No. 12-2617

United States Court of Appeals
For the Seventh Circuit

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

Case No. 1:11-cv-9288

Hon. Charles P. Korocas, presiding

Brief for Defendants-Appellees PayDay Financial LLC, *et al.*

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Amended Corporate Disclosure Statement

In accordance with Rule 26.1 and Circuit Rule 26.1, Defendants-Appellants disclose that:

1. The full name of every party that the attorney represents in the case:

Defendants-Appellees CashCall, Inc., 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 Martin A. Webb.

Note: CashCall, Inc. filed its initial corporate disclosure statement separately (App. Dkt. #6) because it had its own counsel of record. Undersigned counsel is now counsel of record for all Defendants. No other information has changed since Defendants filed their initial corporate disclosure statements.

2. The law firm whose partners or associates have appeared 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 above-listed parties in this court:

Katten Muchin Rosenman LLP., Ballard Spahr, LLP, and McGinnis Tessitore Wutscher LLP.

3. If the party or amicus is a corporation:

i) Identify all its parent corporations, if any:

None.

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

None.

Attorney's Signature: /s/ Claudia Callaway
Attorney's Printed Name: Claudia Callaway

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes.

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Jurisdictional Statement

Plaintiffs' jurisdictional statement is complete and correct.

Issue Presented for Review

1. Did the district court properly enforce the Parties' choice of forum agreement on the basis of the facts presented, or should it have invalidated the agreement on the basis of Plaintiffs' bare speculation about the impropriety of enforcement.

Counter-Statement of the Case

This putative consumer class action was initiated in the Circuit Court of Cook County, Illinois in late 2011. R. 2, 13-28.[1] It asserted four claims against Martin A. Webb and his wholly owned company Western Sky Financial LLC (Western Sky),[2] all allegedly arising from consumer loan contracts between Western Sky and each of the named Plaintiffs. R. 20-27. Defendants removed to the Northern District of Illinois under the Class Action Fairness Act, 28 U.S.C. § 1332(d). S.A. 338-345. Thereafter Plaintiffs filed an amended complaint naming CashCall, Inc. a defendant for all claims. S.A. 5-6, 9-17. Western Sky assigns some of its loans to CashCall but the two companies are not affiliated by ownership or management. S.A. 5-6.

In separate motions, Defendants moved to dismiss or stay the case pending bilateral arbitration of each named Plaintiff's claims as required by the loan contracts' arbitration and

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[1] Citations to the Record are denoted "R. ___"; to the Short Appendix, "S.A. ___"; and to Plaintiffs' brief, "Pet. Br. ___".

[2] Plaintiffs sued a number of other LLCs wholly owned by Mr. Webb, but not for any specific conduct. Rather, Plaintiffs allege without specifics (or support) that Western Sky and these other LLCs "have operated as a common enterprise". S. A. 13. These other 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. S.A. 2.

choice of forum agreement.[3] R. 781-795, 810-829. Following a full round of briefing, the district court, Judge Charles P. Kocoras presiding, ruled that the choice of forum was enforceable and dismissed for improper venue under Rule 12(b)(3). S.A. 1-9; 364-367. Plaintiffs' appeal followed.

Counter-Statement of the Facts

Defendant Martin A. Webb is a fully enrolled member and resident of the Cheyenne River Sioux Tribe (Tribe), a federally recognized Tribe whose reservation (Reservation) is located within the exterior boundaries of South Dakota. S.A. 347-348. Mr. Webb is the sole owner and member of Western Sky and each of the other non-CashCall defendants named in this action. S.A. 347-348. Western Sky offers consumer loans from its Reservation offices, which consumers can apply for online or by telephone. S.A. 16. The loans are unsecured and can be prepaid in full at anytime without penalty. S.A. 33-34, 47, 297.

Each of the three named Plaintiffs—Ms. Deborah Jackson, Ms. Linda Gonnella, and Mr. James Binkowski—applied for and obtained a loan from Western Sky in 2010 or 2011. S.A. 8-9. Western Sky subsequently assigned its interests in the loans to defendant CashCall, an unaffiliated California corporation with a principal place of business in Anaheim, California. S.A. 9.

In their amended complaint, Plaintiffs allege four claims against all Defendants on behalf of themselves and all similarly situated Illinois consumers. S.A. 9-17. Two of the claims are for usury under Illinois law; one is for an alleged violation of the Illinois Consumer Fraud Act based

[3] CashCall also moved to dismiss Plaintiff Jackson's claims against it for lack of standing. S.A. 364. The district court denied that motion as moot when it dismissed the entire case for improper venue. S.A. 1.

on the usury claims; and the final one is for a declaratory judgment that the arbitration and choice of forum agreement contained in each of Plaintiffs' loan contracts is unenforceable.[4] S.A. 9-17.

Plaintiffs' loan contracts are each six pages long, written in plain English in 11-point or larger font. S.A. 29-34; S.A. 43-47; S.A. 293-298. They contain all the truth in lending disclosures required by federal law. S.A. 29; S.A. 43; S.A. 293. They also make clear in the first paragraph that Western Sky is an authorized tribal lender, that its loans are made under and governed by tribal law, and that by entering into the contract the borrower is consenting to the Tribe's jurisdiction over the contract. S.A. 29; S.A. 43; S.A. 293. Approximately half of each contract's six pages are dedicated to explaining the arbitration and choice of forum agreement.

The agreement begins with the bolded, all-caps heading "**WAIVER OF JURY TRIAL AND ARBITRATION**". S.A. 31; S.A. 45; S.A. 295. Following the request to "**PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY**", the agreement explains that, unless the consumer exercises the right to opt out, all disputes between a consumer and Western Sky (including its assigns and related third parties) will be resolved by *individual* arbitration conducted by an authorized representative of the Cheyenne River Sioux Tribal Nation. S.A. 31-32; S.A. 45; S.A. 295. While arbitration is to be administered on the Reservation, the agreement provides that the consumer may appear via telephone or video conference and "will not be required to travel to the" Reservation. S.A. 32; S.A. 46; S.A. 296. In addition, the agreement requires Western Sky to pay all filing and arbitrator fees, regardless of who initiates a dispute. S.A. 32; S.A. 46; S.A. 296.

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[4] Because Plaintiffs' arbitration and choice of forum agreements are materially identical, for ease of reference Defendants refer to them as the singular "choice of forum agreement".

The arbitrator is empowered to award all remedies available at law. S.A. 32-33; S.A. 46; S.A. 296. If a consumer substantially prevails and applicable law permits, he may obtain reasonable attorney fees. S.A. 32; S.A. 46; S.A. 296. An award can be filed with any court having jurisdiction, except that if the arbitrator refuses to enforce the agreement's class action waiver, the dispute must be resolved a Cheyenne River Sioux tribal court. S.A. 32-33; S.A. 46; S.A. 296.

With respect to the class action waiver, the agreement states in all caps that "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 CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT." S.A. 32; S.A. 46; S.A. 296. The limitation on class relief is reiterated three times. S.A. 31-33; S.A. 45-47; S.A. 295-297. Further, to obtain their loans, Plaintiffs were required to check a box acknowledging that they had "READ AND UNDERSTAND THE ARBITRATION SECTION OF THIS NOTE AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THAT SECTION". S.A. 34; S.A. 47; S.A. 297.

Despite the foregoing, after this litigation began Defendants offered to forego the procedural dispute and arbitrate Plaintiffs' claims on a bilateral basis before a court-appointed arbitrator in Illinois. R. 502-503. Plaintiffs refused, stating that the offer was "beyond cynical". R. 502-503.

Plaintiffs now appeal the district court's ruling that the choice of forum agreement is enforceable and that "the Cheyenne River Sioux Tribal Nation is the proper and exclusive venue for this action . . . ." S.A. 1.

