

**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.

**DEFENDANTS' BRIEF IN  
SUPPORT OF MOTION STAY  
PROCEEDINGS AND TO  
COMPEL ARBITRATION**

This action arises from loans obtained by Thomas Brown and Monica Johnson ("Plaintiffs") from Defendant Western Sky Financial, LLC ("Western Sky"). The loans contracts contain comprehensive arbitration agreements requiring individual arbitration of any disputes arising from the loan transactions. All named Defendants join this motion to stay proceedings and compel arbitration.

Defendants respectfully ask that the Court grant the following relief provided by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 3-5:

- (a) a stay of judicial proceedings under § 3;
- (b) an order compelling individual arbitration under § 4; and
- (c) an appointment of arbitrators under § 5.

If this Court concludes that it cannot compel arbitration of certain of Plaintiffs' claims because arbitration of those claims must take place in the federal



judicial district of South Dakota, Defendants ask that those claims be dismissed or transferred to that district under 28 U.S.C. § 1406(a).

Defendants are also filing a separate motion to dismiss under Federal Rule of Civil Procedure 12(b)(3) to enforce the judicial forum-selection clauses in the loan contracts. Defendants do not intend this Motion to contradict their Rule 12(b)(3) motion. As judicial venue is the threshold issue, if the Court dismisses for improper venue it need not consider this Motion.

### **NATURE OF THE CASE AND STATEMENT OF THE FACTS**

Plaintiffs Monica Johnson and Thomas Brown are North Carolina consumers. (Compl. ¶¶ 10-11). Each obtained a \$2,600 loan from Defendant Western Sky—Johnson in 2011 and Brown in 2012—that was serviced by Defendant CashCall, Inc. (“CashCall”). (*Id.* ¶¶ 78, 83). Western Sky is a consumer lender located and operated exclusively on the Cheyenne River Sioux Indian Reservation within the state of South Dakota. (Compl. Ex. 5 at 1). Western Sky is wholly owned by Defendant Martin Webb, an enrolled member of the Cheyenne River Sioux Indian Tribe. (*Id.* ¶ 33, Ex. 5). CashCall is a California corporation that, like Western Sky, has no physical presence or operations in North Carolina. (*Id.* ¶ 34). The remaining Defendants apparently were sued based on their relationship to Mr. Webb. (*Id.* ¶¶ 169-71).



Plaintiffs’ loan contracts, which they attached to their Complaint, prominently and repeatedly disclose that Western Sky is Native American owned and operated. (Ex. 1 at 1; Ex. 2 at 1). Both contracts have prominent choice-of-law provisions specifying Cheyenne River Sioux law. (*Id.*). Both contracts make the courts of the Cheyenne River Sioux Tribal Nation the exclusive venue for any court proceedings. (Ex. 1 at 1, 4; Ex. 2 at 1, 4).

In addition, the contracts contain comprehensive arbitration agreements (“Arbitration Agreements”) requiring “[d]isputes” to be resolved by individual—and not class—arbitration. (Ex. 1 at 3; Ex. 2 at 3). “Disputes” are defined in the “broadest possible” manner and include “without limitation, all claims or demands “based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law,” no matter the “legal or equitable theory . . . and regardless of the type of relief sought.” (*Id.*). Disputes also include any issues concerning the “validity, enforceability, or scope” of the Arbitration Agreements themselves. (*Id.*). The Arbitration Agreements further provide that if any of their provisions are “held invalid, the remainder shall remain in effect.” (Ex. 1 at 5; Ex. 2 at 4).

The only disputes exempted from arbitration are disputes over the enforceability of the waiver of class proceedings—such disputes must be resolved by a Cheyenne River Sioux tribal court. (Ex. 1 at 4, Ex. 2 at 4). Likewise, any judicial review of an arbitration award must also take place in tribal court. (*Id.*).



The only pertinent difference between Plaintiffs' Arbitration Agreements is that they designate different arbitral forums. (*See* Ex. 1 at 3; Ex. 2 at 4). Under Mr. Brown's Arbitration Agreement, he may choose among the American Arbitration Association ("AAA"), JAMS, tribal arbitrators, or any other agreed-upon organization. (Ex. 2 at 3). Mr. Brown may choose to arbitrate either on the Cheyenne River Sioux Tribal Reservation or at a location within thirty miles of his residence. (*Id.*). Ms. Johnson's Arbitration Agreement specifies that disputes shall be arbitrated by a panel of three tribal elders. (Ex. 1 at 4). Arbitration is to occur on the reservation, though Ms. Johnson "may appear . . . via telephone or video conference, and . . . will not be required to travel." (*Id.*). Both Arbitration Agreements require Western Sky to pay the arbitration fees and costs regardless of which party files a claim. (*Id.*; Ex. 2 at 3). The Arbitration Agreements also give the arbitrator discretion, unless prohibited by law, to award attorneys' fees to any party who substantially prevails in the arbitration. (Ex. 1 at 4; Ex. 2 at 3).

If Plaintiffs did not wish to arbitrate, they had sixty days after signing their loan contracts to opt out of arbitration. (Ex. 1 at 5; Ex. 2 at 4). Neither did so. Plaintiffs retained the right to bring claims in tribal small claims court. (Ex. 1 at 4; Ex. 2 at 4).

Plaintiffs have not abided by the provisions of the Arbitration Agreements. Instead, they filed the present class action. In their Complaint, Plaintiffs assert at



least nineteen rationales for avoiding arbitration and request that the Court declare their Arbitration Agreements invalid. (See Compl. ¶¶ 100-38).

### **QUESTIONS PRESENTED**

- I. WHETHER DEFENDANTS HAVE MADE THE REQUISITE SHOWING TO COMPEL ARBITRATION UNDER *WHITESIDE*?
- II. WHETHER DEFENDANTS ARE ESTOPPED FROM INSISTING ON ARBITRATION BECAUSE THE AGREEMENTS BETWEEN THE PARTIES PURPORT TO DENY THAT FEDERAL LAW APPLIES?
- III. WHETHER PLAINTIFFS HAVE ANY VALID DEFENSE TO ENFORCEMENT OF THEIR ARBITRATION AGREEMENTS?
- IV. WHETHER, BY BRINGING THIS ACTION, MS. JOHNSON HAS WAIVED THE CHOICE-OF-VENUE PROVISION IN HER LOAN AGREEMENT?

### **STANDARD OF REVIEW**

A summary judgment standard applies to motions to compel arbitration. *See Wen-Chouh Lin v. Brodhead*, No. 1:09CV882, 2012 WL 4793710, at \*2 (M.D.N.C. Oct. 9, 2012). “[T]he Court should compel arbitration ‘if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Id.* (quoting Fed. R. Civ. P. 56(a)).



## ARGUMENT

### I. THE FAA REQUIRES ENFORCEMENT OF PLAINTIFFS' ARBITRATION AGREEMENTS.

#### A. Under the FAA, Arbitration Agreements Must Be Enforced Unless the Party Opposing Arbitration Can Prove a Generally Applicable Contract Defense.

The FAA enacted a “liberal federal policy favoring arbitration agreements.”

*Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The FAA ensures that private arbitration agreements are enforced “notwithstanding any state substantive or procedural policies” that obstruct arbitration. *See Noohi v.*

*Toll Bros., Inc.*, 708 F.3d 599, 606 (4th Cir. 2013) (quoting *Moses*, 460 U.S. at 24).

