IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12-2617

DEBORAH JACKSON, *et al*,

Plaintiffs - Appellants,

v.

PAYDAY FINANCIAL LLC, *et al*,

Defendants - Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division,
Hon. Charles P. Kocoras, presiding.

1 : 11 CV 9288

OPENING BRIEF OF APPELLANTS

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-2617

Short Caption: Deborah Jackson et al v. Payday Financial LLC et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Plaintiffs-appellants Deborah Jackson, Linda Gonnella and James Binkowski

(seeking relief for themselves and several classes of similarly situated persons)

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Edelman Combs Latturner & Goodwin LLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Daniel A. Edelman Date: 7/11/2012

Attorney's Printed Name: Daniel A. Edelman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** _____

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JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Illinois (Kocoras, J.) had jurisdiction over claims brought by Deborah Jackson, Linda Gonnella and James Binkowski ("plaintiffs"). 28 U.S.C. §1332(d). Their claims are based on high-interest loans they received, and are brought for several classes. (SA 10-27; PageID 413-430.)[1] Appellees admit that the classes include more than 100 persons; further, they made over $5,000,000 in loans to Illinois residents. (SA 347-349; PageID 10-12.) Plaintiffs are from Illinois. Defendants are a group of South Dakota chartered entities, an individual South Dakotan, and a California corporation. (SA 11-15, 347-349; PageID 10-12, 414-418.)

The District Court dismissed the amended complaint under Fed.R.Civ.P. 12(b)(3) on July 9, 2012, finding that the only proper venue was the Cheyenne River Sioux Tribe, within its reservation in South Dakota. (SA 1-9; PageID 1305-1313.) Plaintiffs filed a notice of appeal on July 10, 2012, from all orders relating to the judgment. (SA 350-351; PageID 1314-1315.)

The United States Court of Appeals for the Seventh Circuit has authority to review, *de novo*, orders dismissing claims for improper venue. *Faulkenberg v. CB Tax Franchise Systems LP*, 637 F.3d 801, 806 (7th Cir. 2011), *Kochert v. Adagen Medical International Inc.*, 491 F.3d 674, 677 (7th Cir. 2007), *Brady v. Sullivan*, 893 F.2d 872, 876 n.8 (7th Cir. 1989) ("when the dismissal is... because of improper venue, the judgment is final and may be appealed"). Thus, this Court has jurisdiction over the appeal, pursuant to 28 U.S.C. §1291.

[1] References to the record on appeal will be made to the "PageID" number given to each document by the Clerk of the District Court, as appears in the top-right corner of each page. References to material in the short appendix will be preceded by "SA."

ISSUES PRESENTED FOR REVIEW

Are contractual terms drafted by a lender regarding forum selection, choice-of-law, arbitration and the right to pursue class actions enforceable if such clauses operate together, as a part of a scheme, (a) to have a dispute decided by persons of the same ethnicity as one party to the dispute, (b) to evade criminal and consumer protection statutes that are incapable of being contractually waived, (c) to require claim resolution in a forum which has no jurisdiction, (d) to impose undue procedural burdens upon a party, and (e) to ultimately deny any form of relief at all to Illinois consumers, contrary to the fundamental public policy of Illinois?

STATEMENT OF THE CASE

I. PLAINTIFFS' SUBSTANTIVE CLAIMS

Plaintiffs received high-interest loans over the internet from a lender associated with Martin Webb, a member of the Cheyenne River Sioux Tribe ("the Tribe") who resides in South Dakota. (SA 347-348; PageID 10-11). Mr. Webb owns and controls several lenders who provide high-interest loans over the internet; these lenders are referred to here as the "Webb Entities."[2] All of the Webb Entities are chartered under South Dakota law. (SA 51- 270; PageID 454-673.) None of them are owned or chartered by the Tribe. (SA 14; PageID 417. See, *e.g.*, SA 60, 94; PageID 463, 497.)

CashCall Inc. ("CashCall") agreed to purchase loans made by the Webb Entities after they are made, or to service loans held by the Webb Entities. CashCall was aware of the content of the loan agreements and their terms, and approved of them. (SA 14-15, 18, 293-300; PageID 417-418, 421, 696-703.)

None of the Webb Entities have ever held a banking charter, or a license from the Illinois Department of Financial and Professional Regulation ("IDFPR"). Holding such a license is required before a lender may provide loans to Illinois residents at an annual interest rate exceeding nine percent. (SA 16; PageID 419.) Likewise, CashCall is not a chartered bank or a licensed lender in Illinois; nor does CashCall hold a collection agency license from the IDFPR. (SA 14-15; PageID 417-418.)

[2] The Webb Entities are Payday Financial LLC, Western Sky Financial LLC, Great Sky Financial LLC, Red Stone Financial LLC, Management Systems LLC, 24-7 Cash Direct LLC, Red River Ventures LLC, High Country Ventures LLC, and Financial Solutions LLC. They operate under several assumed names. Payday Financial LLC was, until at least February 2011, a managing member of the other Webb Entities – including Western Sky Financial, which made loans to each plaintiff. (SA 11-14; PageID 414-417. See SA 81; PageID 484.)

Despite the fact that the Webb Entities did not have a lending license from the IDFPR, each plaintiff received a loan from Western Sky Financial with an interest rate of approximately 139%. (SA 17-18; PageID 420-421. See SA 29-35 and PageID 432-438 (Jackson); SA 37-50 and PageID 440-453 (Gonnella); SA 293-298 and PageID 696-701 (Binkowski) (collectively, "the Agreements").) Thus, each loan was civilly and criminally usurious. Each loan violated the Interest Act, 815 ILCS 205/.01 *et seq*., because,

> except as otherwise provided in [815 ILCS 205/4.05], in all written contracts it shall be lawful for the parties to stipulate or agree that 9% per annum, or any less sum of interest, shall be taken and paid upon every $ 100 of money loaned or in any manner due and owing from any person to any other person or corporation in this state, and after that rate for a greater or less sum, or for a longer or shorter time, except as herein provided.... [815 ILCS 205/4(1).]

The Agreements also violated the Criminal Code of Illinois's anti-usury provisions:

> Any person commits criminal usury when, in exchange for either a loan of money or other property or forbearance from the collection of such a loan, he knowingly contracts for or receives from an individual, directly or indirectly, interest, discount or other consideration at a rate greater than 20% per annum either before or after the maturity of the loan. [720 ILCS 5/17-59(a) (2012); see 720 ILCS 5/39-1 (2011) (citation prior to renumbering).]

Under 720 ILCS 5/17-59(c) (2012), criminal usury is a Class 4 felony, which is punishable by three years' imprisonment. See 720 ILCS 5/39-2 (2011). In addition to a prison sentence, restitution can also be ordered; further, a fine can be imposed upon corporations of up to $50,000 per offense, payable to the Illinois State Treasurer. 730 ILCS 5/5-4.5-45, 5/5-4.5-50, 5/5-5-6, and 5/5-9-1.

Because defendants imposed and collected interest in excess of the limits set by Illinois law, defendants engaged in unfair practices in the course of trade and commerce, contrary to the Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 *et seq*. 815 ILCS 505/2.

Two plaintiffs (Ms. Jackson and Ms. Gonnella) brought claims under these Illinois

statutes in a complaint originally filed in Illinois state court (No. 11 CH 35207 (Cook Co. Cir. Ct.). After removal from that Court pursuant to 28 U.S.C. §1332(d), Mr. Binkowski joined the action, and plaintiffs filed an amended complaint. The amended complaint also sought a finding that the arbitration clauses contained within the Agreements were unenforceable. Plaintiffs sought this relief for classes of those similarly situated. (SA 18-26; PageID 421-429.)

II. THE MOTIONS TO DISMISS

The Webb Entities moved to dismiss, pursuant to Fed.R.Civ.P. 12(b)(3) and the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* ("FAA"). Among other arguments, the Webb Entities claimed that the Agreements included forum selection clauses which "prevent the plaintiffs from pursuing their claims in this Court." (PageID 782.) CashCall filed a motion of its own, which incorporated the Webb Entities' memorandum. (PageID 816.)

The Agreements contain integrated forum selection, choice-of-law, and arbitration provisions. Taken together, these provisions require the pursuit of disputes regarding the Agreements within the Tribe's reservation – before a person selected based upon his membership in the Tribe – and exempt the Agreements from all federal and state laws, which would be subject exclusively to the laws of the Tribe:

> **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 by 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.**
>
> ...
>
> 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.
>
> ...
>
> **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 HEREBY AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL, TO HAVE A COURT DECIDE YOUR DISPUTE, TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO HAVE CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT.... [The] parties agree that the arbitrator has no authority to conduct class-wide proceedings.... The validity, effect and enforceability of this waiver of class action lawsuit and class-wide Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne [River] Sioux Tribal Nation, and not by the arbitrator.... [See, *e.g.*, SA 29-32; PageID 432-435.][3]

Plaintiffs argued that these clauses, and others, are invalid because they are a part of a scheme to deprive plaintiffs of any remedy at all. The selection of a decision-maker based solely upon his or her race is fundamentally improper. Further, the Agreements were illegal under the civil and criminal laws of Illinois, the provisions of which cannot be waived by contract. As such, the forum selection, choice of law and arbitration provisions violated the fundamental public policy of Illinois. Further, the consumers were in a substantially inferior bargaining position to the Webb Entities; this is grounds for not enforcing the Agreement.

