IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

CHAD MARTIN HELDT, CHRISTI W. JONES, SONJA CURTIS, and CHERYL A. MARTIN, individually and on behalf of all similarly situated individuals, Plaintiffs, -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.	Court File No. 3:13-cv-3023-RAL

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Compel Arbitration

Arbitration is a matter of consent—not coercion. Here, Defendants seek to enforce a purported arbitration provision that cannot possibly be enforced because its essential and integral terms do not exist. Through uneven bargaining power, Defendants misled Plaintiffs into believing that (1) the Cheyenne River Sioux Tribal Nation conducts arbitrations, (2) the Cheyenne River Sioux Tribal Nation has consumer rules, and (3) the purported arbitration provision was made pursuant to a transaction involving the Indian Commerce Clause of the Constitution. None of those things are true, and they cannot be true because the (1) Cheyenne River Sioux Tribal Nation does not conduct arbitrations, (2) the tribe does not have consumer rules, and (3) the transaction could not be subject to the Indian Commerce Clause because it was not made by an Indian tribe—it was made by a South Dakota limited liability (LLC) company owned by one person. Simply put,

Defendants cannot enforce the purported arbitration provision because it is impossible to perform under its terms.

Defendants' argument is based on the same smoke and mirrors as their purported arbitration provision. The two primary terms of the agreement do not exist.

Not surprisingly, the only two federal district courts that have considered the arbitration provision at issue in this motion have found it to be "a sham and an illusion" and "void." After the United States Court of Appeals for the Seventh Circuit remanded the arbitration issue to the Northern District of Illinois, the Court made the following findings of fact and law:

> It is abundantly clear that, on the present record, the answer to the [question of whether the Cheyenne River Sioux Tribe has any authorized arbitration mechanism available to the parties and whether the arbitrator and method of arbitration required under the contracts is actually available] is a resounding no. … The scheme described in the New Hampshire Banking Department's Cease and Desist Order has been apparently devised for the purpose of evading federal and state regulation of Defendants' activities. The intrusion of the Cheyenne River Sioux Tribal Nation into the contractual arbitration provision appears to be merely an attempt to escape otherwise applicable limits on interest charges. As such, the promise of a meaningful and fairly conducted arbitration is a sham and an illusion.

Jackson v. PayDay Financial, LLC, et al., No. 11-cv-9288, slip op. at 5–6 (N.D. Ill. Aug. 28, 2013) (attached hereto as Exhibit A). The record of facts that the Court adopted as true is attached hereto as Exhibit B. Similarly, the United States for the Southern District of Florida made the following findings of fact and law:

> Therefore, based on the record evidence, the Court makes two findings. First, the Court finds that Mr. Chasing Hawk is not, and does not purport to be, conducting arbitration as an authorized representative of the Tribe. Second, having failed to select an arbitrator who is an authorized representative, CashCall has further failed—despite numerous opportunities—to show that the Tribe is available through an authorized representative to conduct arbitrations. Accordingly, the Court concludes that Plaintiff has provided new evidence showing that the agreed upon arbitral forum is not available, and that reconsideration is appropriate.

Inetianbor v. CashCall, Inc., 13-cv-60066, slip op. at 9 (S.D. Fla. Aug. 19, 2013) (attached hereto as Exhibit C). The Court continued:

> At the August 16, 2013 hearing, CashCall conceded that, while the Tribe has rules concerning consumer relations—e.g., usury statutes—it does not have any consumer dispute rules. Without such rules, it is obvious that arbitration cannot be conducted "in accordance with [Tribal] consumer dispute rules" as required by the arbitration agreement. Accordingly, the Court concludes that Plaintiff has provided new evidence demonstrating that 1) the arbitral forum does not exist, and 2) rules governing the purported forum do not exist. Moreover, for the reasons stated in the April 1 Order, the selection of the Tribe as an arbitrator was integral to the agreement to arbitrate.

Id. at 10. Two other federal courts have rejected the same arguments Defendants make here, and Defendants have not provided any reason why this Court should rule any differently.

Defendants ask this Court to compel Plaintiffs into an arbitration scheme that is nonexistent. There is no Tribal arbitration. There are no Tribal consumer dispute rules. And the transaction has nothing to do with the Tribe. Defendants ask this Court to overlook those facts as if they were minor details or drafting errors. But they are not.

Those terms are substantive and integral terms of the proffered arbitration agreements. Without the existence of the forum and the procedures, there can be no arbitration as contemplated by the proffered agreements.

I. Factual Background

This litigation is one case of dozens of private and public civil actions against Defendants pending throughout the United States. Plaintiffs generally detail the nature of the Western Sky consumer loans scheme in their Amended Complaint; additionally, the United States District Court for the Northern District of Illinois adopted a volume of documents and transcripts produced as part of the other actions as fact.[1] Plaintiffs submit that record to this Court as Exhibit B. The following is a brief summary of the facts contained in the Amended Complaint and Exhibit B.

Defendants offer small loans through various Internet websites and a call center. Each Defendant plays a different role in the operation, but Defendant CashCall is the ringleader. CashCall pays for Western Sky's operating office space (which is primarily located on Tribal land), reimburses Western Sky for its employee payroll, pays for Western Sky's operating expenses, and provides Western Sky with a toll free telephone and fax number. CashCall also pays for maintenance of Western Sky's computer systems. CashCall markets Western Sky loan products via television, radio, and Internet websites. Once a consumer applies for a loan, CashCall reviews the application for underwriting requirements and obtains credit information. After CashCall approves the loan, Western Sky steps in to execute a promissory note (using CashCall's computer systems) and then disburses the loan money using a dedicated bank account that is funded by CashCall. By

[1] "Other than this Court's disagreement with Plaintiffs' position as to the availability of tribal law, pages 8 through 10 of 'Plaintiffs' Statement of Relevant Facts, and On Further Discovery Required on Limited Remand by Court of Appeals' fairly describe what the facts show." *Jackson*, No. 11-cv-9288, slip op. at 6 (N.D. Ill. Aug. 28, 2013) (Exhibit A).

agreement, CashCall then purchases the consumer loan from Western Sky. From then on, Western Sky is out of the picture.