Courts “rigorously enforce” arbitration agreements under the FAA. *See Dean*

*Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

Sections 2 through 5 of the FAA are the primary pre-arbitration enforcement provisions:

- Section 2 governs the FAA’s scope, declaring that it applies to any “written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy.” 9 U.S.C. § 2; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995).
- Section 3 requires a court, at the request of any party, to stay all court proceedings concerning matters subject to arbitration. 9 U.S.C. § 3; *United States v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir.2001).



- Section 4 requires a court to compel arbitration if any party to an agreement has refused to arbitrate. 9 U.S.C. § 4; *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).
- Section 5 requires a court to appoint an arbitrator if “for any reason” there has lapse in naming one. 9 U.S.C. § 5; *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 226 (4th Cir. 1994).

Based on these provisions, the Fourth Circuit requires the party moving to compel arbitration to allege: “(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the [non-moving party] to arbitrate the dispute.” *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir.1991).

Once a moving party satisfies the *Whiteside* test, the court the non-moving party bears the burden of demonstrating a defense to enforcement of the arbitration agreement. *See Wake Cnty. Bd. of Educ. v. Dow Roofing Sys., LLC*, 792 F. Supp. 2d 897, 900 (E.D.N.C. 2011). Arbitration agreements may be avoided on grounds that “exist at law or in equity for the revocation of any contract,” 9 U.S.C. § 2, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue,” *Concepcion*, 131 S. Ct. at 1746.



Unless the non-moving party can prove such a defense, the court must compel arbitration. *See id.*

B. Because the *Whiteside* Test Is Satisfied and Plaintiffs Cannot Prove a Defense, the FAA Requires Enforcement of Plaintiffs' Arbitration Agreements.

Plaintiffs' Arbitration Agreements and their Complaint satisfy all four parts of the *Whiteside* test. Plaintiffs, on the other hand, cannot advance a generally applicable defense to enforcement of the Arbitration Agreements. Thus, as the Southern District of Florida recently held in a case featuring an agreement materially identical to Ms. Johnson's, the Court must compel arbitration. *See Inetianbor v. CashCall, Inc.*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 2156836, at \*1, \*5 (S.D. Fla. May 17, 2013).

First, Plaintiffs' current lawsuit establishes the existence of a dispute. *See Cmty. State Bank v. Knox*, 850 F. Supp. 2d 586, 602 (M.D.N.C. 2012) (underlying lawsuit constitutes a "dispute"), *aff'd*, No. 12-1304, 2013 WL 1459243 (4th Cir. Apr. 11, 2013); *Whiteside*, 940 F.2d at 102.

Second, Plaintiffs entered into written Arbitration Agreements and the dispute between the parties falls within the scope of those Arbitration Agreements. *See Whiteside*, 940 F.2d at 102. Plaintiffs' Arbitration Agreements are contained in their written Loan Agreements. (*See* Exs. 1, 2). To the extent Plaintiffs' contend that the fact that they did not sign the Loan Agreements by hand renders



the Arbitration Agreements unenforceable (*see* Compl. ¶ 127), that argument is foreclosed by federal law giving full effect to electronic signatures. *See, e.g.*, 15 U.S.C. § 7001(a). Mr. Brown suggests that he had a separate or subsequent oral loan contract as a result of sending back some of his loan proceeds. (*See* Compl. ¶ 138). However, Mr. Brown executed a written Loan Agreement stating that the Arbitration Agreement therein “survives any termination, amendment, expiration, or performance of any transaction between you and us and continues in full force and effect unless you and we otherwise agree in writing.” (Ex. 2 at 4). Moreover, Mr. Brown’s written contract specifically contemplates that he may, pursuant to the terms of that agreement, “prepay all or any part of the principal without penalty.” (*Id.* at 2).

All nine of Plaintiffs’ claims fall within the scope of the Arbitration Agreements. “Dispute,” according to the Arbitration Agreements, “includes without limitation, all claims or demands . . . based on any legal or equitable theory . . . and regardless of the type of relief sought . . . .” (Ex. 1 at 3; Ex. 2 at 3). Even Plaintiffs’ claim for declaratory relief invalidating the Arbitration Agreements is subject to arbitration. When parties “clearly and unmistakably” delegate to the arbitrator gateway questions of arbitrability, such as the scope or enforceability of an arbitration agreement, the Supreme Court requires that the delegation provision be enforced. *See Rent-A-Center, West, Inc. v. Jackson*, 130 S.



Ct. 2772, 2777 (2010); accord *Carson v. Giant Food, Inc.*, 175 F.3d 325, 330-31 (4th Cir. 1999) (“Those who wish to let an arbitrator decide which issues are arbitrable need only state that ‘all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration,’ or words to that clear effect.”). With one exception, *see infra* I.C., Plaintiffs’ Arbitration Agreements provide that “any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement” shall be resolved by arbitration. (Ex. 1 at 3; Ex. 2 at 3-4). “This language unequivocally delegates to the arbitrator all claims regarding the validity of the arbitration clauses and therefore constitutes a clear and unmistakable delegation provision.” *Meena Enters., Inc. v. Mail Boxes Etc.*, No. DKC 12-1360, 2012 WL 4863695, at \*5 (D. Md. Oct. 11, 2012) (unpublished) (reviewing delegation provision stating “claims regarding the validity, scope, and enforceability of this Section, shall be solely and finally settled by binding arbitration”).

In any event, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses*, 460 U.S. at 24; accord *People’s Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir.1989) (“An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”).



Third, the transaction at issue involves interstate commerce. *See Whiteside*, 940 F.2d at 102; *Allied-Bruce*, 513 U.S. at 276 (Congress intended FAA to apply to any interstate transaction within Congress' constitutional commerce power). The lender, Western Sky, operates on a tribal reservation within the State of South Dakota. (Ex. 1 at 1; Ex. 2 at 1). Plaintiffs have alleged that they were physically present in North Carolina when they submitted their loan applications. (Compl. ¶¶ 10-11). It is thus undisputed that the loan transactions crossed state lines.

Finally, Plaintiffs' current lawsuit establishes their refusal to arbitrate. *See LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194, 198 (2d Cir. 2004).

C. Although Disputes Concerning Class Action Waivers Cannot Be Arbitrated, the Supreme Court Has Already Determined as a Matter of Law That Class Waivers Do Not Void Arbitration Agreements.

The only disputes carved out from the Arbitration Agreements are disputes over the validity of Plaintiffs' waiver of any right to bring class actions. (Ex. 1 at 4; Ex. 2 at 4). Class waiver disputes must be decided by the tribal court. (*Id.*). Plaintiffs' contend that their class action waivers discourage small-dollar claims, which they suggest can be better litigated in class actions. (*See* Compl. ¶¶ 131-32). Plaintiffs also protest that enforcement of the Arbitration Agreements would violate North Carolina public policy. (*See id.* ¶¶ 135-37). Because the Supreme Court has expressly rejected Plaintiffs' arguments, Plaintiffs cannot manufacture a non-arbitrable dispute by challenging their class waivers.



