IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DEBORAH JACKSON, *et al*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	11 C 9288
	)	Judge Kocoras
PAYDAY FINANCIAL, LLC, *et al*,	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS OR STAY THE CASE BROUGHT BY THE WEBB ENTITIES

Daniel A. Edelman
Thomas A. Soule
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
120 S. LaSalle St., Suite 1800
Chicago, IL 60603
(312) 739-4200
(312) 419-0379 (fax)

I. BACKGROUND

This action is one a series of suits, many by state authorities, seeking redress for lawless conduct involving high-interest loans made over the Internet by a number of South Dakota limited liability companies which are controlled by Martin Webb (hereafter, the "Webb entities").[1] See *FTC v. Payday Fin. LLC*, No. 3:11CV3017 (D.S.D.) (Exhibit 2); *Maryland Comm'r of Fin. Reg. v. Western Sky Fin. LLC*, No. 1:11CV735, 2011 U.S. Dist. LEXIS 117665 (D.Md., Oct. 12, 2011), *Western Sky Fin. LLC v. Maryland Comm'r of Fin. Reg.*, No. 1:11CV1256, 2011 U.S. Dist. LEXIS 118241 (D.Md., Oct. 13, 2011), *Colorado ex rel. Suthers v. Western Sky Financial*, No. 1:11CV887, 2011 U.S. Dist. LEXIS 148461 (D.Colo. Dec. 27, 2011), *Missouri v. Webb*, No. 4:11CV1237 (E.D.Mo.) (Exhibit 3) and *West Virginia ex rel. McGraw v. Payday Loan Resource Center LLC et al.*, No. 10-MISC-372 (Kanawha Co. (W.Va.)) (Exhibit 4). Defendants' arguments as to tribal jurisdiction, choice-of-law and other matters have been rejected in several of these cases.

Defendants portray this case as one where Plaintiffs attempt to sidestep Tribal Law and the sovereignty of the Cheyenne River Sioux Tribal Nation. The fact is, there are no tribal interests in this case whatsoever. In reality, it is the defendants – South Dakota limited liability companies – who have been flagrantly violating state licensing regulations and consumer protection statutes, with defendants' owner, Martin Webb, improperly attempting to use his Native American heritage as a device to reap profits from desperate consumers, and to thwart the attempts of consumers to seek recourse for these violations by attempting to implement an unconscionable arbitration provision in an already illegal and usurious contract.

A. The defendants. Mr. Webb is a member of the Cheyenne River Sioux Tribe ("Tribe") but is not, and does not claim to be, a Tribal official. He is the sole owner and

[1] The Webb entities include Payday Financial LLC, Western Sky Financial LLC, Great Sky Finance LLC, Red Stone Financial LLC, Management Systems LLC, 24-7 Cash Direct LLC, Red River Ventures LLC, High Country Ventures LLC, Financial Solutions LLC, and several Doe defendants (including but not limited to WS Funding LLC). All of these entities operate under several other business names, including internet domain names such as westernsky.com, lakotacash.com, and others. (*Id.*, ¶¶4-32.)

manager of each Webb entity. The website for Payday Financial LLC declares that "it is owned wholly by an individual Tribal Member of the Cheyenne River Sioux Tribe and is not owned or operated by the Cheyenne River Sioux Tribe or any of its political subdivisions." (Docket No. 14 ("Am.Cmplt."), ¶¶4-25.)

Each Webb entity is chartered as an ordinary business entity by the State of South Dakota, with Mr. Webb registering each business as such and paying the necessary registration fees. Mr. Webb also personally paid the fees necessary to register Internet domain names for the Webb entities. Mr. Webb controlled and participated in all of the Webb entities' business practices and actions – including decisions on where loans could be made, how those loans would be advertised, and how much to charge in interest. (*Id*. ¶¶4-25.)

Defendant CashCall, Inc. ("CashCall"), a California corporation, has headquarters in Anaheim, California. It contracted with the Webb entities to purchase loans made by the Webb entities, or to receive loans for collection or servicing. It has also approved of the contractual terms (including the choice-of-law provisions and the arbitration clause). (*Id.*, ¶¶26-31, 39-40.)

