UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CHAD MARTIN HELDT, CHRISTI W. JONES, SONJA CURTIS, and CHERYL A. MARTIN, individually and on behalf of all similarly situated individuals	*	Case No. 3:13-cv-3023-RAL
Plaintiffs,	*	Honorable Roberto A. Lange
v.	*	
PAYDAY FINANCIAL, LLC, d/b/a Lakota Cash and Big Sky Cash; WESTERN SKY FINANCIAL, LLC, d/b/a Western Sky Funding, Western Sky, and Westernsky.com; MARTIN A. ("Butch") WEBB; and CASHCALL, INC,	*	
Defendants.	*	

DEFENDANTS' MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION

Full Text of Frequently Cited Provisions of the Federal Arbitration, 9 U.S.C. §§ 1-16

Section 2:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2.

Section 3:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. 9 U.S.C. § 3.

Section 4:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is

within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. 9 U.S.C. § 4.

Section 5:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator. 9 U.S.C. § 5.

I. Introduction to Defendants' Motion to Stay Proceedings and Compel Arbitration

This lawsuit arises from loans obtained by Plaintiffs from Defendant Western Sky Financial, LLC ("Western Sky"). The loans were issued under loan contracts containing comprehensive Arbitration Agreements ("Arbitration Agreements" or "Agreements") requiring individual arbitration of any disputes between the Parties. This Motion seeks to enforce those Agreements.[1]

Defendants respectfully ask for the following relief under Sections 3, 4, and 5 of the Federal Arbitration Act ("FAA" or "Act"), 9 U.S.C. §§ 3-5:

(a) a stay of judicial proceedings under Section 3;

(b) an order compelling individual arbitration under Section 4; and

(c) an appointment of arbitrators under Section 5.

Defendants are also filing a separate motion to dismiss under Rule 12(b)(3) to enforce the loan contracts' judicial venue clauses. Defendants do not intend this arbitration Motion to contradict their venue motion; Defendants bring both simply to preserve all rights. As judicial venue is the threshold issue, the Court need not consider this Motion if it dismisses for improper venue.

[1] All Defendants—PayDay Financial, LLC, Western Sky Financial, LLC, Martin A. Webb, and CashCall, Inc.—join this motion.

II. Issues Presented in this Motion

A. To succeed on a motion to compel arbitration under the FAA, a movant must show (1) "there is a valid agreement to arbitrate between the parties", and (2) "the dispute falls within the scope of that agreement" *Kubista v. Value Forward Network, LLC*, Civ. No. 12-4066, 2012 WL 2974675, at *2 (D.S.D. July 20, 2012). Do Defendants carry their burden under this two-pronged test?

B. Once a moving party satisfies the two-pronged test, the burden shifts to the party opposing arbitration to establish an arbitration-neutral contract defense to the arbitration agreement's enforcement. *See Kubista*, 2012 WL 2974675, at *6.

(1) Are Plaintiffs' contract-defenses properly before this Court given that the Parties agreed to delegate all threshold questions of arbitrability, including whether or not the Arbitration Agreements are valid?

(2) If the Court reaches Plaintiffs' contract defenses, do any of them merit scrapping the Arbitration Agreements?

C. If the Court finds the Arbitration Agreements are enforceable, how should it proceed with appointing arbitrators under Section 5 of the FAA?

III. The Relevant Facts

A. The Parties

Plaintiffs are four consumers who sought and obtained loans from Western Sky. Chad Martin Heldt, the first-named Plaintiff, entered into his loan contract and the included Arbitration Agreement in April 2013. (Complaint "C." ¶ 6.) (Loan contract attached as Ex. 1.)[2] Plaintiffs Christi W. Jones, Sonja Curtis, and Cheryl Annette Martin each entered into their loan contracts and included Arbitration Agreements in,

[2] Although the Complaint cited to and quoted from Plaintiffs' loan contracts and the included Arbitration Agreements, Plaintiffs declined to file those contracts with the Court. Defendants attach them here as Exhibits 1-4.

respectively, July, August, and December 2011.[3] (C. ¶¶ 7-9.) . (Loan contracts attached as Ex. 2 through 4) (together referred to as the "2011 Agreements".)

Defendant Western Sky is a consumer lender located and operated exclusively on the Cheyenne River Indian Reservation within the geographic boundaries of South Dakota. (*See* C. ¶ 11; Ex. 1 p. 1.) Western Sky is wholly owned by Defendant Martin Webb, an enrolled member of the Cheyenne River Sioux Indian Tribe. (*See* C. ¶ 11.) Defendant PayDay Financial, LLC ("PayDay Financial")—another consumer lender wholly owned by Webb and located and operated exclusively on the Reservation—has no connection to Plaintiffs' loans and was apparently only sued because it was the original managing member of Western Sky. (*See* C. ¶ 10.) But the two companies dissociated in February 2011, months before Plaintiffs obtained their Western Sky loans. (*See* C. ¶ 10.)

