the agreement contained a delegation clause and whether Mr. Parnell was required to specifically challenge the enforceability of the delegation clause to avoid his claims being sent to arbitration. *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1144 (11th Cir. 2014) (*Parnell I*). This Court held, following *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010), that Mr. Parnell was required to "articulate a challenge to the delegation provision specifically" to avoid sending the larger question of arbitrability to arbitration, and that he had not done so. *Parnell I*, 804 F.3d at 1146. The decision also, however, noted that Mr. Parnell could seek leave from the district court to amend his complaint to correct the deficiency. *Id.* at 1149 & n.2.

On remand, Mr. Parnell did just that, and the district court granted him leave to amend. Doc. 47. Mr. Parnell amended the

complaint to add a section entitled "The Delegation Provision is Void and Unenforceable," which alleges that the delegation clause is unenforceable because it sends the question of arbitrability to a tribal forum that does not exist and because it prohibits the arbitrator from applying state or federal law. Doc. 48, at 29-32.

Once again, CashCall moved to compel arbitration, raising many of the same arguments that it had raised in its first motion to compel. This time, CashCall also quibbled with whether Mr. Parnell had, in fact, specifically challenged the delegation provision. Doc. 54-1, at 10-12.

And once again, in a lengthy decision, the district court rejected CashCall's arguments. The district found that, in his complaint, Mr. Parnell had specifically challenged both the delegation clause and arbitration clause and, therefore, the court could determine whether the each was unconscionable. Doc. 70, at 43-46. Relying on this Court's decision in *Inetianbor*, the district court reiterated its holding that the tribal forum is both nonexistent and integral to the agreement. Doc. 70, at 49-62. Because the arbitral forum is nonexistent and the arbitrator would be prohibited from applying state or federal law, the district

court concluded that the provisions sending the claim to arbitration are unconscionable and unenforceable. Doc. 70, at 74. The district court did not change its view that the references to AAA and JAMS did not save the agreement, and also explained that the AAA rules themselves distinguished between conducting and administering arbitrations. Doc. 70, at 62-65.

CashCall appealed.

SUMMARY OF THE ARGUMENT

The district court was correct in concluding that the Western Sky delegation clause and arbitration agreement are unenforceable because they prohibit the arbitrator from applying any state or federal law and because the required, integral arbitral forum does not exist. CashCall's arguments as to why its transparent attempt to use arbitration to avoid compliance with state and federal law should nevertheless be enforced fall flat.

First, CashCall's brazen argument that no state-law unconscionability analysis applies in the arbitration context is simply wrong. The Supreme Court has repeatedly—and recently—made clear that arbitration agreements governed by the FAA continue to be subject

to general state-law contract defenses, including unconscionability, so long as the state-law rules do not hinge on the fact of arbitration. And that is equally true whether it is the delegation clause or arbitration agreement as a whole that has been challenged.

CashCall is similarly off the mark with its other technical arguments as to why the delegation clause must be enforced. Contrary to CashCall's arguments and as required by *Parnell I*, Mr. Parnell articulated a specific challenge to the delegation clause in the district court, including adding a delegation-clause-dedicated section to his amended complaint. That section, as did Mr. Parnell's papers filed below, alleged that the delegation clause is unenforceable for the same reasons the arbitration agreement as a whole is unenforceable: It purports to send disputes to an arbitrator who does not exist and who is prohibited from applying any state or federal law. Though the district court acknowledged that Mr. Parnell had specifically challenged the delegation clause, because the unenforceability arguments raised the same issues, the court appropriately considered the challenges to the two parts of the agreement together. Nothing prohibits the district

court from working with such efficiency, and CashCall's protestations over the challenge to the delegation clause are ill-founded.

Second, the Western Sky delegation clause and arbitration agreement cannot be enforced because they expressly and unambiguously prohibit the arbitrator from applying any state or federal law. The Fourth Circuit, in *Hayes v. Delbert Services Corp.*, refused to enforce an identical Western Sky agreement because Supreme Court precedent makes clear that its prospective waiver of all federal statutory rights is impermissible and unenforceable. This Court should follow suit. But even if the *Hayes* principle does not apply here because Mr. Parnell brings only state-law claims, the Western Sky agreement is still unenforceable because Georgia unconscionability law precludes the enforcement of contracts purporting to prospectively waive all state-law rights.

Third, the Western Sky delegation clause and arbitration agreement are also unenforceable because, as this Court held in *Inetianbor v. CashCall, Inc.*, the tribal arbitration described in the contract does not exist. *Inetianbor* went on to hold that tribal involvement was integral to the agreement, and, therefore, § 5 of the

FAA did not apply to permit arbitration to proceed before a substitute arbitrator under substitute rules.

There is only one difference between the agreement at issue in *Inetianbor* and the one here, and that difference does not warrant a different outcome. Mr. Parnell's agreement states that the arbitration may be *administered* by AAA, JAMS, or another arbitration organization, but it still requires that an authorized representative of the Tribe *conduct* the arbitration. Because a tribal arbitrator still does not exist, the holding in *Inetianbor* applies with full force, and this Court must affirm the district court's denial of CashCall's motion to compel arbitration.

ARGUMENT

BOTH THE DELEGATION CLAUSE AND THE ARBITRATION AGREEMENT AS A WHOLE ARE UNENFORCEABLE.

I. The District Court Properly Subjected Both the Delegation Clause and the Arbitration Agreement to State Unconscionability Review.