B. Defendants' activities. Since 2007, the Webb entities have offered, and provided, high-interest loans ranging from $300 to $2,525 to Illinois residents. These loans are marketed through the Internet and TV ads targeted at Illinois residents. No efforts were made to refrain from making loans to Illinois residents, even though such efforts could have been made; indeed, the Webb entities do not provide loans to Tribe members. (*Id*., ¶¶23, 46.) Consumers interested in obtaining a loan complete an online application via a Webb entity's website, or call advertised toll-free numbers, to apply. Loans made to Illinois residents are collected by debiting bank accounts located in Illinois. Some loans were assigned to CashCall for servicing after the Webb entities made them; Cashcall attempted collection by sending demand letters into Illinois. (*Id*., ¶¶3-4, 33-54.)

The rates of interest on all of the Webb entities' loans exceeded 100%. However, at no time did any of the Webb entities hold (a) a banking charter or (b) a license from the Illinois Department of Financial and Professional Regulation ("IDFPR") authorizing them to make

loans at more than 9% to residents of Illinois. (*Id*., ¶¶35, 37.)

The loans given to Illinois residents were civilly and criminally usurious. 720 ILCS 17/59 (criminal usury occurs when unlicensed interest exceeds 20% per year); 815 ILCS 205/0.01 *et seq*. ("Interest Act") and 205/4(1) (civil usury occurs when such interest exceeds 9% per year). Thus, plaintiffs seek relief under the Interest Act (Am.Cmplt., ¶¶55-65), the criminal usury statute (*id*., ¶¶66-77), and the Consumer Fraud Act, 815 ILCS 505/1 *et seq*. (*id*., ¶¶78-91). Plaintiffs seek for themselves and classes of similarly situated persons the award of compensatory, statutory, and punitive damages, as well as a finding that the loans are void and unenforceable, an injunction against enforcement of the loan contracts and further lending in Illinois, attorney's fees, costs and all other appropriate relief.

C. The arbitration and choice-of law provisions. The key provisions of the contract, as to all three plaintiffs, are similar. The contract provided to James Binkowski is representative; it is attached in full as Exhibit 1, and provides:

> **This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation....** [No] other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation....
>
> **GOVERNING LAW.** This Agreement is governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe. We do not have a presence in South Dakota or any other states of the United States.[2] Neither this Agreement nor Lender is subject to the laws of any state of the United States of America....
>
> **Agreement to Arbitrate.** You agree 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....
>
> **Choice of Arbitrator.** ... 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.

[2] The Cheyenne River Reservation is physically located within South Dakota.

As set forth in the Amended Complaint, and discussed further below, the arbitration clauses in defendants' loan agreements are invalid.[3]

II. THE DOCTRINE OF "TRIBAL EXHAUSTION" IS INAPPLICABLE

Defendants first argue that plaintiffs must seek relief in "tribal courts." (Docket No. 25 ("Def.Mem.") at 3-5.) However, there are no tribal interests at stake and Tribal courts do not have even colorable subject matter jurisdiction over a dispute between a corporate entity chartered by the state of South Dakota and a non-Native American residing in Illinois concerning a loan made over the Internet. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *Montana v. United States*, 450 U.S. 544 (1981).

The adjudicatory authority of Indian tribes, with respect to nonmembers, is very limited. Generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. There, the Court set forth two situations in which Native American tribes can exercise jurisdiction over nonmembers:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [*Id*. at 565-566.]

These exceptions are "limited" and the proponent of tribal jurisdiction has the burden of establishing their applicability. *Plains Commerce Bank*, 554 U.S. at 330. "[With] only one minor exception [involving zoning], we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Id*. at 333.