Summary of the Argument

A choice of forum agreement is presumptively valid and will only be set aside upon a showing that, (1) the agreement 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 agreement would contravene a strong public policy of the forum in which suit is brought. *See AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 525 (7th Cir. 2001). Plaintiffs oppose enforcement of their choice of forum agreement on four (principal) grounds, none of which satisfy the test.

First, Plaintiffs argue that the agreed upon forum—arbitration by an authorized representative of the Cheyenne River Sioux Tribal Nation—is inherently biased against non-Indians. Pet. Br. 21-22. But the mere allegation of bias is insufficient to overcome a choice of forum agreement. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 34 (1st Cir. 2000) (citing among others *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987)). Further, if Plaintiffs actually do suffer bias, they have adequate post-award remedies. *Cf. Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997).

Second, Plaintiffs argue that their choice of forum agreement should be voided because, they presume, the contract in which it is contained is void. Pet. Br. 25-29. But courts do not work backwards from a claim that a contract is void to determine if the choice of forum agreement contained therein is enforceable. *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 760 (7th Cir. 2006). Along the same lines, Plaintiffs argue that their choice of *law* agreement is unenforceable, and because (they presume) the tribal forum will enforce the choice of law agreement, they should not be held to their *forum* agreement. Pet. Br. 25-29. But speculation over

how the tribal forum will rule on the choice of law question does not entitle Plaintiffs to preemptive invalidation of their choice of forum agreement, particularly since they have adequate post-award remedies if the forum issues a fundamentally flawed ruling. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540, 115 S. Ct. 2322, 2329-30, 132 L. Ed. 2d 462 (1995).

Third, Plaintiffs argue that their choice of forum agreement should be voided for duress, which they contend should be inferred from the terms of their loan contracts. Pet. Br. 37-38. But "[d]uress does not exist merely where consent to an agreement is secured because of hard bargaining positions or the pressure of financial circumstances." *Cont'l Illinois Nat. Bank & Trust Co. of Chicago v. Stanley*, 606 F. Supp. 558, 562 (N.D. Ill. 1985). Rather, "a party must show that he was induced by a wrongful act or threat of another to execute an agreement under circumstances which deprived him of the exercise of his free will." *Id.* Here, Plaintiffs sought out loans from Western Sky online and over the phone. They do not allege, nor could they, that Defendants pressured them into their loan contracts or their choice of forum agreement.

Fourth, Plaintiffs argue that the Cheyenne River Sioux tribal courts do not have subject matter jurisdiction and therefore tribal arbitration would be improper. Pet. Br. 29-33. But arbitral subject matter jurisdiction is simply a matter of whether the arbitration agreement covers the claims at issue—which in this case is not disputed. *See, generally, AT & T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986). And even if tribal jurisdiction is necessary for arbitration, it exists under *Montana v. U.S.,* which provides for tribal jurisdiction over claims asserted by non-Indians arising from their "consensual relationships with the tribe or its members, through commercial dealing, contracts,

leases, or other arrangements". 450 U.S. 544, 565, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493 (1981) (emphasis added). Moreover, the district court was not required to rule on tribal jurisdiction because once Defendants asserted a colorable basis for its existence, the tribal exhaustion rule kicked in, which among other things requires Plaintiffs to raise their jurisdictional arguments in tribal court before seeking federal remedies. *See Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621, 622 (8th Cir. 1997).

In short, the district court correctly ruled that Plaintiffs had failed to assert a cognizeable basis for invalidating their choice of forum agreement. This Court should affirm.

Argument

I. Standard of review.

As Plaintiffs note, this Court reviews the enforceability of a choice of forum agreement *de novo*. *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 760 (7th Cir. 2006). Plaintiffs further contend, however, that all facts and reasonable inferences should be drawn in their favor. Pet. Br. 16. This is at odds with the presumption of validity afforded choice of forum agreements. *See, e.g., Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993) (discussing the "presumptive validity of a forum selection clause"). Moreover, the case Plaintiffs rely on, *Faulkenberg v. CB Tax Franchise Sys., LP*, appears to be an outlier. 3 F.3d 156, 160 (7th Cir. 1993). *Faulkenberg* itself cites *Kochert v. Adagen Med. Int'l, Inc.* for the standard of review, but *Kochert* makes no mention of drawing facts or inferences in any party's favor. 491 F.3d 674, 677 (7th Cir. 2007).

Because a choice of forum agreement supplants the normal deference accorded a plaintiff's choice of forum, it follows that factual findings relevant to a motion to enforce such an agreement should be reviewed for clear error. *Cf. Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc.*, 293 F.3d 1023, 1027 (7th Cir. 2002) (reviewing factual findings relating to order compelling arbitration for clear error). Also relevant here, Plaintiffs' opposition to their choice of forum agreement required the district court to interpret Illinois public policy as that policy is manifested through Illinois law. S.A. 7-8. This Court gives some deference to the district court's interpretation. *See Enis v. Cont'l Illinois Nat. Bank & Trust Co. of Illinois*, 795 F.2d 39, 40 (7th Cir. 1986) ("our policy is to give some

though of course not complete deference to the interpretation of state law by a district judge sitting in the state whose law is in question").

II. The sole issue on appeal is whether the district court correctly enforced the Parties' choice of forum agreement on the basis of the facts presented, or whether it should have invalidated the agreement on the basis of Plaintiffs' bare speculation about the impropriety of enforcement.

The parties agreed to resolve all disputes in tribal arbitration. S.A. 31-32. This being such a dispute, the district court dismissed for improper venue. Correctly so.

A choice of forum agreement must be enforced unless the party seeking otherwise establishes a justification for invalidating it. *See AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 525 (7th Cir. 2001). Not any will do—this Court has specified it must be one of the following: (1) that the choice of forum agreement (as distinct from the contract in which it is contained) was the result of fraud, undue influence, or overweening bargaining power; (2) that 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) that enforcing the agreement would contravene a strong public policy of the forum in which suit is brought.[5] *Id.*

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[5] Plaintiffs declare that *Thomas v. Guardsmark Inc.*, 381 F.3d 701 (7th Cir. 2004) "stands for the proposition that choice-of-law clauses are subject to a basic question of fairness." Pet. Br. 16. Presumably, Plaintiffs want choice-of-forum clauses subjected to the same standard as they do not provide a separate standard for those. But even if this Court were inclined to abrogate *AAR Int'l* in favor of Plaintiffs' fairness standard, that standard would have to come from somewhere else.

Thomas says nothing about fairness, noting simply that "Illinois courts respect a contractual choice-of-law clause if the contract is valid, and the law chosen is not contrary to Illinois's fundamental public policy. . . . In addition, consistent with Restatement (Second) of Conflict of Laws § 187 (1971), some Illinois courts have also required that

Importantly, the justification must be grounded in facts or circumstances known or supported at the time the choice of forum agreement is challenged. It cannot be based on speculation over facts and circumstances that might arise in the future. This follows from the dictum that venue is a threshold question concerning the propriety of a court even hearing a given case. *See Poroj-Mejia v. Holder*, 397 F. App'x 234, 236 (7th Cir. 2010). It is not answered by reaching past the threshold. The horse must lead the cart.

Thus, courts do not rule on post-threshold issues like the validity of the contract containing a choice of forum agreement before ruling on the enforceability of the choice of forum agreement itself. *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006). Similarly, the propriety of venue does not turn on speculation over future rulings or legal actions by the agreed upon forum, or by the parties themselves. *Cf. Reuben H. Donnelley Corp. v. F.T.C.*, 580 F.2d 264, 268 (7th Cir. 1978) (basing a venue ruling on the possibility that subsequent administrative ruling will alter the legal location of where the injury arose "approaches the question backwards"); *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (speculation that plaintiff will be subject to retributive litigation in chosen forum does not invalidate choice of forum clause). And perhaps most important of all, courts do not invalidate a choice of forum agreement on the basis of bare, speculative allegations of future unfair treatment in the agreed upon forum. *See Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 384-85 (S.D.N.Y. 2001) *aff'd sub nom. In re Arbitration between Monegasque De*

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there be some relationship between the chosen [law] and the parties or the transaction." *Id.* at 706 (citations and internal quotations omitted).

Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488 (2d Cir. 2002) ("For this Court to credit [plaintiff's] argument would require it effectively to pass value judgments on the adequacy of justice and the integrity of another sovereign state's judicial system on the basis of no more than bare denunciations and sweeping generalizations."); *see also Gonzales v. P.T. Pelangi Niagra Mitra Int'l.*, 196 F. Supp. 2d 482 (S.D. Tex. 2002) (same) (gathering cases).

Yet, undeterred, Plaintiffs' opposition to the choice of forum agreement they readily signed is predicated almost entirely on speculation about future facts and circumstances: the impact of future merits rulings in this case, the bias they allege they will suffer in tribal forums, the results of tribal exhaustion, and so on and so forth. The district court correctly ruled that such will not do.

This Court should affirm.

III. Plaintiffs are not entitled to a presumption that tribal forums are biased and incompetent.

Plaintiffs first argue that they will not get a fair shake by a tribal decision maker because they are not Indian.[6] Pet. Br. 20-22, 30, 37-38. And yet, they offer not an iota of evidence that the tribal forums in question are biased against them specifically. Consequently, Plaintiffs must be seeking to invoke a presumption that tribal forums are

[6] In their brief, Plaintiffs first speculate about how the tribal forum will rule on the choice of law question. Pet. Br. 18-20. But the unspoken premise seems to be that the tribal forum will rule incorrectly, which seems based on the idea that the forum is biased. For this reason, Defendants address the bias argument first.

biased against non-Indians generally, incapable of treating them fairly, and unqualified to consider or apply non-tribal law.

Such a presumption does not exist at law—

> The unsupported averment that non-Indians cannot receive a fair hearing in a tribal court flies in the teeth of both congressional policy and the Supreme Court precedents establishing the tribal exhaustion doctrine. The requirements for this exception are rigorous: absent tangible evidence of bias—and none has been proffered here—a party cannot skirt the tribal exhaustion doctrine simply by invoking unfounded stereotypes.

Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 34 (1st Cir. 2000) (citing among others *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987)). Bare allegations of bias do not get a litigant out of tribal court. *Burrell v. Armijo*, 456 F.3d 1159, 1168 (9th Cir. 2006). Out of tribal arbitration. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 (1978). Or out of either just because non-tribal law is involved. *See Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir. 1993).

Simply put, without "grounds to doubt the competence or honesty of a [given] judicial system", the system must be presumed fair and competent. *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1040 (7th Cir. 2006) (concluding that foreign judicial systems must be trusted by U.S. courts unless tangible grounds exist to warrant distrust). Here the sole reason Plaintiffs ask this Court to doubt the tribal forums—the fact that they are tribal and Plaintiffs are not—is no reason at all.[7] Accordingly, the tribal forums must be presumed fair and competent. *See Duncan Energy Co. v. Three Affiliated Tribes of Ft.*

[7] Indeed, although Defendants are not inclined to press the point, Plaintiffs' bias arguments are particularly troubling given the historical backdrop from which they arise.

Berthold, 27 F.3d 1294, 1301 (8th Cir, 1994) ("Absent any indication of bias, we will not presume the Tribal Court to be anything other than competent and impartial.").

That said, it bears noting that the tribal court system at issue in this case, the Cheyenne River Sioux judiciary, rendered the judgments at issue in the Supreme Court's recent opinion in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 128 S. Ct. 2709, 2718, 171 L. Ed. 2d 457 (2008). *Plains Commerce* featured an Indian Plaintiff and a non-Indian bank defendant. Although the Court ultimately voided the tribal judgments for lack of subject matter jurisdiction over the underlying dispute (the bank's sale of non-Indian land to a non-Indian), it said nothing about bias or incompetence. One imagines that the Court would have mentioned it if the tribal courts were in fact "outright prejudiced" or that their hearing of a case involving a non-Indian was "as impermissible as a litigant insisting that he, as a white man, was entitled to have his case heard by a Caucasian judge." Pet. Br. 21, 22.

A. Tribes are authorized by federal law to limit tribal membership—and by extension tribal judgeships and arbitrator positions—to Native Americans. That Plaintiffs' case will be decided by a judge or arbitrator selected in part on the basis of his or her tribal membership does not violate Plaintiffs' rights.

Perhaps recognizing the futility of an argument that says "adjudication before a Native American is inherently unfair", Plaintiffs also argue, in effect, that "adjudication before someone who is necessarily Native American is inherently unfair." Pet. Br. 21-22.[8] This argument seeks to borrow from the constitutional right to equal protection that

[8] Plaintiffs assume that the Tribe requires judges and arbitrators to be tribal members. Defendants disagree, but because the record is undeveloped Defendants' argument assumes that Plaintiffs are correct.

exists in state and federal court. Pet. Br. 21. As such, it misunderstands the source of federal rights that non-Indians have in tribal forums. Non-Indians (and Indians too for that matter) are entitled to due process and equal protection in tribal forums—but these rights are guaranteed by the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, not the individual rights provisions of the federal Constitution, which generally-speaking do not apply. *See, generally, Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170, 102 S. Ct. 894, 919, 71 L. Ed. 2d 21 (1982) ("The equal protection components of the Fifth and Fourteenth Amendments, which limit federal or state authority, do not similarly limit tribal power.").[9]

ICRA equal protection is similar to, but not the same as, constitutional equal protection. Whereas the latter limits, for example, a state's ability to enact certain state residency requirements, the former does not limit a tribe's authority to define its membership as it sees fit, including by limiting membership to Native Americans.[10] *Cf. Plains Commerce*, 554 U.S. at 327 ("As part of their residual sovereignty, tribes retain power . . . to determine tribal membership"); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 94, 97 S. Ct. 911, 924 n.5, 51 L. Ed. 2d 173 (1977) (noting that "[a] person must

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[9] Defendants are not taking the position that the Due Process and Equal Protection provisions of the federal Constitution do not apply to tribes at *all*. Here the point is only that (1) Plaintiffs cannot blithely graft them onto tribes, and (2) it is well-settled that they do not prevent a tribe from limiting its membership to Native Americans.

[10] To be certain, Congress retains the power to limit a tribe's authority to define its membership. *See Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007) ("[a]n Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress"). But unless and until Congress so acts, tribal authority in this regard is unrestricted.

have at least one-eighth Delaware blood in order to be recognized as a member of the Absentee Delaware Tribe"). As the greater authority implies the lesser, it also does not prevent a tribe from requiring its judges and arbitrators to be tribal members. *Cf. Arizona Pub. Serv. Co. v. E.P.A.*, 211 F.3d 1280, 1287 (D.C. Cir. 2000) (recognizing that "Native American nations have inherent power to determine forms of tribal government . . . [and] to administer tribal judicial systems"). This is so even though they may hear cases involving non-Indians. *Cf. Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18, 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.").

Taken together, Plaintiffs do not have a right to appear before a tribal decision maker who has ascended to the tribal bench without regard to whether he or she is Native American. That is not to say that Plaintiffs are not entitled to a fair hearing, or that they are without recourse if one is denied. Only that the law does not presume unfairness because a tribal decision maker is, not coincidentally, Native American.

B. ICRA and the federal law on the recognition of tribal judgments protect Plaintiffs against unfair treatment in tribal courts.