In *Concepcion*, the Supreme Court rejected the suggestion that state law could invalidate an arbitration agreement that prohibited class proceedings because “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.” 131 S. Ct. at 1753. The Court held that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” *Id.*

The result is no different here even though Plaintiffs have attempted to refashion the argument that “class proceedings are necessary to prosecute small-dollar claims” by asserting that the class waivers exculpate Defendants from liability and hinder enforcement of North Carolina’s Consumer Finance Act. (*See* Compl. ¶¶ 132, 135-37). In *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 179-81 (4th Cir. 2013), the putative class plaintiff attempted a similar strategy, insisting that class proceedings were necessary to “fully vindicat[e] his statutory rights.” The Fourth Circuit disagreed, holding that the FAA “prohibit[s] application of the general contract defense of unconscionability to invalidate an otherwise valid arbitration agreement under these circumstances.” *Id.* at 180; *see also* Noohi, 708 F.3d at 606 (“In *Concepcion*, the Supreme Court further prohibited courts from altering otherwise valid arbitration agreements by applying the doctrine of unconscionability to eliminate a term barring classwide procedures.”).



In summary, Defendants have met their burden under the *Whiteside* test. Therefore, Plaintiffs cannot avoid arbitration unless they can prove a valid defense to enforcement of the Arbitration Agreements.

## II. PLAINTIFFS CANNOT AVOID *WHITESIDE* BY CLAIMING THAT DEFENDANTS ARE ESTOPPED FROM RELYING ON THE FAA.

Of the roughly nineteen defenses Plaintiffs' assert, all but one are contract defenses subject to the delegation clause as discussed above. Plaintiffs' sole attempt to avoid *Whiteside* is to ask the Court to find that Defendants are "barred and estopped from any attempt to rely on the FAA as a basis for requiring arbitration." (Compl. ¶¶ 100, 118). Plaintiffs base this argument on the loan contracts' inclusion of choice-of-law provisions specifying the exclusive application of tribal law.

Plaintiffs' argument misconstrues the FAA and fails on its own terms. First, Plaintiffs cannot plead the elements of estoppel. Estoppel requires that Plaintiffs relied on a misrepresentation and would be materially harmed if Defendants were now allowed to take actions inconsistent with that representation. *See Rhone-Poulenc Agro, S.A. v. Monsanto Co.*, 445 F. Supp. 2d 531, 564 (M.D.N.C. 2006). The representation at issue here is the Arbitration Agreements' tribal choice-of-law clauses. Plaintiffs claim these clauses are inconsistent with Defendants' reliance on the FAA. (*See* Compl. ¶¶ 100, 118). However, Plaintiffs cannot credibly claim



they relied on the choice-of-law clauses or would be harmed if they didn't apply—Plaintiffs have attempted to evade those clauses by filing this action.

Second, § 2 of the FAA provides the exclusive test for determining whether the FAA applies to an arbitration agreement: It applies if the agreement is “[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction.” 9 U.S.C. § 2. This test is intended to capture all interstate agreements over which Congress has commerce power. *See Allied-Bruce*, 513 U.S. at 276. Plaintiffs ask the Court to alter this test by considering whether a non-federal choice-of-law clause defeats the application of the FAA. The FAA is a congressional command to enforce arbitration agreements “according to their terms.” *See Concepcion*, 131 S. Ct. at 1748. While the terms of an arbitration agreement are relevant to its enforceability, those terms cannot alter the applicability of the FAA. Parties to arbitration agreements often opt out of the default rules of the FAA, such as its venue rule, in favor of agreed-upon alternatives. “[W]hile parties may opt out of the FAA’s default rules, they cannot ‘opt out’ of FAA coverage in its entirety because it is the FAA itself that authorizes parties to choose different rules in the first place.” *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 288 (3d Cir. 2010).



For these reasons, Plaintiffs cannot avoid arbitration by asserting estoppel.

III. NONE OF THE REMAINING ATTACKS ON THE AGREEMENTS  
CARRY BROWN AND JOHNSON’S BURDEN OF ESTABLISHING AN  
ARBITRATION-NEUTRAL CONTRACT DEFENSE.

Because the Agreements delegate disputes over enforceability to the arbitrator, Plaintiffs’ remaining contract defense arguments must be arbitrated. But if the Court were to reach them, § 2 requires they be rejected.

Under § 2, only “generally applicable contract defenses, such as fraud, duress, or unconscionability” can invalidate an arbitration agreement. Any defense must be arbitration-neutral—it cannot “apply only to arbitration or [] derive [its] meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 131 S. Ct. at 1746. Further, it is futile to base a defense on an alleged ambiguity in the contract for, “whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability,” the “liberal federal policy favoring arbitration” requires that ambiguities “be resolved in favor of arbitration.” *Moses*, 460 U.S. at 24-25; *see also Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, Inc.*, 2525 F.3d 707, 710 (4th Cir 2001).

Ignoring this, Plaintiffs lodge various complaints about arbitration as defenses. Pleading in this manner is reason enough to reject the entire lot. *See generally Jones v. Keller*, No. 1:10-cv-964, 2011 WL 3862092, at \*5 (M.D.N.C. June 29, 2011) *adopted by* No. 1:10-cv-964, 2011 WL 3875429 (M.D.N.C. Sept. 1,



2011). (Ex. 1 at 5; Ex. 2 at 4). But even if they were properly pleaded, none of the defenses have merit. Each is addressed in turn:

**Tribal Law** (Comp. ¶¶ 101-104, 109, 115)—Plaintiffs’ complaint about tribal law is irrelevant to the choice of forum issue, and in any event mooted because the Court can designate a non-tribal arbitration forum. *See infra* IV.

**Tribal Court Subject Matter Jurisdiction** (Compl. ¶ 104)—The tribal court has subject matter jurisdiction. *See Inetianbor*, 2013 WL 2156836, at \*3. Moreover, the Supreme Court has repeatedly held that challenges to a tribal court’s jurisdiction must first be brought in the tribal court. *See, e.g., Nat’l Farmers Union Ins. Coss v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985).

**Sham** (Compl. ¶ 108)—*Inetianbor* recognized tribal arbitration. Also, the Court’s ability to appoint a non-tribal arbitration forum forecloses this complaint.

**Bias** (Compl. ¶¶ 110-111)—There is no presumption of bias in a tribal forum, and alleged bias is not a basis to invalidate the Agreements. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 34 (1st Cir. 2000) (“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.”).

**Race** (Compl. ¶¶ 112-114)—Plaintiffs’ claim that tribal arbitration is “unlawful[ly]” “race-based” fails in light of the unassailable principle that Tribes can exercise jurisdiction over non-Indians. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (“Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.”).

**Attorneys’ Fees** (Compl. ¶ 116)—A provision granting the arbitrator discretion, constrained by applicable law, to award either “substantially prevailing” party to recover attorneys’ fees is not a basis to invalidate the Agreements. (Ex. 1 at 4; Ex. 2 at 3). This provision also undercuts Plaintiffs’ contention that the low value of their claims stymies them from bringing individual actions.

**Reimbursing Western Sky** (Compl. ¶ 116)—The provision requiring the consumer to “pay Western Sky’s attorney fees in collecting on the debt” applies “[e]xcept as may be provided in the ‘Arbitration’ section.” (Ex. 1 at 2; Ex. 2 at 2).



**Small Claims Court** (Compl. ¶ 117)—Plaintiffs’ attack on the small claims option fails for the same reasons as their attacks on tribal court venue and the tribal arbitration forum. It fails for the same reasons those attacks fail. (*See* Defendants’ Brief in Support of Motion to Dismiss (DE 32)).