The Eighth Circuit held that *Montana*, together with other case law, "[establishes] one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court

[3] Defendant CashCall filed separate motions to compel arbitration, and also to dismiss the case, on February 24, 2012. (Docket Nos. 31-36.) This brief responds strictly to the motion brought by the Webb entities; plaintiffs reserve the right to file a written response to the CashCall motions.

may exercise civil jurisdiction over a non-Indian or nonmember...." Further, "the leading treatise on American Indian law... specifically states: 'tribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property.'" *A-1 Contractors v. Strate*, 76 F.3d 930, 939 (8th Cir. 1996). Similarly, *Wisconsin v. EPA*, 266 F.3d 741, 748 (7th Cir. 2001) held that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, [but a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

A state-chartered corporate entity is treated as being non-tribal, regardless of its ownership by Native Americans. *Airvator v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 602 (N.D. 1983), citing the leading treatise, F. Cohen, *Handbook on Federal Indian Law* (1982 ed.), pp. 355-56; *Oglala Sioux Tribe v. C & W Enters.*, 516 F. Supp.2d 1044, 1050 (D.S.D. 2007). Corporations formed under state law are under the "plenary power and authority" of the chartering state. *Airvator*, 329 N.W.2d at 603. Indian tribes can charter corporations, but if Mr. Webb elected to have the benefits of a state-chartered entity, such as ready access to the governing law (*see* p. 7 and n. 3, *infra*), he must accept its burdens.

Under *Montana*, tribal court jurisdiction over this case clearly does not exist. A loan between two persons who are not Tribal members (here, a South Dakota limited liability company which "is not owned or operated by the Cheyenne River Sioux Tribe or any of its political subdivisions," and a non-tribal individual in Illinois), made over the Internet, is not a proper subject for the exercise of authority by a Native American tribe. Indeed, the Supreme Court has held that tribal courts lack jurisdiction over a dispute between two nonmembers, even if it concerns acts entirely within the boundaries of an Indian reservation. *Strate v. A-1 Contractors*, 520 U.S. 438, 456-59 (1997) (tribal courts lack jurisdiction over accident involving nonmembers on a public highway within the reservation).

Tribal court jurisdiction is a matter of subject matter jurisdiction and cannot be created by recitals in a contract of adhesion where there is insufficient connection with Tribal affairs. Tribal "laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. ***Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.***" *Plains Commerce Bank*, 554 U.S. at 337 (emphasis added). The making of a loan by a South Dakota corporate entity to an Illinois resident over the Internet does not qualify. Significantly, defendants state (Def. Mem. p. 8) that they are willing to arbitrate in Illinois before a non-Indian arbitrator as long as it is done on an individual basis, admitting that this dispute has no impact on any interest of the Cheyenne River Sioux Tribe.

Defendants cite no case holding that a tribal court can determine a controversy between a state-chartered corporation and a non-Native American. In fact whereas here the incidents complained of occurred in Illinois, "To trigger exhaustion, an off-the-reservation claim must at a bare minimum impact directly on Tribal Affairs." *Ninigret Devel. Corp. v. Narragansett Indian Wetuomuck*, 207 F.3d 21, 23 (1st Cir. 2000). The only interests at stake here are the financial interests of South Dakota companies' in earning a profit on internet loans from Illinois consumers which are usurious under Illinois civil and criminal law. The Tribe has no interest in this case whatsoever.

Even if there were any Tribal interests in this case - which there are not - "the Supreme Court has not demanded exhaustion 'where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.'" *Ninagaret*, 207 F.3d at 33-34, *quoting National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n. 21 (1985). As discussed *infra* the attempt to assert tribal authority now, and the inclusion of such provisions in the contract, are nothing more than acts of bad faith on the part of defendants.

III. THE CHOICE OF LAW CLAUSE IS NOT VALID

In determining what law applies, a federal court adjudicating a state law claim follows

the choice-of-law rules of the forum state, here Illinois. *Baltimore Orioles, Inc. v. M.L.B. Players Ass'n,* 805 F.2d 663, 681 (7th Cir. 1986). Defendants disclaim applicability of both Illinois and federal law, but cite no other applicable law which authorizes a choice of law clause.[4] Defendants admit (Def.Mem., p. 14) that a choice of law clause will only be honored as to "any issue which the parties could have resolved by an explicit provision in their contract."