III. THE DISTRICT COURT'S ORDER

After briefing, the District Court dismissed plaintiffs' amended complaint under

[3] Review of these provisions shows that provisions regarding forum selection are embedded within paragraphs dealing with other subjects, including arbitration, choice-of-law and waiver of the right to bring a class action. As shown in the argument, *infra*, this was not accidental, but part of an overall plan to thwart any claims brought by consumers.

Fed.R.Civ.P. 12(b)(3). The Court below did not address any of the arguments regarding the arbitration clause, the choice-of-law provisions, or the class action waiver, but only addressed whether the forum selection provisions were proper.

The District Court held that the forum selection clauses could not be invalidated because of the Agreements' illegality, because "doing so would require us to rule on the substance of [plaintiffs'] complaint before reaching the threshold question of whether venue in this court is proper in the first instance." (SA 5-6; PageID 1310-1311.) The District Court further held that plaintiffs consented to the Agreements' terms, and that their "difficult financial circumstances alone do not warrant invalidating the forum selection clause." (SA 6-7; PageID 1311-1312.) Finally, the District Court held that "Illinois and Seventh Circuit case law indicate that a party may prospectively waive by contract her statutory right to litigate in her preferred forum, even if the likelihood of success in a contractually selected forum is less favorable," and that enforcement of those laws could be done outside of Illinois. (SA 7-8; PageID 1312-1313.)

Based on these holdings, the District Court concluded that "plaintiffs have not identified any basis for invalidating the forum selection clause." (SA 8; PageID 1313.) Plaintiffs respectfully submit that the record shows otherwise, and that the court below erred. Thus, plaintiffs appeal from this order, and from all others regarding the judgment. (SA 350; PageID 1314.)

STATEMENT OF FACTS

I. THE LOANS PROVIDED BY THE WEBB ENTITIES

Each plaintiff borrowed $2,525.00 from Western Sky Financial LLC (one of the Webb Entities), through an internet transaction. Deborah Jackson's loan agreement, dated August 16, 2010, required her to pay Western Sky Financial $10,917.57 to satisfy that loan over three years, at a disclosed annual interest rate of 139.33%. (SA 29; PageID 432.) James Binkowski's loan, dated December 19, 2010, required $10,878.57 in payments over three years, at a disclosed interest rate of 139.33%. (SA 293; PageID 696.) Linda Gonnella's loan, dated January 25, 2011, required her to pay $10,820.07 over three years, at a disclosed annual percentage rate of 138.99%. (SA 43; PageID 446.)

The loans given to plaintiffs are typical of loans provided by the other Webb Entities since at least August 2007. The Webb Entities offer loans marketed to Illinois residents through the internet and television advertisements, provide between $300 and $2,525 on each loan, and impose interest rates in excess of 100%. (SA 15-16; PageID 418-419.) None of the Webb entities held a banking charter, or a license from the Illinois Department of Financial and Professional Regulation, which would authorize them to make loans at more than 9% to residents of Illinois. (SA 16; PageID 419.) The Webb Entities made high-interest loans to plaintiffs anyway, even though defendants either knew that their loans were unenforceable or recklessly disregarded that fact. (SA 17; PageID 420.)

The Webb Entities are a common enterprise run by Martin Webb, who is a member of the Tribe but is not a Tribal official. (SA 14; PageID 417.) None of the Webb Entities are owned or operated by the Tribe; each is chartered under South Dakota law. (SA 11-14; PageID 414-417.) Mr. Webb exercised complete control over the Webb Entities. As such, it was his decision to

lend to Illinois residents, advertise those loans to Illinois residents, and set the interest rates for those loans, through the Webb Entities. (SA 14; PageID 417.) Mr. Webb also decided to exclude Tribe members from receiving loans from the Webb Entities. (SA 14, 17; PageID 417, 420.)

II. THE LOAN AGREEMENTS

The terms regarding forum selection, arbitration, choice of law, and pursuing class actions, are fundamentally identical in each of the Agreements. The loan documents provided to Ms. Jackson, for example, provide as follows:

> **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 by 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.
>
> ...
>
> 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[4] or any other states of the United States. Neither this Agreement nor Lender is subject to the laws of any state of the United States of America.
>
> ...
>
> 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.
>
> ...

[4] The Tribe's reservation is physically located in South Dakota. Its administrative center is located in Eagle Butte, S.D., which is approximately 90 miles by road from Pierre, S.D.

> 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,[5] and shall be conducted in accordance with the Cheyenne River Sioux Tribal Nation's consumer dispute rules and the terms of this Agreement.
>
> ...
>
> YOU HEREBY AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL, TO HAVE A COURT DECIDE YOUR DISPUTE, TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO HAVE CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT.... [The] parties agree that the arbitrator has no authority to conduct class-wide proceedings.... The validity, effect and enforceability of this waiver of class action lawsuit and class-wide Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne [River] Sioux Tribal Nation, and not by the arbitrator....
>
> …
>
> 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. The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement. [SA 29-32; PageID 432-435.][6]

There are even provisions disclaiming the applicability of federal law, even though disclosures which purportedly comply with federal requirements are found in the Agreements:

> Our inclusion of [Truth In Lending Act] disclosures does not mean that we [the Webb Entities] consent to the application of state or federal law to us, to the loan, or this Loan Agreement.

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[5] For the sake of clarity, plaintiffs note that Tribal Elders, and members of the Tribal Council, would be members of the Tribe. The Webb Entities concede as much; they said, in a brief filed with the District Court, that "arbitrations conducted by Tribal institutions will be staffed by members of the Tribe." (PageID 790.)

[6] Mr. Binkowski's version of the Agreement is identical. (SA 293-296; PageID 696-699.) Ms. Gonnella received a slightly different version of the Agreement. In substance, however, it is the same; specifically, the application of federal and state law to disputes is forbidden, the application of Tribal law is required, the jurisdiction of the Tribe's courts is asserted, and the selection of a Tribe member as the arbitrator is required. (SA 43-46; PageID 446-449.)

...

> Although federal law does not apply to this Agreement, this Note is in original format an electronic document fully compliant with the [E-SIGN Act] and other applicable laws and regulations.... [SA 29, 31; PageID 432, 434.]

Throughout the Agreements, reference is made to the laws of the Cheyenne River Sioux Tribe, and the Tribe's consumer dispute rules. Nothing in the record shows what those laws and rules are; indeed, insofar as the record shows, no such laws exist. A good-faith attempt to obtain those rules, by normal means of legal research, was attempted by plaintiffs' counsel. This attempt failed. Furthermore, defendants have provided no evidence of what those laws and rules are, and did not produce them upon the request of plaintiffs' counsel. (SA 301-337; PageID 1198 -1247.)

The costs of arbitration would be advanced by the Webb Entities. However, the other expenses that plaintiffs would incur would be borne by them. Further, the arbitrator is empowered to award costs (including those advanced by the Webb Entities) to a prevailing party, as part of a ruling on the parties' claims. (SA 32; PageID 435.)

A provision permitting consumers to "opt out" of arbitration exists. (SA 33; PageID 436.) However, borrowers would still be subject to the laws and jurisdiction of the Tribe if they chose to opt-out, under the terms of the Agreements; any action to pursue claims would have to take place before the Tribal Court, on the Cheyenne River Sioux Tribe's reservation. (*Id.*)

III. CASHCALL'S INVOLVEMENT

CashCall is a California corporation; it is not a chartered bank, and holds no relevant licenses from the IDFPR. (SA 14-15; PageID 417-418.) It arranged with the Webb Entities to either purchase their loans or service them. In the course of its relationship with the Webb Entities, CashCall has become aware of the terms of their loans, and approved of their use. (SA 15; PageID 418.) Further, the arbitration clause in the Webb Entities' loans is binding upon

assignees and successors to the Webb Entities, like CashCall. (SA 296-297; PageID 699-700.)

The relationship between CashCall and the Webb Entities can be seen through documents relating to Mr. Binkowski's loan. The account number assigned to his loan by Western Sky Financial was 5007850. On December 1, 2011, CashCall sent a letter to Mr. Binkowski, stating that he "breached [his] contract and your Loan #5007850 with CashCall, Inc. is now in default." (SA 18, 293-300; PageID 421, 696-703.) On information and belief, CashCall made similar arrangements to purchase, or service, the loans given to Ms. Jackson, Ms. Gonnella and other Illinois consumers. (SA 18; PageID 421.)

