No. _____

IN THE
Supreme Court of the United States

CASHCALL, INC.,

Petitioner,

v.

ABRAHAM INETIANBOR,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether there is a non-textual "integrality exception" to the mandatory requirement in the Federal Arbitration Act ("FAA") that a substitute arbitrator "shall" be appointed by the court whenever the parties' chosen arbitrator is unavailable for "any ... reason"? 9 U.S.C. § 5.

II. Whether a court may void an entire arbitration clause—and force the parties to litigate in court—despite the fact that the parties included a severance provision that, if applied, would render the arbitration clause enforceable?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner makes the following disclosure:

CashCall, Inc. is a privately held corporation. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Petitioner CashCall, Inc. ("CashCall") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion (Pet. App. 1a) is reported at 768 F.3d 1346. The Eleventh Circuit's denial of panel rehearing and rehearing en banc (Pet. App. 70a) is unreported. The district court's order granting Respondent Abraham Inetianbor's ("Mr. Inetianbor") renewed motion for reconsideration (Pet. App. 22a) is reported at 962 F. Supp. 2d 1303. The district court's order compelling arbitration (Pet. App. 36a) is unreported but available at 2013 WL 2156836. The district court's order granting Mr. Inetianbor's motion to reopen case (Pet. App. 48a) is unreported but available at 2013 WL 1325327. The district court's original order compelling arbitration (Pet. App. 59a) is reported at 923 F. Supp. 2d 1358.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit entered its judgment on October 2, 2014, and denied a timely petition for rehearing en banc on December 1, 2014.

STATUTORY PROVISION INVOLVED

The Federal Arbitration Act ("FAA") provides, in pertinent part:

> 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; but if no method be provided therein, … 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 … .

9 U.S.C. § 5.

INTRODUCTION

This case presents two important questions about what courts must do when the parties' contractually-chosen arbitrator is deemed unavailable to hear their dispute. The first question is whether courts must follow the statutory requirements of the FAA and appoint a substitute arbitrator, or instead void the entire arbitration clause by invoking a judicially-created "integrality exception" that finds no support in the text of the FAA and also conflicts with this Court's jurisprudence. *See* Section I, below. The second question is whether a court can void the entire arbitration clause and force the parties to litigate their dispute in court despite the fact that the parties included a severance provision that, if applied, would

render the arbitration clause enforceable. *See* Section II, below.

These questions have split the courts of appeals, and there is significant risk of further confusion unless this Court resolves these issues promptly.

The parties here agreed in the text of their contract to arbitrate all of their disputes, but the arbitral forum they selected in their contract was later found to be unavailable. The FAA dictates that the unavailability of the parties' selected arbitrator does not render the entire arbitration clause void. Rather, FAA § 5 states that "if for *any* … reason there shall be a lapse in the naming of an arbitrator … or in filling a vacancy, then upon the application of either party to the controversy the court *shall* designate and appoint an arbitrator." 9 U.S.C. § 5 (emphases added). The Eleventh Circuit held that there is an exception to this mandatory language. According to the Eleventh Circuit, where the identity of the arbitral forum is "integral" to the arbitration clause, that forum's unavailability voids the entire agreement to arbitrate—and thus forces the parties to litigate in court.

On the question of whether there is an "integrality exception" to FAA § 5, the Eleventh Circuit expressly acknowledged that its decision directly conflicts with a recent decision from the Seventh Circuit, which thoroughly analyzed the issue and concluded that neither the text nor the purpose of the FAA supports such an exception to § 5's mandatory requirement that the courts appoint a substitute arbitrator. *Green v.*

U.S. Cash Advance Ill., LLC, 724 F.3d 787, 790-92 (7th Cir. 2013). Although several courts had adopted the so-called integrality exception before *Green*, the Eleventh Circuit's decision is the first court of appeals opinion to reject the conclusion of *Green*, thus demonstrating that a direct conflict exists among the circuits on this important issue of arbitration law.

The Eleventh Circuit's opinion also conflicts with this Court's ruling in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585-87 (2008). In *Hall Street*, this Court addressed an attempt to create an exception by contract to the judicial review sections of the FAA, 9 U.S.C. §§ 10, 11. This Court rejected the very same argument relied on by the Eleventh Circuit below—namely, that courts can give effect to parties' efforts to avoid the FAA's mandatory requirements.

Further, the Eleventh Circuit deepened another circuit split and again contravened this Court's precedent by relying on the unavailability of the arbitral forum to void the parties' entire arbitration clause despite the inclusion of a severance provision. Other courts of appeals have honored severance provisions by striking unavailable or unenforceable arbitration terms and then enforcing the remainder of the arbitration clause. By refusing to do so here, the Eleventh Circuit also ignored this Court's admonition that courts cannot deny arbitration unless there is no possible reading of the parties' arbitration clause that would embrace the dispute.

* * *

The unavailability of a contractually-selected arbitral forum is a common occurrence, as evidenced by the many lower court decisions on point. *See* p. 23 below. As the Eleventh Circuit's rejection of the Seventh Circuit's ruling in *Green* establishes, the courts of appeals will continue to disagree over these issues unless this Court provides uniformity. Given the split in circuit authority and the conflict between the Eleventh Circuit's holding and this Court's precedent, this petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

A. Mr. Inetianbor Signed A Comprehensive Arbitration Clause.

In January 2011, Mr. Inetianbor received an unsecured installment loan from non-party Western Sky Financial, LLC ("Western Sky"), which is owned by an enrolled member of the Cheyenne River Sioux Tribe ("CRST" or "Tribe") and operates on the Cheyenne River Indian Reservation in South Dakota. Pet. App. 8a, 59a.

Before receiving the loan, Mr. Inetianbor signed a contract ("Loan Agreement") that provided the terms of repayment and also included an arbitration clause ("Arbitration Clause"). The Arbitration Clause stated that any 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." Pet. App. 3a. Arbitration would be conducted by Mr. Inetianbor's choice of either "(i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council." Pet. App. 23a. The Arbitration Clause stated that Mr. Inetianbor does not have to pay the arbitration filing fee or any fees charged by the arbitrator, C.A. App. Tab 53-2 at 6,[1] and that Mr. Inetianbor may participate in the arbitration by phone or video conference, Pet. App. 61a.[2]

The Arbitration Clause contains a severance provision ("Severance Provision") stating: "If any of this Arbitration Provision is held invalid, the remainder shall remain in effect[.]" C.A. App. Tab 53-2 at 7. The Arbitration Clause also contains a survival provision ("Survival Provision") to ensure that any and all disputes are channeled away from litigation and into arbitration.[3]

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[1] "C.A. App." refers to the "Appendix to Principal Brief of Appellant CashCall, Inc." filed in the Eleventh Circuit.

[2] The Loan Agreement also permitted Mr. Inetianbor to opt out of arbitration by emailing Western Sky within sixty days, but he did not exercise this right. C.A. App. Tab 53-2 at 7.

[3] The Survival Provision states: "This Arbitration provision will survive: (i) termination or changes in this Agreement, the Account, or the relationship between us concerning the Account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of my Note, or any amounts owed on my account, to any other person or entity. This Arbitration provision benefits and is binding upon you, your respective heirs, successors and assigns. It also benefits and is binding upon us, our successors and assigns, and related third parties. The Arbitration Provision continues in full force and effect, even if your obligations have

Western Sky later transferred Mr. Inetianbor's loan to non-party WS Funding, LLC, which assigned Petitioner CashCall as the servicer. Pet. App. 2a, 44a.[4]

B. The District Court Initially Enforced The Arbitration Clause, Then Ultimately Concluded That The Arbitral Forum Was Unavailable.

In 2012, Mr. Inetianbor filed an action in Florida state court, alleging that CashCall had defamed his character by misrepresenting his creditworthiness to credit reporting agencies and had violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and Florida's usury laws. Pet. App. 61a. CashCall timely removed the action to the United States District Court for the Southern District of Florida and moved to dismiss or stay the case in favor of arbitration pursuant to the FAA in accordance with the Arbitration Clause. Pet. App. 61a-62a.

The district court initially granted CashCall's motion to compel arbitration, concluding that the

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been paid or discharged through bankruptcy. The Arbitration Provision survives any termination, amendment, expiration, or performance of any transaction between you and us and continues in full force and effect unless you and we otherwise agree in writing." C.A. App. Tab 53-2 at 6-7.

[4] The Arbitration Clause can be enforced by "the holder of the note," as well as "any marketing, servicing, and collection representatives and agents." Pet. App. 44a.

Arbitration Clause covered all of Mr. Inetianbor's claims and that Mr. Inetianbor had failed to show why the Arbitration Clause was not enforceable. Pet. App. 65a-68a.

Mr. Inetianbor then filed a motion to reopen the case, arguing that the arbitral forum was unavailable because a CRST Magistrate Judge had stated in a letter answering Mr. Inetianbor's inquiry that the Tribe "does not authorize Arbitration as defined by the American Arbitration Association ('AAA')." Pet. App. 49a. Mr. Inetianbor asserted that the Arbitration Clause required the Tribe to be involved in arbitration, and therefore the contractually-designated arbitral forum was unavailable. Pet. App. 50a.

The district court agreed that the designated forum was unavailable because the Arbitration Clause required that arbitration be conducted by an authorized representative of the Tribe. Pet. App. 50a. Citing FAA § 5, the district court acknowledged that the "unavailability of an arbitrator named in an arbitration agreement does not necessarily void the agreement." Pet. App. 50a-53a. Nevertheless, the district court concluded that there is an exception to FAA § 5 where the choice of forum "is an integral part of the agreement to arbitrate." Pet. App. 50a (internal quotation marks omitted). The district court then *sua sponte* analyzed the Loan Agreement to determine whether the tribal arbitral forum here was indeed "integral" to the agreement to arbitrate, such that the forum's unavailability would void the entire Arbitration Clause. Pet. App. 53a-56a.

In its analysis, the district court noted that the Arbitration Clause stated that (1) it "shall be governed by the law of the Cheyenne River Sioux Tribe"; (2) arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules"; and (3) arbitration would be conducted by either a Tribal Elder or a panel of Tribal council members. Pet. App. 53a-55a. Given these contractual terms, the district court found that the Arbitration Clause "specifically names the arbitral forum and details whom the parties may select as their arbitrator(s)." Pet. App. 56a. Concluding, based solely on the text of the Arbitration Clause, that "the choice of arbitrator was as important a consideration as the agreement to arbitrate itself," the district court held that the tribal arbitral forum was integral to the Arbitration Clause. Pet. App. 56a. This was despite the fact that Mr. Inetianbor plainly did not want to arbitrate before the tribe or its members, and that CashCall had volunteered to arbitrate before another entity, such as the AAA or JAMS. Pet. App. 53a. The district court concluded that the unavailability of the parties' chosen arbitrator voided the entire Arbitration Clause, FAA § 5 notwithstanding. Pet. App. 56a.

CashCall then filed a renewed motion to compel arbitration, submitting another letter from the CRST Magistrate Judge clarifying that while the Cheyenne River Sioux Tribal Court itself "does not provide arbitration," arbitration as "a contractual agreement ... is permissible." Pet. App. 41a. CashCall also submitted

evidence showing that Robert Chasing Hawk, Sr., a Tribal Elder of the Cheyenne River Sioux Tribe, had agreed to serve as arbitrator. Pet. App. 41a. The district court found that the arbitral forum was available and again ordered the parties to arbitrate. Pet. App. 41a, 46a.

The district court then reversed itself again after Mr. Inetianbor filed two motions for reconsideration, arguing that Mr. Chasing Hawk had indicated that he was not an "authorized representative" of the CRST, as the district court believed the Arbitration Clause required. Pet. App. 30a-31a. The district court concluded that Mr. Chasing Hawk "is not, and does not purport to be, conducting arbitration as an authorized representative of the Tribe," and therefore arbitration could not be conducted as required by the Arbitration Clause. Pet. App. 32a.[5] Referencing its previous order finding that the selection of a tribal arbitrator was an "integral" part of the Arbitration Clause, *see* Pet. App. 29a, the district court concluded that "[b]ecause the Tribe is not available to arbitrate the parties' claims in this action, the arbitration agreement is void" in its entirety. Pet. App. 34a.

[5] The district court also found, as CashCall acknowledged, that the CRST does not have "consumer dispute rules" for use in arbitration. Pet. App. 33a-34a. However, the district court and the Eleventh Circuit both rested their integrality holdings on the unavailability of the arbitral forum, not of the rules. *See* Pet. App. 13a, 33a-34a.

C. The Eleventh Circuit Affirmed, Holding That There Is An Integrality Exception To FAA § 5.

CashCall appealed the denial of the motion to compel arbitration, and the Eleventh Circuit affirmed. Pet. App. 1a-21a. The Eleventh Circuit first addressed what happens when the parties' selected arbitral forum is allegedly unavailable. The court of appeals agreed with the district court that there is an exception to FAA § 5's requirement that the court "shall" appoint a substitute arbitrator whenever the parties' selected arbitrator has failed "for any ... reason." Pet. App. 5a. Relying on a prior Eleventh Circuit case, *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000), the court of appeals held that "the failure of the chosen forum precludes arbitration whenever the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern." Pet. App. 5a-6a (internal quotation marks and alterations omitted).

The Eleventh Circuit noted that "[t]his rule is not without controversy," but expressly declined to follow a recent Seventh Circuit decision that had "criticiz[ed] and reject[ed] the integral provision rule." Pet. App. 6a (citing *Green*, 724 F.3d at 790-92).

To determine whether the tribal arbitral forum was "integral" here, the Eleventh Circuit looked at "how important the term was to one or both of the parties at the time they entered into the agreement." Pet. App. 7a. The Eleventh Circuit noted that the Arbitration

Clause "expressly provides 'that any Dispute … will be resolved by Arbitration, which *shall be* conducted *by* the Cheyenne River Sioux Tribal Nation by an authorized representative.'" Pet. App. 8a (court's emphases). Additionally, "the selection of arbitrators" and a "number of other provisions of the agreement" all reference the Tribe or the tribal forum. Pet. App. 8a. The court of appeals concluded that the Arbitration Clause "evidences an intent to have a specific type of arbitration in a particular arbitral forum," and accordingly the tribal forum was an integral part of the Arbitration Clause. Pet. App. 11a. In its analysis, the Eleventh Circuit disregarded the facts of record that CashCall had informed the district court that the tribal arbitral forum was not integral to its agreement and that Mr. Inetianbor plainly did not want to arbitrate in the tribal forum. Pet. App. 53a.

The court of appeals held that it must "give effect to the intent of the parties," and accordingly, "the only way to enforce the [Arbitration Clause] in accordance with the terms of the agreement is to compel arbitration before an authorized representative of the Tribe." Pet. App. 11a (internal quotation marks and citation omitted).