Defendant CashCall, Inc. ("CashCall") is a California corporation. (C. ¶ 6.) It contracted to purchase Western Sky's interests in Plaintiffs' loan contracts and subsequently sought to collect the payments due. (See C. ¶¶ 13, 28.) It is not affiliated with Western Sky, PayDay Financial, or Webb by either ownership or control.

B. The Arbitration Agreements

Plaintiffs' loan contracts are, in many respects, nearly identical. Each contract makes clear that it is "fully performed within the exterior boundaries of the Cheyenne River Indian Reservation". (Ex. 1 p. 1; Ex. 2 p. 1; Ex. 3 p. 1; Ex. 4 p. 1.) Each contains

[3] Plaintiff Christi Jones' loan contract was executed under her prior name Christi Trusevich.

identical choice of law provisions specifying Cheyenne River Sioux law. (*Id*.) And each prominently sets forth a judicial venue clause under which the borrower, by entering into the contract, consents to the "sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court". (*Id*.)

In addition, the contracts contain comprehensive Arbitration Agreements requiring the Parties to arbitrate all "Disputes" on an individual—and not class—basis. (Ex. 1 pp. 3-5; Ex. 2 pp. 3-5; Ex. 3 pp. 3-5; Ex. 4 pp. 3-5.) "Dispute" is defined in the "broadest possible" manner and includes "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". (Ex. 1 p. 4; Ex. 2 p. 4; Ex. 3 p. 4; Ex. 4 p. 4.) "Dispute" also includes any issues concerning the "validity, enforceability, or scope" of the Arbitration Agreements themselves. (*Id*.) In resolving any Disputes over the Agreements, the arbitrator can and must sever any portion of the Agreements it finds unenforceable. (Ex. 1 p. 5; Ex. 2 p. 5; Ex. 3 p. 5; Ex. 4 p. 5.)

The only limited disputes not covered by the Agreements are disputes over the Agreements' waiver of the ability to pursue claims on a class basis. (Ex. 1 p. 4; Ex. 2 p. 4; Ex. 3 p. 4; Ex. 4 p. 4.) Under the express terms of the Agreements, including the judicial venue clause, class waiver disputes must be brought in the Cheyenne River Sioux Tribal Courts. (*Id*.) The Tribal Courts are also the sole venue for any judicial review or confirmation proceedings. (Ex. 1 p. 5; Ex. 2 p. 5; Ex. 3 p. 5; Ex. 4 p. 5.)

The Agreements may be enforced by Plaintiffs, their heirs, successors, and assigns. (Ex. 1 p. 5; Ex. 2 p. 5; Ex. 3 p. 5; Ex. 4 p. 5.) On the other side, the Agreements are enforceable by Western Sky, its heirs, successors, assigns, related or affiliated third parties, and any servicers or holders of Plaintiffs' loan contracts. (*Id*.)

Regardless of who files claims, the Agreements require Western Sky (or any subsequent holder of Plaintiffs' loan notes) to pay all of the arbitration fees and costs. (Ex. 1 pp. 1, 4; Ex. 2 pp. 1, 4; Ex. 3 pp. 1, 4; Ex. 4 pp. 1, 4.) The Agreements also permit the arbitrator to award attorney's fees to any party who substantially prevails in the arbitration unless such an award is prohibited by law. (*Id*.)

If Plaintiffs did not wish to arbitrate, each had 60 days after his or her loan contract was executed to opt out of arbitration entirely simply by providing written notice. (Ex. 1 p. 5; Ex. 2 p. 5; Ex. 3 p. 5; Ex. 4 p. 5.) Each choose not to. Each did, however, retain the right under the Agreements to bring claims in the Cheyenne River Sioux Small Claims Court instead of in arbitration, provided the claims fall within the Court's jurisdiction. (*Id*.)

The only pertinent difference between Plaintiffs' Agreements are their designations of different arbitration forums. Under Plaintiff Heldt's Agreement—executed in 2013—he has the express option of choosing as the arbitration forum the American Arbitration Association ("AAA"), JAMS, or any other agreed-upon organization. (Ex. 1 p. 4.) The rules of the selected organization will govern the

proceeding. (*Id*.) At Heldt's choosing, any hearing will occur either on the Reservation or at a location within 30 miles of Heldt's residence. (*Id*.)

