Katten
Katten Muchin Rosenman LLP

2800 K Street NW
North Tower – Suite 200
Washington, DC 20007-5118
www.kattenlaw.com

CLAUDIA CALLAWAY
claudia.callaway@kattenlaw.com
(202) 625-3590 direct
(202) 295-1120 fax

September 12, 2013

Via Electronic Filing

Clerk of the Court
U.S. Court of Appeals for the Seventh Circuit
Room 2722
219 South Dearborn Street
Chicago, IL 60604

Re: **Jackson et al. v. PayDay Financial, LLC, et al., No. 12-2617 - Defendants-Appellees' Response to the District Court's Factual Findings of August 28, 2013.**

To the Clerk of the Court:

Defendants-Appellees respectfully submit this letter in response to the district court's findings of fact ("FOF") dated August 28, 2013.

The district court made two findings. First, the court agreed with Defendants and found that the laws of the Cheyenne River Tribe are available to consumers. (FOF at 2.) Second, the court sided with Plaintiffs and found—based on an arbitration proceeding in a different case—that the arbitration forum specified in the Parties' loan agreements is unavailable. (FOF at 6.)

As the first finding is correct, Defendants do not expand upon it here. But as to the second finding, Defendants wish to make five brief points:

(a) *First*, the arbitration finding has no impact on the enforceability of the judicial venue clause in the Parties' loan agreements. Even if arbitration is not possible, Plaintiffs must still bring their claims in tribal court.

(b) *Second*, the arbitration proceeding referenced in the finding was never permitted to finish. Thus, there is no permissible basis under federal law to presume (as the district court did) that any arbitration award would be biased and unenforceable.

(c) *Third*, the district court improperly found that the arbitration agreements are structurally unfair because the arbitrators are tribal members. Federal Indian law forbids this finding.

(d) *Fourth*, the district court improperly relied upon preliminary factual allegations in a different case involving Defendant CashCall, Inc. But those factual allegations have yet to be proven or even examined by any tribunal. They are not entitled to any weight.

(e) *Fifth*, even if the arbitration forum specified by the agreements is unavailable, under this Court's opinion in *Green v. U.S. Cash Advance Ill., LLC*, – F.3d –, 2013 WL 3880219 (7th Cir. 2013), Section 5 of the Federal Arbitration Act ("FAA") requires the appointment of a substitute arbitrator.

Taken together, the district court's arbitration finding neither voids the agreements nor provides any reason to delay enforcement of the judicial venue clause.

A. Judicial Venue, not Arbitration, is the Threshold Issue.

Plaintiffs' loan agreements contain a judicial venue clause making the tribal courts of the Cheyenne River Tribal Nation the exclusive venue for all non-arbitration proceedings. Plaintiff Jackson's Agreement, for example, states in the first paragraph that—

> This Loan Agreement is subject solely to the exclusive law and jurisdiction of the Cheyenne River Sioux Tribe . . . . By executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, [and] consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court . . . . (Short Appendix "S.A." at 29.)

Whether or not the loan agreement's arbitration terms are also enforceable has no bearing on the judicial venue clause. Indeed, the Parties' dispute about arbitration not only does not vitiate the judicial venue clause—but under the terms of the loan agreements and binding federal law, the dispute is required to be decided in tribal court before the parties may pursue federal court remedies. *See,*

e.g., Krempel v. Prairie Island Indian Cmty., 125 F.3d 621, 622 (8th Cir. 1997) ("It is now settled that principles of comity require that tribal-court remedies must be exhausted before a federal district court should consider relief in a civil case regarding tribal-related activities on reservation land.").

B. The District Court (and Plaintiffs) Improperly Presumed that the Aborted Arbitration Proceeding Referenced in the District Court's Finding Would Have Resulted in a Biased or Unenforceable Award.

The court's arbitration finding was based foremost on the court's interpretation of a separate arbitration proceeding between CashCall and a Western Sky borrower that was the subject of a case captioned *Inetianbor v. CashCall*, Civ. No. 13-60066 (S.D.Fla. Aug. 18, 2013). But that arbitration proceeding was never allowed to finish; it was cut short at the insistence of the consumer plaintiff.

The district court nonetheless concluded that "no arbitration award could ever stand in the instant case if an arbitrator was similarly selected". (FOF at 4.) The court's judgment is premature. It rests on the assumption that the chosen arbitrator was biased or incompetent. But that's not a cognizable assumption. *Cf. Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 34 (1st Cir. 2000) (citing among others *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987)); *Omron Healthcare v. Maclaren Exports*, 28 F.3d 600, 604 (7th Cir.1994) (finding a forum selection clause choosing the High Court of Justice in England to be enforceable despite allegations of bias against the plaintiff). It should not impact this case.

C. Arbitration Before a Tribal Member is Permitted.

The district court also condemned the arbitration agreements because Defendant Martin Webb and the would-be arbitrators are members of the same tribe. This too is an impermissible basis for judging the agreements.

