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 MOTION FOR SUMMARY DISPOSITION

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September 22, 2016

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE 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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Murphy, Harold L., United States District Court Judge

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Parnell, Joshua, Plaintiff-Appellee

Public Justice, P.C., Counsel for Plaintiff-Appellee

Reddam, John P., Related to Defendant-Appellee

Skadden, Arps, Slate, Meagher & Flom LLP, Counsel for Defendant-Appellant

Webb, Martin A., Unserved/Dismissed Defendant in District Court

Western Sky Financial, LLC, Unserved/Dismissed Defendant in District Court

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APPELLEE JOSHUA PARNELL'S MOTION FOR SUMMARY DISPOSITION

Because this Court's recent decision in *Parm v. National Bank of California, N.A.*, __ F.3d __, No. 15-12509, 2016 WL 4501661 (Aug. 29, 2016), resolves the issues raised in this case, Appellee Joshua Parnell respectfully requests that this Court summarily dispose of this appeal by affirming the decision of the district court and forgoing oral argument. *See U.S. v. Starks*, 579 Fed. App'x 725, 726 (11th Cir. 2014) ("Summary disposition is appropriate . . . where the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case[.]") (internal quotations removed). As explained in more detail below, after *Parm*, there are no substantial questions remaining on this appeal and, thus, summary disposition is appropriate. Counsel for Appellee Mr. Parnell contacted counsel for Appellant CashCall, Inc., and CashCall does not consent to this motion.[1]

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[1] This Court's August 29, 2016, decision in *Parm v. National Bank of California, N.A.*, is attached as Appendix A, and the district court's decision in this case is attached as Appendix B. Because briefing on the merits has already been completed in this case, this Motion liberally references the arguments articulated in more detail in the briefing.

Parm addressed a legal issue indistinguishable from the one at issue here: Both *Parm* and this case involve consumer claims regarding the same illegal Western Sky Financial, LLC, lending scheme and raise the question whether the same iteration of the Western Sky arbitration agreement and its delegation clause are enforceable. *Parm*, No. 15-12509, at *2-*4; Appellee Br. 5, 11, 14-16. *Parm* held that the Western Sky delegation clause—which purports to require disputes about the enforceability of the arbitration agreement to be decided by the arbitrator—as well as the arbitration agreement as a whole, are not enforceable. *Parm*, No. 15-12509, at *14. Interpreting the contract under Georgia law, which also applies here, *Parm* reasoned that even though the contract permits AAA, JAMS, or another arbitration organization to *administer* the arbitration, the terms of the agreement still require an authorized tribal representative to *conduct* the arbitration—"administer" and "conduct" are not synonymous in the context of the Western Sky agreement. *Id.* at *7-*12. Because this Court had already recognized in *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1352-54 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015), that the tribe referenced in the Western Sky agreement does not authorize

any representatives to conduct arbitration, the arbitration scheme required by the agreement (tribal arbitration) does not exist. *Parm*, No, 15-12509, at *7. Further, *Parm* held that because tribal involvement in the arbitration process is integral to the agreement, no substitute arbitrator could be appointed under § 5 of the Federal Arbitration Act. *Id.* at *12-*14. Because the terms of the agreement require arbitration before an arbitrator who does not exist and who could not be substituted, *Parm* found that neither the delegation clause, nor the agreement as a whole are enforceable, and the plaintiff was permitted pursue her claim in court. *Id.* at *14.

This case involves the identical delegation clause and arbitration agreement, and Mr. Parnell raises the very same arguments embraced by *Parm* as to why they are unenforceable. Appellee's Br. 48-63 (arguing that the terms of the agreement require tribal arbitration, which *Inetianbor* held does not exist, and explaining that § 5 does not apply). As such, *Parm* is binding precedent that controls this case, there are no more issues left to be resolved, and the district court's denial of CashCall's motion to compel arbitration must be affirmed.

Proceeding to oral argument at this juncture would be a waste of the Court's and the parties' time and resources.