The Agreements for Plaintiffs Jones, Curtis, and Martin, meanwhile—all executed in 2011—specify that Disputes will be arbitrated by "a panel of three Tribal Elders". (Ex. 2 p. 4; Ex. 3 p. 4; Ex. 4 p. 4.) The 2011 Agreements further provide that arbitration shall accord with the Tribe's consumer dispute rules. (*Id*.) Any hearing will occur on the Reservation, but Plaintiffs "may appear . . . via telephone or video conference, and [] will not be required to travel". (*Id*.)

That difference in arbitral forum aside, Plaintiffs all expressly agreed to arbitration. Indeed, before their loan contracts were executed each Plaintiff attested to the following all-caps statement: "YOU HAVE READ AND UNDERSTOOD THE ARBITRATION SECTION OF THIS NOTE AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THAT SECTION." (Ex. 1 p. 5; Ex. 2 p. 5; Ex. 3 p. 5; Ex. 4 p. 5.)

C. Plaintiffs' Lawsuit

Plaintiffs abided by none of the above. They instead filed the present putative class action lawsuit. Their Complaint acknowledges their Arbitration Agreements, but gives five cursory reasons for why Plaintiffs believe the Agreements can be discarded.

First, they allege "[t]here is a reasonable question of whether a consumer sees the entire term of the loan or arbitration clauses before they accept the loan." (C. ¶ 35.) Next they imply the 2011 Agreements are unenforceable because, Plaintiffs insist, the

"Cheyenne River Sioux Tribal Nation's consumer rules do not exist." (C. ¶ 38.) Then they claim that because the contracts contain both an Arbitration Agreement and a judicial venue clause they are contradictory. (C. ¶ 39.) At the same time, they declare that the Tribal Court does not itself conduct arbitration and this is somehow problematic to enforcement. (*Id*.) Finally, they argue the 2011 Agreements violate the Federal Arbitration Act because the Tribal Elder arbitrators are members of the Tribe and further because the arbitrators are supposedly "chosen solely by the Defendants". (*Id*.)

None of these arguments have merit. And none grant Plaintiffs the right to evade their obligations to arbitrate. Defendants now move to enforce the Agreements and to compel arbitration of all claims.

IV. Legal Standard

This Court decides motions to compel arbitration under the FAA using "the procedures used in summary judgment motions." *Dakota Foundry, Inc. v. Tromley Indus. Holdings, Inc*., 1:11-CV-01026, 2012 WL 32440, at *1 (D.S.D. Jan. 5, 2012). Thus, the Court grants a motion to compel when the moving party "shows that there is no genuine issue as to any material fact and that [the movant] is entitled so judgment as matter of law." *Id*. (quoting Fed. R. Civ. P. 56(a)) (internal quotation marks omitted).

That said, the arbitration standard does not rigidly track Rule 56's summary judgment standard. While Rule 56 generally instructs that evidence be "view[ed] in a light most favorable to the non-moving party", *id*., the United States Supreme Court has repeatedly reminded courts that under the FAA "any doubts concerning the scope of

arbitrable issues should be resolved in favor of arbitration". *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983). And of course, the "non-moving party cannot rest on pleadings alone but must set forth specific facts showing that a genuine issue of material fact exists through affidavit or other evidence." *Dakota Foundry*, 2012 WL 32440, at *1 (citing Fed. R. Civ. P. 56(c)).

V. Argument

I. The FAA Requires Courts to Enforce all Arbitration Agreements Covered by the Act. Only an Arbitration-Neutral Contract Defense can Defeat Enforcement.

The FAA enacted a "liberal federal policy favoring arbitration". *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Its primary purpose was to ensure the "rapid and unobstructed enforcement" of private arbitration agreements. *Telectronics Pacing Sys., Inc. v. Guidant Corp.*, 143 F.3d 428, 432 (8th Cir. 1998) (citing *Moses*). It leaves "no place for the exercise of discretion", but instead commands courts to "rigorously enforce" all agreements covered by the Act. *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; *see also Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 268, (1995). Section 3 requires a court, at the request of any party to an agreement, to stay all court proceedings concerning matters subject to

arbitration. *See* 9 U.S.C. § 3; *see also Kubista v. Value Forward Network, LLC*, Civ No. 12-4066, 2012 WL 2974675, at *2 (D.S.D. July 20, 2012). Section 4, in turn, requires a court to compel arbitration if any party to an agreement refuses to arbitrate. *See* 9 U.S.C. § 4; *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). At last, Section 5 requires a court to appoint an arbitrator if—"for any reason"—there has been a lapse in naming one. *See* 9 U.S.C. § 5; *see generally Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1168 (D.S.D. 2010).

Reading these provisions together, this Court will grant a motion to stay proceedings and compel arbitration—and will appoint an arbitrator as necessary—whenever (1) "there is a valid agreement to arbitrate between the parties", and (2) "the dispute falls within the scope of that agreement". *Kubista*, 2012 WL 2974675, at *2.