ICRA does not give credence to the idea that tribal forums are inherently biased against non-Indians; but neither does it assume they are perfect. To this end, it "provides non-Indians with various protections against unfair treatment in the tribal courts." *Iowa Mut.*, 480 U.S. at 19 (citing 25 U.S.C. § 1302). Most important here, it declares that tribal courts may not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law". 25 U.S.C. §

1302(8). So not only would it be self-defeating for a tribe to deny basic rights to a non-Indian to advantage a tribal member—cross-border "business transactions depend on evenhanded application of legal rules; home-town favoritism is the enemy of commerce", *see Intec USA*, 467 F.at 1040—but it would also violate federal law.

While state and federal courts do not have full authority to compel tribal forums to adhere to ICRA directly, they are fully empowered to deny recognition to tribal judgments that fundamentally violate ICRA. As the Ninth Circuit has explained it, courts will not recognize a tribal judgment unless "there has been opportunity for a full and fair trial before an impartial tribunal . . . and there is no showing of prejudice in the tribal court or in the system of governing laws." *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997). Non-Indian litigants like Plaintiffs, then, are not bound in state or federal court by a non-compliant tribal award. To the contrary, such an award serves to invalidate a tribal choice of forum agreement—thereby permitting the dispute to go forward in other forums—by exhausting tribal remedies without providing a binding resolution (*i.e.* without providing a judgment entitled to preclusive effect).

For that reason, there is no risk that by affirming the district court's dismissal Plaintiffs will be unable to bring their claims in a forum that affords basic due process and equal protection under the law. The only question is whether Plaintiffs must first submit their claims to the tribal forums and see if they meet this standard, or whether they can skip past them on account of bare assertions of bias. Law and equity provide the same answer—Plaintiffs agreed to resolve this dispute in a tribal forum, and they must first

attempt to do so before they may be heard to complain that those forums are biased against them.

IV. Plaintiffs are not entitled to a presumption that their choice of *law* agreement or their loan contracts are unenforceable in order to avoid enforcement of their choice of *forum* agreement.

Plaintiffs devote a substantial portion of their brief to arguing that their choice of *forum* agreement is unenforceable because, they contend, their choice of *law* agreement is unenforceable and further, so are their broader loan contracts. Pet. Br. 19-21, 25-29. But speculation over these post-threshold issues is not a basis for voiding their choice of forum agreement.

A. Courts do not rule on the legality of a contract to determine the enforceability of a choice of forum agreement. To the contrary, the choice of forum agreement decides who will rule on the legality of the contract.

This Court made clear in *Muzumdar* that it will not work backwards from a claim that a contract is illegal to determine if the choice of forum agreement contained therein is enforceable.[11] *Muzumdar*, 438 F.3d at 762. The question of who decides illegality

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[11] Similarly, Courts do not assess the enforceability of an arbitration agreement by jumping ahead to the question of whether the contract in which it's contained is illegal. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449, 126 S. Ct. 1204, 1210, 163 L. Ed. 2d 1038 (2006) ("a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator").

Moreover, Plaintiffs are wrong to conclude that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, does not apply here. Pet. Br. 22-23. The fact that the loan contracts call for the exclusive application of tribal law does not affect the FAA's mandate that courts enforce all arbitration agreements "contained in a contract evidencing commerce" unless grounds exist at law or equity for the revocation of any contract. *Id.* at §§ 2, 3; *see, generally, Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 288 (3d Cir. 2010), *as amended* (Dec. 7, 2010) ("But while parties may opt out of the FAA's default rules, they cannot 'opt out' of FAA coverage in its entirety

necessarily comes before the question of illegality. If the latter is decided first, the former is no longer a question. *Id.* Plaintiffs nonetheless insist that certain cherry-picked language from this Court's opinions compel deciding illegality first. A fair reading of those opinions reveals the opposite.

First, Plaintiffs argue that *Muzumdar* actually stands for the proposition that a choice of forum agreement will not be enforced if the *contract in which it is contained* is procured by fraud. Pet. Br. 33-35. Not so. *Muzumdar* says that a choice of forum agreement will not be enforced if the agreement "*itself* was procured by fraud." *Muzumdar*, 438 F.3d at 762 (emphasis added). Plaintiffs do not allege that the choice of *forum* agreement itself is fraudulent. Nor could they—it was clearly disclosed, beginning in the second sentence of Plaintiffs' loan contracts: "you, the borrower, hereby acknowledge and . . . consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court . . . ."S.A. 29.

Next, Plaintiffs argue that the Court in *Guardsmark* "held" that Illinois law conditions the enforcement of a choice of law agreement (which they analogize to a choice of forum agreement) on the contract being "valid." Pet. Br. 35. But *Guardsmark* was talking about validity in the sense of whether there was a putative contract, not whether the contract was enforceable. *See Guardsmark, Inc.*, 381 F.3d at 705 ("No one is disputing that the Agreement exists, or that both parties signed it."). Indeed, although the Court in *Guardsmark* ruled on the enforceability of the agreement first per the parties' wishes, it

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because it is the FAA itself that authorizes parties to choose different rules in the first place.").

noted that it saw "nothing in Illinois's choice-of-law rules" that would require it to first determine the validity of the contract before assessing the enforceability of the choice of law agreement.[12] *Id.*

Finally, the order of decision—first, choice of forum; second, merits—is not affected by the fact that Plaintiffs pled a claim for criminal usury.[13] Plaintiffs are not the State. Contrary to what they seem to be implying, this is not a criminal prosecution. It is not even piggybacking on one, as none exists, present or past. So regardless of what Plaintiffs are getting at when they say "[t]he Criminal Code of Illinois can only be applied by Illinois courts", the fact that Plaintiffs are alleging criminal conduct does not diminish the validity of their choice of forum agreement vis-a-vis their tort claims. Pet. Br. 27.

B. Speculation over the enforceability of the choice of law agreement is not a basis for invalidating the choice of forum agreement.

Next, Plaintiffs claim that a purported fundamental Illinois public policy concerning their choice of law agreement requires invalidation of their choice of forum agreement.

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[12] In similar fashion, Plaintiffs cite to a handful of Illinois state court decisions that stand for the proposition that a contract is void if it concerns conduct subject to an unsatisfied state licensure requirement. But be that as it may, allegations that this case is like those do not render the Parties' contracts void. Whether the licensure requirements cited by Plaintiffs apply here must still be decided—in the forum the Parties agreed to. *See LRN Holding, Inc. v. Windlake Capital Advisors, LLC*, 409 Ill. App. 3d 1025, 1035, 949 N.E.2d 264, 273 (2011) (claim that unsatisfied licensure requirement voided contract must be arbitrated pursuant to the contract's arbitration provision).

[13] Obviously Plaintiffs cannot literally bring a criminal claim. Defendants understand Plaintiffs' criminal usury claim to mean that Plaintiffs are asserting an implied private (civil) cause of action under the criminal usury statute. It is doubtful such an implied right exists given that there is an express cause of action under the civil usury statute, but that is a matter for the tribal forum.

Pet. Br. 25-29. The argument goes that (1) Plaintiffs' state statutory claims cannot be waived, meaning the choice of law agreement cannot be enforced, and (2) the tribal forum will [they assume] enforce the choice of law agreement, ergo (3) the choice of forum agreement cannot be enforced. In support, Plaintiffs latch on to a single sentence in footnote 19 of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* in which the Supreme Court noted "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." 473 U.S. 614, 637 n.19, 105 S. Ct. 3346, 3359, 87 L. Ed. 2d 444 (1985); Pet. Br. 18-20.

This argument ignores the rest of *Mitsubishi*, even the rest of footnote 19, wherein the Court made clear that it was not going to speculate about how the agreed upon forum, the Japan Commercial Arbitration Association, would rule on the choice of law questions. If the forum's ruling denied fundamental statutory rights, *then* the choice of forum agreement would be invalidated and the arbitral award would be given no effect in U.S. courts—

> Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.
>
> . . .
>
> We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award.