The Eleventh Circuit then addressed whether the tribal forum was indeed unavailable. Pet. App. 13a-15a. The court concluded that "the Tribe does not involve itself in arbitration between private parties at all," and thus arbitration as called for by the Arbitration Clause was unavailable. Pet. App. 15a.

The Eleventh Circuit briefly considered CashCall's argument that the Severance Provision showed that "the parties intended the general agreement to arbitrate to be enforceable even if the limitations contained in the [Arbitration Clause] are unenforceable." Pet. App. 11a-12a. The Severance Provision states, "If any of this Arbitration [Clause] is held invalid, the remainder shall remain in effect[.]" C.A. App. Tab 53-2 at 7. Relying on the Restatement (Second) of Contracts, the Eleventh Circuit held that a provision cannot be severed when it is "an essential part of the agreed exchange." Pet. App. 12a (emphasis omitted). Having already held that the tribal forum was an "integral part" of the Arbitration Clause for FAA § 5 purposes, it was a foregone conclusion that the forum was also "an essential part" of the Arbitration Clause for purposes of the Restatement's rule on severance provisions. Pet. App. 12a. Accordingly, the Eleventh Circuit refused to enforce the Severance Provision, finding that it did "not aid in [the court's] interpretation" of the Arbitration Clause. Pet. App. 12a.

Therefore, having found that the tribal arbitral forum was both integral and unavailable, and that the Severance Provision was irrelevant, the Eleventh Circuit affirmed the district court's conclusion that the unavailability of the contractually-designated arbitral forum rendered the entire Arbitration Clause void, despite FAA § 5. Pet. App. 15a-16a.

On December 1, 2014, the Eleventh Circuit denied CashCall's timely petition for panel rehearing and rehearing en banc. Pet. App. 70a-71a.

REASONS FOR GRANTING THE PETITION

This case meets all of this Court's criteria for granting certiorari. The courts of appeals have issued decisions in direct conflict about whether the unavailability of the arbitrator named in a contract renders the entire arbitration clause void, or whether FAA § 5 instead requires courts to appoint a substitute arbitrator. One court of appeals on each side of the split has expressly rejected the other side's analysis. This case provides an excellent vehicle to resolve this issue because the opinion below openly acknowledged that it was refusing to follow the Seventh Circuit's recent decision on this very same question.

The courts of appeals have also issued conflicting opinions about whether courts can disregard a severance provision within an arbitration clause, even when this results in voiding the entire agreement to arbitrate. By refusing to enforce the Severance Provision here, the Eleventh Circuit also contravened this Court's oft-repeated admonition that arbitration can be denied only if the court can say with positive assurance that the parties' arbitration clause does not cover the dispute.

These are both exceptionally important issues that will continue to confound courts throughout the country. Further, despite this Court's recent rulings

consistently enforcing the FAA, there remains some "judicial resistance to arbitration," which is the precise harm that Congress designed the FAA to prevent. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Unless this Court intervenes, there is a serious risk that some courts will continue to void entire arbitration clauses merely because a particular detail cannot be enforced—even though Congress provided clear rules to the contrary, and even when the parties provided clear instructions to the contrary by including severance and survival provisions. Accordingly, the Court should grant certiorari.

I. The Circuit Courts Are In Open Conflict About Whether There Is An "Integrality" Exception To The FAA's Mandate That A Substitute Arbitrator "Shall" Be Appointed Whenever The Parties' Chosen Arbitrator Is Unavailable.

1. Under FAA § 5, the unavailability of the parties' contractually-chosen arbitrator does not void the entire arbitration clause. Rather, "if for *any* ... reason there shall be a lapse in the naming of an arbitrator … or in filling a vacancy," then "the court *shall* designate and appoint" a substitute. 9 U.S.C. § 5 (emphases added).

The Eleventh Circuit held that there is an exception to the mandatory language in FAA § 5. If the arbitral forum is "integral" to the arbitration clause, then that forum's unavailability renders the entire arbitration clause unenforceable, and the parties must instead litigate in court. Pet. App. 5a-6a. For want of a forum,

the Arbitration Clause was lost. In reaching this conclusion, the Eleventh Circuit acknowledged that its decision was contrary to a recent ruling by the Seventh Circuit, stating: "This rule is not without controversy. *See Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 790-92 (7th Cir. 2013) (criticizing and rejecting the integral provision rule)." Pet. App. 6a.

In *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013), the Seventh Circuit concluded that there is no such integrality exception to FAA § 5. *See id.* at 789-93. *Green* was the first decision in which a federal court of appeals had thoroughly analyzed this question, and the decision below by the Eleventh Circuit is the first time that a court of appeals has addressed this issue since *Green*.

In *Green*, the parties' contract called for arbitration before the National Arbitration Forum ("NAF"), which no longer accepted consumer disputes when the case began. *Id.* at 789. The *Green* plaintiffs argued that the contractual forum was "integral" to the arbitration clause, and thus the courts could not appoint a substitute arbitral forum. *Id.* The Seventh Circuit rejected that argument and held that in FAA § 5, "Congress ... provided that a judge can appoint an arbitrator when for 'any' reason something has gone wrong." *Id.* at 791. Given that absolute language, the *Green* court was "skeptical" of any argument that "allow[s] a court to declare a particular aspect of an arbitration clause 'integral' and on that account scuttle arbitration itself." *Id.*

Green acknowledged that other courts—including the Eleventh Circuit—had assumed that § 5 contains an "integral part" exception. *See id.* at 790-92 (citing *Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012); *In re Saloman Inc. Shareholder's Derivative Litig.*, 68 F.3d 554, 561 (2d Cir. 1995); *Brown*, 211 F.3d at 1222); *see also* Pet. App. 6a n.1 (listing other decisions). *Green* observed, however, that all of those cases rested on dicta from a single unpersuasive district court case from within the Seventh Circuit: *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359 (N.D. Ill. 1990). *Green* concluded that *Zechman* was incorrect and overruled it, *see* 724 F.3d at 792, thereby undermining every decision that had created an integrality exception to FAA § 5. Indeed, in its decision below, the Eleventh Circuit held that it was bound to apply the integrality exception because its precedent in *Brown* had assumed its existence. *See* Pet. App. 5a-6a (citing *Brown*, 211 F.3d at 1222). However, *Brown*, which preceded *Green* by more than a decade, did not thoroughly analyze the issue and in fact expressly relied upon the now-overruled *Zechman* case. *See Brown*, 211 F.3d at 1222.

Given the Eleventh Circuit's refusal to follow *Green*, the courts of appeals are in open disagreement, and this Court should step in and resolve the split.

2. The Eleventh Circuit's decision on this issue was erroneous. The text of the FAA contains no such integrality exception, and imposing the exception subjects parties to significant litigation burdens, which is contrary to the purpose of arbitration. As this Court held in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct.

1740 (2011), "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Id.* at 1749. Therefore, the Eleventh Circuit's decision directly undercuts the FAA's "national policy favoring arbitration." *Buckeye Check Cashing*, 546 U.S. at 443.

As *Green* noted, "no court has ever explained what part of the text or background of the [FAA] requires, or even authorizes, such an" integrality exception. 724 F.3d at 792. The language of the FAA is plain and clear: a substitute "shall" be appointed whenever the arbitral forum is unavailable for "any ... reason." 9 U.S.C. § 5. The FAA lists no exceptions, and the Eleventh Circuit identified no textual basis for its integrality test.

Rather, the Eleventh Circuit justified the integrality exception by relying on the broad assertion that arbitration "is a matter of contract" and that courts should enforce arbitration clauses "in accordance with the[ir] terms." Pet. App. 4a-5a (internal quotation marks and emphasis omitted).

This Court rejected that very same rationale in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). In *Hall Street*, the plaintiff argued that parties should be allowed to expand by contract the grounds for judicial review of arbitration awards beyond those provided by the FAA "because arbitration is a creature of contract, and the FAA is motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered." *Id.* at

585 (internal quotation marks omitted) (alteration in original). In rejecting that argument, this Court acknowledged that "the FAA lets parties tailor some, even many, features of arbitration by contract," but "the FAA has textual features at odds with enforcing a contract [that] expand[s] judicial review following the arbitration." *Id.* at 586 (citation omitted). In particular, FAA § 9 states that courts "must grant" confirmation of any arbitral award unless it is "vacated, modified, or corrected as prescribed in sections 10 and 11," which "unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions" in § 10 or § 11 applies. *Id.* at 587 (internal quotation marks omitted).

FAA § 5 contains similar mandatory language: the court "*shall* designate and appoint an arbitrator" if "for *any* … reason there shall be a lapse in the naming of an arbitrator … or in filling a vacancy." 9 U.S.C. § 5 (emphases added). Just as there are no exceptions to § 9's requirements, there are no exceptions to § 5's requirements. Thus, even if the parties here had tried to contract around § 5, they could not have done so any more than the parties in *Hall Street* could contract around § 9, because parties cannot contractually trump or modify the mandatory requirements of the FAA. *See Hall Street*, 552 U.S. at 585-86. As Judge Easterbrook noted for the Seventh Circuit in *Green*, *Hall Street* "tells courts not to add to, or depart from, the standards in the" FAA, and "[a]n 'integral part' proviso to § 5 sounds like the sort of addendum that *Hall Street* forbids." *Green*, 724 F.3d at 791.

Further, in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), this Court re-affirmed the impropriety of imposing exceptions to the FAA's clear text. In *Marmet*, the lower court refused to enforce an arbitration clause covering wrongful-death claims, even though such clauses would be valid under the text of FAA § 2, which outlines the permitted grounds for challenging an arbitration clause. *Id.* at 1203. This Court reversed, holding that § 2's "text *includes no exception* for personal-injury or wrongful-death claims. It requires courts to enforce the bargain of the parties to arbitrate." *Id.* (emphasis added) (internal quotation marks omitted). The same logic applies here when construing the text of § 5.

In addition to being unsupported by the text of § 5, an integrality exception is also antithetical to the purpose of the FAA. Whenever a term of an arbitration provision arguably fails or is missing, parties will have to litigate whether that particular arbitral detail was "integral." As *Green* noted, "[h]ow could a district judge tell what is 'integral' without a trial at which parties testify about what was important to them and lawyers present data about questions such as whether consumers or businesses shifted from arbitration to litigation when the Forum stopped accepting new consumer disputes for resolution? The process would be lengthy, expensive, and inconclusive to boot." 724 F.3d at 792. This process would undermine "the informality of arbitral proceedings [which] is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Concepcion*, 131 S. Ct. at 1749.

In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), this Court rejected just such a requirement to conduct a case-by-case determination: "[I]t would be unwieldy and unsupported by the terms or policy of the [FAA] to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs." *Id.* at 2311-12 (second alteration added). Yet the Eleventh Circuit would impose these burdens pursuant to an exception that is found nowhere in the text of the FAA.

Further, when a court does not hold a trial to determine whether a particular forum was integral, but instead decides the question of integrality based solely on the contract's language, the results can be absurd. For example, the district court and Eleventh Circuit here both concluded that the tribal arbitral forum was an integral part of the parties' agreement to arbitrate, even though *both* parties had disavowed the tribal forum: Mr. Inetianbor plainly did not want to arbitrate in that particular forum, and CashCall had informed the district court that it was willing to arbitrate before AAA or JAMS. Pet. App. 53a. This shows that even without a trial, it is simply unworkable to apply the integrality exception.

Ultimately, regardless of how a court attempts to determine integrality, the results will be unpredictable because contracting parties cannot foresee which factor the court will find to be determinative. The court may base its decision on (1) the number of times that the forum is mentioned in the arbitration clause, *see* Pet.

App. 8a; (2) the presence of seemingly "mandatory" language implying that the forum is exclusive, *see Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006), *abrogated on other grounds as recognized by Atlantic Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 940 (9th Cir. 2010); (3) whether the arbitration clause lists both the forum *and* procedural rules, *see* Pet. App. 10a; or (4) whether the forum became unavailable only *after* the parties signed their contract, *see* Pet. App. 21a. But none of these considerations is relevant under § 5.

Congress designed § 5 to respect and enforce parties' agreements to use "private dispute resolution," and "[c]ourts should not use uncertainty in just how that would be accomplished to defeat the evident choice." *Green*, 724 F.3d. at 793. "[T]he key aspect of the analysis of an agreement to arbitrate is the intent of the parties to arbitrate, not the identity of the arbitrator." *Torrence v. Nationwide Budget Fin.*, 753 S.E.2d 802, 807 (N.C. Ct. App.), *review denied*, 759 S.E.2d 88 (N.C. 2014).

The purpose of § 5 is to prevent the scenario where the unavailability of an arbitral term voids the entire arbitration clause: "Section 5 allows judges to supply details in order to make arbitration work." *Green*, 724 F.3d at 793. By imposing an integrality exception on § 5, the Eleventh Circuit not only split from the Seventh Circuit but also imposed an exception that is not in the text of the FAA and is hostile to the FAA's goal of reducing litigation.

3. This Court's guidance is needed. Not only is there a circuit split, but this issue will continue to arise. The unavailability of parties' selected arbitral fora is a common occurrence. For example, in the wake of the NAF's decision to stop hearing consumer disputes, there has been significant litigation about arbitration clauses that listed the NAF as the arbitral forum; ever since, the issue "has vexed courts across the country." *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 972 (D. Minn. 2012); *see also*, *e.g.*, *Green*, 724 F.3d at 791; *Khan v. Dell, Inc.*, 669 F.3d 350, 354-55 (3d Cir. 2012); *In re Liberty Refund Anticipation Loan Litig.*, No. 12-cv-2949, 2014 WL 3639189, at *3-4 (N.D. Ill. July 23, 2014); *GGNSC Lancaster v. Roberts*, No. 13-cv-5291, 2014 WL 1281130, at *6-7 (E.D. Pa. Mar. 31, 2014); *Selby v. Deutsche Bank Trust Co. Ams.*, No. 12-cv-1562, 2013 WL 1315841, at *10-11 (S.D. Cal. Mar. 28, 2013); *Torrence*, 753 S.E.2d at 807.

Further, the integrality exception, if allowed to continue as a viable legal theory, could be raised in cases where *any* detail about the arbitral forum or rules is missing or unenforceable. Under the Eleventh Circuit's holding, all of those arbitration clauses are at risk of being voided in their entirety, with the parties forced to litigate in court. Even when such arguments are ultimately found to be meritless (*i.e.*, the details are not "integral"), this process will consume judicial and litigation resources, and thereby eliminate the benefits of having a streamlined arbitration process. *See Concepcion*, 131 S. Ct. at 1749. This cannot be squared with the text or purpose of the FAA, nor with this Court's precedent.