The Illinois Consumer Fraud Act, which incorporates the PLRA, provides that rights under it cannot be waived. 815 ILCS 505/10c ("any waiver or modification of the rights, provisions, or remedies of this Act shall be void and unenforceable"). Providing for application of the law of another state, which does not afford the same protection, is an invalid waiver of the consumer's rights and remedies under Illinois law under such a provision. *Bixby's Food Systems, Inc. v. McKay*, 193 F. Supp.2d 1053, 1060 (N.D. Ill. 2002); *To-Am Equip. Co., v. Mitsubishi Caterpillar Forklift America*, 152 F.3d 658, 662 (1998); *Healy v. Carlson Travel Network Assocs., Inc.*, 227 F. Supp.2d 1080, 1087 (D. Minn. 2002) (anti-waiver provision of Illinois law voids choice of law provision). See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 637 n. 19 (1985) (a choice of law clause may constitute an unlawful waiver of statutory rights).

Similarly, duties imposed by criminal statutes represent fundamental public policy that cannot be waived. The Illinois Criminal Code expressly provides that:

> (a) A person is subject to prosecution in this State for an offense which he commits while either within or outside the state, . . . if
>
> (1) The offense is committed either wholly or partly within the state; . . .

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[4] If defendants wanted to rely on tribal law, it was their burden to show what it is through evidence, citation, or other appropriate means. See Fed. R.Civ.P. 44.1 (law of foreign country). Under Illinois choice of law rules, if a party fails to show what the law of a foreign jurisdiction is, it is presumed to be the same as the law of Illinois. *In re Estate of Day,* 7 Ill. 2d 348, 352, 131 N.E.2d 50 (1955); *McCallum v. Baltimore & Ohio R. Co.*, 379 Ill. 60, 68, 39 N.E.2d 340 (1942); *Opp v. Pryor*, 294 Ill. 538, 541, 128 N.E. 580 (1920); *Rozycke v. Sroka*, 3 Ill. App. 3d 741, 744, 279 N.E.2d 155 (5th Dist. 1972); *Colligan v. Cousar*, 38 Ill. App. 2d 392, 402, 187 N.E.2d 292, 296 (1st Dist. 1963); *Sommers v. 13300 Brandon Corp.*, 712 F. Supp. 702, 704 (N.D.Ill. 1989). The Cheyenne River Sioux Tribe has a website, www.sioux.org, but it contains nothing relevant.

> (b) An offense is committed partly within this State, if either the conduct which is an element of the offense or the result which is such an element, occurs within the State. . . .

720 ILCS 5/1-5. Thus, an out of state unlicensed lender that makes a loan in excess of 20% to an Illinois consumer commits a felony. The IDFPR expressly holds that out-of-state Internet lenders must obtain a license. (Am. Cmplt, ¶ 44).

Parties cannot agree to commit conduct defined as a felony by the Illinois Criminal Code. It is well established that application of another state's law to evade a prohibition enforced by criminal sanctions is improper, regardless of any contractual provision. Indeed, defendants included a choice of law provision in their adhesion contracts with financially desperate consumers in an attempt to avoid state regulations and statutes prohibiting their lending practices - an attempt to shield themselves under the purported aegis of tribal immunity.