**Meeting of the Minds/Choice of Arbitrator** (Compl. ¶¶ 119-123, 126)—Naming different arbitrators in Brown’s Agreement does not create any ambiguity, because under the Agreement, Brown can pick any of the named forums. *See Singleton v. Haywood Elec. Membership Corp.*, 588 S.E.2d 871, 875 (N.C. 2003) (contract terms “are to be harmoniously construed”). Plus, any actual ambiguity must be resolved in favor of arbitration. *Moses Cone*, 460 U.S. at 24.

**Meeting of the Minds/Disputes Over the Agreements** (Compl. ¶¶ 121, 124-126)—The fact that the Agreements have a specific provision that requires a court to decide disputes over the class waiver while the general provision requires disputes to be arbitrated is no “fatal contradiction[.]” *See, e.g., Tohato, Inc. v. Pinewild Mgmt., Inc.*, 496 S.E.2d 800, 804 (N.C. Ct. App. 1998) (specific contract language controls over general terms).

**CashCall’s Alleged Alternative Remedies** (Compl. ¶ 128, 130)—To the extent CashCall can electronically debit borrower’s accounts, it is a method of payment, not a remedy, and is revocable by borrowers at any time. (Ex. 1 at 5-6; Ex. 2 at 4). Filing a bankruptcy proof of claim, meanwhile, is not an alternative remedy but a compelled federal-law procedure for protecting a creditor’s rights when a debtor declares bankruptcy. *See, e.g.*, 11 U.S.C. § 1327(a).

**Non-Signatory** (Compl. ¶ 129)—CashCall can enforce the Agreements as a servicer of the loans. (Ex. 1 at 3; Ex. 2 at 3). Thus, CashCall can compel Plaintiffs to arbitrate their claims against it. *See RPR & Assocs. v. O’Brien/Atkins Assocs.*, 24 F. Supp. 2d 515, 520-21 (M.D.N.C. 1998).

**Class Waivers** (Compl. ¶¶ 131-132)—*See supra* I.C.

**Adhesion Contracts** (Compl. ¶ 133)—The FAA does not permit arbitration agreements to be invalidated because they are contained in adhesion contracts. *See Concepcion*, 131 S. Ct. 1750 (“the times in which consumer contracts were anything other than adhesive are long past”). Further, Plaintiffs were free to opt out of arbitration entirely without affecting their loans. (Ex. 1 at 5; Ex. 2 at 4).



**Just Forum** (Compl. ¶ 134)—The claim that the Agreements block access to a “just forum” fails like the other challenges to tribal involvement. *See supra*.

**The Consumer Finance Act and Public Policy** (Compl. ¶¶ 135-137)—To the extent state public policy disfavors arbitrating claims brought under the North Carolina Consumer Finance Act, it is preempted by the FAA. *See Goldstein v. Am. Steel Span, Inc.*, 640 S.E.2d 740, 743 (N.C. Ct. App. 2007) (“the FAA preempts North Carolina’s statute and public policy regarding forum selection”).

**Oral Contract** (Compl. ¶ 138)—*See supra* II.B.

Plaintiffs’ arguments cannot invalidate their Arbitration Agreements. In any event, these arguments must be addressed to an arbitral forum. *See supra* II.B.

IV. UNLESS PLAINTIFFS AGREE TO SUBMIT THEIR CLAIMS TO THE ARBITRATION FORUMS LISTED IN THEIR AGREEMENTS, § 5 REQUIRES AN APPOINTMENT OF ARBITRATORS.

Unless Plaintiffs submit their claims to one of the arbitration forums listed in their contracts, the FAA requires the judicial appointment of arbitrators. *See* 9 U.S.C. § 5.

This Court, adhering to the majority view, reads § 4 of the FAA as proscribing courts from compelling arbitration outside of their judicial district. *See Newman ex rel. Wallace v. First Atl. Res. Corp.*, 170 F. Supp. 2d 585, 593 (M.D.N.C. 2001). The case law further suggests that if an arbitration agreement contains an enforceable forum-selection clause designating a forum outside of a court’s district, the court cannot avoid § 4’s proscription by appointing an intra-district arbitrator under § 5. *See Merrill Lynch, Pierce, Fenner & Smith v. Lauer*,



49 F.3d 323, 326 (7th Cir. 1995). Instead, the court must either dismiss the case or transfer it under 28 U.S.C. § 1406(a) to the district court for the district encompassing the designated forum. *See Choice Hotels*, 252 F.3d at 709-10 (4th Cir. 2001); *Aspen Spa Props., LLC v. Int'l Design Concepts, LLC*, 527 F. Supp. 2d 469, 473-74 (E.D.N.C. 2007).

Mr. Brown's Arbitration Agreement provides for arbitration by the AAA, JAMS, or any other agreed-upon forum. (Ex. 2 at 3). It also states that arbitration may take place either on the Reservation or within thirty miles of Brown's residence, that is, within this district. (*Id.*). Therefore, the Court may appoint an arbitrator and compel arbitration.

Ms. Johnson's Arbitration Agreement, however, calls for arbitration by a tribal arbitrator on the reservation, which is located within South Dakota. (Ex. 1 at 4). Ms. Johnson may participate fully by phone or videoconference. (*Id.*). Still, it is not clear that the Court can compel arbitration on the reservation.

However, Ms. Johnson has waived her right to enforce the arbitration venue clause by filing suit in a court that has no power to enforce it. *See generally Canaday v. United States (I.R.S.)*, No. 1:03-2050, 2004 WL 2482174, at \*3 (S.D.W. Va. Sept. 17, 2004) (“[E]ven if a plaintiff has a right to object to venue, it is clear that by filing suit in this court, plaintiff herein has waived any right he might have to object to venue.”); *cf. United States v. E. Metal Prods. &*



*Fabricators, Inc.*, 112 F.R.D. 685, 687 (M.D.N.C. 1986). After declaring that tribal arbitration is a racially biased sham forum, Johnson cannot credibly claim any right to, or prejudice if she cannot, arbitrate in the tribal forum.

Given her waiver, and given the difficulties with compelling arbitration in another district Defendants are willing to waive the arbitration venue clause in Ms. Johnson's contract so the Court may compel arbitration in the Middle District.

If the Court finds that it cannot compel arbitration of Johnson's claims because the of the arbitration venue clause, Defendants ask that the claims be either dismissed or transferred to the District of South Dakota.

### **CONCLUSION**

Because the Parties signed binding Agreements requiring the arbitration of all disputes, Defendants respectfully request that the Court stay these proceedings, appoint arbitrators, and compel Brown and Johnson to arbitrate their claims on an individual basis.



This the 21st day of May, 2013.

/s/ Paul K. Sun, Jr.

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**CERTIFICATE OF SERVICE**

I hereby certify that on 21 May 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

This the 21st day of May, 2013.

/s/ Paul K. Sun, Jr.  
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# **EXHIBIT 1**



## WESTERN SKY CONSUMER LOAN AGREEMENT

Loan No.: 7329873	Date of Note: August 17, 2011
	Expected Funding Date: August 17, 2011
Lender: Western Sky	Borrower: MONICA JOHNSON
Address: P.O. Box 370 Timber Lake, SD 57656	Address: 2026 MEGAN CT APT A CLEMMONS, NC 27012

In this Consumer Loan Agreement ("Agreement"), the words "you" and "your" mean the person signing as a borrower. "We," "us," "our," and "Lender" mean Western Sky, a lender organized under and authorized by the laws of the Cheyenne River Sioux Tribal Nation and the Indian Commerce Clause of the Constitution of the United States of America, and any subsequent holder of this Note ("Western Sky"). All credit and lending decisions were made by Western Sky, LLC, and this loan will be funded by Western Sky. Neither this Agreement nor Lender is subject to the laws of the United States.