SUMMARY OF ARGUMENT

The District Court erred when it found that "plaintiffs have not identified any basis for invalidating the forum selection clause." (SA 8.) On the contrary, they have. The District Court also failed to consider the broader purpose of the Agreements' terms regarding forum selection, choice-of-law and arbitration, all of which "operated in tandem as a prospective waiver" of the plaintiffs' rights under Illinois law. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 637 n.19 (1985). Put simply, the Agreements were crafted to prevent any consumer from attempting to pursue claims against the Webb Entities, to ensure that any dispute that was brought would be heard by a forum that would be prejudiced (and perceived as prejudiced) against the interests of the borrower and in the lender's favor, and to shield Martin Webb and the high-interest lenders he controlled from any meaningful liability for their abusive practices.

First, provisions in the Agreement were included to ensure that the person hearing the matter would be a Native American, and a member of the same Tribe as the man who controls a lender providing usurious loans. The arbitrator had to meet no other qualification besides membership in the Cheyenne River Sioux Tribe – thus disqualifying the most experienced and intelligent Caucasians, or African-Americans, or any other person who was not a Native American and would otherwise be available to hear the matter. Further, Mr. Webb's businesses would *not* lend to Tribe members. Thus, it was guaranteed that any dispute over the Agreements (1) would concern a business owner who was a member of the Tribe and a consumer who was not a Tribe member, and (2) would be decided *only* by a member of the same Tribe as the business owner. Such a requirement is unjustifiable – just as a contract requiring a dispute between a white man and a black man to be heard only by a Caucasian (or, alternatively, by an

African-American) cannot be justified.

Second, under Illinois law, the criminal and civil laws of Illinois cannot be waived by contract, and the pursuit of those laws by state authorities demonstrate that the prevention of usurious transactions, performed by out-of-state lenders over the internet, represents the fundamental public policy of Illinois, as expressed in its laws, its court rulings, and the acts of its officials. By purporting to disclaim Illinois law and providing that the dispute could only be resolved by a Native American, the Agreements violate the fundamental public policy of Illinois; none of them are enforceable.

Third, a Native American tribe has no jurisdiction over disputes between South Dakota corporate entities and borrowers who do not reside on the Tribe's reservation, and who do not share the Tribe's ethnicity. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *Montana v. United States*, 450 U.S. 544 (1981). The Agreements therefore deprive the borrowers of *any* relief at all.

Fourth, there is no evidence in the record that the Tribe actually has any laws with respect to usury, trade practices, arbitration, or claim resolution procedures. (See SA 301-337.)

In particular, examination of the Agreements shows that defendants violated the Criminal Code of Illinois. 720 ILCS 5/39-1 (2011); 720 ILCS 5/17-59 (2012) [renumbered]. The Criminal Code applies to a crime if any "conduct which is an element of the offense, or the result which is such an element" occurs in Illinois, even if other elements to the crime took place elsewhere. 720 ILCS 5/1-5(b). The victims' presence in Illinois during the transactions makes the Criminal Code applicable to defendants. *People v. Ruppenthal*, 331 Ill.App.3d 916, 922-923; 771 N.E.2d 1002, 1007-1008 (1st Dist. 2002). Defendants' conduct in making and collecting the loans is a felony in Illinois. This (a) demonstrates the strength of the public policy against

usurious transactions and (b) makes any exercise of jurisdiction by the courts of a Tribe in South Dakota, over application of the criminal laws of Illinois, totally inappropriate. Of course, the Agreements actually *prohibit* the Tribal forum from enforcing any laws or regulations besides those of the Tribe. Thus, the forum selection provisions together with the choice-of-law clauses, served to act as a shield from liability for felonies committed in Illinois.

The Consumer Fraud Act also prohibits the contractual waiver of protections afforded to Illinois consumers. 815 ILCS 505/10(c). A clause waiving consumers' rights under Illinois law therefore cannot be enforced, and the Consumer Fraud Act applies to the Agreements. Since the Webb Entities charged a rate of interest more than ten times the rate permitted by the Interest Act (815 ILCS 205/4(1)), the Agreements are civilly usurious, and constitute unfair practices in the course of trade or commerce. Furthermore, the protection provided by these laws is necessary to protect Illinois borrowers from abuse. The fact that plaintiffs were required to pay almost $11,000 for a loan of about $2,500, and to agree to other punitive terms, demonstrates a severe disparity in bargaining power, contrary to the District Court's conclusion on the matter. *Williams v. Illinois State Scholarship Commission*, 139 Ill.2d 24, 72, 563 N.E.2d 465, 486-487 (1990).

Enforcement of the Agreements would be unjust and contrary to law. This Court should so find, and reverse the decision below.

ARGUMENT

I. STANDARD FOR REVIEWING RULE 12(B)(3) MOTIONS

This Court "review[s] *de novo* [a] district court's order dismissing [a] case for improper venue, construing all facts and drawing reasonable inferences in favor of the plaintiffs." *Faulkenberg v. CB Tax Franchise, supra,* 637 F.3d at 806.

II. STANDARD FOR REVIEWING CHOICE-OF-LAW AND CHOICE-OF FORUM PROVISIONS IN CONTRACTS

A federal court adjudicating a state law claim follows the choice-of-law rules of the forum state – *i.e.*, Illinois. *Baltimore Orioles Inc. v. M.L.B. Players Association,* 805 F.2d 663, 681 (7th Cir. 1986).

Generally speaking, "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). And as the District Court found, "Illinois' public policy is set out in its Constitution, statutes, and longstanding case law." (SA 7 (citing *In re Estate of Feinberg*, 235 Ill.2d 256, 919 N.E.2d 888 (2009).) *Thomas* stands for the proposition that choice-of-law clauses are subject to a basic question of fairness.

Bonny v. Society of Lloyd's, 3 F.3d 156, 160 (7th Cir. 1993), is in line with this, both with respect to choice-of-law clauses and choice-of-forum provisions:

> the presumptive validity of a forum selection clause can be overcome if the resisting party can show it is "unreasonable under the circumstances." [*M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)]…. [Forum] selection and choice of law clauses are "unreasonable" (1) if their incorporation into the contract was the result of fraud, undue influence or overweening bargaining power, *Carnival Cruise Lines, Inc. v. Shute*, [499 U.S. 585 (1991)] *M/S Bremen*, 407 U.S. at 12-13; (2) if the selected forum is so "gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court." *Id.* at 18; or (3) if enforcement of the clauses would contravene a strong public policy of the forum in which the suit is brought,

declared by statute or judicial decision. *Id*. at 15.

Accord, AAR International Inc. v. Nimelias Enterprises SA, 250 F.3d 510, 525 (7th Cir. 2001). The District Court's opinion cited to both *Bonny* and *AAR* (SA 5-7), but failed to correctly apply them to the Agreements, which frustrate the fundamental public policy of Illinois.

Some consumer protection statutes (like the Consumer Fraud Act) include provisions expressly prohibiting the waiver of their protections. 815 ILCS 505/10c. *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 132 (7th Cir. 1990), considered the anti-waiver provisions of Indiana law regarding franchising, and held that

> **the public policy, articulated in the nonwaiver provisions of the statute is clear: a franchisor, through its superior bargaining power, should not be permitted to force the franchisee to waive the legislatively provided protections, whether directly through waiver provisions or indirectly through choice of law.** This public policy is sufficient to render the choice to opt out of Indiana's franchise law one that cannot be made by agreement. [Emphasis added.]

This holding was followed, as to an anti-waiver provision in Illinois law, in *Korean American Broadcasting Co. Inc. v. Korean Broadcasting System*, 2012 U.S. Dist. LEXIS 44353, *8-*9 (N.D.Ill. Mar. 29, 2012):

> The… reasoning in *Wright-Moore* applies here. **Illinois has a strong public policy of protecting Illinois franchisees by overriding the Agreement's choice-of-law provision, and we concur with our colleagues who have relied on *Wright-Moore* in holding that this public policy invalidates contractual choice of law in the franchise context.** See *Franklin's Sys., Inc. v. Infanti*, 883 F.Supp. 246, 250-51 (N.D.Ill. 1995) (holding that the Franchise Act applied notwithstanding the parties' contractual choice of Georgia law); [*Flynn Beverage Inc. v. Joseph E. Seagram & Sons, Inc*., 815 F.Supp. 1174, 1178 (C.D.Ill. 1993)] (applying the Franchise Act notwithstanding the parties' contractual choice of New York law); *Hengel, Inc. v. Hot 'N Now, Inc.*, 825 F.Supp. 1311, 1316-17 (N.D.Ill. 1993) (holding that the Franchise Act "represents a fundamental policy" that invalidated contractual choice of Michigan law); see also *To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am., Inc.*, 152 F.3d 658, 662 (7th Cir. 1998) (citing *Hengel* for the proposition that "Illinois, like many other states, has made it clear that parties cannot opt out of the coverage of the Act for Illinois

> franchisees"). The Franchise Act thus overrides the California choice-of-law in the Agreement and voids the forum-selection clause.