A. Delegation Clauses and Arbitration Agreements Are Both Subject to State-Law Unconscionability Review.

Contrary to CashCall's argument, it is black-letter law that delegation clauses and arbitration agreements are subject to state-law unconscionability analysis. CashCall makes the outlandish claim that

the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), categorically "forbid[s] the use of state-law unconscionability doctrines to void an arbitration clause." CashCall Br. 29. Hogwash. *Concepcion* said no such thing—and, in fact, said just the opposite—the text of the FAA does not support CashCall's view, and in the five years since *AT&T*, this Court has repeatedly subjected arbitration clauses to state-law unconscionability analysis.

The Supreme Court explained that § 2 of the FAA makes clear that arbitration agreements are not to automatically be enforced all of the time. It "permits agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* at 339 (quoting 9 U.S.C. § 2). *Concepcion* went on to explain that § 2 "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or *unconscionability*.'" *Id.* (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)) (emphasis added). The generally applicable contract defenses must truly be general—the FAA preempts state-law contract defenses aimed exclusively at arbitration or that are specifically hostile to arbitration. *Id. Concepcion* addressed the question

whether a *particular* California unconscionability rule regarding class-action waivers was aimed at arbitration. *Id.* at 340. The Court found that it was and was therefore preempted by the FAA. *Id.* at 352. *Concepcion*, then, did *not* hold that all state-law unconscionability analysis is preempted and, as noted above, expressly recognized unconscionability as the type of general contract defense that could nullify an agreement to arbitrate.

Since *Concepcion*, this Court has specifically held that general state unconscionability law is *not* preempted by the FAA and may be used to invalidate arbitration agreements. *In re Checking Account Overdraft Litigation MDL No. 2036* explained that *Concepcion* preserved general contract defenses like unconscionability so long as they are not aimed at arbitration. 685 F.3d 1269, 1277 (11th Cir. 2012) (*Barras*). This Court went on to hold that South Carolina's unconscionability law was not preempted by the FAA and invalidated an arbitration agreement's cost-and-fee shifting provision on that basis. *Id.* at 1279, 1282.

Barras is hardly an outlier. Subjecting arbitration agreements, or aspects thereof, to state-law unconscionability analysis is a regular part

of this Court's post-*Concepcion* arbitration jurisprudence. *See, e.g.*, *In re Checking Account Overdraft Litig. MDL No. 2036*, 672 F.3d 1224, 1228-30 (11th Cir. 2012) (*Hough*) (recognizing that unconscionability is a potentially valid defense and analyzing whether an arbitration clause was procedurally or substantively unconscionable under Georgia law); *Kaspers v. Comcast Corp.*, 631 Fed. App'x 779, 782-83 (11th Cir. 2015) (same); *In re Checking Account Overdraft Litig. MDL No. 2036*, 459 Fed. App'x 855, 858-59 (11th Cir. 2012) (*Buffington*) (same).

And the Supreme Court could not be clearer that the FAA's § 2 savings clause permitting arbitration agreements to be invalidated by generally applicable state-law contract defenses—including unconscionability—applies with equal force to delegation clauses: "The FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. Since *Concepcion*, this Court has reiterated that same standard for delegation clauses. *In re Checking Account Overdraft Litigation MDL No. 2036*, 674 F.3d 1252, 1255 (11th Cir. 2012) (*Given*) ("Under the FAA, a delegation provision is valid, 'save upon such grounds as exist at law or in equity for the revocation of

any contract.'") (quoting 9 U.S.C. § 2) (citing *Rent-A-Center*, 561 U.S. at 70).

Troublingly, CashCall fails to cite any of this precedent in its preemption discussion, and the cases it does cite do not help it. CashCall relies on *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224 (11th Cir. 2012), and *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011). Both those cases involved state-law unconscionability rules regarding class-action waivers very similar to the California rule the Supreme Court found preempted in *Concepcion*. Neither of those cases held that state-law unconscionability doctrines were *per se* preempted, simply that class-waiver unconscionability rules similar to the preempted California rule did not survive *Concepcion*. *Pendergast*, 691 F.3d at 1235; *Cruz*, 648 F.3d at 1212-13. Since Mr. Parnell's unconscionability argument here does not hinge on the agreement's class-action waiver, those cases do not mean that Mr. Parnell's unconscionability arguments are categorically preempted.[5]

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[5] CashCall's reliance on *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173 (4th Cir. 2013), suffers from the same problem. Like *Pendergast* and *Cruz*, *Muriithi* dealt with a class-action waiver issue very similar to that in *Concepcion* itself, and CashCall's quotation (at 29) is incomplete

CashCall's argument that all state-law unconscionability law is preempted after *Concepcion* is simply wrong, and to agree with CashCall on that point, this Court would have to overturn its decisions in *Barras*, *Hough*, *Given*, and others, and disregard the Supreme Court's statements in *Concepcion* regarding § 2 of the FAA. Such a dramatic departure from settled law is not permitted or warranted.

B. The District Court Correctly Recognized that Mr. Parnell Specifically Challenged the Delegation Clause and Found It Unenforceable for the Same Reasons the Arbitration Agreement as a Whole Is Unenforceable.

