IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NUMBER 1:13-CV-00255-WO-JLW

THOMAS BROWN, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
WESTERN SKY FINANCIAL, LLC, *et al.*,	)
	)
	)
Defendants.	)

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS AND TO COMPEL ARBITRATION

Plaintiffs hereby respond to Defendants' Motion to Stay Proceedings and Compel Arbitration filed May 22, 2013 (Doc. 33), showing the motion should be denied.

I. NATURE OF THE MATTER BEFORE THE COURT.

Arbitration is a matter of contract including the rules under which that arbitration will be conducted. Here, the agreements state that arbitration will be conducted under "consumer rules" which do not exist. There are other material falsities in the agreement as well. Accordingly no contract was formed and there was no meeting of the minds.

Specifically, Ms. Johnson's agreement states that the arbitration will be conducted "by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules" and later references the "Tribal Nation's consumer rules." Doc. 1-1, pp. 3-4. Mr. Brown's contract has similar language that arbitration will be conducted under the "consumer dispute rules" of the Tribe. Doc. 1-2, p. 3. However, Plaintiffs have been unable to locate any such rules. In the ongoing FTC

case against Webb entities, the Court noted in a Memorandum and Order dated March 28, 2013 at page 7 footnote 5 that "Any 'consumer dispute rules' of the Tribe have not been filed as part of the record in this case." (**Exhibit 1**, attached).

Another key term in any arbitration agreement is whom the parties choose to arbitrate their disputes. Ms. Johnson's agreement states on the one hand that "Arbitration … shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative," but on the other hand that it will be conducted by "a panel of three Tribal Elders." Doc. 1-1, pp. 3-4; Complaint ¶¶ 107, 113 (emphasis added). How the arbitration would be done by one arbitrator, and also by three, is unexplained.

On a similar note, Mr. Brown's agreement states that "Arbitration … shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative," but then that it will be conducted by the American Arbitration Association, JAMS, or a party-agreed arbitrator. Doc. 1-2, p. 3; Complaint ¶¶ 119-123. The agreement of the parties on who the arbitrator is, is integral, and yet the agreement gives two mutually exclusive alternatives. It is hopelessly ambiguous and confusing.

The agreement is unconscionable. An arbitration agreement is unlawful where it has terms forbidding the assertion of certain statutory rights. Here, the terms seeking to subject these North Carolina consumers to Tribal law in arbitration have precisely that effect by seeking to avoid the application of the North Carolina small loan usury laws which the State Legislature has unequivocally said reflect a "paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws." N.C. Gen. Stat. § 24-2.1(g) (emphasis added).

Also, the costs and fees associated with arbitrating the case would make access to the forum impracticable, especially once the "loser-pays" provisions and the costs to go to South Dakota to effectively prosecute the claim are considered. The consumer must go to South Dakota if he wants an in-person hearing. The limited information available the purported arbitration system reflects that a great deal of work may need to be done even on basic issues like qualifying the arbitrator. See discussion of the *Inetianbor* case in the Southern District of Florida – the *pro se* Plaintiff submitted emails and other documents reflecting how the Company was using an arbitrator who had one or more family members working for the Western Sky organization, and ghostwriting the arbitrator's written communications with the parties. *See* **Exhibit 2**, consisting of selected docket filings from that case. Further according to the consumer, the purported arbitrator refused to speak to him (representing himself *pro se*), because of fear that CashCall would get angry with him. This evidence if true is incredible and unusual and clearly warrants merits discovery and denial of Defendant's motion.[1]

[1] "First, Plaintiff claims that **[the arbitrator] Mr. Chasing Hawk's daughter, Shannon Chasing Hawk, is employed by Western Sky. Plaintiff has attached what he claims is a printout of Ms. Chasing Hawk's Facebook profile page, listing "Western Sky Financial" as her employer….** He further alleges that Mr. Chasing Hawk has "10+ kids and every single one of them has either worked for, currently works at CashCall or one of its subsidiaries … or had illegally attempted to conduct an unsuccessful arbitration for the defendant." …. Second, Plaintiff alleges that **CashCall and Mr. Chasing Hawk have colluded in the initiation of arbitration proceedings. Plaintiff attaches what he claims is an email chain between Mr. Chasing Hawk and an employee of Lakota Cash, LLC ("Lakota Cash"), a subsidiary of Western Sky, which purportedly shows that Lakota Cash prepared the letter for Mr. Chasing Hawk…. Plaintiff further claims that he called Mr. Chasing Hawk, and that Mr. Chasing Hawk admitted during the phone call that CashCall had prepared the letter for him. Plaintiff represents that he has tried calling Mr. Chasing Hawk again,**