See *Bixby's Food Systems Inc. v. McKay*, 193 F.Supp.2d 1053, 1060 (N.D.Ill. 2002) (same); *Healy v. Carlson Travel Network Associates Inc.*, 227 F.Supp.2d 1080, 1087 (D. Minn. 2002) (anti-waiver provision of Illinois law voids choice of law provision).

Mitsubishi Motors v. Soler, *supra*, 473 U.S. at 637 n.19, notes that the use of choice-of-forum and choice-of-law clauses to evade otherwise applicable restrictions on conduct are invalid:

> **in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.** See, e. g., *Redel's Inc. v. General Electric Co.*, 498 F.2d 95, 98-99 (5th Cir. 1974); *Gaines v. Carrollton Tobacco Board of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967); *Fox Midwest Theatres v. Means*, 221 F.2d 173, 180 (8th Cir. 1955). *Cf. Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1955). [Emphasis added.]

See *Vimar Seguros y Reaseguros SA v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *Cange v. Stotler & Co.*, 826 F.2d 581, 594-595 (7th Cir. 1987) (similar). This concept was cited with approval as recently as this July in *Wootten v. Fisher Investments*, 688 F.3d 487 (8th Cir. 2012). See, *e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006).

This action is not the first one the Webb Entities have faced where the legality of their loans under state laws was challenged. Far from it; this action is one a series of suits – some of which were brought by state governments – seeking redress for lawless conduct involving high-interest loans made by the Webb Entities. Courts have rejected defendants' arguments regarding the application of state laws. For example, *Colorado v. Western Sky Financial LLC*, 845 F.Supp.2d 1178, 1180-1182 (D.Colo. 2011) held that the misconduct alleged by the State of Colorado did not "[involve] regulation of Indian affairs on a reservation," and that "there was no

reasonable basis for defendants' repeated argument that the case involves regulation of Indian affairs on an Indian reservation." In *Missouri v. Webb*, 2012 U.S. Dist. LEXIS 41702, *10-*11 (E.D.Mo. Mar. 27, 2012), the Webb Entities claim of "sovereign immunity" was rejected, for "Webb, as an enrolled member of the Tribe, is not individually entitled to immunity, nor does his membership in the Tribe confer such immunity upon the Lending Companies. [*Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 171-72 (1977)] (holding that the "doctrine of sovereign immunity…. does not immunize individual members of [a] Tribe."). Further, as noted above, there is no evidence on the current record that the Lending Companies have applied for tribal entity status under the rules applicable to that process." And in *Western Sky Financial v. Maryland Commissioner of Financial Regulation*, 2012 U.S. Dist. 107016 *4-*5, *11-*18 (D.Md. July 27, 2012), the Court held that, under *Younger v. Harris*, 401 U.S. 37 (1971), it was required abstain from interfering with a cease-and-desist order issued by the State of Maryland, notwithstanding the Webb Entities' claim that by doing so, the State deprived them of "rights guaranteed by the Fort Laramie Treaty of 1868 (15 Stat. 635) and an Act of Congress enacted in 1889 (25 Stat. 888)… [contrary to] 42 U.S.C. § 1983 (2006)."

III. THE VARIOUS PROVISIONS OF THE AGREEMENTS MUST BE READ, CONSTRUED AND TREATED TOGETHER

When reading contractual provisions, *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 565 (7th Cir. 1995) instructs Courts to read a contract as a whole, give effect to all of its provisions, construe it consistently and logically, interpret it under all the circumstances of the situation and, if it is unambiguous, determine its meaning as a matter of law. *Accord, Sprague v. Central States S.E. & S.W. Areas Pension Fund*, 143 F.Supp.2d 948, 954 (N.D.Ill. 2001) (courts must "engage in a holistic reading" of contracts).

When this is done, various provisions of the Agreements lead to the following results:

- Disputes between the parties, including claims that the lender engaged in illegal or abusive conduct, would be resolved through arbitration conducted on the Tribe's reservation.
- Those disputes would be heard and decided *only* by either (1) a Tribal Elder of (2) a panel of three members of the Tribal Council. The contract provides for no other qualification to serve as the arbitrator besides whether the decision-maker is a Native American, or not.
- When a dispute arises, the only law that would be used to resolve it would be the laws of the Tribe. Federal and state laws, under the Agreements' terms, cannot be applied.
- What the Tribe's law and rules are regarding consumer protection, usury and civil procedure – if they exist – is a mystery. Certainly, they are not easily accessible to the average consumer accepting a loan from defendants.
- The Agreements include a class action waiver, the validity of which would be decided only by a court located within the Tribe's reservation. Further, any other disputes that could not be handled by the arbitrator (for whatever reason) could be resolved only by a Tribal court.

The effects of that the Agreements have, as a whole, are absolutely impermissible. The District Court failed to address these effects in any way, and instead dismissed on the ground that "plaintiffs have not identified any basis for invalidating the forum selection clause." (SA 8.) This wrong as a matter of fact; several grounds for not enforcing forum selection provisions exist. Furthermore, the District Court failed to appreciate the combined effect that the

Agreements' terms had, when they were viewed in tandem. The sum of the Agreements' parts is a bad-faith attempt to deny the rights of Illinois residents to be free from abusive (indeed, criminal) financial transactions, and to permit defendants to evade any liability for their actions. The District Court incorrectly found that these provisions did not have this effect.

IV. THE AGREEMENTS ARE UNENFORCEABLE

A. There can be no racial discrimination when selecting the person deciding the case

The Agreements provide that the person resolving the parties' disputes be selected not because of any experience she may have, but solely on the basis of the fact that he is a Native American. That arbitrator would sit in judgment of a claim between (a) a business owned by a member of the arbitrator's Tribe and (b) a consumer who is not a member of the Tribe. This fact was not addressed by the District Court. It should have been.

The result of application of the Agreements' terms is as impermissible as a litigant insisting that he, as a white man, was entitled to have his case heard by a Caucasian judge. *United States v. Rutledge*, 648 F.3d 555, 562 (7th Cir. 2011) ("the Equal Protection Clause mandates that race discrimination be eliminated from all official acts and proceedings of the State"). The question before the Court is only slightly different than this hypothetical – can a contractual provision requiring the selection of a decision-maker based strictly on his ethnicity be enforced by a court? The answer is "no."

Rejection of a clause mandating an arbitrator of a specific race is particularly necessary here, where the ethnicity of the arbitrator will be shared by one party to the contract, and not shared by an opponent. At the very least, this creates an inherent, and intolerable, appearance of prejudice. Nevertheless, regardless of context, any agreement which provides that the sole qualification for appointment as a person presiding over resolution of a claim is that person's

race is anathema to decades of due process and equal protection law. See, *e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (redlining); *Terry v. Adams*, 345 U.S. 461 (1953) (discrimination in primary election process); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (public accommodation). "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Romer v. Evans*, 517 U.S. 620, 633 (1996) (relying upon, *inter alia*, *Shelley*) (internal quotation marks omitted).

The immediate result of this analysis is that the arbitration agreement cannot be enforced. Further, it must follow that arbitration cannot be compelled, at all. Defendants suggested below that substitution under 9 U.S.C. §5 is permissible. Given the content of the arbitration clause, when viewed in tandem with other clauses in the Agreements, it is not. The selection of a Tribe member as the arbitrator is clearly fundamental to the agreement to arbitrate. The selection of an arbitrator on account of his ethnicity was intentional, and designed by the Webb Entities for the purpose of ensuring a friendly, if not outright prejudiced, forum. Thus, the selection of a member of the Tribe is not a mere logistical concern, but is integral to the arbitration clause as a whole. Under *Carr v. Gateway Inc.*, 241 Ill.2d 15; 944 N.E.2d 327 (2011), and *QuickClick Loans LLC v. Russell*, 407 Ill.App.3d 46; 943 N.E.2d 166 (1st Dist. 2011), defendants cannot save their arbitration clause by claiming, after the fact, that arbitration can be done in Illinois, before someone who is not selected on account of race.

Beyond that, it should be emphasized that the Agreements reject the application of any federal law. Since application of the rules governing any dispute resolution process in an arbitration clause is a matter of contract, and as the use of *any* federal law is rejected here, the

FAA cannot be applied to the arbitration agreement. See *Rent-A-Center West Inc. v. Jackson*, 130 S.Ct. 2772, 2776 (2010). As a result, the Agreements cannot enjoy the benefit of any supposed presumption in favor of arbitration. See, *e.g.*, *Kawasaki Heavy Industries v. Bombardier Recreational Products Inc.*, 660 F.3d 988, 994 (7th Cir. 2011) ("the Federal Arbitration Act… was originally enacted to reverse the longstanding judicial hostility to arbitration… and to place arbitration agreements upon the same footing as other contracts").

Similarly, the class action waiver provision is entitled to no deference, on account of any supposed preemption by the Federal Arbitration Act. Thus, the holdings of *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) are inapplicable here.[7] The class action waiver provision "operated in tandem" with the choice-of-forum, choice-of-law and arbitration provisions to further shield defendants from any liability for a pattern of illegal conduct. *Mitsubishi Motors v. Soler*, *supra*.