CashCall's other technical arguments surrounding the delegation clause—that Mr. Parnell failed to challenge it with specificity and that the district court ought to have considered it separately—also fail. Both CashCall's arguments arise from the same misguided notion that the delegation clause cannot be unenforceable for the same reasons that the arbitration as a whole is unconscionable; here, because an arbitrator could not apply any state or federal law and because the arbitral forum is fictional. As Mr. Parnell argued, and the district court concluded,

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and misleading. *Muriithi*, 712 F.3d at 180. *Muriithi* does not purport to invalidate state unconscionability law beyond the class-waiver issue.

those flaws are fatal to both the delegation clause and larger the arbitration agreement.

First, CashCall's argument that Mr. Parnell failed to specifically attack the delegation clause and, therefore, the case must be sent to arbitration, is utterly without merit. As CashCall admits (at 24-25), Mr. Parnell argued below that the delegation clause was not enforceable because, among other reasons, the delegation clause purports to put the question of arbitrability before an arbitrator who does not exist and who is prohibited from applying state or federal law. Doc. 48, at 30-32; Doc. 63, at 8. All that is required by *Rent-A-Center* and *Parnell I* is that Mr. Parnell "articulate a challenge to the delegation clause specifically," and it cannot be disputed that he did so here. *See Parnell I*, 804 F.3d at 1146. As such CashCall's contention that that is somehow not enough is wrong—and frankly, it is unclear what a litigant in Mr. Parnell's position could do to satisfy the bar CashCall proposes.[6]

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[6] In other cases, CashCall's affiliates have used this Court's decision in *Parnell I* to argue that a plaintiff is required to challenge the delegation clause *in the complaint*, rather than merely in response to a defendant's assertion that a delegation clause requires arbitration. Oct. 29, 2015, Letter from Brian J. Fischer to Patricia S. Connor, *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016) (Nos. 15-1170 & 15-

It also makes perfect sense for Mr. Parnell's arguments to apply to the delegation clause. If an arbitral forum that is designated by the contract—and is integral to that contract's agreement to arbitrate—does not exist, but the delegation clause is enforceable anyway, then a consumer's claims cannot be heard anywhere. And if an arbitrator is prohibited from applying any state or federal law, then a consumer's argument that state law limits the scope or enforceability of an arbitration agreement could also not be heard in anywhere at all. *See Smith v. W. Sky Fin., LLC*, 2016 WL 1212697, at *7 (E.D. Pa. Mar. 4, 2016) ("In practical terms, enforcing the delegation provision would place an arbitrator in the impossible position of deciding the

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1217), 2015 WL 6673772. However, that is not what *Parnell I* holds. Rather, *Parnell I* merely restates and applies the principle—established in *Rent-A-Center*—that "when a plaintiff seeks to challenge an arbitration agreement containing a delegation provision, he or she must challenge the delegation provision directly." *Parnell I*, 804 F.3d at 1144. Just as with the plaintiff in *Rent-A-Center*, the problem was that Mr. Parnell had failed to challenge the delegation clause *at all*, not in his complaint and not in his papers opposing arbitration. Indeed, this Court has previously held that a defendant waives the right to enforce a delegation clause when it does not seek arbitration on that basis, even though the plaintiffs did not challenge the delegation clause in their complaint. *Hough*, 672 F.3d at 1228. This Court should make clear that *Parnell I* did not somehow graft a new complaint requirement onto the *Rent-A-Center* standard.

enforceability of the agreement *without* authority to apply any applicable federal or state law.") (emphasis in original).

As illustration, say a company wrote an arbitration agreement that included a delegation clause and that required all disputes to be heard before the Tin Man in the Land of Oz. Further, the arbitrator was restricted to applying the law of the Munchkins. According to CashCall's theory (at 25), arguments that the delegation clause is not enforceable because the Tin Man does not exist and, even if he existed, would not be able to apply state and federal law regarding the enforceability of arbitration agreements ever only go to the question whether the arbitration agreement as a whole is enforceable, and never to whether the delegation clause is enforceable. *See* CashCall Br. 25 (attacks on an arbitration agreement's "choice-of-forum and choice-of-law provisions . . . are not grounds to invalidate *the Delegation Provision*") (emphasis in original). Thus, according to CashCall, the delegation clause would nevertheless require questions regarding arbitrability to be sent to the Tin Man for analysis according to the law of the Munchkins. Obviously, that cannot be the law. This is a silly example, but no more absurd than CashCall's insistence that questions

about the existence of an arbitrator and applicable law have no bearing on the enforceability of a delegation clause.

Further, contrary to CashCall's contention, *Parnell I* did nothing to foreclose Mr. Parnell's delegation-clause arguments here. *Parnell I* held that the district court's denial of CashCall's motion to compel had to be reversed because Mr. Parnell "did not articulate a challenge to the delegation clause specifically." 804 F.3d at 1146. In reaching that conclusion, this Court focused on the fact that Mr. Parnell's argument, as it stood at that time, only stated the "Loan Agreement is unconscionable" and that the "arbitration provision . . . violates substantive Georgia law." *Id.* at 1148. The problem was that Mr. Parnell had not expressly asserted that the delegation clause was unenforceable—*Parnell I* conducted no analysis of whether, had he done so, his arguments would be sufficient to render the delegation clause unenforceable. *See id.* at 1148-49.