None of the "consumer rules" promised to have existed in the arbitration agreement were noted to have been produced in the FTC action. See Federal Court Order in that case, filed as an exhibit hereto. The Federal Court noted this fact in a footnote for a reason. Also this Court should note how the agreement has changed multiple times as the lawsuits have piled up. The arbitration clause for Mr. Inetianbor states one Tribal Elder is the arbitrator. The clause for Ms. Johnson in 2011 states that it is one "representative" of the Tribe, but then contradictorily say no, there have to be three Tribal Elders. The clause for Mr. Brown stated that it had to be one Tribal representative, then, no, it is the AAA, JAMS, or your choice. The agreement is constantly being revised to make it appear less unlawful, or simply to confuse consumers.[2]

Ms. Johnson, who works for the state government, would have had to pay back almost $14,000 on a less than $3000 loan. (Doc. 1-1). She paid approximately $4000 in approximately $250/month payments for over a year. Mr. Brown, who is a disabled Air Force serviceman, would have had to pay the same but fortuitously learned the loans were illegal and stopped payments after making several. (**Exhibit 3**, Affidavit of Brown, Declaration of Johnson).

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but that he told Plaintiff that "I am not able to talk to you because cash call (sic) will get mad. You have to call the attorney, sorry." *Id.* at 3." (**Exhibit 2**, Order at Doc. 70 in the *Inetianbor* case, emphasis added).

[2] In addition, the organization's way of selling customers on the loans has altered. As of 2011 with Ms. Johnson, the telemarketer gave no mention of the arbitration clause. *See* Johnson Declaration dated June 20, 2013. However, by 2012, according to Mr. Brown, the salesperson was now mentioning arbitration, but merely as an option one could do, not as a mandatory program. *See* Brown Affidavit, Ex. 3.

Every North Carolina consumer who got a loan from Western Sky must travel to the reservation if they want a live hearing, whereas if the venue provision is enforced, the company never has to come down here. The venue provision and arbitration provisions themselves are plainly intentionally drafted to try to evade the small loans statutes, though the statutes expressly prohibit evasions. Meanwhile the company chills any claims by proclaiming it will seek attorney fees and is entitled to them if it prevails on page one of a fraudulent agreement that also says the Western Sky LLC is "organized" under Tribal law (Docs. 1-1, first page) when it is actually organized under South Dakota law per the corporate filings. (**Exhibit 4**). If Plaintiffs' allegations are true, there is no way to whitewash the fact that the arbitration agreement itself is fraudulent and criminal, under the "severability" test of *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006) and *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395 (1967). The organization also baldly tells this Court it is not a payday lender, when it runs payday loan websites to this day and one Defendant is named "Payday Financial, LLC." Plaintiffs believe after merits discovery the case may warrant amendment to add RICO charges, and submit that on these facts, discovery should precede deciding any motion to dismiss the fraudulent transfer count.

See also developments in *FTC v. Payday Financial, LLC* case in South Dakota Federal Court. The FTC alleges that Western Sky was filing false wage garnishment papers in the Tribal small claims court, an incredible travesty of justice. This company was intentionally and demonstrably using the small claims carve-out (See Doc. 1-1, section entitled "Small Claims Exception") in the arbitration agreement to file and serve

false garnishment papers. If the small claims system allowed this it is grossly unfair; if it did not this proves the enterprise's criminality. When the FTC sued, the enterprise shut down the practice. (**Exhibit 5**). An arbitration clause used to keep consumers from suing while allowing the company to serve and file false garnishment papers is criminal and void. See FTC press release:

> When customers fall behind in their payments, Payday Financial, LLC **improperly files suits against them in the Cheyenne River Sioux Tribal Court, attempting to obtain a tribal court order to garnish their wages, the amended complaint alleges. The tribal court does not have jurisdiction over claims against people who do not belong to the Cheyenne River Sioux Tribe and who do not reside on the reservation or elsewhere in South Dakota.**
>
> In its original complaint filed in September 2011, the agency alleged that the defendants illegally tried to garnish employees' wages without court orders….