Under Illinois law, illegality voids the *entire* contract. *Asta v. Metropolitan Life Ins. Co.*, 312 Ill.App.3d 972, 728 N.E.2d 629 (1st Dist. 2000). And the Agreements are in fact illegal, for reasons discussed *infra*. Similarly, the unconscionability of the deal would void the contract. If "examined with reference to all of the circumstances surrounding the transaction," the Agreements' requirement of an arbitrator or decision-maker selected solely because of his race surely would qualify as unconscionable. *Kinkel v. Cingular Wireless LLC*, 223 Ill.2d 1, 24; 853 N.E.2d 250, 265 (2006).

While the Agreements purport to reject the application of any state law, application of

[7] Of course, the terms of the *Concepcion* arbitration agreement, which provided for a minimum award of $7,500 for a successful claim, plus twice the amount of attorney's fees incurred (*Concepcion*, 131 S.Ct. at 1744) is miles removed from the terms of the Agreements considered here.

Illinois law to a transaction within the jurisdiction of Illinois does not require the parties' assent. Thus, the laws of Illinois do apply, and provide that substitution of an arbitrator, where the choice provided for by the agreement fails, is *not* permitted. 710 ILCS 5/3.

B. Nothing in the record establishes what the Tribe's laws are

An important consideration, as to whether public policy concerns require invalidation of a choice-of-law provision, is what the laws of the two competing jurisdictions require. *Thomas*, *supra*. Nothing in the record on appeal shows what the laws of the Tribe are; thus, no firm comparison to Illinois law can be made. In fact, so far as this Court is concerned with this case, no Tribal law on relevant matters exist.

This is not for want of an effort to establish what Tribal law required. The Webb Entities, in a reply brief filed with the District Court, said that the laws were electronically available:

> Moreover, a court can ascertain the laws of the Cheyenne River Sioux Tribe the same way it would for a state: survey the statutes and case law, both which are published and publicly available. See, *e.g.*, WESTLAW database CRSIOUX-CS. These materials are available in libraries throughout the country. (PageID 1158.)

Counsel for plaintiffs called this bet. Investigation showed that (a) the Chicago Public Library did not have access to Westlaw or any other internet legal research service, (b) the Cook County Law Library had access to Westlaw but not to the CRSIOUX-CS database, (c) a review of the Cook County Law Library's had no relevant printed material, and (d) accessing Westlaw through piecemeal credit card transactions (1) did not permit searches on keywords and (2) would cost $36.00 per case citation – presuming that the consumer had a case citation at hand. When all else failed, counsel for plaintiffs simply asked counsel for defendants to produce the law defendants were relying upon. No response came. (SA 1207-1210.) In response to

plaintiffs advising the Court of the efforts to obtain the law (including a request directly to defendants), the Webb Entities only said that the laws could be provided by the Tribe itself, at a cost of $75. (PageID 1250.) Importantly, no defendant has bothered to provide that information to the Court, to prove that application of the laws of the Tribe would be fair to all concerned and would not frustrate Illinois public policy.

The only presumption that can be drawn from the preceding, and from the generally onerous terms imposed by the contract, is that the laws of the Tribe are incompatible with those of Illinois. As a result, application of Tribal law should be regarded as a derogation of the rights of Illinois residents. And as shown below, this constitutes a violation of the fundamental public policy of Illinois.

Furthermore, if an experienced attorney has difficulty accessing all relevant laws that can be used to assist a consumer in prosecuting a dispute against defendants, a borrower working alone have very little chance of successfully prosecuting a claim. The fact that the laws that would govern any dispute would not be readily ascertainable by people who are demonstrably unable to spend any significant sum of money to obtain a copy of that law (for, after all, they just took out a loan with an abusively high interest rate) constitute a significant barrier to the pursuit of claims of unfair business practices that borrowers may have.

C. The choice-of-law and choice-of-forum provisions serve to waive the rights of Illinois residents that, as a matter of law and of public policy, cannot be waived

The Agreements provide that the Tribe's law are the only ones that can be applied to the dispute; no state or federal law or regulation would apply to the Agreements, their enforcement, or their interpretation. (SA 29, 31, 33, 43, 45, 46, 293, 295, 296.) The result is that felonies committed against Illinois residents cannot be prosecuted, and rights given to them by consumer

protection statutes are waived, contrary to a ban on any waiver of those rights and the fundamental public policy expressed in Illinois law. Accordingly, the forum selection and choice-of-law provisions cannot be enforced.

1. The Criminal Code of Illinois

Under 720 ILCS 5/39-1 (2011) and 720 ILCS 5/17-59 (2012), usury is a Class 4 felony. An unlicensed and unregulated person that imposes an interest rate in excess of 20% on a loan commits a crime that is punishable by a prison sentence of up to three years, a fine of up to $50,000 per violation (payable to the State), and an order to make restitution to victims. 730 ILCS 5/5-4.5-45, 5/5-4.5-50, 5/5-5-6, and 5/5-9-1.

The allegations in the complaint make it clear that, under the provisions of the Criminal Code, the crime occurred in Illinois. 720 ILCS 5/1-5 provides:

> **(a) A person is subject to prosecution in this State for an offense which he commits, while either within or outside the State, by his own conduct or that of another for which he is legally accountable, if:**
>
> **(1) the offense is committed either wholly or partly within the State; or**
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> **(2) the conduct outside the State constitutes an attempt to commit an offense within the State; or**
>
> **(3) the conduct outside the State constitutes a conspiracy to commit an offense within the State, and an act in furtherance of the conspiracy occurs in the State; or**
>
> **(4) the conduct within the State constitutes an attempt, solicitation or conspiracy to commit in another jurisdiction an offense under the laws of both this State and such other jurisdiction.**
>
> **(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….**

Plaintiffs reside in Cook County, Illinois. (SA 11.) The Webb Entities offered loans to

Illinois residents, through television and internet advertisements specifically directed to Illinois residents. (SA 15.) The Webb Entities made loans to persons residing in Illinois. (SA 17-18.) Collection was sought by the Webb Entities, and by CashCall, from Illinois residents. (SA 18. See SA 300 (CashCall letter address to Binkowski's address in Illinois).) The loans at issue are alleged to be criminally usurious. (SA 20-22.) Under 720 ILCS 5/1-5, defendants' alleged actions are punishable by the Criminal Code of Illinois. See *People v. Ruppenthal*, 331 Ill.App.3d 916, 922-923; 771 N.E.2d 1002, 1007-1008 (1st Dist. 2002) (application of 720 ILCS 5/1-5 to solicitation offense).

While no comparison can be made to Tribal law from the record, the most drastic thing a state can do, to prohibit a certain course of action, is to declare the bad act a felony. The imposition of penalties of tens of thousands of dollars per violation, and authorization of substantial prison sentences, are the clearest imaginable expressions of what Illinois public policy is.

The Criminal Code of Illinois can only be applied by Illinois courts. It is clear that "one State's law has no force beyond that State's boundaries unless another State chooses to recognize it." *Rollins v. Ellwood*, 141 Ill.2d 244, 256; 565 N.E.2d 1302, 1307 (1990). The choice-of-forum, choice-of-law and arbitration provisions "operated in tandem as a prospective waiver" of the protection of any state law – including, therefore, Illinois's criminal laws. *Mitsubishi*, *supra*.

2. The Consumer Fraud Act

Plaintiffs bring claims under the Consumer Fraud Act, which provides that any unfair or deceptive practice done in the course of trade or commerce is prohibited. 815 ILCS 505/2. The Consumer Fraud Act expressly provides that it cannot be contractually waived. 815 ILCS 505/10c provides as follows:

> **Any waiver or modification of the rights, provisions, or remedies of this Act shall be void and unenforceable.**

By comparison, the anti-waiver provision of the Franchise Disclosure Act (815 ILCS 705/4), which was enforced in *Korean American Broadcasting*, *Bixby's Food* and *Hengel*, *supra*, provides that "any provision in a franchise agreement that designates jurisdiction or venue in a forum outside of this State is void, provided that a franchise agreement may provide for arbitration in a forum outside of this State." The Consumer Fraud Act's anti-waiver provision is stronger than the Franchise Disclosures Act provision; 815 ILCS 505/10c deals with the waivers of the protection of the act (and not simply where the dispute is resolved), and makes *no* exception for arbitrations outside of Illinois. Thus, the holding of *Korean American Broadcasting*, *supra*, that "Illinois has a strong public policy of protecting Illinois franchisees by overriding the Agreement's choice-of-law provision," applies with much more force with respect to claims under the Consumer Fraud Act here, where Illinois law is ignored and a biased forum which will enforce an illegal loan is selected.

3. Under Illinois law, the Agreements are illegal

As the facts alleged here, if proven, establish that the Criminal Code of Illinois has been violated, it necessarily follows that the contract as a whole is illegal, and that the choice-of-law and choice-of-forum provisions are both void, for they "operated in tandem as a prospective waiver" of the rights of Illinois residents under Illinois law. *Mitsubishi*, *supra*.