Second, CashCall incorrectly criticizes the district court for conducting its analysis of the delegation clause and the arbitration agreement simultaneously. CashCall Br. 27-28. As previously stated, the reasons why the delegation clause and the arbitration agreement

are unenforceable are the same, so it is unsurprising that the district court analyzed those arguments together instead of repeating itself. In doing so, the district court made clear that it was applying its analysis to both parts of the agreement, and that is sufficient to fulfill the requirements of *Parnell I*—which, after all, only to speak to whether the party opposing arbitration has challenged the delegation clause and say nothing about the court's method of analysis. *See* Doc. 70, at 45-46, 74. In considering the same arguments as applied to the identical Western Sky loan agreement, the Fourth Circuit also considered enforceability of the delegation clause and arbitration clause together, just as the district court did here. *Hayes*, 811 F.3d at 671 n.1. If this Court were to agree with CashCall's argument that the district court's combined discussion was erroneous, it would create a conflict with the Fourth Circuit's approach, and there is no reason to do so.

It would also create tension with CashCall's own brief, which also merges the analysis of the delegation clause and arbitration clause arguments. Pages 30 through 53 of CashCall's brief appear to address issues that go both to whether the delegation clause is enforceable and to whether the arbitration agreement is enforceable. As CashCall's brief

demonstrates, considering the common substantive issues simultaneously is a sensible way to approach them.

CashCall's arguments set a far higher bar for litigants and courts analyzing the enforceability of delegation clauses and arbitration agreement than any court decisions have done, and there is no reason for this Court upset settled law and adopt new standards.

II. The Delegation Clause and Arbitration Agreement Are Unenforceable Because They Prohibit the Arbitrator from Applying Any State or Federal Law.

In *Hayes*, the Fourth Circuit refused to enforce an identical delegation clause and arbitration agreement because of its "categorical rejection of the requirements of state and federal law," and this Court should follow suit. *Hayes*, 811 F.3d at 668; *see id.* at 671 n.1 (discussing the delegation clause). Not only, as *Hayes* explained, is an outright waiver of federal statutory rights prohibited under the Supreme Court's FAA jurisprudence, *id.* at 675, but the wholesale waiver of state-claims is, at a minimum, unconscionable under Georgia state law.

That the Western Sky agreement throws state and federal law overboard cannot be seriously disputed. Over and over, the Western Sky agreement makes clear that the only applicable law is that of the

Cheyenne River Sioux Tribe and that any arbitrator is expressly forbidden from applying state or federal law:

- "you . . . consent to the sole subject matter jurisdiction of the Cheyenne River Sioux tribal Court, and that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation," Doc. 54-2, at 2;
- "[o]ur inclusion of these disclosures does not mean that we consent to the application of state or federal law to us, to the loan, or this Loan Agreement," Doc. 54-2, at 2;
- "[t]his agreement is governed by . . . the laws of the Cheyenne River Sioux Tribe. . . . Neither this Agreement nor Lender is subject to the laws of any state of the United States of America. . . . You also expressly agree that this Agreement shall be subject to and construed in accordance only with the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law applies to this Agreement," Doc. 54-2, at 4;
- location accommodations made during the arbitration process "shall not be construed in any way . . . to allow for the

application of any law other than the law of the Cheyenne River Sioux Tribe," Doc. 54-2, at 5; and

- the arbitration agreement "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," Doc. 54-2, at 6 (emphasis in original).

In short, the Western Sky agreement is not subtle about its intent to displace state and federal law with tribal law, nor does it beat around the bush as to what laws the arbitrator may and may not apply.

A. The Delegation Clause and Arbitration Agreement Are Unenforceable Under the FAA Because They Purport to Prospectively Waive All State and Federal Statutory Rights.

In *Hayes*, the Fourth Circuit saw this attempt to circumvent the strictures of all state and federal law for what it is: a transparent attempt to use "the arbitration agreement [ ] to ensure that Western Sky and its allies could engage in lending and collection practices free from the strictures of any federal law." *Hayes*, 811 F.3d at 676. It explained that the problem with the Western Sky arbitration agreement was that "[w]ith 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." *Id.* at 673-74. Though the FAA and the federal policy favoring arbitration allow parties to elect to have their federal claims heard in arbitration rather than in court, "[t]he 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 674.

That holding is well-founded in Supreme Court jurisprudence, which recently reiterated that prospective waivers of a "party's *right to pursue* statutory remedies" remains prohibited in the context of arbitration. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (Court "would have little hesitation in condemning" an arbitration contract that operated as "a prospective waiver of a party's right to pursue statutory remedies"). In essence, relying on a long line of Supreme Court cases, the Fourth Circuit

concluded that a company cannot prohibit consumers from pursuing their federal statutory rights under the guise of the FAA.[7]

CashCall's argument that *Hayes* was wrongly decided because an arbitrator would end up applying federal law to determine the enforceability of the arbitration agreement misses the point. According to CashCall, though the agreement requires the application of tribal law, because tribal law does not speak to whether arbitration agreements are unenforceable, federal law would be used as a gap-filler, and the arbitrator would end up applying federal law to the enforceability question anyway; hence, there is no legal vacuum and federal rights are preserved. CashCall Br. 53. But *Hayes* does not rest on a vacuum of law theory, nor is it based only on the law an arbitrator would apply in determining the enforceability of the arbitration clause. Rather, *Hayes* rests on the fact that, for decades, the Supreme Court has stated that arbitration agreements cannot be used to force

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[7] CashCall's reference to the views of a dissenting justice in a later case do not overcome the statement of the Supreme Court in *American Express* that prospective waivers of the right to pursue statutory rights remain prohibited. CashCall Br. 52 n.13. At rate, it is unlikely that Justice Ginsburg was anticipating an agreement like this one, that expressly and completely bars all state and federal claims.

signatories to waive all their federal statutory rights. *Hayes*, 811 F.3d at 674-75 (an arbitration agreement "may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject"). That the substance of federal law may have some overlap in some circumstances with the alternative law designated by the agreement does not alter that analysis.