4. If the Eleventh Circuit had properly applied FAA § 5, it would have ordered the district court to appoint a substitute arbitrator. *See, e.g., Green*, 724 F.3d at 792-93; *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715-16 (7th Cir. 1987) (relying on FAA § 5 to order arbitration even though the arbitration clause lacked "such implementing details as who the arbitrator would be, where the arbitration would take place, and what procedures would govern"). Then, either the district court or the appointed arbitrator would determine the rules under which the arbitration would proceed. *See Schulze & Burch Biscuit*, 831 F.2d at 716; *Chattanooga Mailers' Union, Local No. 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1315 (6th Cir. 1975) ("[T]he arbitrator may determine his procedures if the parties cannot agree."), *abrogated on other grounds as recognized by Bacashihua v. U.S. Postal Serv.*, 859 F.2d 402 (6th Cir. 1988). Nothing more was required to resolve this issue.

This Court should grant the petition and establish that FAA § 5 means what it says: a court "*shall*" appoint a substitute whenever the listed arbitrator is unavailable for "*any* ... reason." 9 U.S.C. § 5 (emphases added).

II. There Is A Deepening Circuit Split On Whether A Court May Void An Entire Arbitration Clause Despite The Presence Of A Severance Provision.

The Eleventh Circuit's ruling on the Severance Provision also warrants this Court's review. The Eleventh Circuit refused to enforce the Severance Provision contained within the Arbitration Clause, even though this resulted in voiding the entire Arbitration Clause. This decision conflicts with opinions from the Fifth, Eighth, and District of Columbia Circuits, all of which have held that when a portion of an arbitration clause is unavailable or unenforceable, the remainder of the arbitration clause still must be enforced. The decision below also conflicts with what could be termed this Court's pro-arbitration canon of construction, which requires that courts compel arbitration unless the parties' arbitration agreement is not susceptible of any interpretation that would cover the dispute. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

1. The Arbitration Clause's Severance Provision directs that "[i]f *any* of this Arbitration [Clause] is held invalid, the remainder *shall* remain in effect[.]" C.A. App. Tab 53-2 at 7 (emphases added)). The Eleventh Circuit refused to enforce this Severance Provision on the grounds that the tribal arbitral forum was an "essential part" of the Arbitration Clause, and under the Restatement (Second) of Contracts, such an

"essential" detail could not be severed. Pet. App. 12a (emphasis omitted). Thus, the entire Arbitration Clause failed. Pet. App. 15a.

Nothing in the Loan Agreement expressly said that the forum was essential, and the Severance Provision made no exception from its directive that the remainder of the Arbitration Clause "*shall* remain in effect" if "*any*" portion were "held invalid." C.A. App. Tab 53-2 at 7 (emphases added)).[6] Thus, the Eleventh Circuit struck the entire Arbitration Clause (and ordered the parties to litigate in court), despite the fact that they explicitly agreed that the Arbitration Clause would remain in effect even if part of that Clause were invalidated.[7]

This ruling is in stark contrast to decisions from numerous other circuits that have addressed the same issue. As the Eighth Circuit held in *Franke v. Poly-America Medical & Dental Benefits Plan*, 555 F.3d 656 (8th Cir. 2009): "[T]he severability clause found in the arbitration agreements specifically stated the intent of

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[6] Indeed, the Severance Provision could have said: "If any of this Arbitration Provision *except the designation of possible arbitrators* is held invalid, the remainder shall remain in effect." In *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1098 (9th Cir. 2009), for example, the severance provision explicitly excluded part of the arbitration clause. The Severance Provision to which Mr. Inetianbor and CashCall agreed, however, did not.

[7] Further, the comprehensive Survival Provision made clear the parties' intent to channel all of their disputes away from litigation and into arbitration. *See* C.A. App. Tab 53-2 at 6-7.

the parties in the event a provision within the agreement is found invalid, i.e., that arbitration proceed once any invalid terms have been severed." *Id.* at 658 (internal quotation marks and alteration omitted); *see also Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 680 (8th Cir. 2001). Likewise, the Fifth Circuit has held that "[t]he purpose of the arbitration provision is to settle any and all disputes arising out of the [contract] in an arbitral forum rather than a court of law. Even with its [offending provision] lifted, … the arbitration clause remains capable of achieving this goal." *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003). Further, as then-Judge Roberts said for the D.C. Circuit in *Booker v. Robert Half International, Inc.*, 413 F.3d 77 (D.C. Cir. 2005): "Compelling [the plaintiff] to arbitrate with the [offending clause] severed is entirely consistent with the intent to arbitrate he manifested in signing the employment agreement in the first place." *Id.* at 83-84.[8]

These courts of appeals would have enforced the Severance Provision and upheld the remaining portions of the Arbitration Clause without resort to the Restatement test.

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[8] At least one state supreme court has recently applied these concepts in precisely the same scenario. In *Schuiling v. Harris*, 747 S.E.2d 833 (Va. 2013), the Virginia Supreme Court held: "The inclusion of this particular severability clause, with its broad scope permitting the severance even of parts of provisions and for any reason, reflects that the parties intended NAF to be the exclusive arbitrator so long as it was available. *However, if its unavailability made its appointment unenforceable, the designation would be severed.*" *Id.* at 837 (emphasis added).

The Eleventh Circuit is not the only court of appeals to employ the Restatement's "essential part" test when deciding whether to enforce a severance provision in an arbitration clause. The Third Circuit has applied the Restatement test but still severed the unenforceable terms and ordered the arbitration to proceed. *See Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 214 (3d Cir. 2003). Similarly, the Ninth Circuit has indicated that an entire arbitration clause can be invalidated by the mere presence of invalid provisions. *See Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248-49 (9th Cir. 1994).

Given the deepening split among the circuits on this issue, this Court's guidance is needed to provide uniformity on when, if ever, a court can void an entire arbitration clause (and thereby require in-court litigation) despite the fact that the parties to the contract agreed to include a severance provision in their arbitration clause.

2. The Eleventh Circuit's reliance on the Restatement's generic "essential part" test to void the entire Arbitration Clause is especially problematic in the context of arbitration law. Under this Court's pro-arbitration canon of construction, arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Warrior & Gulf*, 363 U.S. at 582-83. Thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when

"construe[ing] ... the contract language itself." *Moses H. Cone*, 460 U.S. at 24-25; *see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989). That is, if an arbitration provision can be read in two ways, one that requires arbitration and one that does not, courts must "resolve th[e] ambiguity *in favor* of arbitration." *Khan*, 669 F.3d at 356 (court's emphasis).

The Eleventh Circuit did the opposite: it construed the Severance Provision in a manner that *prevented* arbitration, even though the Severance Provision's most natural reading would require the court to sever any unavailable tribal arbitration details and enforce the remainder of the Arbitration Clause. *See* Pet. App. 12a. By refusing to interpret the Severance Provision in accordance with its plain terms, the Eleventh Circuit ignored a reasonable reading of the Arbitration Clause (which contained the Severance Provision) that would have required the case to be arbitrated. This holding not only contravened *Warrior & Gulf,* 363 U.S. at 582-83, and *Moses H. Cone*, 460 U.S. at 24-25, but also created a considerable risk in future cases that every arbitration clause that contains an unavailable term is subject to being voided in its entirety, despite the parties' best efforts to avoid that very scenario.

3. If the Eleventh Circuit had properly enforced the Severance Provision, the court would have excised the tribal arbitration details, and the Arbitration Clause would say that the parties "agree that any Dispute ... will be resolved by Arbitration." *See* Pet App. 3a. Under FAA § 5, as discussed above in Part I, such an

Arbitration Clause is enforceable, and the district court would provide substitute arbitral details. *See Green*, 724 F.3d at 792-93; *Schulze & Burch Biscuit*, 831 F.2d at 715-16; *Chattanooga Mailers' Union*, 524 F.2d at 1315; *Deaton Truck Line, Inc. v. Local Union 612*, 314 F.2d 418, 421 (5th Cir. 1962). Nothing more was required to resolve this issue.

The conflict between the decision below and the opinions of this Court and other circuits warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 31, 2014

APPENDIX

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-13822

D.C. Docket No. 0:13-cv-60066-JIC

ABRAHAM INETIANBOR,

Plaintiff-Appellee,

versus

CASHCALL, INC.,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Florida

(October 2, 2014)

Before MARTIN, Circuit Judge, and RESTANI,[*] Judge, and HINKLE,[**] District Judge.

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[*] Honorable Jane A. Restani, United States Court of International Trade Judge, sitting by designation.

[**] Honorable Robert L. Hinkle, United States District Judge for the Northern District of Florida, sitting by designation.

MARTIN, Circuit Judge:

This appeal arises out of a disagreement between Abraham Inetianbor, who borrowed money at a high interest rate, and CashCall, Inc., the servicer of Mr. Inetianbor's loan. Mr. Inetianbor filed a lawsuit against CashCall, which then sought to compel arbitration based on the loan agreement. The District Court ultimately refused to compel arbitration because the arbitration agreement in the loan document contained a forum selection clause that was integral to the agreement, and the specified forum was not available to arbitrate the dispute. CashCall appeals that decision here. After careful review, and with the benefit of oral argument, we affirm.

I. FACTUAL BACKGROUND

According to Mr. Inetianbor's complaint, he borrowed $2600 from Western Sky Financial, LLC in January 2011. After Mr. Inetianbor paid CashCall—the servicer of his loan—$3252.65 over the course of twelve months, he believed he satisfied his obligations under the loan agreement. CashCall disagreed and sent Mr. Inetianbor a bill the following month, which he refused to pay. Mr. Inetianbor alleges that CashCall then reported the purported default to credit agencies, which caused his credit score to drop significantly. Mr. Inetianbor sued CashCall for defamation and usury violations, as well as a violation of the federal Fair Credit Reporting Act.

Early in the litigation, CashCall filed a motion to compel arbitration, pursuant to the terms of the loan agreement. In the loan agreement, Mr. Inetianbor

"agree[s] that any Dispute . . . 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." The loan agreement contains a number of other references to dispute resolution by the Cheyenne River Sioux Tribal Nation (the "Tribe"), rather than in a court.

Initially, the District Court granted CashCall's request to compel arbitration. Mr. Inetianbor attempted to comply with this order, but returned to the District Court once he received a letter from the Tribe explaining that it "does not authorize Arbitration." The District Court agreed with Mr. Inetianbor that the chosen arbitral forum was not available, and decided to entertain the case in federal court in light of its finding that the forum selection clause was integral to the arbitration agreement. Then, the District Court reversed course again and deemed the forum available after CashCall submitted clarification from the Tribe that "Arbitration, as in a contractual agreement, is permissible," even though the tribal court does not involve itself in the arbitration process.

Mr. Inetianbor, as he had after the District Court's first arbitration order, attempted to comply. Eventually, however, he came back to the District Court again with more evidence that the Tribe has nothing to do with the arbitration process. With this new information, the District Court came back to agree with Mr. Inetianbor that the arbitral forum was not

available to hear his dispute with CashCall, and so refused to compel arbitration.

CashCall appeals this decision on several grounds. First, CashCall takes issue with our precedent holding that if a forum selection clause is integral to an arbitration agreement, and the forum is unavailable, then arbitration cannot be compelled. Second, CashCall maintains that, even assuming the integral provision rule is good law, it does not operate to preclude arbitration here because the forum selection clause is not integral. Finally, CashCall argues that the District Court erred when it found that the arbitral forum is unavailable. None of these arguments carry the day.

II. LEGAL BACKGROUND

The Federal Arbitration Act (FAA) provides that a written agreement in any contract to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision "reflect[s] both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, ___, 131 S. Ct. 1740, 1745 (2011) (quotation marks and citation omitted). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id.* (citations omitted); *see also, e.g., Am. Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, ___, 133 S. Ct. 2304, 2309 (2013) ("This text reflects the overarching principle that arbitration is a matter of contract. And consistent with that text, courts must rigorously enforce

arbitration agreements according to their terms. . . ." (quotation marks and citation omitted)); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67, 130 S. Ct. 2772, 2776 (2010) (same).

The FAA includes several provisions to ensure that an arbitration agreement is enforced. Two are relevant here. First, the FAA provides that, when a recalcitrant party refuses to proceed with an arbitration agreement, District Courts "shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement.*" 9 U.S.C. § 4 (emphasis added). The FAA also includes some provisions for what to do if the agreement contains no method for selecting an arbitrator, or if "any party thereto shall fail to avail himself of [a provided] method, 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." *Id.* § 5. In those cases, "upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein." *Id.* The question this case presents is what to do when the principle that arbitration is a matter of contract comes into conflict with § 5's substitution provision.

This is not the first time this issue has been presented to this Court. We have said that, § 5 notwithstanding, "the failure of the chosen forum preclude[s] arbitration" whenever "the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern." *Brown v. ITT*

Consumer Fin. Corp., 211 F.3d 1217, 1222 (11th Cir. 2000) (quotation marks omitted). This rule is not without controversy. *See Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 790-92 (7th Cir. 2013) (criticizing and rejecting the integral provision rule). Nevertheless, it remains the majority rule among Circuit Courts.[1] Most important, of course, is that the integral provision rule remains the law of our Circuit under our strong prior panel precedent rule. *See United States v. Hanna*, 153 F.3d 1286, 1288 (11th Cir. 1998) (per curiam) ("In this circuit, only the court of appeals sitting *en banc*, an overriding United States Supreme Court decision, or a change in the statutory law can overrule a previous panel decision."). We must, therefore, apply the rule here.

III. APPLICATION

"This Court reviews *de novo* questions of law, such as a district court's interpretation of an agreement to arbitrate (and whether it binds the parties to arbitrate), but accepts the district court's findings of fact that are not clearly erroneous." *Multi-Fin. Sec. Corp. v. King*, 386 F.3d 1364, 1366 (11th Cir. 2004). Applying this standard of review, and bearing in mind

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[1] *See In re Salomon Inc. S'holder's Derivative Litig. 91 Civ. 5500(RRP)*, 68 F.3d 554, 561 (2d Cir. 1995); *Khan v. Dell Inc.*, 669 F.3d 350, 354-57 (3d Cir. 2012); *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.*, 689 F.3d 481, 491 n. 7 (5th Cir. 2012); *Nat'l Iranian Oil Co. v. Ashland Oil Co.*, 817 F.2d 326, 333-35 (5th Cir. 1987); *Reddam v. KPMG LLP*, 457 F.3d 1054, 1059-61 (9th Cir. 2006), *abrogation on other grounds recognized by Atlantic Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 940 (9th Cir. 2010).

the legal background against which we must decide this case, the District Court is due to be affirmed.