In *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244, 251-252; 98 N.E. 541, 544 (1912), the court held that "a contract to waive the performance of a duty imposed by statute and enforceable by a criminal prosecution will not be recognized by a court but is void." Similarly, the Seventh Circuit held, *In re C & S Grain Co.*, 47 F.3d 233, 237 (7th Cir. 1995), that "in Illinois, once a statute imposes licensure as a precondition for operation and provides a penalty for its violation, a contract for the unlicensed performance of that act is void." In *LVNV Funding, LLC v. Trice*, 2011 IL App (1st) 092773, 952 N.E.2d 1232, 1237 (1st Dist. 2011), *leave to appeal denied*, 2011 Ill. LEXIS 1886 (Nov. 30, 2011), regarding the activities of an unlicensed collection agency, the court held:

> "When a contracting party is required to have a license to engage in a business and violation of required licensing statute is made a crime, a contract calling for performance in violation of this requirement is illegal and void." 10 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* §19.47, at 562 (4th ed. 1993).
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> **The rule follows from the "elementary principle of contract law... that an illegal contract is void *ab initio.*"** *People v. Caban*, [318 Ill.App.3d 1082, 1089; 743 N.E.2d 600, 606 (1st Dist. 2001)]. [Emphasis added.]

This principle invalidates any choice of law provision.

"Illinois courts respect a contractual choice-of-law clause" only "if the contract is valid, and the law chosen is not contrary to Illinois's fundamental public policy." *Thomas v.*

Guardsmark, Inc., 381 F.3d 701, 705, 706 (7th Cir. 2004). *Electrical & Magneto Serv. Co., Inc. v. AMBAC Int'l Corp.*, 941 F.2d 660, 661-662 (8th Cir. 1991), considered similar choice of law rules and held that laws that protect those in an inferior bargaining position, or that impose criminal sanctions, represent a state's fundamental public policy. *Id.*, 941 F.2d at 663-664, 668 ("the legislature would not allow a criminal law to be bypassed by the mere existence of a choice of law provision contained in a contract").

Under *Chatham Foot Specialists PC v. Health Care Serv. Corp.*, 216 Ill. 2d 366, 381; 837 N.E.2d 48, 57 (2005), "courts will not enforce a contract involving a party who does not have a license called for by legislation that expressly prohibits the carrying on of the particular activity without a license where the legislation was enacted for the protection of the public, not as a revenue measure.

Plaintiffs' reliance on Illinois law does not present a "Catch-22" (Def. Mem., p. 10 n. 10). Defendants, by disclaiming in their contract reliance on Illinois and federal law, cannot rely on Illinois or federal law as to any matter that is a permissible subject of agreement. Plaintiffs rely on Illinois statutes which are not dependent on the parties' consent for their efficacy, and in fact are intended to protect Illinois residents against improvident agreements. Simply put, Illinois can make it a felony to transmit harmful matter into the state, whether the harmful matter is a bullet, child pornography, a fraudulent prospectus, or a usurious loan by an unregulated lender. Illinois can also provide that the consent of the victim is ineffective and attach civil consequences to the prohibited conduct.

IV. THE FORUM-SELECTION PROVISION IS INVALID

Defendants claim that the forum-selection provision is valid because it was agreed to.

Under Illinois law, a forum selection clause is not enforceable where enforcement would contravene the strong public policy of the forum or the chosen forum is "seriously inconvenient for the trial of the action." *See Calanca v. D & S Mfg. Co.*, 157 Ill.App. 3d 85, 510 N.E.2d 21, 23 (1st Dist. 1987). If ever such circumstances existed, they do here. Furthermore, a forum selection clause contained in boilerplate language indicates unequal bargaining power, and the

significance of the provision is greatly reduced. *IFC Credit Corp. v. Rieker Shoe Corp.*, 378 Ill. App. 3d 77, 86, 881 N.E.2d 382, 389 (1st Dist. 2007); *citing Williams v. Illinois State Scholarship Comm'n*, 139 Ill. 2d 24, 72, 563 N.E.2d 465 (1990).

The forum selection clause is not valid under Illinois law because it is part of an illegal contract. Illinois courts will not aid a litigant who seeks to enforce an illegal contract. *Chatham, supra*, 216 Ill. 2d 366, 381, 837 N.E.2d 48 (2005). The sole purpose of defendants' forum selection clause was to further their criminal scheme of evading state law, by selecting a biased forum unlikely to enforce Illinois law. The contract violates Illinois public policy and cannot be enforced.