Exhibit 6, emphasis added; see Stipulated Preliminary Injunction, in *Federal Trade Commission v. Payday Financial, LLC*, Case 3:11-cv-03017-RAL, filed September 7, 2011, attached as Ex. 5. The Preliminary Injunction enjoined them from misrepresenting that they could garnish consumers' wages. *Id.*, p. 5.[3]

[3] The FTC Amended Complaint alleges the Western Sky enterprise sent bogus garnishment papers to employers of consumers (a misrepresentation of properly using the court system) and also, filed numerous collection actions in the Tribal small claims court that in fact lacks jurisdiction. Amended Complaint ¶¶ 36-37 filed March 1, 2012 (Doc. 44 in that case, attached as **Exhibit 7**). Western Sky falsely told consumers that it was getting court garnishment order, a misuse and overreaching of the venue clause and arbitration clause itself with its small claims carve-out. The practice is analogous to when payday lenders threaten consumers with being arrested and criminal prosecution. We see here evidence of overreaching and fraud in action in how the company seeks to misuse the arbitration clause with small claims carve-out (see Complaint Exs. 1-2) and the venue clause. If the Court does not find it can summarily deny Defendants' motions at this time, it should allow discovery.

II. STATEMENT OF FACTS.

In addition to the facts described above: Plaintiffs' Complaint filed March 28, 2013 alleges claims against Western Sky Financial, LLC ("Western Sky"), Martin A. Webb ("Webb") who owns Western Sky, and other Webb-related entities.[4] Complaint ¶¶ 12-34. The Complaint also names CashCall, Inc., a corporation incorporated under the laws of California ("CashCall"). *Id.* ¶ 34. The Webb entities are organized under South Dakota law. *Id.* ¶ 33. Webb is a resident of South Dakota. *Id*.

None of the Defendants are licensed to make loans to North Carolina residents. *Id.* ¶¶ 35, 54. However, Western Sky markets loans to North Carolina residents by television and radio ads and the internet and makes loans to them over its website. *Id.* ¶¶ 2-3, 57, 63. Plaintiffs contend all the Webb entities participate in the unlawful lending enterprise and/or are alter egos and that CashCall is assigned the loans after they are made. *Id.* ¶¶ 2, 34, 53; Sixth Claim for Relief.

Plaintiff Thomas Brown resides in Kernersville, North Carolina. He is a United States Army veteran, injured while in service and now disabled living on a fixed income. Complaint ¶ 85. On or about July 5, 2012, Mr. Brown, in a situation of economic hardship, applied for a loan with Western Sky from his home using his internet and

[4] They are 24 Seven Solution, LLC, 24-7 Cash Direct, LLC, Advance Wireless, LLC, Dekake Ranch, LLC, Financial Solutions, LLC, Great Plains Lending, LLC, Great Sky Finance, LLC, Green Billow, LLC, High Country Ventures, LLC, Horizons Consulting, LLC, Interim Holding Company, Management Systems, LLC, Native Imagination, LLC, New Holding Company, Payday Financial, LLC, Red River Ventures, LLC, Red Stone Financial, LLC, Webb Ranch, LLC, Western Capital, LLC, and Western Sky Dakota Holding Company. They and Western Sky are collectively known as the "Webb entities." (Complaint ¶¶ 13-32). Plaintiffs are withdrawing their claim against Western Sky Dakota Holding Company, and allege the rest are alter egos.

phone, and funds were deposited to his bank account in North Carolina. *Id.* ¶¶ 10, 78. He was ostensibly loaned $2,600 but Western Sky retained $75 of that amount as a "Prepaid Finance Charge/Origination Fee," so that the amount actually sent was $2,525. In return, he was to make 48 monthly payments at a nominal APR of 139% / effective APR of 273%, resulting in total payments of $14,102.87, more than **five times** the amount borrowed.[5]

Mr. Brown intended to pay off the entire loan after one month, but consistent with Defendants' business model, was unable to do so and was trapped into making payments of nearly $300 per month. Mr. Brown's military disability income is direct-deposited into his bank account. Western Sky and/or CashCall automatically debited loan payments from his bank account. Complaint ¶¶ 81-82.

Plaintiff Monica Johnson resides in Clemmons, North Carolina. On or about August 17, 2011, she entered into the loan with Defendants from her home using her internet and phone, and funds were deposited to her bank account in North Carolina. Ms. Johnson was loaned $2,600 by Defendants ($2,525 after the "Prepaid Finance Charge/Origination Fee"). In return, she was to make 48 monthly payments at a nominal

[5] Plaintiff Brown informed Defendants he only wanted to borrow $1,500. Nevertheless, Defendants sent $2,525. When he complained, Defendants told him to just send back $1,000. He did so. He received no statement acknowledging the repayment or modifying his repayment schedule and was sent no new contract reflecting the new terms for a loan of $1,500. *Id.* ¶ 79.

APR of 139% / effective APR of 273%, resulting in total payments of $13,985.87, more than five times the amount borrowed. Complaint ¶¶ 11, 83.[6]

Plaintiffs Johnson and Brown were issued two different forms of a loan agreement. Complaint Ex. 1-2. Both state that "[n]either this Agreement nor Lender is subject to the laws of the United States." *Id.*; Complaint ¶ 68. This is false, as Defendants now rely on various United States laws in their effort to avoid jurisdiction. The agreements also state that "this Loan Agreement is fully performed within the exterior boundaries of the Cheyenne River Indian Reservation…." Complaint ¶ 68. This is also false; it was largely performed in North Carolina.