A. Is the Forum Selection Clause Integral?

To decide whether the forum selection clause is integral, we must consider how important the term was to one or both of the parties at the time they entered into the agreement. *See In re Salomon*, 68 F.3d at 561 (looking to whether the forum selection clause was "central" to the agreement to arbitrate, or "as important a consideration as the agreement to arbitrate itself"); *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1364 (N.D. Ill. 1990) ("Where one term of an arbitration agreement has failed, the decision between substituting a new term for the failed provision and refusing to enforce the agreement altogether turns on the intent of the parties at the time the agreement was executed. . . ." (quotation mark omitted)). To answer this question, we look primarily to the language of the contract. *E.g.*, *Rose v. M/V "Gulf Stream Falcon"*, 186 F.3d 1345, 1350 (11th Cir. 1999) ("It is well settled that the actual language used in the contract is the best evidence of the intent of the parties and, thus, the plain meaning of that language controls."); *Nat'l Iranian Oil Co.*, 817 F.2d at 333 ("Whether the agreement to arbitrate is entire or severable turns on the parties' intent at the time the agreement was executed, as determined from the language of the contract and the surrounding circumstances.").

It is clear that the parties here intended the forum selection clause to be a central part of the agreement to arbitrate, rather than an ancillary logistical provision.

Brown, 211 F.3d at 1222. The arbitration clause expressly provides "that any Dispute . . . 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." (Emphasis added.) The agreement again references arbitration in the Tribal forum in the paragraph concerning the selection of arbitrators. A number of other provisions of the agreement expressly reference the Tribe, including the very first provision of the contract, which explains that the agreement "is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation." In total, the contract references the Tribe in five of its nine paragraphs regarding arbitration. That the designation of the particular forum pervades the arbitration agreement is strong evidence that at least Western Sky, which drafted the contract, and whose majority shareholder is a member of the Tribe, considered arbitration conducted by the Tribe to be an integral aspect of the arbitration agreement.

The cases on which CashCall relies to support a contrary conclusion are inapposite. This case is quite unlike *Brown*, where this Court applied the integral provision rule but permitted substitution pursuant to § 5. In *Brown*, the arbitration agreement provided for the procedural rules only, stating that "[A]ny dispute . . . shall be resolved by binding arbitration under the Code of Procedure of" an unavailable arbitration forum. 211 F.3d at 1220. Unlike in *Brown*, the arbitration

agreements we consider here select not just the rules of procedure, but also the arbitral forum. Beyond that, unlike in *Brown*, here the chosen arbitral forum is referenced throughout the arbitration agreement. As a result, *Brown* in no way compels us to reach the same outcome here. The cases from other jurisdictions on which CashCall relies are inapposite for the same reasons. *Reddam*, 457 F.3d at 1057 (interpreting the provision that "Any arbitration . . . shall be determined pursuant to the rules then in effect of the National Association of Securities Dealers"); *Khan v. Dell*, No. 09-3703, 2010, No. 09-3703 (D.N.J. Aug. 18, 2010), Tab 1: Dell's Online Policies 4, ECF No. 12-3 (referencing the particular forum only once in the operative arbitration agreement).

CashCall relies primarily on *Reddam* to argue that because the arbitration agreement does not specify that the Tribe would be the exclusive arbitral forum, this is evidence that the forum selection provision is not integral to the agreement to arbitrate. But the Ninth Circuit's reliance on the fact that "there was not even an express statement that the [forum] would be the arbitrator," *Reddam*, 457 F.3d at 1060, must be understood in the context of the arbitration provision before that Court. Like *Brown*, *Reddam* interpreted contract language that adopted the "rules" of a particular forum. *Id.* at 1057. Whereas the clause at issue in *Reddam* did not name any forum at all, the clause we interpret here does include an express statement that the Tribe will be the arbitrator. We think that express statement is tantamount to designating the forum as the exclusive arbitral forum,

even if the word "exclusive" is not used. As the loan agreement says, the arbitration "shall"—that is, "is required to," Black's Law Dictionary (9th ed. 2009)—be conducted by an authorized representative of the Tribe. *See In re Tennyson,* 611 F.3d 873, 877 (11th Cir. 2010) ("The word 'shall' is ordinarily the language of command." (quotation marks omitted)).

Neither is *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308 (11th Cir. 2005) (per curiam),[2] any help to CashCall. In that case, this Court decided that a number of details about arbitration could be supplied, including the identity of the arbitrator, the location and forum for arbitration, and the allocation of costs between the parties. *Id.* at 1312-13. However, in *Blinco* the agreement to arbitrate was general, providing that "All disputes . . . shall be resolved by binding arbitration by one arbitrator." *Id.* at 1310. Nothing in the agreement said anything at all to place limitations on the arbitration, like specifying a particular forum or particular rules. *Blinco v. Green Tree Servicing LLC*, No. 04-00422 (M.D. Fla. July 29, 2004), Def. Mot. to Stay Case and Compel Arbitration 3, ECF No. 3 (reprinting the arbitration clause); *see also Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715-16 (7th Cir. 1987) (permitting a substitute arbitrator to be named where the arbitration agreement clause provided, in its entirety, that "All disputes under this transaction shall be arbitrated in the usual matter"

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[2] This case was abrogated on other grounds, as recognized by *Lawson v. Life of the South Insurance Co.*, 648 F.3d 1166, 1171 (11th Cir. 2011).

(quotation marks and capitalization in original omitted)). In the face of such a general arbitration agreement, where the agreement clearly evidences an intent to arbitrate no matter what, it makes sense to fill in the incomplete clauses.

Mr. Inetianbor's arbitration agreement is quite different. It evidences an intent to have a specific type of arbitration in a particular arbitral forum. The parties to the agreement we consider here have exercised their right to "structure their arbitration agreements as they see fit," by way of "choos[ing] who will resolve specific disputes" between them. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683, 130 S. Ct. 1758, 1774 (2010) (quotation marks omitted). "It falls on courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." *Id.* at 684, 130 S. Ct. at 1774-75; *see also Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1214 (11th Cir. 2011) ("Even though there is a presumption in favor of arbitration, the courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties." (quotation and alteration marks omitted)). As a result, the only way to enforce the arbitration agreement "in accordance with the terms of the agreement," 9 U.S.C. § 4, is to compel arbitration before an authorized representative of the Tribe, as the integral forum selection provision requires.

Finally, we turn to CashCall's argument that the severability provision is evidence that the parties

intended the general agreement to arbitrate to be enforceable even if the limitations contained in the agreement are unenforceable. Two provisions will be severed only "if the performance as to which the agreement is unenforceable is not an *essential part* of the agreed exchange." Restatement (Second) of Contracts § 184(1) (emphasis added). The forum selection provision here is an "essential part" of the arbitration agreement for the same reason it is integral to that agreement. We look to a case in which we severed an unenforceable provision from an otherwise enforceable arbitration agreement as instructive. In *In re Checking Account Overdraft Litigation MDL No. 2036*, 685 F.3d 1269 (11th Cir. 2012), this Court severed an unenforceable cost-and-fee shifting provision from the general agreement to arbitrate. *Id.* at 1283. We said the provisions in the Multidistrict Litigation contract were severable because the cost-and-fee shifting provision did not "pervade the arbitration agreement." *Id.* (quotation and alteration marks omitted). Here, by contrast, the selection of the Tribe as the exclusive arbitral forum pervades the entire arbitration agreement, including the paragraph labeled "Agreement to Arbitrate." Based on these facts, we cannot disregard the limiting provision without undermining the express, repeated intent of the parties to arbitrate subject to that limitation. This being the case, the forum selection provisions are not severable from the general agreement to arbitrate, so the severability clause does not aid in our interpretation of how integral the limiting forum selection provision is.

For these reasons, the designation of the Tribe as the arbitral forum is integral to the agreement, so arbitration can only be compelled if that forum is available.

B. Is the Arbitral Forum Unavailable?

CashCall maintains that the District Court got the availability analysis wrong, for two reasons. First, CashCall argues that the contract should not be interpreted to require involvement of the Tribe. Second, even if Tribal involvement is required, CashCall argues that the District Court's unavailability finding is clearly erroneous. Neither argument provides a basis for upsetting the District Court's determination.

CashCall's first argument raises an issue of contract interpretation, which we review *de novo*. *Multi-Fin. Sec. Corp.*, 386 F.3d at 1366. We must interpret the agreement "by reading the words of [the] contract in the context of the entire contract and construing the contract to effectuate the parties' intent." *Faez v. Wells Fargo Bank, N.A.*, 745 F.3d 1098, 1104 (11th Cir. 2014). When interpreting an arbitration agreement, "due regard must be given to the federal policy favoring arbitration, and ambiguities to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76, 109 S. Ct. 1248, 1254 (1989). Again, this Court has held that even as we recognize the presumption in favor of arbitration, we will not elevate the federal policy above the intent of the parties, *Princess Cruise Lines*, 657 F.3d at 1214, as determined by the "objective meaning of the words used," *Faez*, 745 F.3d at 1104.

We, like the District Court, understand the arbitration agreement to require the Tribe's involvement. The "Agreement to Arbitrate" clause expressly provides that the arbitration "shall be conducted *by* the Cheyenne River Sioux Tribal Nation by an *authorized representative*." (Emphasis added.) We can think of no other reasonable interpretation of the provision for arbitration "by" the Tribe before an "authorized representative" of the Tribe than one requiring some direct participation by the Tribe itself. This interpretation of the agreement is bolstered by a number of other references that clarify that Mr. Inetianbor and Western Sky envisioned that the Tribe would be involved in any dispute that arose under the contract. For example, the first paragraph of the agreement says that "This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe," and that Mr. Inetianbor "consent[s] to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court." Thus, the agreement read as a whole clearly communicated to Mr. Inetianbor that, if intervention was necessary to enforce the terms of the contract or resolve disputes, the intervention would be under the authority of the Tribe.

Second, the District Court did not commit clear error when it found that the arbitral forum was unavailable. Mr. Inetianbor presented the District Court with a letter from the Tribe explaining that "the Cheyenne River Sioux Tribe, the governing authority[,] does not authorize Arbitration." The Tribal Elder CashCall initially chose to arbitrate the dispute

expressed a similar sentiment in response to Mr. Inetianbor's question about whether the Tribe was aware of the arbitrator selection process, explaining that because "this is a private business deal[, t]he Tribe has nothing to do with any of this business." Finally, the fact that the arbitration clause calls for the arbitration to be conducted according to consumer dispute resolution rules that do not exist supports the conclusion that the Tribe is not involved in private arbitrations.

The clarifying letter from the Tribe explaining that "Arbitration, as in a contractual agreement, is permissible" does not undermine the District Court's finding of unavailability. That parties could, hypothetically, agree to private arbitration without Tribal involvement does not help CashCall here, where the parties' actual agreement was to arbitrate under the auspices of the Tribe. Based on all the evidence that the Tribe does not involve itself in arbitration between private parties at all, the District Court did not clearly err when it found that the selected arbitral forum was unavailable.

IV. CONCLUSION

In keeping with the FAA's purpose to enforce arbitration agreements according to their terms, we hold CashCall to the terms of the integral forum selection provision included in Mr. Inetianbor's loan agreement. Because the selected forum is unavailable, a substitute arbitrator pursuant to 9 U.S.C. § 5 cannot be appointed under the terms of the contract we consider here. *See Brown*, 211 F.3d at 1222. We therefore affirm

the District Court's order decision not to compel these parties to arbitration.

AFFIRMED.

RESTANI, Judge, concurring:

I agree with the majority's conclusion that the arbitral forum was unavailable, for the reasons stated. I also agree that arbitration may not be compelled here, but for different reasons from those relied on by the majority. Here, from the outset Mr. Inetianbor objected to arbitration on numerous grounds, including that the agreement to arbitrate was unconscionable. Although the District Court found that the arbitral forum was unavailable, it neither addressed substitution of a different arbitrator under § 5 of the FAA nor reached Mr. Inetianbor's claim of unconscionability.

Mr. Inetianbor does not ask us specifically to affirm on the grounds that the agreement to arbitrate was unconscionable, but he has repeatedly maintained on appeal that the agreement was a sham. I agree and conclude Congress did not intend for the federal courts to compel arbitration in such circumstances and that we should exercise our discretion to affirm the District Court on this alternate ground. *See Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001) (holding that in reviewing a district court's decision on a motion for summary judgment *de novo*, the decision can be affirmed "on any ground that finds support in the record," including an alternate ground); *Stewart v. Happy Herman's Cheshire Bridge*, 117 F.3d 1278, 1286 (11th Cir. 1997) (accepting Appellee's suggestion to affirm on alternative basis); *Chamberlain v. United*

States, 869 F.2d 1501, 1501 (11th Cir. 1989) (affirming dismissal of case on alternative ground "which is obvious and readily applied in this case."); *Jackson v. Payday Fin., LLC*, No. 12-2617, ___ F.3d ___, 2014 WL 4116804, at *1, *3, *7-9, *13 (7th Cir. Aug. 22, 2014) (invalidating a substantially similar arbitration agreement as unconscionable).

The FAA provides that a written agreement in any contract to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. One such ground for the revocation of a contract or arbitration agreement is unconscionability. *See Cmty. State Bank v. Strong*, 651 F.3d 1241, 1267 n. 28 (11th Cir. 2011) (noting that the Supreme Court's decision in *Concepcion* "preserved generally applicable contract defenses such as . . . unconscionability" to arbitration agreements (internal quotation marks omitted)); *see also Jackson*, 2014 WL 4116804 at *1, *3, *7-9, *13 (invalidating a substantially similar arbitration agreement as unconscionable). Under Florida Law, courts must find an arbitration agreement to be both substantively and procedurally unconscionable to invalidate the agreement. *See Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1134 (11th Cir. 2010).

In Florida, in determining whether an arbitration agreement is procedurally unconscionable, courts look to:

> (1) the manner in which the [arbitration agreement] was entered into; (2) the relative bargaining power of the parties and whether the complaining party had a

> meaningful choice at the time the [arbitration agreement] was entered into; (3) whether the terms were merely presented on a 'take-it-or-leave-it' basis; and (4) the complaining party's ability and opportunity to understand the disputed terms of the contract.

Id. at 1135. The "central question" is "whether the consumer has an absence of meaningful choice in whether to accept the contract terms." *Id.* (citing *Belcher v. Kier*, 558 So. 2d 1039, 1042 (Fla. Dist. Ct. App. 1990)).

Substantive unconscionability is determined by looking at whether the terms of the agreement are "unreasonable and unfair." *Id.* at 1139. "A contract is substantively unconscionable if its terms are so outrageously unfair as to shock the judicial conscience." *Bhim v. Rent-A-Center, Inc.*, 655 F.Supp.2d 1307, 1313 (S.D. Fl. 2009) (internal quotation marks and citations omitted).