The FAA permits contracting parties to choose the nationality of their arbitrators. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 636-37 (1985) (finding no reason an arbitration clause requiring arbitration in Japan would not adequately resolve disputes that arose between a Japanese company and a Swiss company). Parties may even specify preferences for arbitrators by their religious affiliation. *See Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d

Cir. 2007) (looking to neutral principles of law and Federal Arbitration Act to enforce an agreement to arbitrate a division of assets before a Jewish arbitration panel and uphold panel's award). In fact, courts routinely enforce arbitration agreements that specify arbitrators with an affiliation shared by one or more parties to the dispute. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (upholding an arbitration clause requiring arbitration under the rules of the New York Stock Exchange despite the plaintiff's argument that the securities arbitration panel would be biased because the claim arose in the employment discrimination context); *Koeveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 365-66 (7th Cir. 1998) (rejecting the plaintiff's claim that an arbitration clause requiring securities industry arbitration would result in bias). Doing so comports with one of the principal aims of the FAA, which is to enable parties to design efficient, streamlined procedures tailored to a particular type of dispute. *See generally AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) ("It can be specified for example, that the decision maker be a specialist in a relevant field, or that proceedings be kept confidential to protect trade secrets").

In other words, the FAA makes it the prerogative of the parties—not the judiciary—to decide if a particular national-, ethnic-, religious-, geographic-, or industry-affiliation is or is not appropriate. *See Stolt-Neilsen v. AnimalFeeds Int'l. Corp.*, 130 S.Ct. 1758, 1773-74 (emphasizing that parties are "generally free to structure their arbitration agreements as they see fit"). The fact that parties may designate an arbitrator that has an affiliation in common with one party but not another is not a basis for challenging arbitration. *See Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 551 (8th Cir. 2007) (noting that even "[w]here an agreement entitles the parties to select interested arbitrators, 'evident partiality' cannot serve as a basis for vacating an award . . . absent a showing of prejudice."). And so the district court erred in adopting it is a basis for condemning the agreements.

D. The District Court Improperly Relied Upon Preliminary and Un-Adjudicated Factual Findings From a Different Case.

The district court also placed heavy emphasis on preliminary factual findings (which are irrelevant to arbitration anyhow) contained in an administrative cease and desist order issued to CashCall by the New Hampshire Banking Department. (FOF at 5.) But there hasn't even been briefing on the cease and desist order, much less a hearing. To accord weight to the order's allegations—and essentially give them res judicata effect—was error under this Court's case law. *Cf. Guenther v.*

Holmgreen, 738 F.2d 879, 883 (7th Cir. 1984) ("collateral estoppel applies only when the party against whom the earlier decision is being asserted had a 'full and fair opportunity' to litigate the issue in question."); *Technical Pub. Co., div. of Dun-Donnelley Pub. Corp. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir. 1984) ("The court's finding, based upon procedures that are less formal and evidence that is less complete than in a full trial, is not equivalent to a judgment on the merits."). The district court should have disregarded the allegations and Plaintiffs' unjustifiable attempt to reply upon them.

E. The FAA Requires Appointment of a Substitute Arbitrator if the Specified Arbitration Forum is Unavailable.

Finally, even if the district court were correct that arbitration by the specified arbitration forum is not possible, Section 5 of the FAA does not permit voiding of the agreements but instead requires appointment of a substitute arbitrator. *See Green v. U.S. Cash Advance Ill., LLC*, – F.3d –, 2013 WL 3880219, at *5 (7th Cir. 2013); *see also Astra Footwear Indus. v. Harwyn Int'l Inc.*, 442 F. Supp. 907, 910 (S.D.N.Y.) ("[Section] 5 was drafted to provide a solution to the problem caused when the arbitrator selected by the parties cannot or will not perform."), *aff'd*, 578 F.2d 1366 (2d Cir. 1978).

Plaintiffs may argue the specified arbitration forum was "clearly integral" to the arbitration agreements and therefore Section 5 does not apply. *See, e.g,, Ranzy v. Tijerina,* 393 F. App'x 174 (5th Cir. 2010). But this Court does not recognize an integral arbitrator exception to Section 5's mandate. *See Green*, 2013 WL 3880219, at *4-6. To the contrary, the Court recently held that the integral arbitrator exception appears to violate the express congressional command voiced in Section 5 that courts appoint a substitute arbitrator if "for any reason" the specified arbitrator cannot or will not perform. *See id.*

And even if Section 5 did contain an integral arbitrator exception, it wouldn't apply here. Plaintiffs cannot, after all, simultaneously allege that the specified forum is unfair *and* that they chose arbitration before that forum "or no arbitration at all." *See id.* at *2. Certainly, the specified forum was not a "condition of [their] agreeing to arbitration." *See id.* Simply put, the integral arbitrator exception does not apply and Section 5 requires appointment of a substitute arbitrator. *See id.*

At bottom, the district court's arbitration finding should not impact the proceedings before this Court. It does not void the binding judicial venue clause that requires this dispute to be brought in tribal court (to the extent it cannot be arbitrated). And it does not void the arbitration agreements as they are mooted by Section 5 of the FAA and otherwise legally flawed. Defendants respectfully ask for an order remanding the case with instructions to dismiss.

Sincerely,

/s/ Claudia Callaway
Claudia Callaway

Attorney for Defendants-Appellees Payday Financial, LLC, Western Sky Financial, LLC, Great Sky Finance, LLC, Red Stone Financial, LLC, Management Systems, LLC, 24-7 Cash Direct, LLC, Red River Ventures, LLC, High Country Ventures, LLC, Financial Solutions, LLC, Martin A. Webb, and CashCall, Inc.

Certificate of Service

I hereby certify that the preceding letter was served upon counsel for Plaintiffs-Appellants through the Court's ECF system on September 12, 2013 as follows:

Daniel A. Edelman
Cathleen M. Combs
James O. Latturner
Thomas Soule
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
120 S. LaSalle Street, 18th Floor
Chicago, Illinois 60603
P: (312) 739-4200
F: (312) 419-0379

Counsel for Plaintiffs-Appellants

/s/ Claudia Callaway
Claudia Callaway