Western Sky makes loans solely to borrowers outside of the reservation and South Dakota. *Id.* ¶ 58. There are no "brick and mortar" stores. The Tribe is not involved in making these loans. Western Sky states it is organized under tribal law. Complaint Ex. 1-2. This is also false: it is an LLC organized under South Dakota state law. *Id.* ¶ 33.

[6] In a typical loan, a borrower contacts Western Sky over the telephone or the internet and sends an application and background information to the company. The approval or denial of a loan is communicated to the borrower over the telephone or internet. If approved, funds are transferred to the borrower's bank located off the reservation. *Id.* ¶ 59. Defendants make withdrawals from borrowers' banks for repayment from accounts located off the reservation. If borrowers miss payments, the Defendants initiate collection procedures. *Id.* ¶ 60. The loans range from approximately $300 to $3,000, payable in installments over 12 to 84 months. They have annual percentage rates of 90% to over 300%. *Id.* ¶¶ 61-62. As part of obtaining a loan, consumers enter into the purported form loan agreement with Western Sky electronically via the website, called the "Western Sky Consumer Loan Agreement." It is not signed by the customer by hand, nor is it provided to the customer in a printed, paper copy, nor signed by the company. Complaint ¶ 64 & Exs. 1-2. Western Sky disburses the loan's proceeds by electronically depositing the proceeds into the consumer's bank account. Western Sky debits electronically funds from the consumer's bank account for the installments and other fees or charges. *Id.* ¶¶ 66-66.

Defendant companies are not tribal entities. Webb claims he is a tribal member, but he is not a tribal officer or representative. None of the Defendants are a federally-recognized tribe and none are created, owned or managed by any tribe. *Id.* ¶¶ 4, 56, 69-70. Western Sky after making loans assigns them to CashCall, which directs collection efforts to North Carolina residents. CashCall is not owned by any tribe either. *Id.* ¶¶ 74-77.[7]

III. ARGUMENT.

Arbitration "is a matter of contract." *American Express Co. v. Italian Colors Restaurant*, No. 12-133, U.S. Supreme Court slip opinion, June 20, 2013, p. 3. The Court's initial inquiry is to determine whether the parties entered into a "valid" arbitration agreement. 9 U.S.C. § 2. The Court must be "satisfied that the making of the agreement for arbitration … is not in issue" before it orders arbitration. *Id.* § 4.[8]

[7] Plaintiffs allege a putative class claim on behalf of North Carolina residents who obtained loans from Defendants. *Id.* ¶¶ 3, 36-43. Plaintiffs allege claims for declaratory relief voiding the arbitration clause (First Claim); violation of the Consumer Finance Act, N.C. Gen. Stat. § 53-164 *et seq*. (Second Claim); usury under N.C. Gen. Stat. § 24-2 *et seq*. (Third Claim); unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1 *et seq*. (Fourth Claim); unjust enrichment, rescission and restitution (Fifth Claim); alter ego and individual liability of Webb (Sixth Claim); fraudulent conveyance (Seventh Claim); civil conspiracy (Eighth Claim) and violation of the Truth in Lending Act (Ninth Claim).

[8] "A court may compel arbitration of a particular dispute only when the parties have agreed to arbitrate their disputes and the scope of the parties' agreement permits resolution of the dispute at issue." *Muriithi v. Shuttle Express, Inc.*, No. 11-1445, slip op. at p. 7 (4th Cir. April 1, 2013). *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S.Ct. 2847, 2855-56 (2010) ("Where the dispute at issue concerns contract formation, the dispute is generally for courts to decide."); *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271-72, 423 S.E.2d 794 (1992) ("The law of contracts governs the issue of whether there exists an agreement to arbitrate. Accordingly, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes.") (citation omitted). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am.*

Because the purported choice of law provisions in the agreement are unenforceable, North Carolina law applies. *See Winston v. Academi Training Center, Inc*., 2013 WL 989999 (E.D.Va. March 13, 2013) (finding North Carolina law applied to arbitration agreement where choice of law provision unenforceable); and Plaintiffs' brief in opposition to Defendant's motion to enforce the forum selection clause, filed herewith.[9] It is Defendants' burden to show an enforceable contract. "In North Carolina

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v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). "[P]ublic policy favoring arbitration does not come into play unless a court first finds that the parties entered into an enforceable agreement to arbitrate." *Evangelistic Outreach Ctr. v. Gen. Steel Corp*., 181 N.C. App. 723, 726, 640 S.E.2d 840, 843 (2007); *Granite Rock*, 130 S.Ct. at 2859-60. "Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate." *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) (citing *Adamovic v. METME Corp*., 961 F.2d 652, 654 (7th Cir. 1992) (stating that "the federal policy favoring arbitration does not give [courts] license to compel arbitration absent an agreement to do so")). "Courts decide whether there is an agreement to arbitrate according to common law principles of contract law." *Id.* (citing *Whiteside v. Teltech Corp.*, 940 F.2d 99, 101 (4th Cir. 1991)).