The forum selection provision in the agreement to arbitrate between Mr. Inetianbor and CashCall is both procedurally and substantively unconscionable. It is procedurally unconscionable, not just because of unequal bargaining power, but because of CashCall's actions Mr. Inetianbor had no ability or opportunity to understand the forum selection clause. *See Pendergast*, 592 F.3d at 1135. The record establishes that no set rules or procedures for conducting arbitrations exist within the Tribe. And the Tribe expressly said that it does not select or approve arbitrators. When faced with a substantially similar forum selection provision, the Seventh Circuit noted, "it was not possible for the

Plaintiffs to ascertain the dispute resolution processes and rules to which they were agreeing." *Jackson*, 2014 WL 4116804, at *8. Because the processes and rules were non-existent, it was impossible for Mr. Inetianbor to understand the provision of the agreement to arbitrate specifying the Tribe, together with its set of rules, as the arbitral forum. *See id.* Accordingly, the clause is procedurally unconscionable.

The terms of the agreement to arbitrate are substantively unconscionable because the forum selection clause, written by CashCall, explicitly chose a nonexistent arbitral forum and set of rules, with an aura of governmental legitimacy. For essentially the reason stated by the District Court and the majority I also conclude the contract does not permit any tribal member or tribal elder to act as an arbitrator without Tribal approval. The District Court also found, however, that the Tribe did not select or approve arbitrators, that there were no tribal consumer dispute rules, and that there were no procedures for conducting arbitrations under the auspices of the Tribe. Although the District Court here did not go as far as the Court in *Jackson*, which concluded that "there simply was no prospect of a meaningful and fairly conducted arbitration" and that the forum selection provision was "a sham and an illusion," *Jackson*, 2014 WL 4116804, at *8 (internal quotation marks omitted), the record before us would compel any factfinder to reach the same result.

Substituting an arbitrator under § 5 of the FAA would be an insufficient antidote to the egregious actions of defendant CashCall. In evaluating a

substantially similar agreement, the Seventh Circuit reasoned that because the agreement provided for any hypothetical dispute to be decided under the auspices of "a legitimate governing tribal body" it was unconscionable in that no dispute could be decided under that body. *Id.* at *9. Further, the Seventh Circuit noted that even if the court substituted an arbitrator under § 5 of the FAA, it would not cure the agreement's failings because there would be no adequate substitute. *Id.* at *9-10. The Court characterized the contract as

> contain[ing] a very atypical and carefully crafted arbitration clause designed to lull the loan consumer into believing that, although any dispute would be subject to an arbitration proceeding in a distant forum, that proceeding nevertheless would be under the aegis of a public body and conducted under procedural rules approved by that body.

Id. at *10. Substitution under § 5 of the FAA would have left the loan consumer "without a basic protection and essential part of his bargain—the auspices of a public entity of tribal governance." *Id.* Thus, because "[t]he loan consumer[] did not agree to arbitration under any and all circumstances, but only to arbitration under carefully controlled circumstances—circumstances that never existed and for which a substitute cannot be constructed," the agreement was unconscionable. *Id.* The same reasoning applies here.

I conclude that the cases addressing whether more typical arbitral provisions are "integral" to the agreement to arbitrate are inapplicable here. Putting

aside the issue of when ordinary arbitration terms are integral, particularly where the contract contains a severability clause, I note that in *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000), and its progeny, where arbitration was compelled, the forum became unavailable because circumstances changed during the time between the signing of the arbitration agreement and the time of the dispute. Here, the alleged forum and procedures selected never existed. At the time the parties signed the agreement to arbitrate, the Tribe did not have consumer dispute rules and did not involve itself in private arbitrations. *See Jackson*, 2014 WL 4116804, at *9-10.

Finally, it would not frustrate the FAA's purpose to refuse to substitute an arbitrator. Although the FAA indicates a policy favoring enforcement of arbitration agreements, its purpose is not to allow parties to make up non-existent forums and rules in an effort to create the façade of a legitimate, reasonable dispute resolution system, especially one conducted by a sovereign entity. *See id.* at *10. Accordingly, this arbitration agreement cannot be saved by appointing a substitute arbitrator under § 5 of the FAA. Therefore I concur.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 13-60066-CIV-COHN/SELTZER

ABRAHAM INETIANBOR,

Plaintiff,

v.

CASHCALL, INC.,

Defendant.
_____/

ORDER GRANTING PLAINTIFF'S RENEWED MOTION FOR COURT TO RECONSIDER ITS ORDER REQUIRING ARBITRATION

JAMES I. COHN, District Judge.

THIS CAUSE is before the Court upon Plaintiff's Renewed Motion for Court to Reconsider Its Order Requiring Arbitration [DE 72]. The Court has considered the motion, Defendant's response [DE 81], Plaintiff's reply [DE 86], the representations of counsel at the August 16, 2013 hearing, the record in this case, and is otherwise fully advised in the premises.

I. BACKGROUND

On January 5, 2011, Plaintiff Abraham Inetianbor entered into a consumer loan agreement with Western Sky Financial, LLC ("Western Sky"), for $2,525.00, with an annual interest rate of 135%. DE 16-2 at 3-4.

Defendant CashCall, Inc. ("CashCall"), is the servicer, handler, and collector on the loan. DE 16 at 2. Plaintiff claims that he has paid off the loan in full, but that CashCall has continued to report to credit bureaus that he has upcoming or late payments. DE 1-3 at 2. On July 12, 2012, Plaintiff brought suit in the Seventeenth Judicial Circuit Court, Broward County, Florida, alleging that CashCall had defamed Plaintiff's character by misrepresenting his creditworthiness to credit reporting agencies. *See* DE 1-2 at 3-4. On December 17, 2012, Plaintiff filed an Amended Complaint in state court. CashCall then removed the action to this Court on January 11, 2013. DE 1 at 2-3.

The subject loan agreement requires that all disputes arising out of the agreement "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." DE 16-2 at 5. The agreement further provides that

> Arbitration shall be conducted in the Cheyenne River Sioux Tribal Nation by your choice of either (i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council, and shall be conducted in accordance with the Cheyenne River Sioux Tribal Nation's consumer dispute rules and the terms of this Agreement . . . . The party receiving notice of Arbitration will respond in writing by certified mail return receipt requested within twenty (20) days. You understand that if you demand Arbitration, you must inform us of your demand of the Arbitrator

> you have selected. You also understand that if you fail to notify us, then we have the right to select the Arbitrator.

Id. at 6. Accordingly, on January 24, 2013, CashCall filed a Motion to Compel Arbitration and Dismiss or Stay Case [DE 16]. On February 15, 2013, the Court issued an Order ("February 15 Order") granting the motion to compel, and directing the parties to submit the claims to arbitration. *See* DE 33 at 8.

Then, on March 12, 2013, Plaintiff filed a Motion to Reopen Case [DE 37], in which he advised the Court that, subsequent to the February 15 Order, he attempted to submit the case for arbitration to the Cheyenne River Sioux Tribal Nation ("the Tribe"). However, the Tribe, through Judge Mona R. Demery, responded with a letter dated March 8, 2013, stating that "the Cheyenne River Sioux Tribe . . . does not authorize Arbitration as defined by the American Arbitration Association ("AAA") here on the Cheyenne River Sioux Reservation located in Eagle Butte, SD 57625." DE 37 at 5. Plaintiff argued that arbitration before the designated forum was unavailable, and requested that the Court reopen the case. CashCall responded that arbitration could still be conducted by Tribe members on the reservation, but failed to clarify how this contention was consistent with the letter from the Tribal court. *See* DE 39. The Court determined that the arbitral forum designated in the loan agreement was unavailable, and that the choice of forum was integral to the agreement to arbitrate. Thus, the Court found that the arbitration agreement failed, and reopened the case. *See* DE 45 ("April 1 Order").

Subsequently, CashCall served a Demand for Arbitration [DE 53-1] requesting that arbitration be conducted before a Tribal Elder. *See* DE 53-1, DE 53 at 1-2. Then, on April 23, 2013, CashCall filed a Renewed Motion to Compel Arbitration and Dismiss or Stay Case [DE 53] ("Renewed Motion to Compel"), arguing that the arbitral forum was in fact available. CashCall attached a letter from Robert Chasing Hawk, Sr., a Tribal Elder of the Cheyenne River Sioux Tribal Nation, stating that he agreed to serve as arbitrator for the case, and that he "[has] no preexisting relationship with either party in this case." *See* DE 57-1. CashCall also submitted a letter from Judge Demery, dated April 4, 2013, in which she stated that:

> The [Tribal] Court does not provide arbitration. Arbitration, as in a contractual agreement, is permissible. However, the Court does not involve itself in the hiring of the arbitrator or setting dates or time for the parties. After there is an arbitration award, the parties may seek to confirm the award in Tribal Court.

DE 53-3 at 2. Based on this evidence, the Court determined that the forum was available, and granted the Renewed Motion to Compel on May 17, 2013. *See* DE 59 ("May 17 Order").

On May 21, 2013, Plaintiff filed a Motion to Reconsider and Report Regarding the Status of the Case [DE 61] and a Motion to Reopen Case [DE 62], each asking the Court to reconsider the May 17 Order compelling arbitration. As grounds for relief, Plaintiff asserted that he had uncovered two new pieces of evidence indicating that Mr. Chasing Hawk is biased

toward CashCall. First, Plaintiff claimed that Mr. Chasing Hawk's daughter, Shannon Chasing Hawk, is employed by Western Sky. Plaintiff attached a printout of Ms. Chasing Hawk's Facebook profile page, listing "Western Sky Financial" as her employer. *See* DE 61 at 9. Second, Plaintiff alleged that CashCall and Mr. Chasing Hawk colluded in the initiation of arbitration proceedings. Plaintiff attached a purported email chain between Mr. Chasing Hawk and an employee of Lakota Cash, LLC ("Lakota Cash"), a subsidiary of Western Sky, showing that Lakota Cash prepared the letter for Mr. Chasing Hawk. *See id.* at 7-8. The Court denied reconsideration, finding that:

> [I]t is well-established that "reviews [of an arbitrator's alleged bias] are confined under the [FAA] to judicial decisions to confirm, modify, or vacate an arbitration award *after* a final arbitration decision has been made." *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 203 F.R.D. 677, 687 (S.D. Fla. 2001) (emphasis in original); *see also Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 376, 490 (5th Cir. 2002) (holding that "where arbitrator bias is at issue, the FAA does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award."). Indeed, the section of the FAA cited by Plaintiff, § 10(a), provides the grounds for vacating an arbitration award, not for avoiding arbitration altogether. *See* 9 U.S.C. § 10(a). Accordingly, Plaintiff's bias argument is not relevant to whether arbitration was properly compelled. Rather, this argument

> is more properly raised on a motion to confirm, modify, or vacate an award after the parties have completed arbitration.

DE 70 at 6-7.

On July 16, 2013, Plaintiff filed the instant motion, asserting numerous grounds for reconsideration of the May 17 Order. CashCall opposes the motion.

II. RECONSIDERATION STANDARD

The May 17 Order was not a final order. Therefore, pursuant to Federal Rule of Civil Procedure 54(b), it is subject to revision at any time before the entry of a final judgment. *See* Fed.R.Civ.P. 54(b); *Coty Inc. v. C Lenu, Inc.*, Case. No. 10-21812-CIV-HUCK/O'SULLIVAN, 2011 U.S. Dist. LEXIS 14813, at *7 (S.D. Fla. Feb. 15, 2011 ("A district court, in its discretion, can modify or vacate a non-final order at any point prior to the entry of a final judgment."). While Rule 54(b) does not specify a standard for reconsideration, "the Advisory Committee Notes make clear that 'interlocutory judgments . . . are left subject to the complete power of the court rendering them to afford such relief as justice requires.'" *Grupo Televisa v. Telemundo Communs. Group, Inc.*, Case. No. 04-20073-CIV, 2007 U.S. Dist. LEXIS 95914, at *3 (S.D. Fla. Oct. 11, 2007) (quoting Fed. R. Civ. P. 54(b), advisory committee's note).

Generally, the "purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002) (citing *Z.K. Marine, Inc. v.*

M/V Archigetis, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992)). There are three major grounds that justify reconsideration: "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." *Burger King*, 181 F. Supp. 2d, at 1369. A motion for reconsideration should not be used to present authorities that were available at the time of the first decision, or to reiterate arguments previously made. *Z.K. Marine*, 808 F. Supp. at 1563; *see also Reyher v. Equitable Life Assur. Soc.*, 900 F. Supp. 428, 430 (M.D. Fla. 1995) ("The Court will not reconsider when the motion . . . only relitigates what has already been found lacking."). Rather, the movant "must demonstrate why the court should reconsider its prior decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Reyher*, 900 F. Supp. at 430.

Here, Plaintiff asks the Court to reconsider an order compelling arbitration. As the Court previously explained,

> The Court's role in deciding a dispute is quite limited when there is an agreement to arbitrate. "[T]he threshold questions a district court must answer when determining whether a case may be properly referred to arbitration are: (1) whether the parties entered into a valid arbitration agreement; and (2) whether the specific dispute falls within the scope of the agreement." *Viamonte v. Biohealth Techs.*, No. 09-21522-CIV-GOLD/McALILEY, 2009 U.S. Dist. LEXIS 119200, *6 (S.D. Fla. Nov. 24, 2009).

DE 59 at 4. Therefore, in order to meet his burden for reconsideration, Plaintiff must show a change in controlling law, newly-available evidence, or a need to correct clear error that pertains to the threshold questions of arbitrability.

The Court has previously held that the availability of the Tribal forum is an integral part of the agreement to arbitrate, and that the unavailability of that forum would void the agreement. *See* DE 45 at 5-7. Indeed, the primary factor guiding the Court's reasoning in both the April 1 Order and the May 17 Order was the availability of the forum described in the parties' agreement. Thus, a showing of new evidence or a need to correct clear error regarding the existence or availability of the Tribal forum would support reconsideration of the May 17 Order.

III. ANALYSIS

Here, the parties agreed to a very specific manner of arbitration. The loan agreement provides that arbitration will be conducted 1) by the Tribe, through an authorized representative, and 2) in accordance with the Tribe's consumer dispute rules. Plaintiff asserts that the Tribe does not conduct arbitrations through an authorized representative. Plaintiff further asserts that the Tribe does not have any consumer dispute rules. Therefore, Plaintiff argues that the agreed upon arbitral forum is not available. As described below, the Court agrees, and will grant reconsideration of the May 17 Order.

A. Whether the Tribe Conducts Arbitration

Plaintiff claims that he has new evidence concerning whether the Tribe, through an authorized representative, conducts arbitrations. Plaintiff represents that, on June 21, 2013, the parties in this action attended a preliminary arbitration hearing before Mr. Chasing Hawk. Plaintiff has attached a transcript of that hearing as an exhibit to this motion. *See* DE 73-22. At the hearing, Plaintiff inquired into who was responsible for selecting Mr. Chasing Hawk as an arbitrator, asking as follows:

Mr. Inetianbor:	Your Honor, who selected you to be an arbitrator, the Tribe or CashCall?
Mr. Chasing Hawk:	The Western Dakota owner.
. . . .	
Mr. Inetianbor:	So the owner of Western Sky asked you to be an arbitrator for this case . . .?
Mr. Chasing Hawk:	Yes because I've been on the Tribal Council for 20 years.
Mr. Inetianbor:	Yeah, is the Tribe aware of this selection process?
Mr. Chasing Hawk:	[Inaudible] . . . because again this is a private business deal. The Tribe has nothing to do with any of this business.