Under *Hayes* and the Supreme Court precedent it relies on, the Western Sky delegation clause and arbitration agreement are unenforceable because they contain an unambiguous waiver of federal statutory rights. Since *Hayes* was decided, two district courts have considered whether the *Hayes* rationale applies when the plaintiff is asserting state-law claims. Both have determined that it does: the district court here, Doc. 70, at 67-73, and *Smith*, 2016 WL 1212697, in which the plaintiff's claims asserted rights under both state and federal law and the court refused to send *any* claims to arbitration. In refusing to enforce the Western Sky arbitration agreement, *Smith* explained that "per the terms of the Loan Agreement, the arbitrator would not be permitted to consider *any* of the claims that Plaintiff asserts in her Complaint since the arbitrator would be prohibited from applying the

relevant law." *Smith*, 2016 WL 1212697, at *6 (emphasis added). *See also Moses*, 781 F.3d at 94 (Davis, J., concurring in part and dissenting in part) ("I do not hesitate to observe the odiousness of CashCall's apparent practice of using tribal arbitration agreements to prey on financially distressed consumers, while shielding itself from state actions to enforce consumer protection laws."). The conclusion of the district court here and *Smith* are consistent with the decisions of several federal courts of appeals applying the vindication of rights doctrine to protect state-law rights as well as federal-law rights. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (invalidating elements of an arbitration agreement "because they prevent the vindication of statutory rights under state and federal law"); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 79-81 (D.C. Cir. 2005) (applying principle to statutory rights under the law of the District of Columbia). *But see Stutler v. T.K. Constructors, Inc.*, 448 F.3d 343, 344 (6th Cir. 2006) (declining to apply federal vindication of rights doctrine to state-law claims).

B. The Delegation Clause and Arbitration Agreement Are Unenforceable Because the Prospective Waiver of All State-Law Rights Is Unconscionable Under Georgia Law.

But regardless of whether the prohibition on the waiver of statutory rights articulated by federal law and applied in *Hayes* comes into play where the plaintiff is asserting only state-law claims, the arbitration agreement is also unenforceable because its wholesale ousting of state law is unconscionable under state law. Under Georgia law, "the 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 contract." *NEC Techs., Inc. v. Nelson*, 478 S.E.2d 769, 771 (Ga. 1996) (internal quotations and citations omitted). It has also been stated that a contractual provision is unconscionable if it is "such an agreement as no sane man not acting under a delusion would make and that no honest man would take advantage of and a contract that is abhorrent to good morals and conscience. It is where one of the parties takes a fraudulent advantage of another." *Id.* at 771 n.2. Contracts are analyzed as to whether they are procedurally and substantively

unconscionable under Georgia law, and there must generally be a certain "quantum" of each for the contract to be unenforceable. *Id.* at 771 & 773 n.6; *see Matthews v. Ultimate Sports Bar, LLC*, 621 Fed. App'x 569, 571 (11th Cir 2015). Given the dearth of Georgia decisions explicating the standard for unconscionability, the Georgia Supreme Court has explained that it is appropriate to look beyond Georgia law when conducting an unconscionability analysis. *NEC Techs.*, 478 S.E.2d at 771.

1. Procedural unconscionability.

Here, there is at least some "quantum" of procedural unconscionability. "Factors relevant to the procedural unconscionability inquiry include the bargaining power of the parties, 'the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice.'" *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 875-76 (11th Cir. 2005) (quoting *NEC Techs.*, 478 S.E.2d at 772). The FTC has explained that the Western Sky arbitration agreement is a procedurally unconscionable take-it-or-leave-it boilerplate contract of adhesion. Br. for the Fed. Trade Comm'n as

Amicus Curiae (FTC Amicus), *Jackson v. Payday Fin. LLC*, 764 F.3d 765 (7th Cir.) (No. 12-2617), 2013 WL 5306136, at *27. Worse, borrowers don't even see the arbitration provisions "until *after* they apply for the loans"—that is, after they "submit loan applications . . . containing their social security numbers, bank account numbers, and other personal information" to Western Sky—"and learn that their loans have been approved." *Id.* at *22, *27 & nn.17, 20 (emphasis added). "By this point," borrowers "will have supplied [Western Sky] with highly sensitive personal and financial data and would understandably be wary of starting the process anew with another lender." *Id.* at *22 n.17. Thus, consumers have neither bargaining power nor meaningful choice as to the no-state-law-allowed aspect of the Western Sky arbitration agreement, and there is at least some "quantum" of procedural unconscionability.

2. Substantive unconscionability.

The Western Sky arbitration agreement's outright prohibition on any application of any state law is—more than a quantum's worth—substantively unconscionable under the Georgia standard. When it comes to substantive 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." *NEC Techs.*, 478 S.E.2d at 771 (internal quotations and citations omitted). The ban on the application of state law here is not commercially reasonable, has the purpose and effect of immunizing CashCall and company for any violations of state law, and takes undue advantage of financially distressed borrowers. Indeed, court after court has explained that the Western Sky arbitration agreement's renunciation of law is a "sham" and a "farce" designed to insulate a predatory and illegal lending scheme from accountability. *Hayes*, 811 F.3d at 674; *Jackson*, 764 F.3d at 779. "The purpose of the arbitration agreement at issue here is not to create a fair and efficient means of adjudicating Plaintiff's claims, but to manufacture a parallel universe in which state and federal law claims are avoided entirely." *Smith*, 2016 WL 1212697, at *6. If this attempt by a predatory company to exclude itself wholesale from all state law is not "abhorrent to good morals and conscience, and does not "take fraudulent advantage" of distressed borrowers, it is hard to imagine what would. *NEC Techs.*, 478 S.E.2d at 771 n.2. Enforcement of the

Western Sky provisions purporting to waive all state law would leave "decent, fairminded persons [with] a profound sense of injustice," and are unconscionable. *Id.* at 775.