[9] The choice law provisions purporting to apply Tribal law fail because they are unreasonable and violate North Carolina public policy. North Carolina has expressed a paramount public policy of protecting North Carolina borrowers with the North Carolina small loan and usury laws. Further, no Tribal law that would regulate these internet loans can be found and the Tribal courts lack subject matter jurisdiction as courts have found in other cases involving Western Sky entities. Further the Tribal law provisions are interwoven with overreaching and false statements in the agreements such as that Western Sky is organized under Tribal law (not true: it is organized under South Dakota law) and that the agreement was performed on the reservation (false: neither Plaintiff ever stepped foot there). *See Cable Tel. Servs., Inc. v. Overland Contr'g, Inc.,* 154 N.C. App. 639, 642-43, 574 S.E.2d 31, 33-34 (2002) (choice of law provisions will not be enforced where "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of a particular issue"); *Cox v. Dine-A-Mate, Inc.,* 129 N.C. App. 773, 501 S.E.2d 353, 356 (1998) (finding that "application of New York law would be a violation of North Carolina public policy"); *Kucan v. Advance America*, No. 04-CVS-2860, 2009 WL 2115349 (N.C. Super Ct. June 16, 2009) (declining to enforce choice of

the burden rests upon the party seeking to compel arbitration to prove the existence of an agreement to arbitrate." *Capps v. Blondeau*, 719 S.E.2d 256 (N.C. Ct. App. 2011).

Under the FAA, an arbitration contract is subject to defenses that are generally applicable to all contracts. While laws that single out arbitration agreements for special scrutiny are preempted, FAA § 2 allows generally applicable contract defenses. 9 U.S.C. § 2; *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1746 (2011); *see Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (arbitration provision may be found unenforceable based on "generally applicable contract defenses, such as fraud, duress, or unconscionability"); *Murray v. United Food and Commercial Workers Int'l Union*, 289 F.3d 297 (4th Cir. 2002) (finding arbitration agreement unenforceable); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (same).

B. <u>There Was No Meeting of the Minds</u>.

The "Agreement to Arbitrate" is as follows:

> **Agreement to Arbitrate.** 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.

Doc. 1-1, p. 3. The undersigned has scoured all readily available laws of the Tribe and cannot locate any "consumer dispute rules." Therefore, Plaintiffs have alleged that the arbitration agreement is false and misleading and unenforceable because there are no known "consumer dispute rules" of the Tribe. Complaint ¶¶ 101-09.

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law clause, payday lending case); *see also* Plaintiffs' brief on the venue clause issues, filed herewith.

Ms. Johnson's agreement states that "Arbitration … shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative," but then contradicts itself and states that it will be conducted by "a panel of three Tribal Elders." Doc. 1-1, pp. 3-4; Complaint ¶¶ 107, 113. Mr. Brown's agreement states that "Arbitration … shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative," but then that it will be conducted by the American Arbitration Association, JAMS, or a party-agreed arbitrator. Doc. 1-2, p. 3; Complaint ¶¶ 119-123. Clearly, the parties never agreed on an arbitrator.

While the Defendants in their brief purport to summarize the arbitration agreement, Defendants fail anywhere to mention the consumer rules – this despite the fact that the Complaint **specifically alleges** how the Plaintiffs cannot locate them. Complaint ¶¶ 102-04, 107-09, 115. The Complaint also alleges how the Plaintiffs cannot locate any Tribal rules for arbitration or governing small loans. *Id.* Defendants' brief in summarizing the agreement conspicuously does not address these allegations. *See* brief at Doc. 34, at pp. 3-4, 8-10, 16-18. The closest Defendants come is by contending that "the Court can designate a non-tribal arbitration forum." Doc. 34, p. 16. This is incorrect, however. The proper approach is not to rewrite a defective agreement but to decline to enforce it. *Tillman v. Commercial Credit*, 362 N.C. 93, 655 S.E.2d 362, 372-73 (2008) (noting "this Court, the Fourth Circuit, and other courts have held that it is inappropriate to rewrite an illegal or unconscionable contract"); *Winston v. Academi Training Center, Inc.*, 2013 WL 989999 (E.D.Va. March 13, 2013) (same).