### TRUTH IN LENDING ACT DISCLOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
<i>The cost of your credit as a yearly rate</i>	<i>The dollar amount the credit will cost you</i>	<i>The amount of credit provided to you</i>	<i>The amount you will have paid after all payments are made as scheduled</i>
<b>139.13 %</b>	<b>\$11,460.87</b>	<b>\$2,525.00</b>	<b>\$13,985.87</b>

### PAYMENT SCHEDULE

One payment of \$146.25 on September 01, 2011.

47 monthly payments of \$294.46 beginning on October 01, 2011.

**Late Charge:** If a payment is more than 15 days late, you will be charged \$29.00.

**Prepayment:** If you pay off this loan early, you will not have to pay any penalty.

Please see the remainder of this document for additional information about nonpayment, default and any required repayment in full before the scheduled date.

### ITEMIZATION OF AMOUNT FINANCED



Amount Financed:	\$2,525.00
Amount Paid to Borrower Directly:	\$2,525.00
Prepaid Finance Charge/Origination Fee:	\$75.00

You promise to pay to the order of Western Sky or any subsequent holder of this Note the sum of **\$2,600.00**, together with interest calculated at **135.00 %** per annum and any outstanding charges or late fees, until the full amount of this Note is paid. You promise to repay this loan by making, at a minimum, the payments described on the payment schedule listed above.

Payments will be applied first to any outstanding charges or late fees, then to earned interest and finally to principal. The payment schedule described above may change in the event you do not make all payments as scheduled or in the event you accrue any fees.

Interest is calculated on a 360/360 simple interest basis. This means that interest is calculated by dividing the annual Interest Rate by 360, multiplying that number by the outstanding principal balance, and multiplying that number by the number of days the principal balance is outstanding.

You may prepay all or any part of the principal without penalty.

If you fail to make any payment due hereunder, the holder of this Note shall have the right, after a 30-day grace period, to declare this note to be immediately due and payable. If you file for an assignment for the benefit of creditors, or for bankruptcy, the holder of this Note shall have the right to declare this Note to be immediately due and payable.

Except as may be provided in the "Arbitration" section of this Note, if we are required to employ an attorney at law to collect any amounts due hereunder, you will be required to pay the reasonable fees of such attorney to protect our interest or to take any other action required to collect the amounts due hereunder.

The Prepaid Finance Charge disclosed above is fully earned upon loan origination and is not subject to rebate upon prepayment or acceleration of this Note.

**LATE FEES.** You will be subject to a late fee of \$29.00 if you fail to make your payment within 15 days of the due date. We can collect any late fees immediately via Electronic Funds Transfer (EFT) from your bank account.

**INSUFFICIENT FUNDS.** You will be subject to a fee of \$29.00 if any payment you make is returned by your bank for insufficient funds.

**E-SIGN/ELECTRONIC COMMUNICATIONS.** Although federal law does not apply to this Agreement, this Note is in original format an electronic document fully compliant with the Electronic Signatures In Global and National Commerce Act (E-SIGN) and other applicable laws and regulations, and the one, true original Note is retained electronically by us. All other versions hereof, whether electronic or in tangible format, constitute facsimiles or reproductions only. You understand that you have previously consented to receive all communications from us, including but not limited to all required disclosures, electronically.

**CREDIT REPORTS.** You agree that we may obtain credit reports on you on an ongoing basis as long as this loan remains in effect. You also authorize us to report information concerning this account to credit bureaus and anyone else we believe in good faith has a legitimate need for such information. Late payments, missed payments, or other defaults on this account may be reflected in your credit report.



**CALL MONITORING/RECORDING.** You understand that, from time to time, we may monitor or record telephone calls between us for quality assurance purposes. You expressly consent to have your calls monitored or recorded.

**TELEPHONE CALLS.** You hereby agree that in the event we need to contact you to discuss your account or the repayment of your loan, we may telephone you at any number, including any cell phone number provided, and that we may leave an autodialed or prerecorded message or use other technology to make that contact or to communicate to you the status of your account.

**VERIFICATION.** You authorize us to verify all of the information you have provided in obtaining approval of this Loan.

**GOVERNING LAW.** This Agreement is governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe. We do not have a presence in South Dakota or any other states of the United States. Neither this Agreement nor Lender is subject to the laws of any state of the United States of America. By executing this Agreement, you hereby expressly agree that this Agreement is executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation. You also expressly agree that this Agreement shall be subject to and construed in accordance only with the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law applies to this Agreement. You agree that by entering into this Agreement you are voluntarily availing yourself of the laws of the Cheyenne River Sioux Tribe, a sovereign Native American Tribal Nation, and that your execution of this Agreement is made as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation.

**ASSIGNMENT.** We may assign or transfer this Loan Agreement or any of our rights under it at any time to any party.

#### **WAIVER OF JURY TRIAL AND ARBITRATION.**

**PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY.** Unless you exercise your right to opt-out of arbitration in the manner described below, any dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to have a jury, to engage in discovery (except as may be provided in the arbitration rules), and to participate in a class action or similar proceeding. In Arbitration, a dispute is resolved by an arbitrator instead of a judge or jury. Arbitration procedures are simpler and more limited than court procedures. Any Arbitration will be limited to the dispute between yourself and the holder of the Note and will not be part of a class-wide or consolidated Arbitration proceeding.

**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.

**Arbitration Defined.** Arbitration is a means of having an independent third party resolve a Dispute. A "Dispute" is any controversy or claim between you and Western Sky or the holder or servicer of the Note. The term Dispute is to be given its broadest possible meaning and includes, without limitation, all claims or demands (whether past, present, or future, including events that occurred prior to the opening of this Account), based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief). A Dispute includes, by way of example and without limitation, any claim based upon marketing or solicitations to obtain the loan and the handling or servicing of my account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance,



regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement. For purposes of this Arbitration agreement, the term "the holder" shall include Western Sky or the then-current note holder's employees, officers, directors, attorneys, affiliated companies, predecessors, and assigns, as well as any marketing, servicing, and collection representatives and agents.

**Choice of Arbitrator.** Any party to a dispute, including related third parties, may send the other party written notice by certified mail return receipt requested at the address appearing at the top of this Loan Agreement of their intent to arbitrate and setting forth the subject of the dispute along with the relief requested, even if a lawsuit has been filed. Arbitration shall be conducted in the Cheyenne River Sioux Tribal Nation by a panel of three Tribal Elders and shall be conducted in accordance with the Cheyenne River Sioux Tribal Nation's consumer rules and the terms of this Agreement. You may appear at Arbitration via telephone or video conference, and you will not be required to travel to the Cheyenne River Sioux Tribal Nation. The party receiving notice of Arbitration will respond in writing by certified mail return receipt requested within twenty (20) days. You understand that if you demand Arbitration, you must inform us of your demand of the Arbitrator you have selected. You also understand that if you fail to notify us, then we have the right to select the Arbitrator.