The "valid agreement to arbitrate" prong asks merely whether the basic elements of a contract are present as to the arbitration agreement itself—offer, acceptance, and sufficient consideration. *See Kubista*, 2012 WL 2974675, at *3. A party opposing arbitration may not attack an agreement's validity by attacking the broader contract in which its contained. The broader contract is irrelevant and, under the FAA, may not be considered. *See Kubista*, 2012 WL 2974675, at *4-5.

So too with the "scope of the agreement" prong, which also "does not reach the potential merits of any claim but construes [the arbitration agreement] liberally, resolving any doubts in favor of arbitration and granting the motion unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that

covers the asserted dispute." *Kubista*, 2012 WL 2974675, at *6 (quoting *3M Co. v. Amtex Sec, Inc.*, 542 F.3d 1193, 1199 (8th Cir. 2008)).

Once the party seeking to arbitrate satisfies the two prongs, the burden shifts to the party opposing arbitration to establish a bona fide, arbitration-neutral contract defense. *See Kubista*, 2012 WL 2974675, at *6 ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration."). As Section 2 of the FAA explains, although arbitration agreements are "valid, irrevocable, and enforceable", they may still be invalidated by contract defenses that "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Concepcion*, 131 S. Ct. at 1746. A contract defense may not, however, "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. It must be an arbitration-neutral defense. And unless the party opposing arbitration proves such a defense, a court *must* compel arbitration.

Finally, the FAA also allows parties to "delegate" to an arbitrator the ability to decide whether an arbitration agreement is enforceable, which includes deciding whether any asserted contract defenses are valid. *See Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777-78, 177 L. Ed. 2d 403 (2010). To do so, the parties need only "clearly and unmistakably" delegate consideration of "threshold issues concerning the arbitration agreement" to the arbitrator. *Id.* Courts must enforce a "delegation agreement" as they would any other arbitration agreement. *Id.*

II. The Parties' Arbitration Agreements are Valid and Cover all of Plaintiffs' Claims.

Plaintiffs do not dispute that (a) the FAA governs the Arbitration Agreements, (b) each of the Agreements was the result of an offer, an acceptance, and an exchange of consideration, and (c) all of Plaintiffs' claims fall squarely within the Agreements' scope. (*See* C. ¶ 39; Ex. 1 p.4; Ex. 2 p. 4; Ex. 3 p. 4; Ex. 4 p. 4.)

Plaintiffs raise only one objection to the validity of their Agreements (their other objections are contract defenses), which is that "[t]here is a reasonable question of whether a consumers sees the . . . arbitration clause before they accept the loan." (C. ¶ 35.) But that question only exists because Plaintiffs failed to attach their loan contracts to their Complaint despite quoting from them extensively. As the contracts make clear, each Plaintiff attested to the following statement: "YOU HAVE READ AND UNDERSTAND THE ARBITRATION SECTION OF THIS NOTE AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THAT SECTION." (Ex. 1 p. 5; Ex. 2 p. 5; Ex. 3 p. 5; Ex. 4 p. 5.) This attestation is enough to make the Arbitration Agreements valid and binding. *See, e.g.*, *Dakota Foundry,* 2012 WL 32440, at *5 (noting that even if party does not have the arbitration agreement at the time of contracting, "arbitration clauses may be incorporated by reference").

But more than that, Western Sky's Web site is structured so that a consumer *cannot* attest to reading any terms and conditions without first scrolling through those terms and conditions. (*See* Affidavit of T. Lawrence, attached as Exhibit 5, at ¶¶ 2-5.) So Plaintiffs

unquestionably had the entire Arbitration Agreement—which they were instructed to "THOROUGHLY READ"—before them when they gave their assent. (*See* Ex. 1 p. 5; Ex. 2 p. 5; Ex. 3 p. 5; Ex. 4 p. 5.)

In addition, because Plaintiffs applied for their loans online, and not in any sort of high-pressure sales environment, they had as much time as they wanted to review and consider the Agreements before attesting to having read them. They also had 60 full days *after* their loan contracts were executed to opt-out of the Agreements entirely. They did not. The Arbitration Agreements are therefore valid and must be enforced.