DE 73-22 at 18. Based on this exchange, Plaintiff argues that Mr. Chasing Hawk is not an authorized representative of the Tribe, and the Tribe does not conduct arbitrations.

The Court's previous determinations on this issue have been based principally on three pieces of evidence. First, in the April 1 Order, the Court relied upon the letter from Judge Demery in which she stated that "the Cheyenne River Sioux Tribe . . . does not authorize Arbitration . . .." DE 37 at 5. As Defendant failed to provide any evidence to the contrary at that time, the Court found that the forum was not available. Then, in filing its motion to reconsider the April 1 Order, CashCall submitted a second letter from Judge Demery, issued as a clarification of the previous letter, stating that "[t]he [Tribal] Court does not provide arbitration. Arbitration, as in a contractual agreement, is permissible." DE 53-3 at 2. CashCall also provided a letter from Mr. Chasing Hawk in which he represented that he "[had] received the Demand for Arbitration from CashCall, Inc. [. . .] and will be serving as the arbitrator for this dispute." DE 57-1 at 2. Thus, the basis for the Court's April 1 Order—Judge Demery's initial letter—was undermined by her subsequent letter. Moreover, while it was not clear that Mr. Chasing Hawk was an authorized representative of the Tribe, there was no evidence to rebut CashCall's assertion that the forum was available. Accordingly, the Court compelled arbitration.

Now, however, the Court has evidence before it that Mr. Chasing Hawk is not an authorized representative of the Tribe for the purpose of

conducting this arbitration, and that the Tribe "has nothing to do with any of this business." Conspicuously, CashCall does not directly answer Plaintiff's charge. Instead, CashCall argues that, even if Mr. Chasing Hawk could not serve as an arbitrator, CashCall has located several other Tribal Elders that would be available. DE 81 at 9. However, CashCall does not specify whether these Elders would be conducting arbitration *as authorized representatives of the Tribe*, as required by the arbitration agreement. At the August 16, 2013 hearing on the motion, counsel for CashCall stated that the Tribe authorizes arbitrations, but offered no factual basis for this contention.

Therefore, based on the record evidence, the Court makes two findings. First, the Court finds that Mr. Chasing Hawk is not, and does not purport to be, conducting arbitration as an authorized representative of the Tribe. Second, having failed to select an arbitrator who is an authorized representative, CashCall has further failed—despite numerous opportunities—to show that the Tribe is available through an authorized representative to conduct arbitrations. Accordingly, the Court concludes that Plaintiff has provided new evidence showing that the agreed upon arbitral forum is not available, and that reconsideration is appropriate.

B. Existence of Tribal Consumer Dispute Rules

Second, Plaintiff contends that he has obtained new evidence showing that the Tribe does not have any consumer dispute rules. Plaintiff submits an affidavit stating that, after the June 21, 2013 preliminary hearing, CashCall sent him a copy of the Tribal legal

code, but that it did not contain any consumer dispute rules. DE 86-1 at 2-3. He further claims that he had previously asked CashCall for a copy of the consumer dispute rules and the Tribal laws, but that he was rebuffed. *Id.*

In its Response to the present motion, CashCall does not respond to the merits of Plaintiff's argument. Instead, CashCall argues that Plaintiff has already raised this argument before the Court and the Court has rejected it. Specifically, CashCall contends that Plaintiff raised this argument at paragraph eight of his reply brief in support of his Motion to Reconsider and Report Regarding the Status of the Case [DE 67]. This is plainly incorrect. In that reply brief, Plaintiff asserted that Mr. Chasing Hawk would not follow tribal arbitration rules, and would instead follow arbitration procedures as dictated by this Court. DE 67 at 3. However, that argument is entirely different from his present contention that tribal consumer dispute rules simply do not exist. While the former assertion implicates the conduct of the arbitrator and the fairness of the proceeding, the latter goes to the availability of the forum, and therefore affects the validity of the arbitration agreement.

At the August 16, 2013 hearing, CashCall conceded that, while the Tribe has rules concerning consumer relations—e.g., usury statutes—it does not have any consumer dispute rules. Without such rules, it is obvious that arbitration cannot be conducted "in accordance with [Tribal] consumer dispute rules" as required by the arbitration agreement. Accordingly, the Court concludes that Plaintiff has provided new

evidence demonstrating that 1) the arbitral forum does not exist, and 2) rules governing the purported forum do not exist.[1] Moreover, for the reasons stated in the April 1 Order, the selection of the Tribe as arbitrator was integral to the agreement to arbitrate. Because the Tribe is not available to arbitrate the parties' claims in this action, the arbitration agreement is void. Therefore, Plaintiff's motion will be granted and the case will be reopened for further proceedings.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Renewed Motion for Court to Reconsider Its Order Requiring Arbitration [DE 72] is GRANTED;
2. The Order Compelling Arbitration [DE 59] is VACATED;.
3. The stay in this case is LIFTED and the Clerk of Court is directed to REOPEN this case;
4. Plaintiff's Motion Requesting Discovery on Arbitration Clause and Related Issues [DE 77] is DENIED as moot;
5. CashCall's Motion for Extension of Time to Respond to Plaintiff's Motion Requesting

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[1] Indeed, the lack of any Tribal rules governing these types of disputes only bolsters the Court's conclusion that the Tribe does not conduct arbitrations concerning such disputes.

Discovery on Arbitration Clause and Related Issues [DE 82] is DENIED as moot; and

6. The Court will enter a separate Order concerning the scheduling of this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, on this 19th day of August, 2013.

/s/
JAMES I. COHN
United States District Judge

Copies provided to:
Counsel of record via CM/ECF.

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 13-60066-CIV-COHN/SELTZER

ABRAHAM INETIANBOR,

Plaintiff,

v.

CASHCALL, INC.,

Defendant.

_____/

ORDER COMPELLING ARBITRATION

JAMES I. COHN, District Judge.

THIS CAUSE is before the Court upon Defendant CashCall, Inc's Renewed Motion to Compel Arbitration and Dismiss or Stay Case [DE 53]. The Court has considered the motion, Plaintiff's response [DE 56], Defendant's reply [DE 57], the record in this case, and is otherwise fully advised in the premises.

I. BACKGROUND

On January 5, 2011, Plaintiff Abraham Inetianbor entered into a consumer loan agreement with Western Sky Financial, LLC, for $2,525.00, with an annual interest rate of 135%. DE 16-2 at 3-4. Defendant CashCall, Inc. ("CashCall"), is the servicer, handler, and collector on the loan. DE 16 at 2. Plaintiff claims that he has paid off the loan in full, but that CashCall

has continued to report to credit bureaus that he has upcoming or late payments. DE 1-3 at 2. On July 12, 2012, Plaintiff brought suit in the Seventeenth Judicial Circuit Court, Broward County, Florida, alleging that CashCall had defamed Plaintiff's character by misrepresenting his creditworthiness to credit reporting agencies. *See* DE 1-2 at 3-4. On December 17, 2012, Plaintiff filed an Amended Complaint in state court. CashCall then removed the action to this Court on January 11, 2013. DE 1 at 2-3. On January 24, 2013, CashCall responded to the Amended Complaint with a Motion to Compel Arbitration and Dismiss or Stay Case [DE 16].

The subject loan agreement requires that all disputes arising out of the agreement "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." DE 16-2 at 5. The agreement further provides that

> Arbitration shall be conducted in the Cheyenne River Sioux Tribal Nation by your choice of either (i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council, and shall be conducted in accordance with the Cheyenne River Sioux Tribal Nation's consumer dispute rules and the terms of this Agreement.

Id. at 6. On February 15, 2013, the Court issued an Order ("February 15 Order") granting the motion to compel, and directing the parties to submit the claims to arbitration. *See* DE 33 at 8.

Then, on March 12, 2013, Plaintiff filed a Motion to Reopen Case [DE 37], in which he advised the Court that, subsequent to the February 15 Order, he attempted to submit the case for arbitration to the Cheyenne River Sioux Tribal Nation ("the tribe"). However, the tribe, through Judge Mona R. Demery, responded with a letter dated March 8, 2013, stating that "the Cheyenne River Sioux Tribe . . . does not authorize Arbitration as defined by the American Arbitration Association ("AAA") here on the Cheyenne River Sioux Reservation located in Eagle Butte, SD 57625." DE 37 at 5. Plaintiff argued that arbitration before the designated forum was unavailable, and requested that the Court reopen the case. CashCall responded that arbitration could still be conducted by tribe members on the reservation, but failed to clarify how this contention was consistent with the letter from the tribal court. *See* DE 39. The Court determined that Plaintiff had provided persuasive evidence that the arbitral forum designated in the loan agreement was unavailable, and that the choice of forum was integral to the agreement to arbitrate. Accordingly, the Court granted Plaintiff's motion and reopened the case. *See* DE 45.

In the instant motion, CashCall once again seeks to compel arbitration, and submits evidence that Robert Chasing Hawk, Sr., a Tribal Elder of the Cheyenne River Sioux Tribal Nation, has agreed to serve as arbitrator for the case and to apply tribal law. *See* DE 57-1 at 2. Plaintiff opposes the motion.

II. LEGAL STANDARD

In considering a motion to compel arbitration, the Court looks first to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA"), which governs the interpretation and enforceability of arbitration provisions. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (noting that the FAA "[creates] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."). Section 2 of the FAA provides that

> "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2. Further, § 3 requires federal courts to stay proceedings when an issue in the proceeding is referable to arbitration; and § 4 directs courts to compel arbitration when one party has failed to comply with an agreement to arbitrate. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citing 9 U.S.C. §§ 3-4). Together, these provisions "manifest a liberal federal policy favoring arbitration agreements." EEOC, 534 U.S. at 829 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). Because of that policy, all doubts concerning the scope of an arbitration provision are resolved in favor of arbitration. *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v.*

Medpartners, Inc., 312 F.3d 1349, 1358 (11th Cir. 2002) (citing *Moses H. Cone*, 460 U.S. at 24-25).

The Court's role in deciding a dispute is quite limited when there is an agreement to arbitrate. "[T]he threshold questions a district court must answer when determining whether a case may be properly referred to arbitration are: (1) whether the parties entered into a valid arbitration agreement; and (2) whether the specific dispute falls within the scope of the agreement." *Viamonte v. Biohealth Techs.*, No. 09-21522-CIV-GOLD/McALILEY, 2009 U.S. Dist. LEXIS 119200, *6 (S.D. Fla. Nov. 24, 2009). A plaintiff challenging the enforcement of an arbitration agreement bears the burden to establish, by substantial evidence, any defense to the enforcement of the agreement. *See Bess v. Check Express*, 294 F.3d 1298, 1306-07 (11th Cir. 2002).

III. ANALYSIS

The Court previously resolved the threshold questions of arbitrability in the February 15 Order, finding as follows:

> The terms of the agreement are clear: all disputes between the borrower and the holder of the Note or the holder's servicer must be settled through arbitration. In this suit, Plaintiff seeks damages from Cashcall, the servicer of the note, for actions related to Cashcall's servicing and collecting on the note. Therefore, Plaintiff's claims fall within the scope of the arbitration provision.

See DE 33 at 6 (internal citations omitted). In the present motion, CashCall argues that the only grounds for reopening the case was the unavailability of the arbitral forum. CashCall asserts that because it has provided evidence that this action can be, and in fact has been, submitted to arbitration with the designated forum, the parties are bound to settle their claims at arbitration. Upon review of the evidence the Court agrees.

First, CashCall submits a letter from Judge Demery, dated April 4, 2013, in which she states that:

> The [Cheyenne River Sioux Tribal] Court does not provide arbitration. Arbitration, as in a contractual agreement, is permissible. However, the Court does not involve itself in the hiring of the arbitrator or setting dates or time for the parties. After there is an arbitration award, the parties may seek to confirm the award in Tribal Court.

DE 53-3 at 2. Further, the record evidence shows that CashCall sent a demand for arbitration to Plaintiff via certified mail [DE's 53-1, 57-2]; that Plaintiff received the demand on May 3, 2013 [DE 57-2]; that Tribal Elder Robert Chasing Hawk, Sr., has agreed to arbitrate the case and is in the process of scheduling a hearing on preliminary matters [DE 57-1]; and that Plaintiff has been notified via email and phone call about the status of arbitration [DE 57-3]. Thus, the Court finds that CashCall has properly submitted this action to arbitration, and that the designated forum is available to conduct arbitration.

Plaintiff attempts to avoid arbitration on four grounds, each of which is unavailing. First, Plaintiff objects to the loan agreement's choice-of-law provision which provides for the application of tribal law in disputes arising under the contract. However, as the Court pointed out in the February 15 Order:

> [T]he Eleventh Circuit has summarized the case law regarding choice-of-law provisions in arbitration agreements as follows:
>
> > (1) courts should apply a strong presumption in favor of enforcement of arbitration and choice clauses; (2) U.S. statutory claims are arbitrable, unless Congress has specifically legislated otherwise; (3) choice-of-law clauses may be enforced even if the substantive law applied in arbitration potentially provides reduced remedies [. . .] than those available under U.S. law, and (4) even if a contract expressly says that foreign law governs . . . courts should not invalidate an arbitration agreement at the arbitration-enforcement stage. . . ."
>
> *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257, 1269 (11th Cir. 2011). There is thus a strong presumption in favor of enforcing the jurisdictional clause of the Loan Agreement. As the party challenging the enforcement of an arbitration agreement, Plaintiff bears the burden of establishing the invalidity of the jurisdictional clause.

DE 33 at 7. Plaintiff cites no authority and provides no evidence showing that the choice-of-law provision is invalid, and thus fails to meet his burden on this issue. Accordingly, the Court concludes that the choice-of-law provision is enforceable and Plaintiff's claims may be arbitrated pursuant to tribal law.

Second, Plaintiff contends that CashCall has repeatedly delayed the resolution of this case. Plaintiff argues that such delays amount to bad faith and willful misconduct, thereby waiving CashCall's right to arbitrate. This argument is without merit. "A party claiming waiver of arbitration must demonstrate: 1) knowledge of an existing right to arbitrate and 2) active participation in litigation or other acts inconsistent with the right." *Ibis Lakes Homeowners Ass'n v. Ibis Isle Homeowners Ass'n*, 102 So. 3d, 722, 731 (Fla. 4th DCA 2012) (quoting *Inverrary Gardens Condo. I Ass'n v. Spender*, 939 So. 2d 1159, 1161 (Fla. 4th DCA 2006)). In light of the strong federal policy in favor of arbitration, "[a]ll doubts regarding waiver should be construed in favor of arbitration rather than against it." *Marine Envtl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 426 (Fla. 4th DCA 2003). Here, Plaintiff fails to show that CashCall has actively participated in litigation in a way inconsistent with its right to arbitrate. To the contrary, CashCall responded to Plaintiff's Amended Complaint with a Motion to Compel Arbitration and Dismiss or Stay Case, thirteen days after removing the action to this Court. Moreover, CashCall did not participate in discovery prior to filing its motion to compel, and CashCall has repeatedly asserted its right to arbitrate. *See Ibis Lakes*, 102 So. 3d at 731-32 (summarizing

relevant case law finding that substantial participation in discovery may constitute waiver of arbitration). Accordingly, the Court finds that CashCall has not waived arbitration.