Mitsubishi, 473 U.S. at 638, 637 n.19. The Court reached the same result in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, the other case Plaintiffs principally rely on.[14] 515 U.S. 528, 540, 115 S. Ct. 2322, 2329-30, 132 L. Ed. 2d 462 (1995). In *Sky Reefer*, the petitioner's attempt to get out of its choice of forum agreement was "premature" because "[a]t this interlocutory stage it is not established what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result."[15] *Id.* So too here.

If anything, the federal judicial review Plaintiffs can obtain of a tribal judgment likely exceeds the "minimal" review of a non-tribal arbitral award that the Supreme Court found sufficient to protect the parties' fundamental rights in *Mitsubishi* and *Sky Reefer*. *See, supra,* Section III.B; *see Mitsubishi*, 473 U.S. at 638; *Sky Reefer*, 515 U.S. at 540. Federal courts have significant equitable discretion to decline to recognize a tribal judgment over a non-Indian, including if it "is against the public policy of the United States or the forum state in which recognition of the judgment is sought." *Wilson*, 127

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[14] Plaintiffs also cite a handful of courts of appeals opinions, including this Court's opinion in C*ange v. Stotler & Co.*, 826 F.2d 581, 594-95 (7th Cir. 1987). Pet. Br. 18. It is not clear why. None of these cases involve the invalidation of a choice of forum agreement. To the extent they even involve an attempt to invalidate such an agreement, those attempts were denied. *See id.* at 492 ("Wootten must fully arbitrate his claims before he may ask a federal court to review the arbitrator's decision regarding a dispute covered by the arbitration agreement").

[15] Plaintiffs' argument that the district court was required to compare the Tribe's laws with those of Illinois also misses the point. The choice of law question must be submitted to the proper forum; it does not itself determine which forum is proper. *See Sky Reefer*, 515 U.S. at 541 (lower court was "correct to reserve judgment on the choice-of-law question . . . as it must be decided in the first instance by the arbitrator").

F.3d at 810. So if there truly is a fundamental Illinois public policy at stake, it can be vindicated if need be *after* tribal judgment.

But to be sure, it is far from clear that Illinois has a fundamental public policy that prevents enforcement of Plaintiffs' choice of law agreement.[16] Illinois courts "apply a strict test in determining when an agreement violates public policy", meaning "[t]he power to invalidate part or all of an agreement on the basis of public policy is *used sparingly* . . . ." *Kleinwort Benson N. Am., Inc. v. Quantum Fin. Services, Inc.*, 181 Ill. 2d 214, 226, 692 N.E.2d 269, 275 (Ill. 1998) (emphasis added). With that in mind, Plaintiffs' claim that usury law represents a fundamental public policy simply because usury is also criminalized lacks persuasive effect. Pet. Br. 26-27. As an abstract matter, it is difficult to see how usury can even be the principal subject of a fundamental public policy given that the federal government has effectively preempted usury with respect to all state and national bank lending. More concretely, Plaintiffs do not offer any insight into the sorts of usury prosecutions the state brings, if it brings any at all. The one case Plaintiffs cite, *People v. Ruppenthal*, concerns indecent solicitation, not usury. 331 Ill. App. 3d 916, 917, 771 N.E.2d 1002, 1003 (2002) ("Following a bench trial, the defendant, Stephen Ruppenthal, was convicted of two counts of indecent solicitation of a child and was sentenced to two years of probation"). Pet. Br. 27. The (it seems) one case to consider usury, meanwhile, they do not cite. Incidentally, that case upheld a choice of law

[16] On the other hand, Illinois does have a strong public policy favoring enforcement of arbitration agreements. *Peregrine Fin. Group, Inc. v. Futronix Trading, Ltd.*, 401 Ill. App. 3d 659, 661, 929 N.E.2d 1226, 1228 (Ill. App. Ct. 2010) (recognizing the "strong public policy favoring enforcement of arbitration agreements").

agreement against the claim that it violated a purported fundamental Illinois policy concerning usury. *See Mell v. Goodbody &* Co., 10 Ill. App. 3d 809, 814, 295 N.E.2d 97, 100 (1973) ("We therefore hold that the application of New York's usury laws in the instant case would not be violative of Illinois public policy").

Plaintiffs' consumer-fraud-claim qua fundamental-public-policy is equally suspect. Plaintiffs point to Section 505/10c of the Consumer Fraud Act, which states that "[a]ny waiver or modification of the rights, provisions, or remedies of this Act shall be void and unenforceable." IL ST CH 815 § 505/10c; Pet. Br. 27-29. But they do not identify any basis for having any rights or remedies under the Act. Their Amended Complaint doesn't allege fraud or any "unfair or deceptive acts". *Id.* at § 505/2. It just restates their civil usury claim as a consumer fraud claim. S.A. 9-11, 13. That is not enough to preemptively void a choice of forum agreement under *Mitsubishi* and *Sky Reefer*.

V. Plaintiffs are not entitled to a presumption that they signed their contracts under financial duress or that their choice of forum agreement makes the just resolution of their claims prohibitively costly.

The district court rule that Plaintiffs had "fail[ed]" to demonstrate they entered into their choice of forum agreement under duress. Pet. Br. 37; S.A. 6-7. Plaintiffs submitted no evidence concerning duress,[17] instead arguing that duress should be inferred from the terms of their loan agreements. But "[d]uress does not exist merely where consent to an agreement is secured because of hard bargaining positions or the pressure of financial

[17] *Cf. CIT Group/Credit Fin. Inc. v. Lott*, 93 C 0548, 1993 WL 157617, at *2 (N.D. Ill. May 13, 1993) (rejecting assertions of financial distress in part because "[n]o affidavits support these contentions").

circumstances." *Cont'l Illinois Nat. Bank & Trust Co. of Chicago v. Stanley*, 606 F. Supp. 558, 562 (N.D. Ill. 1985). Rather, "a party must show that he was induced by a wrongful act or threat of another to execute an agreement under circumstances which deprived him of the exercise of his free will." *Id.*

Plaintiffs voluntarily sought out loans from Western Sky through the phone or Internet. S.A. 16. They had as much time as they wanted, in whatever environment they choose (*e.g.* their living room), to evaluate the terms of any potential agreement. *Cf. Faulkenberg*, 637 F.3d at 809 ("In Illinois a party to a contract is charged with knowledge of and assent to a signed agreement."). The terms themselves were clearly disclosed in plain English in standard-sized font (11-point and larger). S.A. 29-34; S.A. 43-47; S.A. 293-298. Nearly half of the six pages of each loan contract is dedicated to explaining and elaborating on the choice of forum agreement. S.A. S.A. 29-34; S.A. 43-47; S.A. 293-298. On these facts, Plaintiffs cannot invoke duress.

Moreover, Plaintiffs' allusions to the comparative cost of resolving this dispute in a tribal forum versus Illinois rings hollow not only because it's factually wrong, but because Plaintiffs rejected Defendants' offer to arbitrate their claims on a bilateral basis in Illinois before a court-selected arbitration. R. 502-503. It is not unreasonable to infer, then, that Plaintiffs' true issue with their choice of forum agreement is not the forum's location or the identity of the decision maker, but the likelihood that the forum is going to enforce their class action waiver. After all, Plaintiffs do not challenge their choice of forum

agreement because it specifies arbitration, but because it specifies *tribal* arbitration. Pet. Br. 19-24. That issue removed, one would think arbitration could proceed apace.[18]

In all events, Plaintiffs are permitted by the terms of their arbitration agreement to appear via "telephone or video conference ", and are "not required to travel to the Cheyenne River Sioux Tribal Nation." S.A. 32; S.A. 46; S.A. 296. Further, Western Sky is required to pay Plaintiffs' arbitration fees, unlike any fees Plaintiffs expend in court. S.A. 32; S.A. 46; S.A. 296. The arbitrator may award reasonable attorneys' fees to the substantially prevailing party, *but only if* permitted by law (the same law that applies in court). S.A. 32; S.A. 46; S.A. 296. Finally, as to Plaintiffs' claim that they might want to "personally confront a witness during a hearing"—this is not a criminal proceeding. There is no reason to think that a just resolution of Plaintiffs' claim requires, or would benefit from, Plaintiffs *personally* confronting witnesses; "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *AT&T Mobility LLC v. Concepcion,* 131 S. Ct.