**Cost of Arbitration.** We will pay the filing fee and any costs or fees charged by the arbitrator regardless of which party initiates the Arbitration. Except where otherwise provided by the law of the Cheyenne River Sioux Tribal Nation, each party will be responsible for its own attorneys' fees and other expenses. Unless prohibited by law, the arbitrator may award fees, costs, and reasonable attorneys' fees to the party who substantially prevails in the Arbitration.

**Waiver of Rights.** 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. The arbitrator has the ability to award all remedies available by statute, at law, or in equity to the prevailing party, except that the parties agree that the arbitrator has no authority to conduct class-wide proceedings and will be restricted to resolving the individual disputes between the parties. The validity, effect, and enforceability of this waiver of class action lawsuit and class-wide Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne Rivers Sioux Tribal Nation, and not by the arbitrator. If the court refuses to enforce the class-wide Arbitration waiver, or if the arbitrator fails or refuses to enforce the waiver of class-wide Arbitration, the parties agree that the Dispute will proceed in tribal court and will be decided by a tribal court judge, sitting without a jury, under applicable court rules and procedures.

**Applicable Law and Judicial Review.** THIS ARBITRATION PROVISION IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE CHEYENNE RIVER SIOUX TRIBE. The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement. The arbitrator must apply the terms of this Arbitration agreement, including without limitation the waiver of class-wide Arbitration. The arbitrator will make written findings and the arbitrator's award may be filed in the Cheyenne River Sioux Tribal Court, which has jurisdiction in this matter. The Arbitration award will be supported by substantial evidence and must be consistent with this Agreement and applicable law or may be set aside by a court upon judicial review.

**Small Claims Exception.** All parties, including related third parties, shall retain the right to seek adjudication in a small claims tribunal in the Cheyenne River Sioux Tribal Small Claims Court for disputes within the scope of such tribunal's jurisdiction. Any dispute, which cannot be adjudicated within the jurisdiction of a small claims tribunal, shall be resolved by binding arbitration. Any appeal of a judgment from a small claims tribunal shall be resolved by binding arbitration.

**Other Provisions.** This Arbitration provision will survive: (1) termination or changes in this



Agreement, the Account, or the relationship between us concerning the Account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of my Note, or any amounts owed on my account, to any other person or entity. This Arbitration provision benefits and is binding upon you, your respective heirs, successors and assigns. It also benefits and is binding upon us, our successors and assigns, and related third parties. The Arbitration Provision continues in full force and effect, even if your obligations have been paid or discharged through bankruptcy. The Arbitration Provision survives any termination, amendment, expiration, or performance of any transaction between you and us and continues in full force and effect unless you and we otherwise agree in writing. If any of this Arbitration Provision is held invalid, the remainder shall remain in effect.

**Right to Opt Out.** If you do not wish your account to be subject to this Arbitration Agreement, you must advise us in writing at P.O. Box 370, Timber Lake, South Dakota, 57565, or via e-mail at info@westernsky.com. You must clearly print or type your name and account number and state that you reject Arbitration. You must give written notice; it is not sufficient to telephone us. We must receive your letter or e-mail within sixty (60) days after the date your loan funds or your rejection of Arbitration will not be effective. In the event you opt out of Arbitration, any disputes hereunder shall nonetheless be governed under the laws of the Cheyenne River Sioux Tribal Nation.

**THIS LOAN CARRIES A VERY HIGH INTEREST RATE. YOU MAY BE ABLE TO OBTAIN CREDIT UNDER MORE FAVORABLE TERMS ELSEWHERE. EVEN THOUGH THE TERM OF THE LOAN IS 48 MONTHS, WE STRONGLY ENCOURAGE YOU TO PAY OFF THE LOAN AS SOON AS POSSIBLE. YOU HAVE THE RIGHT TO PAY OFF ALL OR ANY PORTION OF THE LOAN AT ANY TIME WITHOUT INCURRING ANY PENALTY. YOU WILL, HOWEVER, BE REQUIRED TO PAY ANY AND ALL INTEREST THAT HAS ACCRUED FROM THE FUNDING DATE UNTIL THE PAYOFF DATE.**

**CAUTION: IT IS IMPORTANT THAT YOU THOROUGHLY READ THIS AGREEMENT BEFORE YOU SIGN IT. YOU ARE ENTITLED TO A COPY OF THIS AGREEMENT.**

<input checked="" type="checkbox"/>	YOU HAVE READ AND UNDERSTAND THE ARBITRATION SECTION OF THIS NOTE AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THAT SECTION.
<input checked="" type="checkbox"/>	YOU HAVE READ ALL OF THE TERMS AND CONDITIONS OF THIS PROMISSORY NOTE AND DISCLOSURE STATEMENT AND AGREE TO BE BOUND THERETO. YOU UNDERSTAND AND AGREE THAT YOUR EXECUTION OF THIS NOTE SHALL HAVE THE SAME LEGAL FORCE AND EFFECT AS A PAPER CONTRACT.

**CONSUMER COMPLAINTS** - If you have a complaint about our loan, please let us know. You can contact us at P.O. Box 370, Timber Lake, South Dakota, 57656, telephone (877) 860-2274.

#### **ELECTRONIC FUNDS AUTHORIZATION AND DISCLOSURE**

You hereby authorize us to initiate electronic funds transfers ("EFTs") for withdrawal of your scheduled loan payment from your checking account on or about the FIRST day of each month. You further authorize us to adjust this withdrawal to reflect any additional fees, charges or credits to your account. We will notify you 10 days prior to any given transfer if the amount to be transferred varies by more than \$50 from your regular payment amount. You also authorize us to withdraw funds from your account on additional days throughout the month in the event you are delinquent on your loan payments. You understand that this authorization and the services



undertaken in no way alters or lessens your obligations under the Loan Agreement. You understand that you can cancel this authorization at any time (including prior to your first payment due date) by sending written notification to us. Cancellations must be received at least three business days prior to the applicable due date. This EFT debit authorization will remain in full force and effect until the earlier of the following occurs: (i) you satisfy all of your payment obligations under this Loan Agreement or (ii) you cancel this authorization.

In addition, you hereby authorize us and our agents to initiate a wire transfer credit to your bank account to disburse the proceeds of this Loan.



YOU UNDERSTAND OUR PAYMENT COLLECTION PROCEDURE AND AUTHORIZE ELECTRONIC DEBITS FROM YOUR BANK ACCOUNT.



# **EXHIBIT 2**



**QUESTIONS? Call Us at 1-866-SKY-1224**[Home](#) | [Logout](#) | [Loan Status](#) | [Upload Documents](#) | [Change Password](#) | [Rates](#) | [Contact Us](#)**Loan Document****WESTERN SKY CONSUMER LOAN AGREEMENT**

Loan No.:	13881249	Date of Note:	July 05, 2012
		Expected Funding Date:	July 05, 2012
Lender:	Western Sky Financial, LLC	Borrower:	THOMAS W BROWN JR
Address:	P.O. Box 370 Timber Lake, SD 57656	Address:	674 SUN MEADOWS DR KLRNERSVILLE, NC 27284

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

You further agree that you have executed the Loan Agreement as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation, and that this Loan Agreement is fully performed within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation.