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." And in *LVNV Funding LLC v. Trice*, 2011 IL App (1st) 092773, 952 N.E.2d 1232, 1237 (1st Dist. 2011),

leave to appeal denied, 962 N.E.2d 483 (2011), which considered 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).
>
> **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.]

Similarly, *In re C & S Grain Co.*, 47 F.3d 233, 237 (7th Cir. 1995), held 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." Likewise, *Chatham Foot Specialists PC v. Health Care Serv. Corp.*, 216 Ill.2d 366, 381; 837 N.E.2d 48, 57 (2005), held that "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." That is precisely the situation here. Under the Interest Act (815 ILCS 205/4(1)), any lender seeking to lend money at an interest rate exceeding nine percent must get a license to do so; 815 ILCS 205/6 sets forth penalties, under the Interest Act, for failing to do so. The penalties for violation of the Criminal Code – three years' imprisonment, a $50,000 fine for each violation, and restitution (730 ILCS 5/5-4.5-45, 5/5-4.5-50, 5/5-5-6, and 5/5-9-1) – likewise provides penalties for those who provide loans to Illinois borrowers illegally.

D. The Tribe has no jurisdiction

Notwithstanding the Agreement's language, the Tribe cannot claim any jurisdiction over this case. To see why, one must first examine the connections of the Tribe to each party, and

apply those connections to the applicable law.

1. Whether any party is a Native American

No plaintiff is a Native American; all of them reside in Illinois. CashCall, meanwhile, is a California resident, and is incorporated there. Mr. Webb is a member of the Tribe, and resides there. And the Webb Entities are residents of South Dakota, where each of them is chartered as a limited liability company under South Dakota law. (See, *e.g.*, SA 86-92 [articles of organization for one Webb Entity submitted to the South Dakota Secretary of State pursuant to S.D. Codified Laws §47-34A *et seq*.].)

Defendants claim that the Webb Entities, as they are owned by Mr. Webb, ought to be regarded as "Native Americans" for the purposes of resolving jurisdictional issues. This is incorrect, for a state-chartered corporate entity is treated as being non-tribal, regardless of its ownership by Native Americans. *Oglala Sioux Tribe v. C & W Enterprises*, 516 F.Supp.2d 1044, 1050 (D.S.D. 2007); *Airvator v. Turtle Mountain Manufacturing Co.*, 329 N.W.2d 596, 602 (N.D. 1983). See F. Cohen, *Handbook on Federal Indian Law* (1982 ed.) at 355-356 (cited in *Airvator*). Besides, membership of the Webb Entities in the Tribe was actually disclaimed on several of the Webb Entities' websites:

> Western Sky Financial LLC 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. [SA 94.]

2. The boundaries of tribal jurisdiction

The situations in which a Tribal forum can have jurisdiction over those who are not Native Americans are extremely limited. The basic rule was expressed in *Montana v. United States*, 450 U.S. 544, 564-566 (1981):

> Indian tribes retain their inherent power to determine tribal membership, to

> regulate domestic relations among members, and to prescribe rules of inheritance for members. **But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation**…. [The] inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.
>
> …
>
> ***Oliphant v. Suquamish Indian Tribe*, [435 U.S. 191, 209 (1978)], [rejected] a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians.** Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court [held] that the Indian tribes have lost any right of governing every person within their limits except themselves. Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. 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. [Citations omitted, emphasis added.]

Accord, *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001).

As to civil claims, even where there is (supposed) consent in a contract, jurisdiction is not automatically conferred. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008), held that

> nonmembers [of a tribe] have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those 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.*** [Emphasis added.]

3. Under applicable decisions, no jurisdiction exists

Based on *Montana* and *Oliphant*, Tribal forums cannot take any to adjudicate a contract between a South Dakota corporate entity and persons who are not Native Americans. This is particularly true with respect to criminal law. As the contracts here expressly prevent the application of any Illinois law, and because "one State's law has no force beyond that State's boundaries unless another State chooses to recognize it" (*Rollins v. Ellwood, supra*), the Tribal forum has no jurisdiction; to hold otherwise would allow defendants to completely evade the reach of Illinois law, for alleged crimes committed 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 question, then, is whether jurisdiction over disputes regarding the Agreements is necessary to preserve the Tribe's right to self-determination. Clearly, it is not. Denial of Tribal jurisdiction here would not prevent the Cheyenne River Sioux Tribe from electing its own leaders, or passing its own laws, or enforcing those laws for the benefit of the people who are governed by them. The only interests at stake here are the financial interests of South Dakota companies (and their partner, a California corporation) in earning a profit on internet loans from Illinois consumers which are usurious under Illinois civil and criminal law, the provisions of which cannot be waived. And, as the Webb Entities have publicly stated, the Tribe has no ownership interest in any of the lenders Mr. Webb controls. Thus, the Tribe has no interest in this case whatsoever.

The Agreements as a whole are fraudulent. By prohibiting the application of any federal and state law, and permitting only the application of an unknown set of Tribal rules, by a decision maker decided strictly on the basis of race, makes it clear that the terms of the contract

requiring Tribal jurisdiction are part of a scheme to prevent consumers from bringing any claim against defendants. Clauses dealing with forum selection, choice-of-law, arbitration and the right to pursue a class action "operated in tandem" towards this single goal. *Mitsubishi, supra*. This is the epitome of fraud and bad faith. The fact that the contract claims that the Tribe can assert jurisdiction, when the Tribe cannot do so, is another just part of the overall scheme represented by the provisions of the Agreements discussed here.

V. HOW THE DISTRICT COURT ERRED

A. The Court should have considered the contract's illegality and unconscionability under Illinois law, and how different clauses in the Agreements worked in tandem

The District Court failed to address the fact that, under 720 ILCS 5/1-5, the allegedly criminal usury committed by defendants occurred at least partially in Illinois, and thus that the criminal statutes of Illinois applied. Nothing could be a stronger indication of what a state's fundamental public policy is than to declare a particular unfair business practice a felony. Nor did the District Court examine the anti-waiver provisions, or the holdings of this Court and Illinois courts regarding whether a contract is void for illegality or unconscionability.

This Court should heed the advice of the Supreme Court in *Mitsubishi*, 473 U.S. at 637 n.19, which said that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." Plaintiffs respectfully submit that the District Court's error came when it considered the choice-of-forum provisions as if they were totally independent of the rest of the contract.

The only case cited by the District Court, in support of its conclusion that the illegality of the contract could not be reached, is *Muzumdar v. Wellness International Network Ltd.*, 438 F.3d

759, 762 (7th Cir. 2006) (SA 5-6.) *Muzumdar* held that

> Appellants also spend a good deal of time trying to convince us that because the contracts themselves are void and unenforceable as against public policy – *i.e.*, they set out a pyramid scheme – the forum selection clauses are also void. The logical conclusion of the argument would be that the federal courts in Illinois would first have to determine whether the contracts were void before they could decide whether, based on the forum selection clauses, they should be considering the cases at all. An absurdity would arise if the courts in Illinois determined the contracts were not void and that therefore, based on valid forum selection clauses, the cases should be sent to Texas – for what? A determination as to whether the contracts are void?
>
> What is true is that forum selection clause can be found invalid because the clause itself was procured by fraud. As the Court established in [*The Bremen, supra*] **a forum selection clause will be enforced unless it can be clearly shown "that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Appellants make no attempt to show that the forum selection clause was itself obtained by fraud.**[8] [Emphasis added.]

First, the portion of *Muzmudar* emphasized here actually *supports* the plaintiffs. As shown above, enforcement of the forum selection clause *would* be unreasonable. The clause should be deemed invalid as a part of a fraudulent scheme to evade the application of Illinois law which covers the transactions at issue.

Beyond that, *Muzumdar* is easily distinguishable. The provisions discussed by the Court were related solely to the location of the forum, and not the question of which state's law would be applied. *Muzumdar*, *id.* at 761, upheld a forum selection provision which provided that all disputes would be resolved in Dallas, Texas. There was no discussion in the decision of what effect any choice-of-law provision would have.

[8] It bears noting that *The Bremen* concerned two sophisticated, international business operations, relating to transporting an off-sea oil rig from Louisiana to Italy. The selected forum was chosen for its expertise in admiralty law, and had no connection to either party. *The Bremen* at 2-4. There is simply no comparison between the bargaining power of the parties involved in that admiralty case, to the bargaining power between a predatory lender and consumers willing to take out a loan carrying a 139% interest rate.