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[18] The fact that Plaintiffs rejected Defendants' offer to arbitrate in Illinois is one of many reasons *Williams v. Illinois State Scholarship Comm'n* has no bearing on this case. 139 Ill. 2d 24, 33, 563 N.E.2d 465, 469 (1990). In *Williams*, consumers were being sued for allegedly delinquent debts in a distant and arbitrary forum, forcing them to choose between accepting default judgments and post-judgment garnishment proceedings or incurring the cost of traveling to defend themselves. *Id.* at 31. The court invalidated the choice of forum agreement providing for the distant forum, finding it dispositive that the debt collector "refused to offer [consumers] any alternative means of dispute settlement outside the courtroom, while vigorously pursuing default judgments against them in a distant forum." *Id.* at 45. Here, Plaintiffs are suing the debt holder, not the other way around. The agreed upon forum does not require Plaintiffs to travel anywhere, *and* Defendants offered to nonetheless to waive the geographical element of the choice of forum agreement entirely. *Williams* is inapt.

1740, 1749, 179 L. Ed. 2d 742 (2011). Indeed, given Plaintiffs' focus on costs, the "the informality of arbitral proceedings" and their propensity for "reducing the cost and increasing the speed of dispute resolution" ought to be a good thing. *Id.*

VI. The district court correctly did not address Plaintiffs' objections to tribal subject matter jurisdiction. To the extent tribal subject matter jurisdiction is even implicated, because Defendants asserted a colorable basis for tribal court jurisdiction, the tribal exhaustion rule requires Plaintiffs to direct any jurisdictional objections to the tribal court before consideration in a federal action.

As an initial matter, the tribal court does not need subject matter jurisdiction over this dispute for the tribal arbitrator to resolve Plaintiffs' claims. Arbitral subject matter jurisdiction is simply a matter of whether the claims being arbitrated are within the scope of the agreement to arbitrate. *See, generally, AT & T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986) ("arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"). Because there is no dispute that Plaintiffs' claims are covered by their arbitration agreement, and further because any award issued under that agreement "may be filed with any court having jurisdiction", it is purely speculative that tribal jurisdiction will ever arise as an issue. A. 32-33; S.A. 46; S.A. 296.

But even assuming that tribal arbitration requires the tribal court to have subject matter jurisdiction, the district court was not required to confirm or even address the tribal court's subject matter jurisdiction. Once Defendants asserted a colorable basis for the tribal court's jurisdiction, the tribal exhaustion rule kicked in, which among other

things requires Plaintiffs to raise their jurisdictional arguments in tribal court before seeking federal remedies. *See Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621, 622 (8th Cir. 1997) *(*"It is now settled that principles of comity require that tribal-court remedies *must* be exhausted before a federal district court should consider relief in a civil case regarding tribal-related activities on reservation land.") (emphasis in original).

A. The tribal jurisdiction rule applies whenever a colorable claim of tribal subject matter jurisdiction is asserted.

The tribal exhaustion rule provides that the tribal "forum whose jurisdiction is being challenged [be given] the first opportunity to evaluate the factual and legal bases for the challenge." *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856, 105 S. Ct. 2447, 2454, 85 L. Ed. 2d 818 (1985). The rule follows not only from the long-standing federal "policy of supporting tribal self-government and self-determination", *see id.*, but also from the fact that tribal subject matter jurisdiction, unlike its Article III counterpart, is in large part a function of the tribal interests at stake. *See Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1135-36 (9th Cir. 2006) (en banc) ("We finally consider whether the tribal courts had sufficient interest to justify the exercise of subject matter jurisdiction in this case."). Thus, it makes sense not only for "a full record to be developed in the Tribal Court" to allow thoughtful evaluation of those tribal interests, but also to have the tribal court opine on that record first to "provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Nat'l Farmers Union*, 471 U.S. at 856-57.

To trigger the tribal exhaustion rule, only a "colorable" claim of tribal subject matter jurisdiction need be asserted. *See Ninigret Dev. Corp.*, 207 F.3d at 31. This is a low threshold. A claim is "colorable" so long as it plausible—so long as once asserted it cannot "plainly" be concluded that tribal jurisdiction does not exist. *See Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848 (9th Cir. 2009) (citing *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001)).[19]

In other words, while "there is no simple test for determining whether tribal court jurisdiction exists", *Salish Kootenai Coll.*, 434 F.3d at 1130, the test for determining if tribal exhaustion applies is clear cut: it applies unless tribal jurisdiction is plainly nonexistent.[20]

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[19] As the Ninth Circuit explained in *Elliot*, the Supreme Court has articulated four exceptions to the tribal exhaustion rule. One is where it is "plain" that tribal jurisdiction is lacking. Another is (somewhat redundantly) where the tribal court action is "patently violative of express jurisdictional prohibitions". *Elliott*, 566 F.3d at 847. By carving these out as "exceptions" to the exhaustion rule rather than making affirmative requirements out of their inverses, it follows that once a colorable claim of tribal jurisdiction is asserted exhaustion becomes presumptive and the burden shifts to the opposing party to demonstrate why it should not apply.

The remaining two exceptions do not relate to tribal jurisdiction per se; they are where "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction" or where an assertion of jurisdiction is "motivated by a desire to harass or is conducted in bad faith". *Id.* These latter two exceptions are focused on the tribal court (or the broader tribal government), not the parties. For that reason, and as discussed above, they can only be invoked alongside tangible evidence of a problem with the tribal court (*e.g.* bias or incompetence). *See Duncan Energy Co.*, 27 F.3d at 1301 (discussing futility exception); *Espil v. Sells*, 847 F. Supp. 752, 757 (D. Ariz. 1994) ("The 'motivated by a desire to harass or is motivated by bad faith' exception to the exhaustion rule relates to actions of courts and not the parties.").

[20] Given that there is no simple test for tribal jurisdiction—as Justice Souter remarked in *Nevada v. Hicks*,"tribal adjudicatory jurisdiction over nonmembers is ... ill-defined", *Hicks*, 533 U.S. at 376 (Souter, J., concurring) (internal quotations omitted)—it stands to

B. Tribal subject matter jurisdiction is colorable here because Plaintiffs' claims all arise from alleged on-Reservation operations by an enrolled tribal member and his wholly owned company. The Tribe has a strong interest in those operations, and adjudicative authority over them.

Plaintiffs do not dispute, nor could they, that the tribal court has jurisdiction over Mr. Webb, as a tribal member, for conduct he allegedly engaged in through his wholly owned, on-Reservation companies. *See Williams v. Lee*, 358 U.S. 217, 223, 79 S. Ct. 269, 272, 3 L. Ed. 2d 251 (1959); *see also Duncan Energy Co.*, 27 F.3d at 1299. Instead, Plaintiffs argue that jurisdiction would be improper because (1) the Tribe allegedly does not have an interest in this case, and (2) they and the entity Defendants are not tribal members. Even on their best day, though, neither argument supports the conclusion that tribal jurisdiction is plainly nonexistent. As such, neither relieves Plaintiffs of their tribal exhaustion obligations.

1. The Tribe has a strong *prima facie* interest in regulating the on-Reservation operations of member owned and operated financial services companies.