In its supplemental authority letter regarding *Parm*, CashCall nevertheless attempts to distinguish this case from *Parm*, but CashCall is just grasping at straws. *See Parnell v. CashCall, Inc.*, No. 16-11369, Sept. 8, 2016, Letter of William J. Holley, II, to David Smith (hereinafter "CashCall 28(j) Letter"). CashCall does not—and cannot—distinguish the agreements or the applicable law. Rather, in attempting to get out from under *Parm*, CashCall first reiterates its specious argument that Mr. Parnell failed to sufficiently raise a challenge to the delegation clause. *Id.* According to CashCall, even though Mr. Parnell expressly articulated a challenge to the delegation clause, that challenge was insufficient because Mr. Parnell argued that the delegation clause was unenforceable for the same reasons that the agreement as a whole is unenforceable: that the agreement required arbitration before an arbitrator who does not exist and cannot be substituted. *Id.* But there is no requirement, and CashCall has pointed to none, that a litigant write his brief less efficiently by repeating his arguments. Mr. Parnell—in his amended complaint, in the district

court briefing, and his appellate briefing—made clear that his arguments applied equally to his challenges to the delegation clause and to the agreement as a whole. *See, e.g.*, Appellee's Br. 28-34; *id.* at 29 (citing delegation clause discussion in district court pleadings). That is all that is required. *Id.* at 29. Indeed, *Parm* itself dispenses with the notion that the two questions cannot be considered together or that both elements cannot be unenforceable for the same reasons: *Parm* conducted the analysis once, then explained that the non-existence of the arbitrator required by the agreement meant that neither the delegation clause nor the arbitration agreement as a whole was enforceable. *See generally Parm*, 15-12509. CashCall's theory would require litigants to nevertheless take a different approach than this Court did in *Parm*, and there is no basis for doing so.

Second, CashCall contends that state unconscionability law does not apply to delegation clauses. CashCall 28(j) Letter. To begin, CashCall's argument is curious given that *Parm* just held that this very delegation clause is not enforceable for the same reasons argued by Mr. Parnell (because the arbitrator does not exist). Even without *Parm*, as Mr. Parnell explained in his brief, the notion that state

unconscionability law does not apply to delegation clauses is directly contrary to this Court's precedent and is just flat-out wrong. Appellee's Br. 23-28; *see In re Checking Account Overdraft Litig. MDL No. 2036 (Given)*, 674 F.3d 1252, 1255 (11th Cir. 2012) ("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).

Further, CashCall's preferred result would be absurd. Mr. Parnell argues that a delegation clause requiring that the question of the arbitration agreement's enforceability be heard before an arbitrator who does not exist is unconscionable. *See* Appellee's Br. 30-32. If CashCall got its way, the delegation clause would nevertheless be enforceable, meaning that Mr. Parnell would be forced to take his dispute over the enforceability of the arbitration agreement to a forum that does not exist before he could proceed, a result that leaves Mr. Parnell without *any* forum for his claims. *Id.* at 31-32. As *Parm* held, that result is unacceptable. *Parm*, No 15-12509, at *12 ("[T]he arbitration agreement's forum selection clause mandates the use of an illusory and unavailable arbitral forum").

Finally, CashCall contends that the fact that this case, unlike *Parm*, includes evidence that AAA and JAMS are conducting arbitration of consumer claims related to the Western Sky somehow changes the legal analysis as to whether the contract language permits it. CashCall 28(j) Letter. CashCall does not explicate its rationale for maintaining that position after *Parm*, and it is hard to imagine what that rationale would be. As *Parm* recognized, arbitration agreements are only enforceable "in accordance with their express terms," and the terms of the Western Sky agreement, as *Parm* explicitly held, do not authorize AAA or JAMS to conduct arbitration of related disputes. *Parm*, No. 15-12509, at *14. That AAA and JAMS are nevertheless conducting such arbitrations does not and cannot change what the language of the contract authorizes. And, as Mr. Parnell explained in his brief, the agreement, not AAA or JAMS, controls which and how disputes are be arbitrated, and courts have not hesitated to void arbitration results where the arbitration was not authorized by the agreement. Appellee's Br. 56-58. Here, *Parm* held that AAA and JAMS are not authorized to conduct Western Sky-related arbitrations under

the terms of the agreement, and AAA's and JAMS's actions are irrelevant to the question of what the agreement authorizes.

CONCLUSION

For these reasons, the Court should grant the motion for summary disposition and cancel oral argument.

Respectfully submitted,

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September 22, 2016

CERTIFICATE OF SERVICE

I certify that on September 22, 2016, I electronically filed the foregoing Appellee Joshua Parnell's Motion for Summary Disposition via the CM/ECF system and served all registered counsel via CM/ECF system.

I also served the following counsel for Appellant via email:

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/s/ Leah M. Nicholls
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