Beyond the invalid agreement defendants cite no other basis for ousting the jurisdiction of Illinois courts to enforce Illinois laws intended to protect Illinois consumers against oppressive loans. Defendants' attempt to portray this contract term as one freely agreed upon by equal parties is ludicrous. Plaintiffs and the members of the putative class are individuals who were so financially desperate that they could not obtain needed funds unless they "agreed" to the criminally usurious terms put forth by defendants.

The circumstances in this case are a far cry from those present in the cases cited by defendants. In *Schwartz v. Sellers Markets, Inc.*, 1:11CV501, 2011 U.S. Dist. LEXIS 100712, at *8-*9 (N.D. Ill. Sept. 7, 2011), the plaintiff seeking to avoid the forum selection clause was an experienced attorney who regularly charged $750 per hour and desired to represent himself in the action. The court found no merit in the plaintiff's claim that the clause was "buried" in the documents and that defendant engaged in "fraud and overreaching" by imposing a two-day deadline to complete the deal. *Id.* These were clearly not two parties of grossly disparate bargaining power. Similarly, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-16 (1972), upheld a choice of law provision in a contract between a United States business and German business to transport an oil rig, stating that disputes would be resolved by the UK admiralty court. There were two equal and sophisticated parties selecting a neutral location as a forum.

Defendants also rely on *Amaro v. Capital One Bank*, 1:97CV4638, 1998 U.S. Dist.

LEXIS 8373 (N.D. Ill. May 21, 1998) , which involved a choice of law clause, not a forum selection clause. Furthermore, the court pointed out that the issue (appropriate amount of late charges) was one that was not regulated by criminal statutes or a civil statute prohibiting waiver of rights. On the other hand, "special usury" statutes regulating lenders who make loans at high rates of interest are generally held to represent fundamental state policy that cannot be waived by contract, particularly where, as here, violations carry serious criminal penalties. *Brack v. Omni Loan Co.*, 164 Cal. App. 4th 1312; 80 Cal. Rptr. 3d 275 (Cal. App. 2008); *Pennsylvania Dept. of Banking v. NCAS of Delaware, LLC*, 596 Pa. 638; 948 A.2d 752 (2008).

It would be unreasonable to apply these clauses to Illinois consumers. On public policy grounds, Illinois has a strong interest in giving its residents the protection of its consumer protection laws, enforced by criminal penalties. Allowing a waiver of these protections would be against public policy.

> Having enacted paternalistic legislation designed to protect those that could not otherwise protect themselves, the Missouri legislature would not want the protections of Chapter 407 to be waived by those deemed in need of protection. . .
>
> The Missouri statutes in question, relating to merchandising and trade practices, are obviously a declaration of state policy and are matters of Missouri's substantive law. To allow these laws to be ignored by waiver or by contract, adhesive or otherwise, renders the statutes useless and meaningless.

Huch v. Charter Comms., Inc., 290 S.W.3d 721, 725-26 (Mo. *en banc* 2009), *quoting Electrical & Magneto*, 941 F.2d at 664.

V. THE ARBITRATION AGREEMENT IS NOT VALID

Plaintiffs contend that the arbitration clauses in defendants' loan agreements are invalid because (1) the loan agreements expressly state that they are not governed by either federal law or the law of any state, and at common law, pre-dispute arbitration agreements were not enforceable, (2) the arbitration clause is part of an illegal contract, and (3) the arbitration agreement is racially discriminatory.

A. Disclaimer Of Federal Arbitration Act. Defendants rely on Federal law, even though the agreement says federal law does not apply. Since "arbitration is a matter of contract'" and "arbitrators derive their authority to resolve disputes only because the parties have agreed in

advance to submit such grievances to arbitration," *Granite Rock Co. v. International Bhd. of Teamsters*, 130 S. Ct. 2847, 2856 (2010), parties can agree that FAA does not apply. *ING Fin. Partners v. Johansen*, 446 F.3d 777 (8th Cir. 2006). Pre-dispute arbitration agreements are not enforceable under Illinois common law. *Horwarth v. Parker*, 72 Ill. App. 3d 128; 390 N.E.2d 72 (1st Dist. 1979). The only basis in Illinois law for enforcing a pre-dispute arbitration agreement is the Illinois Uniform Arbitration Act, which defendants also state will not apply.