Plaintiffs' first argument is based entirely on the fact that Western Sky is owned by the Tribe. Pet. Br. 30. From this, Plaintiffs conclude that "the Tribe has no interest in this case whatsover." Pet. Br. 32. But in the same way New York does not need to own JP Morgan to have an interest in its Wall Street operations, a tribe does not need to own the financial services companies that operate on its Reservation to have an interest in their conduct. Local businesses employ local residents, drive the local economy, use the local

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reason that tribal jurisdiction over a case involving a novel question of law or atypical fact pattern will rarely be unquestionably foreclosed.

infrastructure, and must follow the local laws. As well, they serve as ambassadors for the local community when they engage in cross-border commerce. Manifestly, then, the Tribe has an interest in claims against a local, member-owned business for its on-Reservation conduct.[21]

In like manner, the Tribe also has legislative authority over that conduct—"As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation . . . ." *Plains Commerce*, 554 U.S. at 327. Given that adjudicative authority is bounded by legislative authority, *see id.*, tribal jurisdiction is proper, or at least colorable, unless it is altered by the fact that the entity Defendants and Plaintiffs are not tribal members. [22]

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[21] Plaintiffs cite to a handful of state regulatory actions against Western Sky. Pet. Br. 18-19. These actions concern the scope of concurrent state authority over certain of Western Sky's operations. They do not purport to limit the Tribe's authority, nor do they contest that Western Sky is a tribal company located and operated exclusively on the Reservation. *See, e.g., Colorado v. W. Sky Fin., L.L.C.*, 845 F. Supp. 2d 1178, 1180 (D. Colo. 2011) (no dispute that Western Sky is a "Native American owned business operating within the boundaries of the Cheyenne River Sioux Reservation").

[22] Plaintiffs cite *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209, 98 S. Ct. 1011, 1013, 55 L. Ed. 2d 209 (1978), for the proposition that tribal courts lack authority to exercise criminal jurisdiction over non-Indians. Pet. Br. 31. Criminal jurisdiction is not at issue. For whatever reason, Plaintiffs appear to believe that because they pled a claim for criminal usury they are prosecuting a criminal action. In reality, their criminal law claim can only survive if the criminal usury statute contains an implied (civil) private right of action. It likely does not given that there already is a civil usury statute, but that is at any rate an issue for the tribal forum.

2. Tribal jurisdiction over Western Sky is colorable because it is considered a tribal entity for purposes of the jurisdictional analysis.

Western Sky is considered Indian for purposes of tribal jurisdiction because it is wholly owned by a tribal member and located and operated on the Reservation. Contrary to Plaintiffs' protestations, the fact that it is organized under South Dakota law does not diminish its dominant tribal character.[23] The South Dakota Supreme Court addressed this matter squarely, finding that:

> Congress' primary objective in Indian law for several decades has been to encourage tribal economic independence and development. By finding that incorporation under state law deprives a business of its Indian identity, we would force economic developers on reservations to forgo the benefits of incorporation in order to maintain their guaranteed protections under federal Indian law.

Pourier v. S. Dakota Dept. of Revenue, 2003 S.D. 21, 658 N.W.2d 395, 405 *aff'd in part and vacated in part on other grounds*, 2004 S.D. 3, 674 N.W.2d 314 (2004), *cert denied*, 541 U.S. 1064 (2004).[24]

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[23] Notably, in their bias arguments, Plaintiffs implicitly ask the Court to treat Western Sky like a tribal member on the basis of Mr. Webb's ownership: [arbitration would be unfair because the] "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. Pet. Br. 21.

[24] *See also Easter Navajo Indus., Inc. v Bureau of Revenue*, 552 P.2d 805, 807-10 (N.M. App. 1976) ("To disregard the Indian ethnicity of taxpayer's shareholders would be to fail to recognize the specific directives of the Indian Business Development Fund Act."); *Cf. Guides, Ltd. v. Yarmouth Grp. Prop.Mgmt., Inc.*, 295 F.3d 1065, 1072 & n.2 (10th Cir. 2002) (corporation assumes racial characteristics of owners); *Gersman v. Grp. Health Ass'n, Inc.*, 931 F.2d 1565, 1567-68 (D.C. Cir. 1991) (same), *vacated on other grounds*, 502 U.S. 1068 (1992); *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982) (same); *Howard Sec. Servs. v. John Hopkins Hospital*, 516 F. Supp. 508 (D.Md. 1981) (same).

In support, the court cited to the Indian Business Development Program (IBDP), which Congress enacted to "establish and expand profit-making Indian-owned economic enterprises", 25 U.S.C. § 1521 (2006), without regard to whether the enterprises are "authorized to do business under State, Federal or Tribal Law". 25 C.F.R. § 286.3.

Plaintiffs do not mention *Pourier* or the IBDP, instead relying on *Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 601-03 (N.D. 1983), wherein the court found a majority Indian-owned corporation incorporated under state law to be a state entity for purposes of *state court jurisdiction.*[25] *Turtle Mountain*—to the extent it would even theoretically prevent a finding that the corporation at issue was also a tribal entity for purposes of tribal court jurisdiction—is distinguishable. The entity in *Turtle Mountain* was a corporation, and so the "citizenship of the shareholders, directors, officers and agents ha[d] little influence with regard to the citizenship of a corporation." *Id.* at 604. In contrast, Western Sky is a single member LLC, which like all LLCs, assumes its owner's citizenship for purposes of jurisdiction. *See Cosgrove v. Bartolotto*, 150 F.3d 729 (7th Cir. 1998). This makes sense. A single-member LLC shares a close identity with its owner. A corporation does not.

The logic and rationale of *Pourier* should control here. But even if the Court retains doubts, the question of how to treat Western Sky for purposes of tribal jurisdiction is, at this juncture, a question for the tribal court.

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[25] Plaintiffs also cite *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 516 F. Supp. 2d 1044, 1048 (D.S.D. 2007) *vacated and remanded*, 542 F.3d 224 (8th Cir. 2008). *Oglala* involved a state-chartered, Indian-owned corporation, true enough, but it didn't address the issue the relevant jurisdictional issue.

3. Tribal jurisdiction over CashCall is colorable because CashCall entered into a contractual relationship with Western Sky on the Reservation and all of Plaintiffs' claims against CashCall are predicated on that relationship.

a. Under *Montana v. U.S.*, a tribe may exercise jurisdiction over consenting non-members whose conduct comes within a tribe's legislative authority.

The Supreme court has long recognized two exceptions to the general rule that a tribal court may not exercise jurisdiction over non-members. *Montana v. U. S.,* 450 U.S. 544, 565, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493 (1981). Known as the *Montana* exceptions, the first concerns non-members who enter "consensual relationships with the tribe *or its members*, through commercial dealing, contracts, leases, or other arrangements"; the second concerns non-member conduct that directly affects the tribe's political integrity, economic security, health, or welfare. *See id.* (emphasis added).

In subsequent cases, the Court has clarified that the first exception, the one relevant here, comprises several requirements. First, and as always, the tribe must have legislative authority over the type of conduct at issue. *Plains Commerce*, 554 U.S. at 330. In this regard, tribal subject matter jurisdiction is similar to its Article III counterpart; the court either has or doesn't have inherent authority to adjudicate a given claim.

Second, the non-member must "consent" to tribal jurisdiction through the sort of "consensual relationship" identified in *Montana*.[26] Importantly, "consent" does not

[26] As an aside, *Plains Commerce* also suggests that consent can be conferred outside of a consensual relationship simply by not opposing tribal jurisdiction. *Plains Commerce*, 554 U.S. at 342 (consent not conferred by litigating in tribal court because objection to jurisdiction was preserved).

mean that the non-member must expressly agree to tribal jurisdiction (although that would qualify). Rather "consent" means that the relationship puts the non-member on notice that its conduct may fall within the tribe's legislative authority (generally by impacting tribal interests in a given way), and the non-member nonetheless decides to go forward. *See id.* at 337 (tribal authority "may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions"). Because consent is a function of notice, not all relationships confer it, and of those that do, consent is generally limited to claims that arise out of the relationship. *See id.* at 338 ("But there is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank's sale of land it owned in fee simple."). In this way, the consent inquiry is not unlike the minimum contacts analysis that must preface the exercise of specific personal jurisdiction over out-of-state defendants. *See Salish Kootenai Coll.*, 434 F.3d at 1138.

b. CashCall brought itself within the legislative authority of the Tribe and consented to tribal jurisdiction at the same time by taking assignment of contracts executed by Western Sky on the Reservation.