In fact, alleged pyramid schemes, such as the one claimed to exist in *Muzumdar*, are illegal in *both* Texas and Illinois. Tex. Bus. & Com. Code §§17.461 and 17.461(c) (violations punishable as a "state jail felony"); *King v. Texas*, 174 S.W.3d 796, 815-817 (Tex. Ct. App. 2005) (conviction upheld, statute found constitutional); 720 ILCS 5/17-60 (Criminal Code, violations punishable as a Class A misdemeanor); 815 ILCS 505/2A (Consumer Fraud Act). Thus, the choice-of-forum and choice-of-law provisions would not affect the outcome, for the alleged pyramid scheme at issue in *Muzumdar* is illegal in both places. Indeed, both states take the matter seriously enough as to make operating a pyramid scheme a crime. Further, the courts of Texas, and Illinois, would have the ability under its own laws to punish the illegal act, which is not the case here. The District Court did not attempt to compare the Tribe's law and the laws of Illinois, but should have.

A consideration of whether a contract is legal is necessary to resolve whether the choice-of-law provision is enforceable. *Thomas* held that choice-of-law provisions would be honored "if the contract is valid." *Thomas v. Guardsmark, Inc.*, 381 F.3d 701, 705, 706 (7th Cir. 2004). This requires an evaluation of the contract's legality, which is a function of state law.

Thomas also requires an examination of the fundamental public policy of Illinois, and whether application of Tribal law would frustrate that policy. While the laws of the Tribe are unknown, it is beyond doubt that, if Illinois has enacted a criminal statute providing for three years' imprisonment and a fine of $50,000 per violation, Illinois considers preventing abuses of its citizens by predatory lenders to be a policy of prime importance. Indeed, the IDFPR and the Attorney General of Illinois have taken action against out-of-state lenders providing loans to Illinois consumers over the internet. (SA 17, 275-291.)

Similarly, *Bonny* and *AAR* held that choice-of-law provisions (and not just forum

selection clauses) are unenforceable if "enforcement of the clauses would contravene a strong public policy **of the forum in which the suit is brought**, declared by statute or judicial decision." *Bonny*, 3 F.3d 156, 160 (emphasis added). The question of illegality, under Illinois law, must be addressed as a result.

Even if only civil law is considered, the recent decision in *Korean American Broadcasting*, put together with *Mitsubishi*, *Wright-Moore* and *Bixby's*, makes it clear that if Illinois lawmakers put a provision in a consumer protection statutes saying that the protections of the law cannot be contractually waived, that decision ought to be respected, and considered a part of the state's fundamental public policy.

Potomac Leasing Co. v. Chuck's Pub, Inc., 509 N.E.2d 751 (2d Dist. 1987) discussed whether Illinois or Michigan law could apply, even though, as the District Court put it, "Michigan law deprived plaintiff of a remedy." (SA 8 (citing *Potomac*, 509 N.E.2d at 756). But the question in *Potomac* was not whether a remedy would be unavailable, but if that lack of relief would cause an impermissible conflict with Illinois law – whether "Illinois public policy is offended by applying Michigan law." *Potomac* at 756.

Beyond that, the question is whether a "fundamental" (*Thomas*) or a "strong" (*Bonny*) public policy is at issue. *Potomac* made the judgment that a "cancellation notice" required by the Consumer Fraud Act was not so important as to justify rejection of Michigan law; "we do not believe that there is a **sufficiently strong or fundamental public policy interest** to justify overriding the parties' choice of Michigan law to govern the agreement." *Potomac* at 754 (emphasis added). This Court should reach a different result about an abusive, usurious loan that is illegal under Illinois's civil statutes and, more than that, is a felony.

Omron Healthcare v. Maclaren Exports, 28 F.3d 600 (7th Cir. 1994), and *Walker v.*

Carnival Cruise Lines, Inc., 383 Ill.App.3d 129, 889 N.E.2d 687 (1st Dist. 2008) were cited only as to whether forum selection clauses were valid. This underscores the problem the decision below presents. Plaintiffs respectfully submit that, by focusing exclusively on the choice-of-forum provisions, the District Court looked at the trees, but missed the forest. When read with the choice-of-law, arbitration and class action provisions, it is clear that the choice-of-forum provisions "operate in tandem" with other provisions, in order to deny borrowers the right to pursue any sort of relief. *Mitsubishi*, *supra*. It would be one thing if the Tribal forum had jurisdiction over plaintiffs' claims, and was fully authorized to resolve those claims in accordance with Illinois law. However, the Tribe has no jurisdiction, and the contract prevents Illinois residents from bringing any claims under Illinois law – requiring instead the use of an unknown set of Tribal laws before a decisionmaker selected strictly on account of his race. The District Court, in short, looked only at the choice-of-forum clause; when it went no further, the District Court erred.

B. Financial distress is a fair subject for consideration

It is beyond dispute that someone who accepts a loan carrying an interest rate of 139% is not in a financially advantageous position. The contracts at issue here provide a loan of $2,525 to consumers and, in return, would receive payments of almost $11,000. The desperation of consumers who receive such loans is inherent in the transaction. Thus, enforcement of Illinois law within an Illinois court is an absolute necessity, given defendants' conduct, and given against whom that conduct was directed. *Williams v. Illinois State Scholarship Commission*, 139 Ill.2d 24, 563 N.E.2d 465 (1990), shows that the District Court was wrong to not conclude that a demonstrably severe disparity in bargaining power existed between plaintiffs and the Webb Entities.

Bonny, 3 F.3d at 157-158 and 158 n.5, dealt with the world's largest insurance operation and three Illinois residents seeking to become underwriters; for this, each plaintiff had to sign over to Lloyd's "irrevocable letters of credit" worth hundreds of thousands of dollars each. Such a transaction is incomparable to a usurious loan given to consumers who, in return, are asked to abandon any chance they may have at obtaining relief.

Furthermore, the issue of financial distress is an important consideration when it comes to procedural fairness. If the plaintiffs ever wanted to personally confront a witness during a hearing, the contracts provisions would require them to travel to a remote Native American reservation, at great personal expense. If the plaintiffs were to lose on their claims, an award by the tribunal could force them to pay the attorney's fees of the defendants. (SA 30, 44, 294.) Attorney's fees normally would not be available in litigation; the possibility of an award of fees, by a racially-biased adjudicator, is a significant deterrent to pursing a claim. See *Lox v. CDA Ltd.*, ___ F.3d ___, 2012 U.S. App. LEXIS 15961, *15-*17 (7th Cir. Aug. 2, 2012). Thus, the financial position of the plaintiffs is of significant importance.

CONCLUSION

In light of the foregoing, plaintiffs respectfully request reversal of the District Court's order of July 9, 2012, the entry of any other appropriate orders, and remand of the case back to the District Court for further proceedings in line with this Court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas E. Soule, certify that on September 21, 2012, the short appendix was filed with the Court electronically, and that a copy of the same was served upon each of the following individuals by overnight delivery:

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STATEMENT PURSUANT TO CIRCUIT RULE 30

I, Thomas E. Soule, certify that all of the materials required by 7th Cir. R. 30(a) and 30(b) are included within the short appendix, which is being filed today separately from the brief, pursuant to rule.

/s/ Thomas E. Soule
Thomas E. Soule

TYPE VOLUME CERTIFICATION

In accordance with Fed.R.App.P. 32(a)(7)(C), I, Thomas E. Soule, certify that this brief meets the type-volume limitation of Seventh Circuit Rule 32(a) in that it contains 11,791 words according the word-counting feature of the WordPerfect 12 word processor application.

/s/ Thomas E. Soule
Thomas E. Soule

ORDERS FROM WHICH PLAINTIFFS APPEAL

Opinion of U.S. District Court for the Northern District
of Illinois (Kocoras, J.), dated July 9, 2012 (PageID 1306-1313) 1

Order from U.S. District Court for the Northern District
of Illinois (Kocoras, J.), dated July 9, 2012 (PageID 1305) 9

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on Defendants' motion to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3). For the reasons set forth below, the Court grants the motion for improper venue.[1]

BACKGROUND[2]

Three Illinois consumers are suing an internet lender, his several businesses, and two debt collectors for allegedly charging annual interest rates well above 100%, in violation of Illinois' civil and criminal usury statutes and consumer fraud statute. In

[1]Defendant CashCall, Inc. filed a motion to dismiss Plaintiff Deborah Jackson from the lawsuit for lack of standing. Also, Defendants assert that we should dismiss or stay the instant suit under the tribal exhaustion doctrine, Federal Rule of Civil Procedure 12(b)(6), or Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3. Because we find that the Loan Agreement's forum selection clause is enforceable and that the Cheyenne River Sioux Tribal Nation is the proper and exclusive venue for this action, we need not rule on Defendants' alternative grounds for dismissal.

[2] We accept as true the factual allegations in Plaintiffs' amended complaint. *Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 763 (7th Cir. 2010).

2010 and 2011, Illinois residents Deborah Jackson ("Jackson"), Linda Gonnella ("Gonnella"), and James Binkowski ("Binkowski") (collectively "Plaintiffs") each obtained loans for $2,525 from Western Sky Financial, LLC ("Western Sky"), a "pay day loan" business chartered in Timber Lake, South Dakota. The interest rate on Jackson's and Binkowski's loans was 139.33%, while Gonnella's was 138.99%. Defendant WS Funding, LLC now owns the debt owed by Gonnella.