A. The Parties' Delegation Agreements Require Arbitration of Disputes Over the Arbitration Agreements.

In addition to arbitrating their substantive claims, Plaintiffs are also required to arbitrate their purported defenses to the Arbitration Agreements' enforcement. As discussed above (Section I, page 10), a delegation agreement that "clearly and unmistakably" delegates threshold arbitration issues to the arbitrator must be enforced like any other arbitration agreement. Here, the Parties' "Delegation Agreements" state that "any issue concerning the validity, enforceability, or scope of . . . the Arbitration agreement" shall be arbitrated. (Ex. 1 p. 4; Ex. 2 p. 4; Ex. 3 p. 4; Ex. 4 p. 4.) This language squarely satisfies the "clearly and unmistakably" standard. *See Wootten v. Fisher Investments, Inc.*, 688 F.3d 487, 493-94 (8th Cir. 2012) (holding that an agreement stating "[a]ny dispute, claim or controversy arising out of this Agreement . . . including but not limited to the breach, termination, enforcement, interpretation or validity of this

Agreement and the scope and applicability of the agreement to arbitrate" satisfies the test) *cert. denied,* 133 S. Ct. 865, 184 L. Ed. 2d 658 (U.S. 2013). Plaintiffs must therefore arbitrate each of their contract defenses.[4]

III. The Court Should Not Reach Plaintiffs' Arbitration Defenses as They Must Be Addressed to the Arbitrator. But if the Court were to Reach Them, None Have Merit.

A. The Fact that the Cheyenne River Sioux Tribal Courts Do Not Themselves Conduct Arbitration Is Irrelevant to the Agreements.

Plaintiffs begin their assault on the Agreements by declaring that "[c]ontrary to representations of the Lending Defendants in the [2011] loan agreement, there is no such thing as arbitration in the Cheyenne River Sioux judicial system." (C. ¶ 38.) It is unclear what representations Plaintiffs are referencing, but this is a straw man argument. The Agreements do not specify arbitration in the Tribal Court but arbitration before a panel of Tribal Elders. (Ex. 2 p. 4; Ex. 3 p. 4; Ex. 4 p. 4.) Accordingly, it makes no difference that the Tribal Court, like the federal courts and the courts of South Dakota, do not conduct arbitration—the Tribal Court was never intended to serve as arbitrator.

But Plaintiffs do not relent. They next quote from a letter by Tribal Mediator and Magistrate Mona Demery stating that the "the governing authority does not authorize Arbitration as defined by the American Arbitration Association (AAA) here on the Cheyenne River Sioux Reservation". (C. ¶ 38.). This too is beside the point.

[4] One *possible* exception to Plaintiffs' obligation to arbitrate their contract defenses is their argument that the Tribal Court does not itself conduct arbitration. But this argument is meritless for the reasons discussed in Section III.A.

As a follow up to that letter, Judge Demery clarified—as Plaintiffs are undoubtedly aware—that "[a]rbitration, as in a contractual agreement, is permissible . . . . [while] the Court does not involve itself in the hiring of an arbitrator or setting dates or times for the parties . . . . [a]fter there is an arbitration award, the parties may seek to confirm the award in Tribal Court." (*See* Apr. 4, 2013 Letter from M. Demery to C. Bogue) (attached as Exhibit 6.) This, and not Tribal Court arbitration, is precisely what the Arbitration Agreements provide for: "The arbitrator's award may be *filed* in the Cheyenne River Sioux Tribal Court". (Ex. 1 p. 5; Ex. 2 p. 5; Ex. 3 p. 5; Ex. 4 p. 5) (emphasis added.)

At bottom, the fact the Tribal Court does not itself conduct arbitration is entirely irrelevant because the Tribal Court is not the arbitrator under the Agreements.

B. There is no Conflict Between the Loan Contracts' Judicial Venue Clause and the Arbitration Agreements' Arbitration Requirement.

In attempting to build upon their misplaced argument that the Tribal Court does not conduct arbitration, Plaintiffs next manufacture a false conflict between their Arbitration Agreements and the judicial venue clauses in their loan contracts. How, they ask, can they be required to arbitrate claims if the Tribal Court—which does not conduct arbitration—has "exclusive jurisdiction" over disputes. (C. ¶ 39.) This misunderstands the separate roles of arbitration and Tribal Court jurisdiction.[5]

[5] There is also no conflict between the Agreements' small claims court exception and the Parties' obligations to arbitrate. The small claims court exception does not require claims to be brought in small claims court but instead grants the Parties the right to bring in small claims

As an initial matter, the Court should not reach the argument because the Delegation Agreements require the argument to be raised in arbitration, not here. But were the Court were to address it, there is no conflict between arbitration and Tribal Court jurisdiction. By the Agreements' plain language, the Parties must arbitrate all disputes other than disputes over Plaintiffs' class action waivers. (Ex. 1 p. 4; Ex. 2 p. 4; Ex. 3 p. 4; Ex. 4 p. 4.) The Tribal Court, meanwhile, is designated for (1) disputes over the class action waivers, (2) judicial review and confirmation proceedings, and (3) any challenges to the Arbitration Agreements that are properly decided by a court (i.e., challenges to validity and scope that are not delegated to an arbitrator). (Ex. 1 pp. 1, 4-5; Ex. 2 pp. 1, 4-5; Ex. 3 pp. 1, 4-5; Ex. 4 pp. 1, 4-5.)