CashCall fits squarely within the first *Montana* exception. Plaintiffs bring against CashCall the same claims, based on the same conduct, that they bring against Mr. Webb and Western Sky. S.A. 9-17. Just as the Tribe has legislative authority over those claims and conduct vis-a-vis Western Sky, so too does it have legislative authority over those claims and conduct vis-a-vis Western Sky's assign CashCall. *See, generally, Dish Network Serv. LLC v. Laducer*, CIV.A. 09-10122, 2012 WL 2782585, at *5 (D.N.D. July 9, 2012)

(slip op.) (tribal jurisdiction is colorable under first *Montana* exception when contract over which tribe has legislative authority is "at the heart" of the dispute).

Similarly, CashCall consented to tribal jurisdiction by entering into a contractual relationship with Western Sky to take assignment of Plaintiffs' loan contracts.[27] As an assignee, CashCall stepped into the shoes of Western Sky with respect to those loan contracts. *Kaplan v. Shure Bros., Inc.*, 153 F.3d 413, 418-19 (7th Cir. 1998) (noting that under Illinois law "privity accompanies a valid assignment of a contract because it puts the assignee in the shoes of the assignor-since the assignor was in privity with the other contracting party, the assignee is as well"). In doing so, it bound itself to the contracts' choice of forum agreement.

[27] Although the record on this point has not been developed, presumably the assignment occurred (at least in part) on the Reservation given that Western Sky has its principal (indeed, only) places of business on the Reservation.

4. Tribal jurisdiction over Plaintiffs is colorable under the first *Montana* exception because, to the extent this lawsuit involves regulating any conduct by Plaintiffs, it is conduct borne out of its contracts with Western Sky. Further, Plaintiffs consented to tribal jurisdiction through their contracts' choice of forum agreement.

As the Supreme Court has consistently reiterated, the legislative authority component of *Montana* asks whether the tribe has authority over the conduct of the *non-Indian* at issue in the lawsuit. *See Montana,* 450 U.S. at 565 ("[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships"); *see also Plains Commerce*, 554 U.S. at 328 ("[t]his general rule restricts tribal authority over nonmember activities"); *Strate v. A-1 Contractors*, 520 U.S. 438, 445, 117 S. Ct. 1404, 1409, 137 L. Ed. 2d 661 (1997) ([o]ur case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances").

Unlike the Indian plaintiffs in *Montana, Strate,* and *Plains Commerce* who were seeking to regulate conduct of the non-Indian defendants, Defendants here are not seeking to regulate any non-Indian conduct. The only conduct at issue is the on-Reservation execution of certain contracts by Western Sky, which Plaintiffs claim was tortious. Consequently, it's not even clear that the Tribe needs to reach *Montana* in order to properly exercise authority.[28]

[28] Both the First and the Ninth Circuits have indicated that consideration of the *Montana* exceptions is unnecessary when, as here, the non-Indian is the plaintiff and the conduct being complained of is that of the Indian defendant. *See Ninigret Dev. Corp.*, 207 F.3d at 32 (no mention of *Montana*; only issue is whether plaintiff's claims fall with in the tribe's legislative authority); *see also Salish Kootenai Coll.*, 434 F.3d at 1131, 1135-36

But assuming it does, which is to say assuming that ruling on Plaintiffs' claims amounts in some manner to incidentally "regulating" certain of Plaintiffs' conduct, *Montana* permits the Tribe to do so. Plaintiffs sought out and entered into consensual, contractual relationships with Western sky, who they knew to be Indian-owned and on-Reservation operated. Whatever conduct of theirs that might be regulated by the resolution of this dispute, it is conduct borne entirely of those relationships. For that reason, it is conduct within the legislative authority of the Tribe under the first *Montana* exception. *See Laducer*, 2012 WL 2782585, at *5 ("By entering into a consensual contractual relationship with tribal members on tribal land, Dish Network subjected itself to the jurisdiction of the Tribal Court.").

Finally, Plaintiffs expressly consented to tribal jurisdiction when they entered into loan contracts containing both a tribal choice of forum agreement and the following language, one sentence into the contracts: "you, the borrower, hereby acknowledge and . . . consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court . . . ." S.A. 29; S.A. 43; S.A. 293. Their four claims each arise from their contracts; the consent requirement is thus satisfied.

Taken together, tribal subject matter jurisdiction is colorable not only over the heart of this dispute—Western Sky's execution of Plaintiffs' loan contracts—but over each of

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("Although we find that Smith's claims do not fit easily with the literal examples cited in the first Montana exception, we nevertheless believe that the Tribes' exercise of civil jurisdiction is consistent with the principles set forth in *Montana* and succeeding cases.").

the Parties and their pertinent conduct. Tribal exhaustion is therefore required before Plaintiffs can object in federal court to tribal jurisdiction.

C. The district court correctly dismissed this case rather than stay it because if further federal review is necessary, it should occur in the federal courts encompassing the district in which the tribal court is located.

Once the tribal exhaustion rule attaches to a case, the court has discretion to either dismiss or stay the federal action. *See, e.g., Duncan Energy Co.*, 27 F.3d at 1301 ("The district court should either dismiss this case without prejudice for failure to exhaust tribal remedies, or should stay any proceedings until those remedies are exhausted."); *see also National Farmers Union*, 471 U.S. at 856. Here, dismissal was appropriate. If review of the tribal court's rulings is necessary, it should occur in the federal courts for the district in which the tribal court is located, South Dakota. South Dakota federal courts have greater familiarity with the Cheyenne River Sioux judiciary—that is where, for example, *Plains Commerce* came out of. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 440 F. Supp. 2d 1070 (D.S.D. 2006) *aff'd*, 491 F.3d 878 (8th Cir. 2007) *rev'd sub nom. Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008). But more than that, allowing them to take the lead on review promotes the consistent development of the law and encourages a valuable and ongoing dialogue between the courts. Those are worthy goals. They were embraced in the design of the federal courts of appeals system. They should be embraced here.

Conclusion

Plaintiffs agreed to resolve all disputes between themselves and Defendants in bilateral arbitration before an authorized representative of the Cheyenne River Sioux Tribal Nation. They now prefer to resolve this dispute in an Illinois class action. But a change of heart does not invalidate a contractual choice of forum agreement. Nor does unsupported speculation concerning any alleged improprieties of enforcing the agreement. Because Plaintiffs have not articulated any cognizeable basis for invalidating their arbitration and choice of forum agreement, and further because Plaintiffs will have the opportunity for federal review of any tribal award, the district court correctly enforced the Parties' agreement. This Court should affirm.

Dated: October 22, 2012

Respectfully submitted,

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Rule 32(a)(7) Certificate of Compliance

I hereby certify that:

1. This brief complies with the type volume limitation of Rule 32(a)(7) because it contains 12,014 words.

2. This brief complies with the typeface and type-style requirements of Rules 32(a)(5) and 32(a)(6) and Circuit Rule 32(b) because it uses 12-point, proportionally-spaced font in both the text and the footnotes.

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Certificate of Service

I hereby certify that on October 22, 2012, a copy of the foregoing brief was filed electronically through the Court's ECF system and that hardcopies of the same were served upon counsel for all Plaintiffs by FedEx delivery, as follows:

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