Likewise in a recent State Court decision in a payday lending case, the Court found there was no meeting of the minds. *Torrence v. Nationwide Budget Finance*, No. 05-CVS-0047, 2012 WL 335947 (N.C. Super. Ct. Jan. 25, 2012).[10] There, the arbitration agreement purported to say the arbitration would be by the National Arbitration Forum under its Rules, however, the NAF stopped doing consumer arbitrations after allegations of corruption. The Court found: **"The arbitration agreement at issue did not become a valid contract because there was no meeting of the minds and because there was no legally effective and knowing consent**." *Id.,* Conclusions of Law ¶ 13 (emphasis added); *see also Carideo v. Dell, Inc*., No. C06-1772JLR, 2009 WL 3485933, at *5 (W.D. Wash. Oct. 26, 2009) (agreement specifying NAF was unenforceable); *Carr v. Gateway, Inc*., 918 N.E.2d 598, 603 (Ill. Ct. App. 2009) (same).[11]

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v.*

[10] The *Torrence* case is currently on appeal to the North Carolina Court of Appeals.

[11] *See also In re Salomon Inc. Shareholders' Derivative Litig*., 68 F.3d 554 (2d Cir. 1995) ("Although the federal policy favoring arbitration obliges us to resolve any doubts in favor of arbitration, we cannot compel a party to arbitrate a dispute before someone other than the NYSE when that party had agreed to arbitrate disputes only before the NYSE and the NYSE, in turn, exercising its discretion under its Constitution, has refused the use of its facilities to arbitrate the dispute in question."); *National Iranian Oil Co. v. Ashland Oil, Inc*., 817 F.2d 326, 333-35 (5th Cir.) (where parties' agreement shows intent that procedures of a particular forum will govern, a court need not compel arbitration if that forum is unavailable), *cert. denied*, 484 U.S. 943 (1987); *Dover Limited v. A.B. Whatley, Inc*., 2006 WL 2987054 (S.D.N.Y. Oct. 18, 2006) (agreement provided that the rules of the NASD controlled but NASD would not arbitrate); *Grant v. Magnolia Manor-Greenwood, Inc*., 678 S.E.2d 435 (S.C. 2009) (where AHLA had become unavailable as an arbitrator, court declined to appoint a new arbitrator because "there would no longer be a meeting of the minds between the parties").

Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). Plaintiffs did not agree to submit a matter to arbitration under no rules or *ad hoc* rules or rules different from the "consumer dispute rules." If those rules do not exist, then Defendants are not entitled to drag Plaintiffs into arbitration. Defendants need to be held accountable to this statement in their form contracts which the Plaintiffs believe to be false and fraudulent. Nor did Plaintiffs ever agree with Defendants about who would arbitrate the matter, since the agreements are self-contradictory on that point.

Under the FAA, the party seeking arbitration must first show a written agreement to arbitrate; the arbitration rules are important. *Hooters of America, Inc.*, 39 F.Supp.2d 582, 606-07 (D.S.C. 1998) (purported arbitration rules did not exist in final form at time agreement was promulgated, and affected important rights; **"the court finds the Rules were essential and material terms of the arbitration agreement. In the absence of a meeting of minds on those issues, the court finds no enforceable arbitration contract"**) (emphasis added), *aff'd,* 173 F.3d 933 (4th Cir. 1999).[12]

[12] Here, the existence of proper, fair, accessible consumer rules to govern arbitration is important given the adhesive nature of the contract, the disparity in bargaining power, and the inaccessibility of the Tribal law. The reference to "consumer rules" tends to cause a reasonable consumer to believe the arbitration will proceed under rules that will afford some measure of protection of his or her rights; this is not the case if they do not exist. The FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Information Sciences, Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ*., 489 U.S. 468, 478 (1989) (citations omitted). Here, it is impossible to enforce the arbitration agreement according to its terms. "[T]he FAA does not require parties to arbitrate when they have not agreed to do so." *Id.* at 478.