Not only does the inclusion of both a judicial venue provision and an Arbitration Agreement not create a conflict, then, but the former is affirmatively " understood . . . as complementary" to the latter. *See Bank Julius Baer & Co., LTD v. Waxfield LTD*, 424 F.3d 278, 284-285 (2d Cir. 2005). For example, in *Patten Securities Corp. v. Diamond Greyhound & Genetics*, 819 F.2d 400 (3d Cir. 1987), *abrogated on other grounds, Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287, 108 S.Ct. 1133 (1988), the Third Circuit reviewed a contract that included both a broad agreement to arbitrate and a forum selection clause that required the parties to submit "to the jurisdiction of the courts of the State of New Jersey and of any federal court sitting in the State of New Jersey with respect to controversies arising under this Agreement." *Id.* at

---

court some claims (i.e., those within the court's jurisdiction) that would otherwise have to be arbitrated. (Ex. 1 p. 5; Ex. 2 p. 5; Ex. 3 p. 5; Ex. 4 p. 5.)

407. The plaintiff there made a similar "conflict" argument to what Plaintiffs assert here. But the Court rejected it, holding that the judicial venue provision did not void the arbitration agreement:

> There is nothing inconsistent between the arbitration obligation and the instant forum selection clause. Both can be given effect, for arbitration awards are not self-enforceable. They may only be enforced by subsequent judicial action. Thus, even if arbitration is completed, the forum selection clause would appear to dictate the location of any action to enforce the award.

Id.; *see also Pers. Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 395 (5th Cir. 2002) (rejecting argument that judicial forum selection clause voided arbitration provision and holding instead that "we must interpret the forum selection clause in the context of the entire contractual arrangement and we must give effect to all of the terms of that arrangement").

In all events, there is no overlap—and therefore no conflict—between what goes to arbitration (in the first instance) and what goes to Tribal Court. Plaintiffs cannot escape their arbitration obligations by falsely claiming the loan contracts are pulling them in different directions.

C. The Cheyenne River Sioux Consumer Disputes Rules is not an Essential Term of Plaintiffs' 2011 Agreements. The Rules' Alleged Non-Existence Does Not Provide a Basis for Evading Arbitration.

In keeping with their conclusory pleading, Plaintiffs also argue that the Cheyenne River Sioux consumer dispute rules referenced in the 2011 Agreements do not exist and

therefore those Agreements are unenforceable. (C. ¶ 38.) As an attack on enforceability, this is an argument for the arbitrator under the Parties' Delegation Agreements.

If the Court were to reach the argument, however, it fails on its own terms. At its core, Plaintiffs' claim is that because of the alleged non-existence of Tribal consumer dispute rules there was no meeting of the minds between the Parties sufficient to form binding Arbitration Agreements.[6] But for the alleged non-existence of the Tribe's consumer dispute rules to affect the Parties' meeting of the minds, the rules must be an essential term of the Agreements. *See Bell, Inc. v. IFS Indus., Inc.*, 742 F. Supp. 2d 1049, 1052 (D.S.D. 2010) ("To form a contract, there must be a meeting of the minds or mutual assent on all essential terms.")

And by arguing that the rules don't exist, Plaintiffs are conceding that, at a minimum, they have no idea what the rules are. So they could not have been essential to Plaintiffs' assent. *See Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1168 (D.S.D. 2010) (finding under analogous circumstances that language "specifying NAF rules was not integral to [Plaintiff's] decision to sign the Arbitration Agreement."). The rules' non-essentiality is even more poignant if Plaintiffs are correct that the rules do not exist. The non-existence of rules that a party has no substantive opinion of in the first place cannot, by definition, be an essential element of that party's assent to a contract.

[6] Although this argument attacks the formation of the Arbitration Agreements (which Defendants address in Section II of this Brief), Defendants address it here because Plaintiffs bear the burden of proving the consumer dispute rules were an essential term of the Agreements.

It might be a different story if the Agreements had made representations about the essential substance of the rules. But they didn't. They simply said that arbitration would be conducted "in accordance" with the rules. (Ex. 2 p. 4; Ex. 3 p. 4; Ex. 4 p. 4.) That's not unlike saying arbitration will be conducted "in accordance with the principles of good faith and fair dealing."

Nevertheless, if Plaintiffs still feel strongly about excising the Agreements' references to the Tribe's consumer dispute rules, Defendants consent to severing the references and using the rules of the AAA and JAMS in their place. *See GGNSC Pierre LLC*, 684 F. Supp. 2d at 1167-68 (language specifying arbitration be conducted "in accordance with the National Arbitration Forum Code of Procedure" is severable and can be replaced with alternative arbitration procedures). But whichever arbitration rules or procedures are used, Plaintiffs' must honor their fundamental obligations to arbitrate.