And even outside the context of such a blatant attempt to avoid accountability as the Western Sky agreement, the question whether a contract interferes with the pursuit of state statutory remedies is a critical aspect of the analysis under Georgia substantive unconscionability law. For example, in deciding whether an arbitration agreement was enforceable under Georgia substantive unconscionability law, this Court viewed the key question as whether a state consumer protection statute's fee-shifting was available in arbitration. *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1125 (11th Cir. 2010). The question was key because whether the plaintiff could pursue his state-law rights at all hinged on the availability of fee-shifting. *Id.* This Court held that because fee-shifting was available in arbitration, the plaintiff was not prevented from pursuing his state-law rights, and arbitration should be compelled. *Id.* at 1127. The story is similar in *Lomax v. Woodmen of the World Life Ins. Society*, 228 F. Supp. 2d 1360, 1366 (N.D. Ga. 2002), where the key question was whether the fee-

divvying provision in the agreement would sufficiently preserve the plaintiffs' rights to pursue their state-law claims. If state unconscionability law views fee provisions as a potentially impermissible inhibitor of access to state-law rights, then the outright ban on the application of state law here is definitely unconscionable.

Relatedly, Georgia law also considers whether the allegedly unconscionable provision is permitted by state statute. For example, plaintiffs failed to prevail on their unconscionability challenge where the allegedly substantively unconscionable provision permitting a bank to seize jointly-owned accounts was, in fact, permitted by Georgia statute. *Buffington*, 459 Fed. App'x at 858. In contrast, Georgia statutory law expressly seeks to *preserve* the state-law rights of consumers taking out small-dollar loans. The Georgia Payday Lending Act prohibits lenders making loans of $3000 or less from requiring Georgians to waive their Georgia state-law rights. O.C.G.A. § 16-17-2(c)(1). Unlike other provisions of the Georgia Payday Lending Act,

§ 16-17-2(c)(1) applies whether or not there is an arbitration agreement at issue.[8]

Given the importance of the availability of the right to pursue state-law remedies to Georgia unconscionability law, the Western Sky arbitration agreement's outright prohibition on the application of state law renders it unconscionable and unenforceable. Nothing about this straightforward application of generally applicable state unconscionability law "takes its meaning precisely from the fact that a contract to arbitration is at issue," and it is not preempted by the FAA. *See Doctor's Assocs.*, 517 U.S. at 687. The point is simply that, regardless of what fora the parties choose, a contract is unenforceable if it cuts off the ability pursue state law rights.

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[8] Here, Mr. Parnell is not relying on the fact that the Western Sky delegation clause and arbitration agreement are unconscionable under O.C.G.A. § 16-17-2(c)(2), which lays out the circumstances in which an arbitration agreement in a small-dollar loan is unconscionable and unenforceable.

III. The Delegation Clause and Arbitration Agreement Are Unenforceable Because They Require Arbitration in an Arbitral Forum that This Court Has Already Held Does Not Exist.

This Court has already held that an earlier version of Western Sky's arbitration agreement is unenforceable because it requires arbitration before an arbitrator—a tribal arbitrator—who does not exist and according to rules—tribal consumer dispute rules—that do not exist. *Inetianbor*, 768 F.3d at 1353-54. This Court has also already held that tribal involvement is integral to the arbitration agreement and that, therefore, § 5 of the FAA does not apply to permit the appointment of substitute arbitrator. *Id.* at 1353. Stressing "the FAA's purpose to enforce arbitration agreements *according to their terms*," this Court concluded that because the written terms of Western Sky's arbitration agreement could not be severed, rewritten, or carried out, arbitration could not be compelled under the FAA. *Id.* at 1354 (emphasis added).

In reaching the same conclusion as *Inetianbor*, other courts, including the court below and the Seventh Circuit—which called the arbitration agreement a "sham from stem to stern"—have emphasized the fraudulent, illusory, and unconscionable nature of an arbitration scheme that purports to provide an arbitral forum for the resolution of

disputes "under the watchful eye of a legitimate governing tribal body" that turns out not to exist. *Jackson*, 764 F.3d at 779. Though the Western Sky arbitration agreement is an unconscionable attempt to avoid having to answer consumer disputes, is a sham, and is an illusion, *Inetianbor* makes clear that this Court need not make an unconscionability finding to hold the agreement unenforceable. *See* Doc. 25, at 77-78. Rather, all this Court needs to find in order to hold that arbitration cannot be compelled is that it is impossible for the parties to arbitrate according to the terms of the agreement. *See Inetianbor*, 768 F.3d at 1354.

Since *Inetianbor* already held that it is impossible for the parties to engage in the tribal arbitration described in the Western Sky agreement, the only remaining question is whether the reference in Mr. Parnell's agreement to AAA or JAMS "administering" the arbitration salvages this otherwise unenforceable agreement. For the reasons explained below, it does not, and this Court should reach the same conclusions that it did in *Inetianbor*.