Defendant Martin A. Webb ("Webb") owned and controlled Defendants Western Sky, along with Payday 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; and Financial Solutions, LLC (collectively the "Webb Entities"). Webb ran the Webb Entities as a common enterprise, and each entity listed the same Timber Lake, South Dakota address as its principal place of business. Webb is a member of the Cheyenne River Sioux Tribe (the "Tribe"). He is not a Tribal official, and the Tribe maintains no role or relationship in the ownership or operation of the Webb Entities, which is noted on Payday Financial LLC's website.

The Webb Entities advertised via internet and television to Illinois consumers, offering loans between $300 and $2,525. They charged interest rates over 100% despite not holding a banking charter or a license from the Illinois Department of Financial and Professional Regulation, whose authorization is required for lenders to charge interest

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rates greater than 9%. To receive a loan from the Webb Entities, borrowers must agree to and sign a six-page contract ("the Loan Agreement") which delineates the rights of each of the parties with respect to the loan. The Loan Agreement provides that the parties resolve any dispute arising out of the loan transaction by arbitration on the Tribal Reservation applying Tribal law.[3]

Jackson and Gonnella filed a four-count class-action lawsuit against Webb, the Webb Entities, and WS Funding, LLC, in the Circuit Court of Cook County. *See Jackson v. Payday Financial, LLC*, Case No. 11-CH-35207 (Oct. 11, 2011). The suit was removed to this Court under the Class Action Fairness Act. 28 U.S.C. 1332(d). After removal, Plaintiffs amended their complaint to add Binkowski as a plaintiff and CashCall, another debt collector that purchased and owns debts from Webb and the Webb Entities, as a defendant. Counts I-III allege that Defendants violated Illinois' civil and criminal usury statutes, 815 ILCS 205/4(1) and 720 ILCS 5/17-59, and the Illinois Consumer Fraud and Deceptive Business Practices Act, 815ILCS 505/2, by charging unlawfully high interest rates. Count IV prays for declaratory and injunctive relief from enforcement of the arbitration clause.

Webb, the Webb Entities, and CashCall (collectively "Defendants") move to dismiss this suit under Federal Rule of Civil Procedure 12(b)(3) for improper venue.

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[3] Borrowers may litigate the dispute in person, by telephone, or by video conference.

LEGAL STANDARD

A motion to dismiss based on the enforcement of an arbitration clause is treated as an objection to venue and is properly brought under Federal Rule of Civil Procedure 12(b)(3). *Faulkenberg v. CB Tax Franchise Sys., LP*, 637 F.3d 801, 807 (7th Cir. 2009); *see also Cont'l Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 733 (7th Cir. 2005) (holding that dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(3) where a forum selection clause requires that a dispute be arbitrated outside of the district in which the suit is brought). When a defendant challenges venue under Federal Rule of Civil Procedure 12(b)(3), it is the plaintiff's burden to establish that venue is proper. *Faur v. Sirius Int'l Ins. Corp.*, 391 F. Supp. 2d 650, 657 (N.D. Ill. 2005). In considering a motion to dismiss under Rule 12(b)(3), the Court construes all facts and draws all reasonable inferences in favor of the plaintiffs. *Faulkenberg*, 637 F.3d at 806.

DISCUSSION

The Loan Agreement states that any dispute arising under the Loan Agreement "will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative . . . ."

Under both Illinois and federal law, a forum selection clause is *prima facie* valid and enforceable unless (1) the clause's incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so

gravely difficult and inconvenient that the complaining party will for all practical purposes be deprived of its day in court; or (3) enforcing the clause would contravene a strong public policy of the forum in which the suit is brought, as declared by statute or judicial decision. *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 525 (7th Cir. 2001). Plaintiffs assert that the forum selection clause is not valid because: (1) it furthers an illegal contract; (2) Plaintiffs' financial straits left them susceptible to Defendants' overreaching; and (3) it is contrary to Illinois' strong public policy.

First, Plaintiffs claim that the forum selection clause is not enforceable because it is part of an illegal contract, and sustaining such a clause would further an illegal objective and thus would be contrary to Illinois public policy. The Seventh Circuit spoke directly on this issue in *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759 (7th Cir. 2006), in which it considered whether a forum selection clause was "void and unenforceable as against public policy" where the underlying contract set out an illegal pyramid scheme. *Id.* at 762. The Seventh Circuit held that the forum selection clause was enforceable because a contrary ruling would have required the court to decide the contract's legality before deciding whether it should consider the case at all – a scenario the court deemed "an absurdity." *Id.* Plaintiffs now seek to invalidate the forum selection clause with the same failed argument that the plaintiffs advanced in *Mazumdar*. But as the Seventh Circuit found, doing so would require us to rule on the

substance of their complaint before reaching the threshold question of whether venue in this court is proper in the first instance. Therefore, the alleged illegality of the Loan Agreement has no bearing on the validity of the forum selection clause.

Next, Plaintiffs argue that the forum selection clause is void because it was procured by duress. Plaintiffs claim that the Webb Defendants preyed on Plaintiffs' financial desperation by dangling needed funds in front of them and then conditioning disbursement on Plaintiffs' assent to the clause.

The allegations in the complaint do not permit for a reasonable inference that the Webb Defendants procured Plaintiffs' assent to the Loan Agreement under duress. Plaintiffs obtained their respective loans after presumably reading through and signing the Loan Agreement. The Loan Agreement explicitly and conspicuously identified the parties' choice of forum. A party to a contract has an obligation to read its provisions, is presumed to know its terms, and consents to be bound by them. *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 160 n.10 (7th Cir. 1993). There is no allegation that the Webb Entities applied any pressure to Plaintiffs to sign the Loan Agreement, or used any deadlines to procure Plaintiffs' consent to the Loan Agreement. Plaintiffs' difficult financial circumstances alone do not warrant invalidating the forum selection clause. *See CIT Group/Credit Fin., Inc. v. Lott*, Case No. 93 C 0548, 1993 U.S. Dist. LEXIS 6669, at *5-6 (N.D. Ill. May 12, 1993) (*citing Cont'l Ill. Nat'l Bank & Trust Co. v.*

Stanley, 606 F. Supp. 558, 562 (1985)) ("Duress does not exist merely where consent to an agreement is secured because of . . . the pressure of financial circumstances . . . ."). Thus, Plaintiffs' argument fails.

Finally, Plaintiffs assert that Illinois' strong public policy in favor of enforcing its usury and consumer protection laws precludes enforcement of the forum selection provision. Illinois' public policy is set out in its Constitution, statutes, and long-standing case law. *In re Estate of Feinberg*, 919 N.E.2d 888, 894 (Ill. 2009). Plaintiffs argue that their right to sue under Illinois' usury and consumer protection statutes cannot be waived by contract. Furthermore, Plaintiffs argue, it would be against Illinois public policy to deny its residents the benefit of its consumer protection laws. However, Plaintiffs cite to no sources establishing Illinois' purported public policy of having its usury laws exclusively enforced in Illinois courts. To the contrary, Illinois and Seventh Circuit case law indicate that a party may prospectively waive by contract her statutory right to litigate in her preferred forum, even if the likelihood of success in a contractually selected forum is less favorable. *See Bonny*, 3 F.3d at 162 (holding that a contract clause choosing England as the forum was enforceable despite the fact that enforcement allowed the defendant to avoid liability under American and Illinois securities laws); *Omron Healthcare v. Maclaren Exports*, 28 F.3d 600, 604 (7th Cir. 1994) (ruling that a forum selection clause choosing the High Court of Justice in

England is enforceable, even if that tribunal may be biased against the plaintiff); *Walker v. Carnival Cruise Lines, Inc.*, 889 N.E.2d 687, 696 (Ill. App. Ct. 1st Dist. 2008) (contract clause accompanying a cruise line ticket choosing Miami, Florida as the forum to resolve future disputes was enforceable despite the possible deterrent effect on "plaintiff's ability to pursue her case."); *see also Potomac Leasing Co. v. Chuck's Pub, Inc.*, 509 N.E.2d 751, 759 (Ill. App. Ct. 2d Dist. 1987) (holding that a choice-of-law provision selecting Michigan law was valid even though Michigan law deprived plaintiff of a remedy). Plaintiffs therefore fail to demonstrate that Illinois' public policy warrants invalidating their freely contracted choice to litigate their dispute in the Tribal forum.

Because Plaintiffs have not identified any basis for invalidating the forum selection clause, Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(3) is granted.

CONCLUSION

For the reasons stated above, we grant Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(3).

Charles P. Kocoras
United States District Judge

Dated: July 9, 2012

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Charles P. Kocoras	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	11 C 9288	DATE	7/9/2012
CASE TITLE	Jackson et al vs. Payday Financial, LLC et al		

DOCKET ENTRY TEXT

ENTER MEMORANDUM OPINION: We grant Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(3). All other pending motions are moot.

■ [For further detail see separate order(s).]

Docketing to mail notices.

Courtroom Deputy Initials:	SCT

SHORT APPENDIX 9