D. The FAA is not Violated by the 2011 Agreements' Designation of Tribal Elders.

Plaintiffs next declare the 2011 Agreements violate the FAA by specifying arbitration by Tribal Elders. (C. ¶ 39.) Again, this argument goes to the enforceability of the Agreements (or a particular provision thereof) and thus must be decided by the arbitrators themselves. But were the Court to reach it, it is also meritless.

First, Plaintiffs are not entitled to a presumption that tribal decision-makers are biased against non-Indians:

> The unsupported averment that non-Indians cannot receive a fair hearing in a tribal court flies in the teeth of both congressional policy and the Supreme

> Court precedents establishing the tribal exhaustion doctrine. The requirements for this exception are rigorous: absent tangible evidence of bias—and none has been proffered here—a party cannot skirt the tribal exhaustion doctrine simply by invoking unfounded stereotypes.

Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 34 (1st Cir. 2000) (citing among others *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987)). Bare allegations of bias do not get a litigant out of tribal court. *Burrell v. Armijo*, 456 F.3d 1159, 1168 (9th Cir. 2006). Out of tribal arbitration. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 (1978). Or out of either just because non-tribal law is involved. *See Altheimer & Gray v. Sioux* Mfg. Corp., 983 F.2d 803, 814 (7th Cir. 1993). Contrary to Plaintiffs' insinuation, tribal forums are presumed to be fair and competent. *See Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold*, 27 F.3d 1294, 1301 (8th Cir, 1994) ("Absent any indication of bias, we will not presume the Tribal Court to be anything other than competent and impartial.").

Second, the FAA in no way prohibits Tribal Members from arbitrating Plaintiffs' claims. Quite the opposite, the FAA grants contracting parties wide latitude to choose the terms of their arbitration, including the composition of the arbitration panel. *See Omron Healthcare v. Maclaren Exports*, 28 F.3d 600, 604 (7th Cir.1994) (ruling a forum selection clause choosing the High Court of Justice in England is enforceable despite allegations of bias against the plaintiff). As such, contracting parties may choose, among other things, 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). They may even specify preferences for arbitrators based on 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 the agreement to arbitrate a division of assets before a Jewish arbitration panel and uphold panel's award.)

Likewise, courts routinely enforce arbitration agreements that specify arbitrators with a community or industry affiliation shared by one or more parties to the dispute. *See 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 Concepcion*, 131 S. Ct. at 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").

Taken together, 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.").

Of course, if a chosen arbitrator turns out to in fact be prejudicially biased, Plaintiffs (and Defendants) have post-arbitration FAA remedies. Under Section 10 of Act, for instance, Plaintiffs can ask a court to vacate any prejudicially-biased arbitration award. *See id,*; *see also* 9 U.S.C. § 10. But to invoke Section 10, Plaintiffs must first arbitrate. They may not preempt arbitration altogether by speculating about arbitrator bias. *See Cox v. Piper, Jaffray & Hopwood, Inc.*, 848 F.2d 842, 843-44 (8th Cir. 1988) ("Appellants cannot obtain judicial review of the arbitrators' decisions about the qualifications of the arbitrators or other matters prior to the making of an award.").

E. The Agreements only Permit Defendants to Choose the Arbitrators if Plaintiffs Refuse to Participate in the Selection Process.

At last, Plaintiffs claim the FAA is again violated because the arbitrators "are chosen solely by the Defendants". (C. ¶ 39.) To the extent this is an arbitrator-bias argument, it must be raised after arbitration. *See Cox*, 848 F.2d at 843-44. To the extent it is attacking the Arbitration Agreements, it must be directed to the arbitrators under the

Parties' Delegation Agreements. But to the extent it is reached by the Court, it is false for the following reason: The Agreements all provide *Plaintiffs* the right to select the arbitrators. (Ex. 1 p. 4; Ex. 2 p. 4; Ex. 3 p. 4; Ex. 4 p. 4.) It is only if Plaintiffs decline to make a selection that Defendants can choose who will arbitrate.[7]

Plaintiffs may not avoid arbitration then by attacking the arbitrator selection process. Plaintiffs agreed to the process, the process is permitted under the FAA, *it grants Plaintiffs the right to select the arbitrators*, and Plaintiffs have post-arbitration remedies if their speculations about bias come true.[8] All of which is to say—Plaintiffs must arbitrate their claims.