The Fourth Circuit, affirming in the *Hooters* case, noted: "In this case, the challenge goes to the validity of the arbitration agreement itself. Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith." 173 F.3d at 938. Here, it is egregiously unfair for Western Sky to misrepresent that rules exist when they apparently do not, along with the other demonstrably false statements in the contract.[13]

The arbitration agreement is plagued with contradictory and confusing terms. *Compare NAACP of Camden County E. v. Foulke Mgmt Corp*., 24 A.3d 777 (N.J. Super. Ct. App. Div. 2011) (finding "the disparate arbitration provisions in this case were too confusing, too vague, and too inconsistent to be enforced"). The facts taken altogether

[13] The same fact of the nonexistence of the consumer rules also means Defendants' argument that the question of arbitrability is delegated to the arbitrator must be rejected. (Def. Br. 10). There is no valid contract to effect such delegation. Further, there is no clear and unmistakable evidence that the issue was delegated since there is no evidence that the rules that would govern the arbitrator even exist. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995) (noting that courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so). Further the parties did not come to a meeting of the minds on whom to send the dispute to. Again, Ms. Johnson's agreement states that arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative," but then states that it will be conducted by "a panel of three Tribal Elders." Doc. 1-1, pp. 3-4; Complaint ¶¶ 107, 113. Mr. Brown's contract in the paragraph entitled, "Agreement to Arbitrate" states that "You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative…." But another paragraph, entitled "Choice of Arbitrator," states that "you shall have the right to select any of the following arbitration organizations to administer the arbitration" and lists AAA, JAMS, or an arbitration organization agreed to by the parties. *Id.* ¶¶ 122-26. "Shall" is mandatory: the statements cannot be reconciled. (All underlined emphases added).

evidence an agreement that fails for lack of formation, lack of meeting of the minds, as well as being unconscionable and unenforceable as discussed further below.

C. The Arbitration Agreement Is Unconscionable.

As noted, while the agreement describes being governed by tribal consumer rules, none can be found. *Compare Hooters of America, Inc.*, 173 F.3d at 936 (noting that "[n]o employee, however, was given a copy of Hooters' arbitration rules"). What tribal laws can be located, can only be found with difficulty, and state that tribal jurisdiction is limited to persons on the reservation. The agreement on its face contains demonstrable falsehoods. These facts show unconscionability. Complaint ¶¶ 100-110, 115.[14]

Under North Carolina law, the Court applies a sliding-scale test examining procedural and substantive unconscionability. *See Tillman v. Commercial Credit*, 362 N.C. 93, 655 S.E.2d 362 (2008) (finding arbitration agreement unconscionable); *Winston v. Academi Training Center, Inc.*, 2013 WL 989999 (E.D.Va. March 13, 2013) (arbitration agreement unconscionable under *Tillman*); *Kucan v. Advance America*, 190 N.C. App. 396, 660 S.E.2d 396 (2008) (remanding in light of *Tillman*); *Kucan*, No. 04-

[14] Arbitration clauses are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This FAA provision remains valid after *Concepcion*. For example, in *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo.), *cert. denied*, 81 U.S.L.W. 3161 (2012), the Missouri Supreme Court held that an arbitration agreement between a consumer and a title company was unconscionable. The court recognized that, under *Concepcion*, the agreement could not be invalidated simply on the basis that it contained a class action ban. *Id.* at 487. However, traditional state law defenses (including unconscionability) could still be applied to arbitration agreements like other contracts: "*Concepcion* permits state courts to apply state law defenses to the formation of the particular contract at issue on a case-by-case basis." *Id.* at 492. The court went on to find the arbitration agreement unenforceable.

CVS-2860, 2009 WL 2115349 (N.C. Super Ct. June 16, 2009) (agreement unconscionable, payday lending case); *Torrence*, *supra* (same). "As with any contract … 'equity may require invalidation of an arbitration agreement that is unconscionable.'" *Tillman, supra,* 655 S.E.2d at 369 (quoting *Murray v. United Food & Commercial Workers Int'l Union,* 289 F.3d 297, 302 (4th Cir. 2002)). Here, the facts reflect unfair surprise (including by falsehoods in the contract), inequality of bargaining power as well as oppressive and one-sided terms.[15]

D. Defendants' Cited Cases Do Not Support Ordering Arbitration.

Plaintiffs expect Defendants will argue that Supreme Court's most recent June 20, 2013 *American Express Co.* case bars an unconscionability argument. However, the basic principles restated by *American Express Co*. actually support the Plaintiffs:

- "[A]rbitration is a matter of contract" including "the rules under which that arbitration will be conducted." *American Express Co.*, No. 12-133, U.S. Supreme Court slip opinion, June 20, 2013, p. 3 (internal quote marks and citations omitted). Here, the arbitration agreements state that arbitration will