B. Illegality. The arbitration agreement is also invalid under Illinois law because it is part of an illegal contract. *Chatham*, 216 Ill. 2d at 380. While under the FAA illegality of the contract as a whole due to noncompliance with licensing requirements may not void the arbitration clause, defendants disclaimed applicability of the FAA. Under Illinois law, illegality voids the entire contract. *Aste v. Metropolitan Life Ins. Co.*, 312 Ill. App. 3d 972, 728 N.E.2d 629 (1st Dist. 2000).

C. The Arbitration Agreement Is Racially Discriminatory. Each loan agreement entered into by the Webb entities mandates individual arbitration before a member of the Cheyenne River Sioux Nation. Because defendants do not lend to members of the Tribe, all disputes arising under a loan agreement will be with someone who is not a member of the Cheyenne River Sioux Nation.

The racial characteristic of the arbitrator is the only qualification stated and is essential to the agreement. All other persons are excluded as arbitrators, no matter how qualified they may be, and even though race is not a *bona fide* occupational qualification for serving as an arbitrator or judge. Arbitration agreements commonly provide that the arbitrator will be a retired judge, or a lawyer, or a person supplied by a reputable organization known to provide qualified arbitrators. The only qualification here is race.

A contract providing that a dispute between an African American and a Caucasian must be resolved by a Caucasian is patently offensive and unenforceable. *See Shelley v. Kraemer*, 334 U.S. 1 (1948). That is essentially what defendants have done.

Contrary to defendants' memo, the arbitration is not by a "tribal institution." As set forth

above, no "tribal institution" has jurisdiction to resolve disputes between a South Dakota corporate entity and a citizen of Illinois.

Bremen v. Zapata, *supra*, which defendants rely upon, does not help them. There, U.S. and German companies agreed that a tribunal of recognized expertise in the UK would decide any disputes according to a body of law (maritime) which is international in character. The UK was willing to hear the case notwithstanding the absence of any connection with either party. This was obviously an attempt to obtain an impartial adjudication by a country that would treat both parties impartially. It is the exact opposite of what defendants are doing.

Notwithstanding defendants' arguments of the alleged "tribal" interest in the dispute, they now offer to submit to another arbitrator. Yet, defendants have made the FAA inapplicable. The Illinois Uniform Arbitration Act does not permit the appointment of a substitute arbitrator. 710 ILCS 5/3, Appointment of arbitrators, provides:

> Sec. 3. Appointment of arbitrators. If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, any method of appointment of arbitrators agreed upon by the parties to the contract shall be followed. An arbitrator so appointed has all the powers of one specifically named in the agreement. When an arbitrator appointed fails or is unable to act, his successor shall be appointed in the same manner as the original appointment. If the method of appointment of arbitrators is not specified in the agreement and cannot be agreed upon by the parties, the entire arbitration agreement shall terminate.

Defendants would have the Court hold that the agreement is one to arbitrate before any arbitrator a court might select, but that is simply not what the document they rely upon says. Again, "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration," *Granite Rock, supra*, 130 S. Ct. at 2856, and "[i]t is not within the province of a court to make a new agreement. . .into which the parties have not entered." *Wilson v. La Salle Mfg. & Mach. Co.*, 58 Ill. App. 3d 219, 221, 374 N.E.2d 30 (3rd Dist. 1978). *See Carr v. Gateway Inc.*, 395 Ill.App.3d 1079, 918 N.E.2d 598 (5th Dist. 2009), *aff'd*, 241 Ill.2d 15; 944 N.E.2d 327 (2011); *Smith v. ERJ Dining LLC*, 1:11CV2061, Docket No. 36 (N.D. Ill. Feb. 10, 2012) (Exhibit 5).