III. The Court Should Stay Proceedings, Appoint Arbitrators, and Compel Arbitration.

Because (1) the Arbitration Agreements are valid, (2) the Agreements cover Plaintiffs' claims, and (3) Plaintiffs have no arbitration-neutral contract defenses (and because such defenses must in all events be raised in arbitration), the Court should stay these proceedings under Section 3 of the FAA and compel individual arbitration under Section 4. *See* 9 U.S.C. §§ 3-4. The only question remaining is who should be appointed to arbitrate.

---

[7] Even if the Arbitration Agreements did in fact specify that Defendants will choose the arbitrators (which they do not) that specification is binding under the FAA: "The parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." *See Delta Mine Holding Co. v. AFC Coal Properties, Inc.*, 280 F.3d 815, 821 (8th Cir. 2001) (quotations and citations omitted).

[8] Defendants also have no objection to arbitration before the AAA or JAMS. In February 2012, Western Sky amended its arbitration agreements to expressly provide for AAA or JAMS arbitration. (*See, e.g.*, Ms. Jones' Arbitration Agreement, Ex. 1 p. 4.)

This Court resolved the issue of arbitrator-appointment under Section 5 of the FAA in *GGNSC Pierre LLC*—a case in which the designated arbitration forum, the NAF, was no longer available—by ordering the Parties to work together to select arbitrators for the Court's review and appointment. That approach make sense. There is no reason that, upon entry by this Court of an order compelling arbitration, the Parties cannot work together in good faith to select arbitrators to resolve Plaintiffs' claims.

Finally, as Defendants' counsel was finalizing this brief they became aware of an order issued today (August 19, 2013) by the District Court for the Southern District of Florida denying a motion by CashCall to compel arbitration of a dispute under a January 2011 Western Sky loan contract. *See Inetianbor v. CashCall, Inc.*, Civ. No. 13-60066 (S.D.Fla. Aug. 18, 2013) (order attached as Exhibit 7). The case, *Inetianbor v. CashCall*, has featured two orders compelling arbitration, one order confirming the second of those orders, and two orders vacating arbitration. *See id*. It is as confusing as it sounds. Counsel here is not counsel in *Inetianbor* and has not had time to meaningfully review the court's latest order. It appears, however, that the court ruled that arbitration by Tribal Elders is unavailable. If that finding (which Plaintiffs here do not allege) were correct and applied to Plaintiffs' Arbitration Agreements, Section 5 of the FAA would require the Court to appoint substitute arbitrators to arbitrate under the 2011 Agreements. *See GGNSC Pierre LLC*, 684 F. Supp. 2d at 1168-69; *see also Green v. U.S. Cash Advance Illinois, LLC*, 13-1262, 2013 WL 3880219 (7th Cir. July 30, 2013) (attached as Exhibit 8). Plaintiffs cannot, after all, credibly claim that the 2011 Agreements' specification that arbitration

would be conducted by Tribal Elders was integral to their assent such that Section 5 does not apply. To the contrary, Plaintiffs are openly contemptuous of Tribal Elder arbitration. For this reason, and because Defendants have already consented to arbitrate claims under the 2011 Agreements before AAA or JAMS, *Inetianbor* should have no impact on the Parties' ability to work together to select arbitrators once the Court enters an order compelling arbitration.

VI. Conclusion

The Parties executed binding Agreements requiring the arbitration of all disputes. The Federal Arbitration Act requires these Agreements to be enforced. The Court should therefore stay judicial proceedings, order the Parties to select arbitrators, and compel the arbitration of Plaintiffs' claims on a bilateral basis.

VII. Request for Oral Argument

Defendants respectfully request oral argument on their Motion to Stay Proceedings and Compel Arbitration, as permitted by D.S.D. Civ. LR 7.1(C).

Dated: August 19, 2013

Respectfully submitted by,

/s/ Cheryl Laurenz-Bogue
Cheryl Laurenz-Bogue
Bogue & Bogue
P.O. Box 50
Faith, SD 57626
Telephone: (605) 976-2529
boguelaw@yahoo.com

Claudia Callaway (applying *pro hac vice*)
John Black (applying *pro hac vice*)
Julian Dayal (applying *pro hac vice*)
KATTEN MUCHIN ROSENMAN LLP
2900 K Street, NW
North Tower - Suite 200
Washington, DC 20007
Telephone: (202) 625-3590
Facsimile: (202) 295-1120
claudia.callaway@kattenlaw.com

Michael J. Lohnes (applying *pro hac vice*)
KATTEN MUCHIN ROSENMAN LLP
525 W. Monroe Street
Chicago, IL 60661-3693
Telephone: (312) 902-5341
Facsimile: (312) 577-4721
michael.lohnes@kattenlaw.com

Attorneys for Defendants Western Sky Financial, LLC, PayDay Financial, LLC, CashCall, Inc., and Martin Webb