Third, Plaintiff argues that CashCall does not have standing to compel arbitration because it did not sign the loan agreement and is not a party thereto. This assertion, however, is contradicted on the face of the agreement. Under the section titled "Arbitration Defined," the agreement provides as follows:

> Arbitration is a means of having an independent third party resolve a Dispute. A "Dispute" is any controversy or claim between you and Western Sky or the holder of the note. . . . For purposes of this Arbitration agreement, the term "the holder" shall include Western Sky . . . as well as any marketing, servicing, and collection representatives and agents.

DE 16-2 at 5-6. Furthermore, under the "Choice of Arbitrator" section, it states that "Any party to a dispute, *including related third parties*, may send the other party written notice . . . of their intent to arbitrate. . . ." *Id.* at 6 (emphasis added). Thus, the arbitration provisions plainly contemplated that third parties, including servicers, could compel arbitration for disputes arising under the loan agreement. CashCall, as servicer on the loan, therefore has standing to compel arbitration in this action.

Finally, Plaintiff argues that the arbitration provision is unenforceable because it is unconscionable. "The Supreme Court has recognized that 'generally applicable contract defenses, such as fraud, duress, or unconscionability may be applied to invalidate arbitration agreements.'" *Jenkins v. First American Cash Advance of Gerogia, LLC*, 400 F.3d 868, 875 (11th Cir. 2005) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Here, Plaintiff contends that the arbitration provision is unconscionable because it allows CashCall to unilaterally choose the pool of arbitrators. In support, Plaintiff cites to *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1002-04 (9th Cir. 2010), in which the court found an arbitration selection process was unconscionable in part because the plaintiff was forced to choose its arbitrator from a list of arbitrators trained by the defendant, or pay a higher arbitration fee. The court in Quixtar was concerned that the use of arbitrators trained by the defendant would give the defendant an unfair advantage. Thus, by charging a higher fee for using arbitrators not affiliated with the defendant, the selection process encouraged the use of biased arbitrators. *See id.* at 1003. In the instant case, however, Plaintiff has not given the Court any reason to believe that the selection process would lead to a biased arbitrator. Unlike in *Quixtar*, there is no evidence that the tribal arbitrators were trained by or have any other connection with CashCall. Indeed, the letter from Mr. Hawk specifically states that he "[has] no preexisting relationship with either party in this case." DE 57-1 at 2. Hence, the Court finds that the arbitration selection process is not unconscionable, and

will compel arbitration in accordance with the loan agreement.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant CashCall, Inc's Renewed Motion to Compel Arbitration and Dismiss or Stay Case [DE 53] is GRANTED. The parties are ordered to submit the claims presented in the instant action to arbitration.

2. Pursuant to the FAA, 9 U.S.C. § 3, this case is STAYED until such arbitration has been had in accordance with the terms of the agreement.

3. The parties are directed to file a status report with this Court upon the earliest of either 1) the completion of arbitration, or 2) November 18, 2013, to advise the Court regarding the status of the case.

4. Any pending motions are DENIED as moot. The Clerk of Court is directed to CLOSE this case for administrative purposes.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, on this 17th day of May, 2013.

/s/
JAMES I. COHN
United States District Judge

Copies provided to:
Counsel of record via CM/ECF

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Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 13-60066-CIV-COHN/SELTZER

ABRAHAM INETIANBOR,

Plaintiff,

v.

CASHCALL, INC.,

Defendant.

_____/

ORDER GRANTING PLAINTIFF'S MOTION TO REOPEN CASE

JAMES I. COHN, District Judge.

THIS CAUSE is before the Court upon Plaintiff's Notice of Compliance with Order Compelling Arbitration and Report Regarding Status of the Case [DE 36] ("Plaintiff's Notice"), and Plaintiff's Motion to Reopen Case [DE 37]. The Court has considered the notice and the motion, the parties' responses and replies, the record in this case, and is otherwise fully advised in the premises.

I. BACKGROUND

On January 5, 2011, Plaintiff Abraham Inetianbor entered into a consumer loan agreement with Western Sky Financial, LLC, for $2,525.00, with an annual interest rate of 135%. DE 16-2 at 3-4. Defendant

CashCall, Inc. ("CashCall"), is the servicer, handler, and collector on the loan. DE 16 at 2. Plaintiff claims that he has paid off the loan in full, but that CashCall has continued to report to credit bureaus that he has upcoming or late payments. DE 1-3 at 2.

On July 12, 2012, Plaintiff brought suit in the Seventeenth Judicial Circuit Court, Broward County, Florida, alleging that CashCall had defamed Plaintiff's character by misrepresenting his creditworthiness to credit reporting agencies. *See* DE 1-2 at 3-4. CashCall removed the action to this Court on January 11, 2013. DE 1 at 2-3. On January 24, 2013, CashCall filed a Motion to Compel Arbitration and Dismiss or Stay Case [DE 16]. The subject loan agreement requires that all disputes arising out of the agreement "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." DE 16-2 at 5. The Court granted the motion on February 15, 2013, and directed the parties to submit the claims presented in this action to arbitration. *See* DE 33 at 8.

In his Motion to Reopen Case, Plaintiff represents that he attempted to submit the case for arbitration to the Cheyenne River Sioux Tribal Nation ("the tribe"). However, the tribe, through Judge Mona R. Demery, responded with a letter dated March 8, 2013, stating that it "does not authorize Arbitration as defined by the American Arbitration Association ("AAA") here on the Cheyenne River Sioux Reservation located in Eagle Butte, SD 57625." DE 37 at 5. Rather, the tribe only

has a mediation program. *Id.* Thus, because the arbitrator named in the agreement appears to be unavailable, Plaintiff asserts that the arbitration agreement is void. Accordingly, he seeks to reopen the case before this Court. CashCall opposes the motion.

II. LEGAL STANDARD

The unavailability of an arbitrator named in an arbitration agreement does not necessarily void the agreement. Pursuant to Section 5 of the Federal Arbitration Act ("FAA"), the Court may appoint an arbitrator "if for any [ ] reason there shall be a lapse in the naming of an arbitrator" under the terms of the arbitration agreement. 9 U.S.C. § 5. However, "if the choice of forum is an integral part of the agreement to arbitrate, rather than 'an ancillary logistical concern,' [then] the failure of the chosen forum [will] preclude arbitration." *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) (citing *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1364 (N.D. Ill. 1990)). In *Brown*, the subject arbitration agreement provided that the parties' disputes would be "resolved by binding arbitration under the Code of Procedure of the National Arbitration Forum ("NAF") . . . ." 211 F.3d at 1220. However, by the time the plaintiff's claims arose, the NAF had dissolved. *Id.* at 1222. The court held that, while the decision to use NAF law implied that the NAF was the chosen forum, there was no evidence to suggest that the forum was an integral part of the agreement to arbitrate. *Id.; see also Zechman* 742 F. Supp. at 1365 (finding that the choice of forum was not

integral to the agreement in part because the forum was not explicitly named in the agreement).

The Ninth Circuit came to a similar conclusion in *Reddam v. KPMG, LLP*, 457 F.3d 1054, 1060-61 (9th Cir. 2006), finding that the parties implicitly chose to arbitrate in a certain forum by agreeing that the rules of that forum would apply to their arbitration. The forum refused to arbitrate the parties' claims. As in *Brown*, the court held that the forum's unavailability was not sufficient to render the agreement unenforceable. In so holding, however, the court explained that it does not "[treat] the selection of a specific forum as exclusive of all other fora, *unless the parties have expressly stated that it was.*" 457 F.3d at 1061 (emphasis added). Therefore, *Brown* and *Reddam* stand for the proposition that where an arbitration agreement merely selects the rules of a specific forum, and does not specify the forum itself, the agreement will not fail based on the unavailability of that forum. *Carideo v. Dell, Inc.*, No. C06-1772JLR, 2009 U.S. Dist. LEXIS 104600, at *14, 2009 (W.D. Wa. Oct. 26, 2009) (citing *Reddam*, 457 F.3d at 1059-1061). On the other hand, if the agreement includes "an express statement designating a particular arbitral forum to administer arbitration," courts have generally found the forum selection to be integral to the arbitration agreement. *See Clerk v. Cash Cent. of Utah, LLC,* No. 09-04964, 2011 U.S. Dist. LEXIS 95494, at *14-15 (E.D. Pa. Aug. 25, 2011) (citing *Gutfreund v. Weiner*, 68 F.3d 554, 556-561 (2d Cir. 1995); and *Carideo*, 2011 U.S. Dist. LEXIS 104600, at *4); *see also Branch v. Sickert,* No. 2:10-CV-128-RWS, 2011 U.S. Dist. LEXIS 19392, at *16 (N.D.

Ga. Feb. 28 2011) (analyzing *Brown* and *Reddam*, and finding that the aribtral forum was not integral to the subject agreement because it was not "specifically or exclusively chosen as the forum.").

Other courts have framed this issue as hinging on whether the parties' "dominant intent" was to arbitrate—and thus the designation of the arbitrator was merely a side issue—or whether the specification of the arbitrator was "as important a consideration as the agreement to arbitrate itself." *Khan v. Dell, Inc.*, 669 F.3d 350, 356 (3d Cir. 2012) (citing *Brown*, 211 F.3d at 1222); *see also Linea Naviera de Cabotaje, C.A. v. Mar Caribe de Navegacion, C.A.*, 169 F. Supp. 2d 1341, 1347 (M.D. Fla. 2001) (finding an arbitration agreement enforceable because "[t]he dominant intent [. . .] was to arbitrate, with the machinery of selection of the arbitrators subordinate and incidental.") (quoting *Lory Fabrics, Inc. v. Dress Rehearsal, Inc.*, 78 A.D.2d 262, 268, (N.Y. App. Div. 1980)).

Ultimately, arbitration agreements are governed by principles of contract law. "Even though there is [a] presumption in favor of arbitration, '[t]he courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties.'" *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1214 (11th Cir. 2011) (quoting *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1419-20 (11th Cir. 1990)). Thus, while § 5 applies when there is a 'lapse' in the naming of an arbitrator, it does not operate to force the parties to arbitrate before one forum when they have explicitly agreed to arbitrate

before a different forum. *See Gutfreund v. Weiner*, 68 F.3d 554, 561 (2d Cir. 1995).

III. ANALYSIS

Here, Plaintiff has made a showing that the arbitration forum specified in the subject arbitration agreement is not available. CashCall has not offered any evidence in rebuttal. Instead, CashCall argues that the Court should compel arbitration before a different forum, such as the AAA or JAMS, Inc. CashCall further asserts that Plaintiff should not be allowed to reopen the case because he did not comply with the procedural requirements of the arbitration agreement. Both of these arguments are without merit.

A. The Choice of Forum was Integral to the Agreement.

First, CashCall cites to *Brown*, and argues that the Court is required by § 5 of the FAA to appoint a substitute arbitrator. The Court disagrees. In this case, unlike in *Brown*, there is ample evidence in the loan agreement and the arbitration provisions that the selection of the tribe as arbitrator was integral to the parties' agreement to arbitrate. At the very beginning of the loan agreement, it states that:

> **This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation.** By executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of

> the Cheyenne River Sioux Tribal Court, and further agree that no other state or federal law or regulation shall apply to this Loan Agreement.

DE 16-2 at 3 (emphasis in original). Later, under the section titled 'Agreement to Arbitrate,' it provides that:

> 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.

Id. at 5. Additionally, under the 'Choice of Arbitrator' provision, it says that:

> Any party to a dispute . . . may send the other party written notice by certified mail return receipt requested at the address appearing at the top of this Loan Agreement of their intent to arbitrate and setting forth the subject of the dispute . . . . Arbitration shall be conducted in the Cheyenne River Sioux Tribal Nation by your choice of either (i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council, and shall be conducted in accordance with the Cheyenne River Sioux Tribal Nation's consumer dispute rules and the terms of this Agreement. You may appear at Arbitration via telephone or video conference, and you will not be required to travel to the Cheyenne River Sioux Tribal Nation. The party receiving notice of Arbitration

> will respond in writing by certified mail return receipt requested within twenty (20) days. You understand that if you demand Arbitration, you must inform us of your demand of the Arbitrator you have selected. You also understand that if you fail to notify us, then we have the right to select the Arbitrator.

Id. at 6. Finally, under 'Applicable Law and Judicial Review,' it states that:

> THIS ARBITRATION PROVISION IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE CHEYENNE RIVER SIOUX TRIBE.

Id. Thus, taken together, these provisions show that (1) the entire loan agreement, including the arbitration provisions, is subject to the sole subject-matter jurisdiction of the tribe; (2) for purposes of the agreement, Plaintiff is subject to the sole personal jurisdiction of the tribe; (3) disputes shall be resolved by arbitration conducted by the tribe; (4) in selecting their arbitrator, the parties may choose either a Tribal Elder or a panel of three members of the Tribal Council; and (5) arbitration will be conducted pursuant to tribal laws and consumer dispute rules. Based on these factors, it is clear that the choice of the tribal forum was integral to the parties' agreement to arbitrate.

In contrast to the arbitration agreements in *Brown* and *Zechman*, the instant agreement does not merely designate the applicable law for arbitration. Rather, it specifically names the arbitral forum and details whom the parties may select as their arbitrator(s). Further, unlike the subject provision in *Branch*, the instant agreement makes clear that it is to be governed *solely* by tribal law and that Plaintiff can consent *only* to the personal jurisdiction of the tribe. Moreover, the language of the agreement is mandatory, not permissive, stating that arbitration "*shall* be conducted by the Cheyenne River Sioux Tribal Nation." DE 16-2 at 5 (emphases added); *cf. Cash Cent. of Utah*, 2011 U.S. Dist. LEXIS 95494, at *18 (finding that the forum was not 'integral' in part because the language of the arbitration clause was permissive, providing that claims "'may be filed' at an NAF office"). Given the repeated, specific, and exclusive references to the tribe's role throughout the arbitration agreement, the Court concludes that the choice of arbitrator was as important a consideration as the agreement to arbitrate itself. Therefore, § 5 of the FAA does not apply in this case, and the unavailability of the designated arbitrator will void the arbitration agreement.