"A court should not modify an agreement that is patently unfair or requires 'drastic modifications' because so doing could 'discourag[e] the narrow and precise draftsmanship which

should be reflected in written agreements.'" *OCE North America, Inc. v. Brazeau*, 1:09CV2381, 2010 U.S. Dist. LEXIS 25523 (N.D. Ill. March 18, 2010); *quoting, Eichmann v. National Hosp. & Health Care Servs. Inc.* 308 Ill. App.3d 337, 719 N.E.2d 1141, 1149 (1st Dist. 1999). Defendants want the deterrent effect of a patently offensive remedy clause and, when called to task, the benefit of a reasonable one. Illinois law does not give them both.

VI. WITHOUT THE FAA, THE CLASS ACTION WAIVER IS NOT VALID

Absent any protection from the FAA, the class action waiver is invalid under Illinois law because it is part of an illegal contract. *Chatham, supra,* 216 Ill. 2d at 380, 837 N.E.2d 48.

In addition, because there is no valid arbitration clause governed by the FAA, the purported class action waiver is unconscionable and therefore unenforceable pursuant to *Kinkel v. Cingular Wireless LLC*, 223 Ill.2d 1, 857 N.E.2d 250 (2006). The Supreme Court held this week that courts may consider whether classaction waivers "are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." *Marmet Health Care Center Inc. v. Brown*, Nos. 11-391 and 11-394, 565 U.S. ___, 2012 U.S. LEXIS 1076, *5-*6 (*per curiam*) (Feb. 21, 2012) (slip opinion attached as Exhibit 6).

Kinkel held that "substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed.... Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity." 223 Ill.2d at 28 (Internal citations omitted.). Furthermore, "the issue of unconscionability should be examined with reference to all of the circumstances surrounding the transaction.... Courts are more likely to find unconscionability when a consumer is involved, when there is a disparity in bargaining power, and [provisions regarding consumers' rights under the contract are] on a pre-printed form." *Id.* at 24. *Kinkel* therefore held that

> a class action waiver will not be found unconscionable if the plaintiff had a meaningful opportunity to reject the contract term or if the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner. If the agreement is so burdened, the right to seek classwide redress is more than a mere procedural device....

> [A class action waiver] is not unconscionable merely because it is contained in an arbitration clause. It is unconscionable because it is contained in a contract of adhesion that fails to inform the customer of the cost to her of arbitration, and that does not provide a cost-effective mechanism for individual customers to obtain a remedy for the specific injury alleged in either a judicial or an arbitral forum.... [*Id*., 223 Ill.2d at 41, 48.]

It is evident that this is precisely the type of unconscionable circumstance that would fall under *Kinkel.* The class action waiver was imposed as a condition of an illegal loan - one that is so unfair that it is criminal under Illinois law. It is a contract of adhesion where there was no way that the desperate borrower could reject it without rejecting the loan. Its obvious purpose is to minimize defendants' liability for conduct defined as a felony under Illinois law. It is obviously contrary to the public policy of Illinois to permit such evasion.

VII. CONCLUSION

For the above stated reasons, the defendants' motion to dismiss or stay should be denied.

Respectfully submitted,

/s/ Thomas E. Soule
Thomas E. Soule

Daniel A. Edelman
Thomas A. Soule
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
120 S. LaSalle St., Suite 1800
Chicago, IL 60603
(312) 739-4200
(312) 419-0379 (fax)
courtecl@edcombs.com

CERTIFICATE OF SERVICE

I, Thomas E. Soule, hereby certify that on February 24, 2012, the preceding document was filed with the Court and served upon counsel of record for all defendants, by operation of the Court's electronic filing system, as follows:

Ralph T. Wutscher	rwutscher@mtwllp.com
Jeffrey Thomas Karek	jkarek@mtwllp.com
Matthew Robert Lasek	lasekm@ballardspahr.com
Christopher J. Willis	willisc@ballardspahr.com
Michael James Lohnes	michael.lohnes@kattenlaw.com

/s/ Thomas E. Soule
Thomas E. Soule