In this Loan Agreement, the words "you" and "your" mean the person signing as a borrower. "We," "us," "our," and "Lender" mean Western Sky Financial, LLC, a lender authorized by the laws of the Cheyenne River Sioux Tribal Nation and the Indian Commerce Clause of the Constitution of the United States of America, and any subsequent holder of this Note ("Western Sky").

**TRUTH IN LENDING DISCLOSURES:** The disclosures below are provided to you so that you may compare the cost of this loan to other loan products you might obtain in the United States. Our inclusion of these disclosures does not mean that we consent to application of state or federal law to us, to the loan, or this Loan Agreement.

**TRUTH IN LENDING ACT DISCLOSURE STATEMENT**

<b>ANNUAL PERCENTAGE RATE</b>	<b>FINANCE CHARGE</b>	<b>AMOUNT FINANCED</b>	<b>TOTAL OF PAYMENTS</b>
<i>The cost of your credit as a yearly rate</i>	<i>The dollar amount the credit will cost you</i>	<i>The amount of credit provided to you</i>	<i>The amount you will have paid after all payments are made as scheduled</i>
<b>139.12 %</b>	<b>\$11,577.87</b>	<b>\$2,525.00</b>	<b>\$14,102.87</b>

**PAYMENT SCHEDULE**

One payment of \$263.25 on August 01, 2012.

47 monthly payments of \$294.46 beginning on September 01, 2012.

**Late Charge:** If a payment is more than 15 days late, you will be charged \$29.00.**Prepayment:** If you pay off this loan early, you will not have to pay any penalty.



Please see the remainder of this document for additional information about nonpayment, default and any required repayment in full before the scheduled date.

ITEMIZATION OF AMOUNT FINANCED	
Amount Financed:	\$2,525.00
Amount Paid to Borrower Directly:	\$2,525.00
Prepaid Finance Charge/Origination Fee:	\$75.00

You promise to pay to the order of Western Sky or any subsequent holder of this Note the sum of **\$2,600.00**, together with interest calculated at **135.00 %** per annum and any outstanding charges or late fees, until the full amount of this Note is paid. You promise to repay this loan by making, at a minimum, the payments described on the payment schedule listed above.

Payments will be applied first to any outstanding charges or late fees, then to earned interest and finally to principal. The payment schedule described above may change in the event you do not make all payments as scheduled or in the event you accrue any fees.

Interest is calculated on a 360/360 simple interest basis. This means that interest is calculated by dividing the annual interest rate by 360, multiplying that number by the outstanding principal balance, and multiplying that number by the number of days the principal balance is outstanding, assuming that each full month is comprised of 30 days.

You may prepay all or any part of the principal without penalty.

If you fail to make any payment due hereunder, the holder of this Note shall have the right, after a 30-day grace period, to declare this note to be immediately due and payable. If you file for an assignment for the benefit of creditors, or for bankruptcy, the holder of this Note shall have the right to declare this Note to be immediately due and payable.

Except as may be provided in the "Arbitration" section of this Note, if we are required to employ an attorney at law to collect any amounts due hereunder, you will be required to pay the reasonable fees of such attorney to protect our interest or to take any other action required to collect the amounts due hereunder.

The Prepaid Finance Charge disclosed above is fully earned upon loan origination and is not subject to rebate upon prepayment or acceleration of this Note.

**LATE FEES.** You will be subject to a late fee of \$29.00 if you fail to make your payment within 15 days of the due date. We can collect any late fees immediately via Electronic Funds Transfer (EFT) from your bank account.

**INSUFFICIENT FUNDS.** You will be subject to a fee of \$29.00 if any payment you make is returned by your bank for insufficient funds.

**E-SIGN/ELECTRONIC COMMUNICATIONS.** Although federal law does not apply to this Agreement, this Note is in original format an electronic document fully compliant with the Electronic Signatures in Global and National Commerce Act (E-SIGN) and other applicable laws and regulations, and the one, true original Note is retained electronically by us. All other versions hereof, whether electronic or in tangible format, constitute facsimiles or reproductions only. You understand that you have previously consented to receive all communications from us, including but not limited to all required disclosures, electronically.

**CREDIT REPORTS.** You agree that we may obtain credit reports on you on an ongoing basis as long as this loan remains in effect. You also authorize us to report information concerning this account to credit bureaus and anyone else we believe in good faith has a legitimate need for such information. Late payments, missed payments, or other defaults on this account may be reflected in your credit report.

**CALL MONITORING/RECORDING.** You understand that, from time to time, we may monitor or record telephone calls between us for quality assurance purposes. You expressly consent to have your calls monitored or recorded.

**TELEPHONE CALLS.** You hereby agree that in the event we need to contact you to discuss your account or the repayment of your loan, we may telephone you at any number, including any cell phone number provided, and that we may leave an autodialed or prerecorded message or use other technology to make that contact or to communicate to you the status of your account.

**VERIFICATION.** You authorize us to verify all of the information you have provided in obtaining approval of this



Loan.

**GOVERNING LAW.** This Agreement is governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe. We do not have a presence in South Dakota or any other states of the United States. Neither this Agreement nor Lender is subject to the laws of any state of the United States of America. By executing this Agreement, you hereby expressly agree that this Agreement is executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation. You also expressly agree that this Agreement shall be subject to and construed in accordance only with the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law applies to this Agreement. You agree that by entering into this Agreement you are voluntarily availing yourself of the laws of the Cheyenne River Sioux Tribe, a sovereign Native American Tribal Nation, and that your execution of this Agreement is made as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation.

**ASSIGNMENT.** We may assign or transfer this Loan Agreement or any of our rights under it at any time to any party.

**WAIVER OF JURY TRIAL AND ARBITRATION.**

**PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY.** Unless you exercise your right to opt-out of arbitration in the manner described below, any dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to have a jury, to engage in discovery (except as may be provided in the arbitration rules), and to participate in a class action or similar proceeding. In Arbitration, a dispute is resolved by an arbitrator instead of a judge or jury. Arbitration procedures are simpler and more limited than court procedures. Any Arbitration will be limited to the dispute between yourself and the holder of the Note and will not be part of a class wide or consolidated Arbitration proceeding.

**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.

**Arbitration Defined.** Arbitration is a means of having an independent third party resolve a Dispute. A "Dispute" is any controversy or claim between you and Western Sky or the holder or servicer of the Note. The term Dispute is to be given its broadest possible meaning and includes, without limitation, all claims or demands (whether past, present, or future, including events that occurred prior to the opening of this Account), based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief). A Dispute includes, by way of example and without limitation, any claim based upon marketing or solicitations to obtain the loan and the handling or servicing of my account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement. For purposes of this Arbitration agreement, the term "the holder" shall include Western Sky or the then current note holder's employees, officers, directors, attorneys, affiliated companies, predecessors, and assigns, as well as any marketing, servicing, and collection representatives and agents.