B. CashCall's Procedural Arguments are Unavailing.

Next, CashCall argues, in its Response to Plaintiff's Notice [DE 39], that Plaintiff has not properly sought arbitration in accordance with the loan agreement. Specifically, CashCall objects to Plaintiff's 'ex parte communication' with the tribal court, and contends that such communication violated CashCall's right to

respond to the arbitration demand within twenty days. This argument is without merit. The agreement provides that the party receiving notice of arbitration has twenty days to respond. DE 16-2 at 6. It also requires that the party demanding arbitration inform the other party of which arbitrator he has selected. *Id.* It does not state that the initiating party must wait for the other party's response before attempting to submit its claims to the arbitrator. Rather, it appears that Plaintiff was attempting to comply with the Court's Order directing the parties "to submit the claims presented in the instant action to arbitration." DE 33 at 8.

CashCall also contends that Plaintiff failed to send the letter by certified mail, and that he did not send it to the address located on the agreement. The address in the agreement is "P.O. Box 37, Timber Lake, SD 57656." *See* DE 16-2 at 3. The heading on Plaintiff's letter lists the intended address as "1600 South Douglass Road, Anaheim, CA 98206," which CashCall asserts is a general mail address for CashCall. DE 36 at 5. CashCall asserts that Plaintiff sent the letter by regular mail and that, as of March 14, 2013, it had not received the letter at either address. Plaintiff responds that, while the letter listed CashCall's California address in its heading, the envelope was addressed to the South Dakota location. Neither party has submitted a copy of the envelope or presents any other evidence on this point. However, in light of Plaintiff's showing that the tribe does not conduct arbitration—and CashCall's complete failure to offer any evidence to the

contrary[1]—the Court concludes that Plaintiff's compliance or lack thereof with this procedural requirement is moot. Accordingly, the Court will grant Plaintiff's motion.

IV. CONCLUSION

Therefore, for the foregoing reasons, it is hereby ORDERED AND ADJUDGED that Plaintiff's Motion to Reopen Case [DE 37] is GRANTED. The stay in this case is LIFTED and the Clerk of Court is directed to REOPEN this case. The Court will enter a separate Order setting the trial and calendar call dates.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida on this 1st day of April, 2013.

/s/ _____
JAMES I. COHN
United States District Judge

Copies provided to:
Counsel of record via CM/ECF

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[1] In fact, CashCall represents that, in March 2011—two months after Plaintiff signed his loan agreement—CashCall amended its 'Choice of Arbitrator' provision to remove the Tribal Elder and Tribal Council options. The amended version permits the initiating party to choose from either JAMS or AAA. DE 39 at 4.

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 13-60066-CIV-COHN/SELTZER

ABRAHAM INETIANBOR,

Plaintiff,

v.

CASHCALL, INC.,

Defendant.

_____/

ORDER DENYING PLAINTIFF'S MOTION FOR REMAND AND GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION

JAMES I. COHN, District Judge.

THIS CAUSE is before the Court upon Plaintiff's Motion to Remand Defendant's Notice of Removal to Federal Court [DE 4], and Defendant's Motion to Compel Arbitration and Dismiss or Stay Case [DE 16] ("Motion to Compel Arbitration"). The Court has considered the motions, the parties' responses and replies, the record in this case, and is otherwise fully advised in the premises.

I. BACKGROUND

On January 5, 2011, Plaintiff Abraham Inetianbor entered into a consumer loan agreement with Western Sky Financial, LLC ("Western Sky"), for $2,525.00,

with an annual interest rate of 135%. Western Sky Consumer Loan Agreement [DE 16-2] ("Loan Agreement") at 3-4. Defendant CashCall, Inc. ("CashCall"), is the servicer, handler, and collector on the loan. Mot. to Compel Arbitration at 2. Plaintiff claims that he has paid off the loan in full, but that CashCall has continued to report to credit bureaus that he has upcoming or late payments. Amended Complaint [DE 1-3] at 2.

The Loan Agreement has several provisions that relate to dispute resolution. First, the opening section of the Agreement provides as follows:

> This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne Sioux Tribe [the tribe], Cheyenne River Indian Reservation. By executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and further agree that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.

Loan Agreement at 3. Furthermore, under the section titled "Waiver of Jury Trial and Arbitration," it states that:

> 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 . . . .
>
> A "Dispute" is any controversy or claim between you and Western Sky or the holder of the Note. . . . For purposes of this Arbitration agreement, the term "the holder" shall include Western Sky or the then-current note holder's employees, officers, directors, attorneys, affiliated companies, predecessors, and assigns, as well as any marketing, servicing, and collection representatives and agents . . . .

Id. at 5-6. However, the Agreement does allow the borrower to appear at arbitration by telephone or video conference, rather than travel to the reservation. *Id.* at 6.

On July 12, 2012, Plaintiff brought suit in the Seventeenth Judicial Circuit Court, Broward County, Florida, alleging that CashCall had defamed Plaintiff's character by misrepresenting his creditworthiness to credit reporting agencies. *See* Complaint [DE 1-2] at 3-4. On September 28, 2012, Plaintiff served the Complaint on CashCall, and on October 18, 2012, CashCall filed a Motion to Dismiss or, in the Alternative, Motion for a More Definite Statement. *See* State Court Docket [DE 1-4] at 12-21. The state court denied the motion to dismiss, but granted the motion for a more definite statement. *Id.* at 46. On December 17, 2012, Plaintiff filed his Amended Complaint in which he brought claims for defamation, usury, and violations of the Fair Credit Report Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"). On January 11, 2013, CashCall removed the action to this Court. Notice of Removal [DE 1] at 2-3.

In the instant motions before the Court, Plaintiff moves to remand the case back to state court, while CashCall asks the Court to compel arbitration and dismiss or stay the case. The Court will deal with each of these motions in turn.

II. MOTION TO REMAND

"[A] defendant's right to remove an action against it from state to federal court 'is purely statutory and therefore its scope and the terms of its availability are entirely dependent on the will of Congress.'" *Global Satellite Commc'n Co. v. Starmill U.K. Ltd.*, 378 F.3d 1269, 1271 (11th Cir. 2004) (quoting 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure*, § 3721, at 285-86 (3d ed. 1998)). Removal statutes are strictly construed. When a plaintiff and defendant disagree about jurisdiction, all doubts must be resolved in favor of remand. *See Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328-29 (11th Cir. 2006) (citing *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994)). Further, "[a] removing defendant bears the burden of proving proper federal jurisdiction." *Leonard v. Enterprise Rent a Car*, 279 F.3d 967, 972 (11th Cir. 2002).

Here, CashCall removed the case pursuant to 28 U.S.C. § 1441(a). Notice of Removal at 1-2. CashCall contends that its removal was proper because the Court has jurisdiction over Plaintiff's FCRA claim pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over Plaintiff's other claims. *Id.* The Court agrees. Section 1441(a) provides that:

> any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). In this case, the Court has original jurisdiction over the action. First, the Court has jurisdiction over the FCRA claim under § 1331, because such claim arises under federal law. Further, the Court has supplementary jurisdiction over the defamation and usury claims because they arise out of the same nucleus of operative facts as the FCRA claim. *See Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743 (11th Cir. 2006); 28 U.S.C. § 1367. Therefore, CashCall's removal was permissible under § 1441(a).

Plaintiff attempts to defeat removal by asserting that "[a]n action may not be removed based on the federal defense of preemption." Mot. to Remand at 2. This argument misconstrues CashCall's basis for removal. Plaintiff sued under the FCRA, which is a federal statute. Plaintiff's claim therefore arises under federal law, and may be removed to federal court. Accordingly, CashCall's removal was proper, and Plaintiff's Motion to Remand will be denied.

III. MOTION TO COMPEL ARBITRATION

A. Legal Standards

In considering CashCall's Motion to Compel Arbitration, the Court looks first to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), which

governs the interpretation and enforceability of arbitration provisions. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (noting that the FAA "[creates] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."). Section 2 of the FAA provides that

> "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2. Further, § 3 requires federal courts to stay proceedings when an issue in the proceeding is referable to arbitration; and § 4 directs courts to compel arbitration when one party has failed to comply with an agreement to arbitrate. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citing 9 U.S.C. §§ 3-4). Together, these provisions "manifest a liberal federal policy favoring arbitration agreements." *EEOC*, 534 U.S. at 829 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). Because of that policy, all doubts concerning the scope of an arbitration provision are resolved in favor of arbitration. *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. Medpartners, Inc.*, 312 F.3d 1349, 1358 (11th Cir. 2002) (citing *Moses H. Cone*, 460 U.S. at 24-25).

The Court's role in deciding a dispute is quite limited when there is an agreement to arbitrate. "[T]he threshold questions a district court must answer when determining whether a case may be properly referred to arbitration are: (1) whether the parties entered into a valid arbitration agreement; and (2) whether the specific dispute falls within the scope of the agreement." *Viamonte v. Biohealth Techs.*, Case No. 09-21522-CIV-GOLD/McALILEY, 2009 U.S. Dist. LEXIS 119200, *6 (S.D. Fla. Nov. 24, 2009). A plaintiff challenging the enforcement of an arbitration agreement bears the burden to establish, by substantial evidence, any defense to the enforcement of the agreement. *See Bess v. Check Express*, 294 F.3d 1298, 1306-07 (11th Cir. 2002).

B. Analysis

Here, Defendant argues that the arbitration agreement, by its plain language, covers Plaintiff's claims. The Court agrees. The terms of the agreement are clear: all disputes between the borrower and the holder of the Note or the holder's servicer must be settled through arbitration. *See* Loan Agreement at 5-6. In this suit, Plaintiff seeks damages from CashCall, the servicer of the note, for actions related to CashCall's servicing and collecting on the note. *See* Amended Complaint at 2. Therefore, Plaintiff's claims fall within the scope of the arbitration provision.

Plaintiff attempts to avoid arbitration on five grounds, each of which is unavailing. First, he contends that the agreement is not legally enforceable because it charges usurious interest on the loan. However, as CashCall points out, the Eleventh Circuit rejected a

similar argument in *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868, 880-82 (11th Cir. 2005). In *Jenkins*, the plaintiff argued that the underlying contracts were illegal and void *ab initio*, and therefore that she should not have to arbitrate over void contracts. *Id.* at 880. The Court rejected this argument because the plaintiff's challenge went to "the content of the contracts—i.e., the rates of interest charged in the loan agreements," rather than the validity or scope of the arbitration agreement. *Id.* at 882. Therefore, the Court held that the legality of the contract was an issue for the arbitrator to decide. *Id.* The reasoning of *Jenkins* is directly applicable to the instant case. By asserting that the Loan Agreement is usurious, Plaintiff is only contesting the contents of the contract. Accordingly, such disputes are "for the arbitrator, not the court, to decide." *Id.*

Second, Plaintiff asserts that the tribal court does not have jurisdiction over this action. Plaintiff does not set forth any reasons that would undermine or invalidate the Loan Agreement's provision that the Agreement is "subject solely to the exclusive laws and jurisdiction of the Cheyenne Sioux Tribe, Cheyenne River Indian Reservation." Loan Agreement at 3. Moreover, as CashCall asserts, the Eleventh Circuit has summarized the case law regarding choice-of-law provisions in arbitration agreements as follows:

> "(1) courts should apply a strong presumption in favor of enforcement of arbitration and choice clauses; (2) U.S. statutory claims are arbitrable, unless Congress has specifically legislated otherwise; (3) choice-of-law clauses may be

> enforced even if the substantive law applied in arbitration potentially provides reduced remedies [. . .] than those available under U.S. law, and (4) even if a contract expressly says that foreign law governs . . . courts should not invalidate an arbitration agreement at the arbitration-enforcement stage . . . ."

Lindo v. NCL (Bahamas) Ltd., 652 F.3d 1257, 1269 (11th Cir. 2011). There is thus a strong presumption in favor of enforcing the jurisdictional clause of the Loan Agreement. As the party challenging the enforcement of an arbitration agreement, Plaintiff bears the burden of establishing the invalidity of the jurisdictional clause. He has not met that burden. Therefore, the Court concludes that the tribe has jurisdiction to arbitrate Plaintiff's claims.

Third, Plaintiff asserts that Western Sky affiliates itself with the tribe and uses tribal law in an attempt to evade state and federal consumer protection laws. This argument does not pertain to the threshold issues that the Court must decide at this stage, namely, the validity and scope of the arbitration clause. Therefore, even if the Court takes Plaintiff's argument as true, it would not provide grounds for denying CashCall's motion. Plaintiff's fourth argument—that CashCall is the actual lender, not Western Sky, and that CashCall is not a bank—fails for the same reason.

Finally, Plaintiff argues that the arbitration agreement is unenforceable because it is unconscionable. "The Supreme Court has recognized that 'generally applicable contract defenses, such as fraud, duress, or unconscionability may be applied to

invalidate arbitration agreements.'" *Jenkins*, 400 F.3d at 875 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). However, in this case, Plaintiff merely asserts unconscionability without any supporting argument.[1] Plaintiff has the burden of proving, by substantial evidence, any defenses to enforcement of the arbitration agreement. He has failed to do so, and accordingly, the Court will grant CashCall's motion.

IV. CONCLUSION

Accordingly, for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion to Remand Defendant's Notice of Removal to Federal Court [DE 4] is **DENIED**.
2. Defendant's Motion to Compel Arbitration and Dismiss or Stay Case [DE 16] is **GRANTED**. The parties are ordered to submit the claims presented in the instant action to arbitration.
3. Pursuant to the FAA, 9 U.S.C. § 3, this case is **STAYED** until such arbitration has been had in accordance with the terms of the agreement.
4. The parties are directed to file a status report with this Court upon the earliest of either 1) the

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[1] Plaintiff implies that he is unable to afford to travel to South Dakota to arbitrate. The Court reminds Plaintiff that the Loan Agreement permits him to appear at the arbitration by telephone or video conference, without physically traveling to the reservation. Loan Agreement at 6.

completion of arbitration, or 2) August 15, 2013, to advise the Court regarding the status of the case.

4. Any pending motions are **DENIED as moot**. The Clerk of Court is directed to **CLOSE** this case for administrative purposes.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, on this 15th day of February, 2013.

/s/
JAMES I. COHN
United States District Judge

Copies provided to:
Counsel of record via CM/ECF

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Plantation, FL 33317

Appendix F

Date Filed: 12/01/2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-13822-CC

ABRAHAM INETIANBOR,

Plaintiff-Appellee,

versus

CASHCALL, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, Circuit Judge, and RESTANI,[*] Judge, and HINKLE,[**] District Judge.

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[*] Honorable Jane A. Restani, United States Court of International Trade Judge, sitting by designation.

[**] Honorable Robert L. Hinkle, United States District Judge for the Northern District of Florida, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Beverly B. Martin
UNITED STATES CIRCUIT JUDGE