A. The Western Sky Agreement Requires Consumers to Arbitrate Claims Before an Arbitrator Who Does Not Exist and Under Rules that Do Not Exist.

As the district held below, permitting AAA or JAMS to *administer* the arbitration does not distinguish the agreement here from the one in *Inetianbor* because administering the arbitration is not the same thing as conducting it, and the terms of Mr. Parnell's Western Sky agreement still require an authorized representative of the Tribe—who still does not exist—to *conduct* the arbitration.

This conclusion is evident from the text of the agreement. Both the agreement in *Inetianbor* and the one at issue here state: "You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement." Doc. 54-2, at 4-5. There is only one way to interpret this provision: Arbitration "'is required to' be conducted by an authorized representative of the Tribe" under the Tribe's consumer dispute rules. *Inetianbor*, 768 F.3d at 1351 (quoting Black's Law Dictionary and explaining that "shall" means "is required to" (9th ed. 2009)). There is therefore only one "way to enforce

the arbitration agreement 'in accordance with [its] terms,' 9 U.S.C. § 4," as required by the FAA: "to compel arbitration before an authorized representative of the Tribe." *Inetianbor*, 768 F.3d at 1352.

CashCall's main argument against this interpretation 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 AAA or JAMS to "administer the arbitration." CashCall Br. 31. According to CashCall, "administer" means that the parties can arbitrate "before" the Tribe, AAA, or JAMS—no tribal involvement necessary. CashCall Br. 31.

But as, the district court held and AAA itself makes clear, "administer[ing]" an arbitration and "conduct[ing]" it are not, in fact, the same. Doc. 70, at 63. "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 also Parm v. Nat'l Bank of Cal.*, No. 4:14-cv-00320-HLM, Doc. 46, Order, (N.D. Ga. May 20, 2015) (concluding that the identical agreement only allows a choice of administrator; it requires tribal involvement); *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.").[9]

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

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

arbitration to be "administer[ed]" by a non-tribal organization is if the words "conducted" and "administered" mean two different things. Further, if CashCall were correct that, under the Western Sky agreement, the consumer may choose any arbitration organization to conduct the arbitration, then the language requiring that an authorized representative of the Tribe conduct the arbitration would be surplusage. *See Westport Ins. Corp. v. Tuskegee Newspapers, Inc.*, 402 F.3d 1161, 1166 (11th Cir. 2005) ("Each word is deemed to have some meaning, and none should be assume to be superfluous. . . . A court will attempt to give meaning and effect, if possible, to every word and phrase in a contract . . . and a construction which neutralizes any provision of a contract should never be adopted if the contract be so construed as to give effect to all the provisions.") (internal quotations and citations omitted).

CashCall's attempts to rescue its nonsensical interpretation run headlong into 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." CashCall Br. 31 (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 interpretation). The "last antecedent rule" provides that "relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote." *Bingham, Ltd. v. U.S.*, 724 F.3d 921, 925 n.3 (11th Cir. 1984). 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. Doc. 54-2, at 6. 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 bizarre 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 consumer 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'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 the terms of those arbitration agreements cannot be carried out, they cannot be rewritten 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); *Inetianbor*, 768 F.3d at 1353-54.

And if enforced, but not according to its terms, courts stand ready to vacate any resulting award. *See Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 349 (4th Cir. 2008) ("An arbitration award may be vacated if it fails to draw its essence from the controlling agreement."); *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25

F.3d 223, 226 (4th Cir. 1994) ("Arbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated."). If, as they are required to by law, AAA or JAMS attempts to administer the arbitration according to the contract's requirements, they will find that no such arbitration can be conducted. But if they ignore the contract's express limitations—if they appoint their own arbitrator and apply their own rules—any decision the arbitrator reached would be void because the arbitration would not be conducted in accordance with the terms of the agreement. *See id.* Regardless, AAA and JAMS would still be prohibited, under the terms of agreement, from applying any state or federal law.

For this reason, it is irrelevant that AAA and JAMS have decided to ignore the terms of the arbitration agreement and accept arbitrations involving disputes with Western Sky. Indeed, this would not be the first time that AAA has accepted arbitration demands that later turned out to be invalid. *E.g.*, *New England Cleaning Servs., Inc. v. Am. Arbitration Ass'n*, 199 F.3d 542 (1st Cir. 1999). The actions of AAA and JAMS cannot justify this Court's departure from the contract's controlling language—which makes clear that it is impossible to compel

arbitration consistent with "the contractual rights and expectations of the parties." *Stolt-Nielsen*, 559 U.S. at 682 (internal quotation marks omitted).

B. Section 5 of the FAA Does Not Save the Agreement Because Tribal Involvement Is Integral to the Delegation Clause and Agreement to Arbitrate.

1. This Court has repeatedly held that § 5 of the FAA does not apply where the designated forum is integral to the agreement to arbitrate.

Stuck with an unenforceable delegation clause and arbitration agreement, CashCall makes the obviously precluded argument that § 5 of the FAA requires a court to rewrite an arbitration agreement until it is enforceable, regardless of the intent of the parties. CashCall Br. 43-46. In relevant part, § 5 provides that

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; . . . or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators[.]