**Choice of Arbitrator.** Any party to a dispute, including a Holder or its related third parties, may send the other party written notice by certified mail return receipt requested at the address appearing at the top of this Agreement of their intent to arbitrate and setting forth the subject of the dispute along with the relief requested, even if a lawsuit has been filed. Regardless of who demands arbitration, you shall have the right to select any of the following arbitration organizations to administer the arbitration: the American Arbitration Association (1-800 778-7879) <http://www.adr.org>; JAMS (1-800-352-5267) <http://www.jamsadr.com>; or an arbitration organization agreed upon by you and the other parties to the Dispute. The arbitration will be governed by the chosen arbitration organization's rules and procedures applicable to consumer disputes, to the extent that those rules and procedures do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate, including the limitations on the Arbitrator below. The party receiving notice of Arbitration will respond in writing by certified mail return receipt requested within twenty (20) days. You understand that if you demand Arbitration, you must inform us of your demand and of the arbitration organization you have selected. You also understand that if you fail to notify us, then we have the right to select the arbitration organization. Any arbitration under this Agreement may be conducted either on tribal land or within thirty miles of your residence, at your choice, provided that this accommodation for you shall not be construed in any way (a) as a relinquishment or waiver of the Cheyenne River Sioux Tribe's sovereign status or immunity, or (b) to allow for the application of any law other than the law of the Cheyenne River Sioux Tribe of Indians to this Agreement.

**Cost of Arbitration.** We will pay the filing fee and any costs or fees charged by the arbitrator regardless of which party initiates the Arbitration. Except where otherwise provided by the law of the Cheyenne River Sioux Tribal Nation, each party will be responsible for its own attorneys' fees and other expenses. Unless prohibited by law, the arbitrator may award fees, costs, and reasonable attorneys' fees to the party who substantially prevails in the Arbitration.

**Waiver of Rights.** 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. The arbitrator has the ability to award all remedies, available by statute, at law, or in equity to the prevailing party, except that the parties agree that the arbitrator has no authority to conduct class wide proceedings and will be restricted to resolving the individual disputes between the parties. The validity, effect, and enforceability of this waiver of class action lawsuit and class wide Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne River Sioux Tribal Nation, and not by the arbitrator. If the court refuses to enforce the class-wide Arbitration waiver, or if the arbitrator fails or refuses to enforce the waiver of class wide Arbitration, the parties agree that the Dispute will proceed in tribal court and will be decided by a tribal court judge, sitting without a jury, under applicable court rules and procedures.

**Applicable Law and Judicial Review.** THIS ARBITRATION PROVISION IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE CHEYENNE RIVER SIOUX TRIBE. The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement. The arbitrator must apply the terms of this Arbitration agreement, including without limitation the waiver of class wide Arbitration. The arbitrator will make written findings and the arbitrator's award may be filed in the Cheyenne River Sioux Tribal Court, which has jurisdiction in this matter. The Arbitration award will be supported by substantial evidence and must be consistent with this Agreement and applicable law or may be set aside by a court upon judicial review.

**Small Claims Exception.** All parties, including related third parties, shall retain the right to seek adjudication in a small claims tribunal in the Cheyenne River Sioux Tribal Small Claims Court for disputes within the scope of such tribunal's jurisdiction. Any dispute, which cannot be adjudicated within the jurisdiction of a small claims tribunal, shall be resolved by binding arbitration. Any appeal of a judgment from a small claims tribunal shall be resolved by binding arbitration.

**Other Provisions.** This Arbitration provision will survive: (i) termination or changes in this Agreement, the Account, or the relationship between us concerning the Account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of my Note, or any amounts owed on my account, to any other person or entity. This Arbitration provision benefits and is binding upon you, your respective heirs, successors and assigns. It also benefits and is binding upon us, our successors and assigns, and related third parties. The Arbitration Provision continues in full force and effect, even if your obligations have been paid or discharged through bankruptcy. The Arbitration Provision survives any termination, amendment, expiration, or performance of any transaction between you and us and continues in full force and effect unless you and we otherwise agree in writing. If any of this Arbitration Provision is held invalid, the remainder shall remain in effect.

**Right to Opt Out.** If you do not wish your account to be subject to this Arbitration Agreement, you must advise us in writing at P.O. Box 370, Timber Lake, South Dakota, 57565, or via e-mail at [info@westernsky.com](mailto:info@westernsky.com). You must clearly print or type your name and account number and state that you reject Arbitration. You must give written notice; it is not sufficient to telephone us. We must receive your letter or e-mail within sixty (60) days after the date your loan funds or your rejection of Arbitration will not be effective. In the event you opt out of Arbitration, any disputes hereunder shall nonetheless be governed under the laws of the Cheyenne River Sioux Tribal Nation.

**Payments.** You have previously authorized and requested us to initiate an automated clearinghouse or other electronic funds transfer ("EFT") from the bank account identified on your Application (the "Bank Account") to make each payment required hereunder on the day it is due. You also authorize us to initiate an EFT to or from the Bank Account to correct any erroneous payment and, in the event any EFT is unsuccessful, to attempt such payment up to two additional times. You understand that unsuccessful EFTs may result in charges by your bank, and you agree that we are not liable for such charges. We will notify you 10 days prior to any given transfer if the amount to be transferred varies by more than \$50 from your regular payment amount. You also authorize us to withdraw funds from your account on additional days throughout the month in the event you are delinquent on your loan payments. Your request and authorization for us to initiate EFTs is entirely voluntary, and you may terminate this authorization by notifying us in writing via fax (866-347-0666) or email ([customer.service@westernsky.com](mailto:customer.service@westernsky.com)) soon enough to allow us a reasonable opportunity to act on your termination (generally at least three business days in advance).

**THIS LOAN CARRIES A VERY HIGH INTEREST RATE. YOU MAY BE ABLE TO OBTAIN CREDIT UNDER MORE FAVORABLE TERMS ELSEWHERE. EVEN THOUGH THE TERM OF THE LOAN IS 48 MONTHS, WE STRONGLY ENCOURAGE YOU TO PAY OFF THE LOAN AS SOON AS POSSIBLE. YOU HAVE THE RIGHT TO PAY OFF ALL OR ANY PORTION OF THE LOAN AT ANY TIME WITHOUT INCURRING ANY PENALTY. YOU WILL, HOWEVER, BE REQUIRED TO PAY ANY AND ALL INTEREST THAT HAS ACCRUED FROM THE FUNDING DATE UNTIL THE PAYOFF DATE.**

**CAUTION: IT IS IMPORTANT THAT YOU THOROUGHLY READ THIS AGREEMENT BEFORE YOU SIGN IT. YOU ARE ENTITLED TO A COPY OF THIS AGREEMENT.**

<input checked="" type="checkbox"/>	YOU HAVE READ AND UNDERSTAND THE ARBITRATION SECTION OF THIS NOTE AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THAT SECTION.
<input type="checkbox"/>	



✓ YOU HAVE READ ALL OF THE TERMS AND CONDITIONS OF THIS PROMISSORY NOTE AND DISCLOSURE STATEMENT AND AGREE TO BE BOUND THERETO. YOU UNDERSTAND AND AGREE THAT YOUR EXECUTION OF THIS NOTE SHALL HAVE THE SAME LEGAL FORCE AND EFFECT AS A PAPER CONTRACT.

**CONSUMER COMPLAINTS** If you have a complaint about our loan, please let us know. You can contact us at P.O. Box 370, Timber Lake, South Dakota, 57656, telephone (877) 860 2274.

[Click here](#) to print out a copy of this document for your records.

**WESTERN SKY FINANCIAL is owned wholly by an individual Tribal Member of the Cheyenne River Sioux Tribe and is not owned or operated by the Cheyenne River Sioux Tribe or any of its political subdivisions. WESTERN SKY FINANCIAL is a Native American business operating within the exterior boundaries of the Cheyenne River Sioux Reservation, a sovereign nation located within the United States of America.**

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