[15] Defendants had a duty to act in good faith. *See Hooters of America, Inc.*, 173 F.3d at 940 (citing Restatement 2nd of Contracts § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.")); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co*., 156 F.3d 535, 542 (4th Cir. 1998) (noting "contractual discretion is presumptively bridled by … the covenant of good faith implied in every contract") (quoting Steven J. Burton & Eric G. Anderson, Contractual Good Faith 46-47). Good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement 2nd of Contracts § 205 cmt. a. Bad faith includes the "evasion of the spirit of the bargain" and an "abuse of a power to specify terms." *Id.* cmt. d. Further, because the agreement purports to make Tribal law apply, but there appears to be no tribal law governing these loans (Complaint ¶¶ 100-110), the Plaintiffs would be left without a remedy. The agreement intentionally tries to violate deprive North Carolina residents of the protections of our State's usury laws when the public policy is "paramount" to protect them. N.C. Gen. Stat. § 24-2.1(g).

be conducted under "consumer rules" which do not exist. There are other material falsities in the agreement. Accordingly no contract was formed.[16]

- The costs and fees associated with arbitrating the case would make access to the forum impracticable, especially once the "loser-pays" provisions and the costs to go to South Dakota to effectively prosecute the claim are considered. *American Express Co.*, pp. 6-7 (agreement may be invalid where "fees attached to arbitration … are so high as to make access to the forum impracticable").

Defendants cite *Inetianbor v. CashCall, Inc*., No. 0:13-cv-60066-JIC, 2013 WL 2156836 (S.D. Fla. May 17, 2013) (Def. Br. 8). In that *pro se* case the court at first compelled arbitration, then reversed itself, then reversed itself again. After its first order compelling arbitration, the plaintiff submitted a letter from the Tribal Judge stating **"the Cheyenne River Sioux Tribe … does not authorize Arbitration** …." *Id.*, Order at pp. 2-3 (emphasis added) (Selected filings from that case are attached as **Exhibit 2**).

Then, CashCall again moved to compel arbitration, and submitted "evidence that Robert Chasing Hawk, Sr., a Tribal Elder of the Cheyenne River Sioux Tribal Nation, has agreed to serve as arbitrator for the case and to apply tribal law." *Id.* at p. 3. CashCall also submitted a new letter, in which Judge Demery stated that **"The [Cheyenne River Sioux Tribal] Court does not provide arbitration"** but added, "Arbitration, as in a

[16] Another key term in any arbitration agreement is "whom the parties choose to arbitrate their disputes." *American Express Co.*, p. 3. Here again, no enforceable contract was formed. In addition, the agreement is unconscionable. First, an arbitration agreement is unlawful where it has terms "forbidding the assertion of certain statutory rights." *American Express Co.*, p. 6. Here, the terms seeking to subject these North Carolina consumers to Tribal law in arbitration have precisely that effect by seeking to avoid the application of the North Carolina small loan usury laws which the State Legislature has unequivocally said reflect a "paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws." N.C. Gen. Stat. § 24-2.1(g) (emphasis added).

contractual agreement, is permissible. However, the Court does not involve itself in the hiring of the arbitrator or setting dates or time for the parties. After there is an arbitration award, the parties may seek to confirm the award in Tribal Court." *Id.* at p. 5 (emphasis added). Based on that, the Court ordered arbitration. Plaintiff moved for reconsideration based on evidence of arbitrator bias and because the plaintiff had no idea what the rules or laws of the Tribe were. (See Docs. 61, 62, 67 in that case). On June 20, 2013 the Court denied the motion to reconsider on the grounds that reconsideration is only ever allowed on narrow grounds, but the facts raise many questions and leave many others unanswered. (Order at Doc. 70 in that case).[17]

IV. CONCLUSION.

Wherefore, Plaintiffs respectfully request that the Court deny the Defendants' Motion to Stay Proceedings and to Compel Arbitration. A proposed Order is attached.

Respectfully submitted, this the 21st day of June, 2013.

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[17] Mr. Inetianbor states that the arbitrator's daughter works for the Western Sky organization and that a Western Sky employee ghost-wrote an arbitrator letter, and that when the pro se plaintiff tried to talk to the arbitrator, he responded that he could not because Cashcall "will get mad." (Doc. 67 filed June 10, 2013 in that case, at pp. 2-3).

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2013, I electronically filed the foregoing PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS AND TO COMPEL ARBITRATION with the Clerk of Court using the CM/ECF system which will send notification of such to all counsel of record.

This the 21st day of June, 2013.

/s/ Aaron F. Goss
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LIST OF EXHIBITS

1. FTC Memorandum and Order dated March 28, 2013.
2. Filings from the *Inetianbor* case.
3. Affidavit of Brown, Declaration of Johnson.
4. Counsel Declaration attaching corporate filings.
5. FTC Stipulated Preliminary Injunction.
6. FTC Press Release.
7. FTC Amended Complaint filed March 1, 2012.
8. Proposed order.