9 U.S.C. § 5.

As CashCall acknowledges, this Court has repeatedly and consistently held that where the arbitral forum designated in the

agreement is integral to the parties' agreement to arbitrate, § 5 simply does not apply. *Inetianbor*, 768 F.3d at 1350; *Brown*, 211 F.3d at 1222; *see, e.g.*, *Flagg v. First Premier Bank*, __ Fed. App'x __, 2016 WL 703063, at *1 (11th Cir. Feb. 23, 2016); *Beverly Enters. Inc. v. Cyr*, 608 Fed. App'x 924, 925 (11th Cir. 2015). *See also Jackson*, 764 F.3d at 780 (rejecting the same argument CashCall makes here (at 44) regarding *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787 (7th Cir. 2013)). Where a specific type of arbitration is an integral part of the agreement, its nonexistence is not a "lapse" under § 5 and simply appointing a different arbitrator or sending the dispute to a different forum is not consistent with the intent of the parties. *See Stolt-Nielsen*, 559 U.S. at 682 (arbitration must be consistent with the "contractual rights and expectations of the parties") (internal quotation marks omitted; *Inetianbor*, 768 F.3d at 1350.

Because it is settled law in this Circuit that § 5 does not operate where a particular arbitral forum is integral to the parties' decision to arbitrate, CashCall's argument must fail.

2. Tribal involvement is integral to the delegation clause and agreement to arbitrate.

In *Inetianbor*, this Court conducted a thorough analysis of whether tribal involvement was integral to the Western Sky agreement to arbitrate and concluded that it was. *Inetianbor*, 768 F.3d at 1350-52. The difference between Mr. Parnell's Western Sky agreement and the one at issue in *Inetianbor*—the added reference to administration by AAA and JAMS—does not warrant a different result.

Inetianbor explained that, "[i]t is clear that the parties . . . intended the forum selection clause," requiring the participation of the Tribe, "to be a central part of the agreement to arbitrate." *Id.* at 1350. Indeed, the "selection of the Tribe as the exclusive arbitral forum pervades the entire arbitration agreement," *id.* at 1352—nearly every paragraph of the arbitration contract includes a reference to the Tribe. Doc. 54-2, at 4-6. In reaching the same conclusion as *Inetianbor*, the Seventh Circuit agreed that the parties "did not agree to arbitration under any and all circumstances." *Jackson*, 764 F.3d at 781. They agreed "only to arbitration under carefully controlled circumstances"—"under the watchful eye of a legitimate governing tribal body"—"circumstances that never existed and for which a substitute cannot be

constructed." *Id.* To enforce Western Sky's arbitration agreement, this Court would have to override the intent of the parties, ignore nearly all of the contract's provisions, and rewrite the agreement to allow for arbitration without the participation of the Cheyenne River Sioux Tribe. It cannot do so. *Inetianbor*, 768 F.3d at 1354.

CashCall's argument that the agreement's severability provision is evidence that the parties intended to go forward with arbitration regardless of tribal involvement is foreclosed by *Inetianbor*. CashCall Br. 39. In *Inetianbor*, this Court rejected that precise argument, explaining that because the requirement of tribal involvement "pervades the entire arbitration agreement, including the paragraph labeled 'Agreement to Arbitrate,'" it is an "essential part" of the agreement to arbitrate and cannot be severed. *Inetianbor*, 768 F.3d at 1352-53 (relying on Restatement (Second) of Contracts § 184(1) and distinguishing *Barras*, 685 F.3d 1269).

CashCall's reliance on the survival provision—which clarifies that the arbitration agreement survives termination of the account, bankruptcy, and transfer—fares no better. CashCall Br. 40. The survival clause has no bearing on the attributes of the arbitration itself,

only whether the agreement continues to be valid following certain events. *See Stevens v. GFC Lending, LLC*, 138 F. Supp. 3d 1345 (N.D. Ala. 2015) (explaining that a broad survival clause does not expand the scope of an arbitration agreement and declining to compel arbitration). Therefore, it does not change the fundamental fact that the parties only agreed to tribal arbitration, and no other forms of arbitration. CashCall cites no authority endorsing its view that survival clauses matter to the question whether unenforceable aspects of arbitration agreements are integral to those agreements.

The notion that Mr. Parnell must go to arbitration because "the parties have not expressly stated that the contractually designated forum is exclusive of all other forums" is, like CashCall's severability clause argument, precluded by *Inetianbor*. CashCall Br. 42. In *Inetianbor*, CashCall also argued that the Western Sky agreement lacked an exclusivity clause. *Inetianbor*, 768 F.3d at 1351. This Court, however, rejected that argument, holding that the clause stating that the arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative" amounts to a statement of exclusivity. *Id.*

The addition of the ability to have AAA or JAMS administer the arbitration does not alter the analysis. As explained above, the fact that another organization may administer an arbitration does not make the requirement that the arbitration be conducted by a tribal representative any less mandatory or exclusive. Nor does it eliminate the pervasive requirement of tribal involvement in any dispute resolution. The arbitration agreement is, as it was in *Inetianbor*, dripping with references to the Tribe, its rules, and its laws.

CashCall is "saddled with the consequences of the [contract] as drafted," and this Court should not reward CashCall and Western Sky's attempts to avoid accountability for their illegal lending scheme by rewriting its arbitration agreement to make it more palatable. *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 205 (3d Cir. 2010).

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,162 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 2013 in 14 point Century Schoolbook font.

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June 3, 2016

CERTIFICATE OF SERVICE

I certify that on June 3, 2016, I electronically filed the foregoing Appellee Joshua Parnell's Brief via the CM/ECF system and served all parties or counsel via CM/ECF system.

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