Western Sky does not accept payments from consumers. Western Sky does not make loan decisions. Western Sky does not market the loan product. Western Sky does not service the loan. Western Sky does not fund the loan with its own money. Western Sky earns money by receiving a percentage of the value of each loan from CashCall. Defendants have made substantial efforts to conceal the business scheme from consumers and regulators. Western Sky does not identify its relationship with CashCall in any marketing materials, and the loan agreements identify Western Sky as the "lender." Consumers believe they are dealing with a tribal entity called Western Sky but, in reality, they are dealing with a California corporation that specializes in payday loans.

The scheme allows CashCall to make and fund high-interest loans that violate every usury law in the country by laundering them through Western Sky—a front organization. This lawsuit challenges the legality of a California corporation operating on Tribal land for the sole purpose of executing a loan agreement. The only contact that any of the consumer loans have with the Cheyenne River Sioux Tribal Nation is that an employee of Western Sky clicks a button to execute the loan on a computer server located in California.

Various regulatory agencies from states throughout the country have already shut Defendants operations down in their states—and many others are in the process of doing so. In addition to the Federal Trade Commission's action against the same Defendants to the instant case pending before this Court (*FTC v. Payday Financial, LLC et al.*), judicial notice should be taken of the fact that in recent years more than ten states have filed lawsuits and issued various administrative findings of fact and cease and desist orders

against Defendants for similar lending activity as the Plaintiffs in this case allege.[2] Those investigations have uniformly uncovered the same set of circumstances, usurious lending practices, shell-game funding and lack of tribal immunity related to these same Defendants. Since this lawsuit was filed, and beginning in late August 2013, Western Sky has laid off most of its employees at its locations in Timber Lake and Eagle Butte, South Dakota. "Western Sky will only have 17 employees left after it closes the Eagle Butte office." *Western Sky Laying Off Nearly All Its Workers*, Ben Dunsmoor, Aug. 23, 2013, http://www.keloland.com/newsdetail.cfm/western-sky-laying-off-nearly-all-its-workers/?id=152343. Additionally, Payday Financial, LLC through its subsidiary Lakota

[2] *See, e.g., The People of the State of California v. CashCall, Inc., a California Corporation,* No. BC420115 (Superior Court, Los Angeles County, State of California); *State of Colorado ex rel. John W. Suthers, Attorney General v. Western Sky Financial*, No. 11-cv-638 (District Court, Denver County, State of Colorado); *In re Western Sky Financial, LLC,* No. 13-CC-265 (Illinois Department of Financial and Professional Regulation, Division of Financial Institutions); *Commissioner of Financial Regulation v. CashCall and Reddam,* No. CFR-EU-2209-184 (State of Maryland); *Maryland Commissioner of Financial Regulation v. Western Sky Financial, LLC et al.*, No. CFR-FY-2011-182 (State of Maryland); *Maryland Commissioner of Financial Regulation v. Western Sky Financial, LLC, et al.*, No. 1:11-cv-00735 (D. Md.); *In re CashCall, Inc. and WS Funding, LLC,* Docket No. 2013-010 (State of Massachusetts); *State of Missouri v. Webb,* No. 4:11-cv-1237-AGF (E.D. Mo. Mar. 27, 2012); *In re CashCall, Inc., John Paul Reddam, President and CEO of CashCall, Inc., and WS Funding LLC,* No. 12-308 (State of New Hampshire Banking Department); *In re Western Sky Financial, LLC,* No. I-12-039 (Department of Consumer Business Services for the State of Oregon); Washington State Department of Financial Institutions Statement of Charges, dated Oct. 18, 2012; *West Virginia v. CashCall, Inc.,* 605 F.Supp.2d 781 (S.D.W. Va. 2009); *State of West Virginia ex rel. McGraw v. Payday Loan Resource Center, LLC, et al.,* No. 10-MISC-372 (Circuit Court, Kanawha County, State of West Virginia); *Federal Trade Commission v. PayDay Financial, LLC,* No. 3:11-cv-03017-RAL; *State of Minnesota, by its Attorney General, Lori Swanson and its Commissioner of Commerce, Michael Rothman v. CashCall, INc., et al.,* No. 27-cv-13-12740 (District Court, Hennepin County, State of Minnesota); *Thomas Brown v. Western Sky Financial, LLC et al.,* No. 1:13-CV-00255 (M.D.N.C.). *See also Find the Loan Behind the Loans,* Gretchen Morgenson, The New York Times, Sept. 7, 2013, http://www.nytimes.com/2013/09/08/business/find-the-loan-behind-the-loans.html?smid=pl-share; *High-interest loan company Western Sky lays off most workers,* Argus Leader, Associated Press, Aug. 23, 2013, http://www.argusleader.com/viewart/20130823/UPDATES/308230049.

Cash, has changed the mandatory arbitration terms on their website to name the National Arbitration Forum ("NAF") as the applicable set of arbitration rules and sole administrative provider of arbitration services for new loans. This change indicates that Payday Financial, LLC is not easily deterred, but has revised its business tactics and expeditiously abandoned its position that the arbitration rules and procedures of the Cheyenne Sioux River Tribe exist or are a valid means of dispute resolution. *See* Lakota Cash Terms and Conditions https://www.lakotacash.com/TermsConditions.aspx (last accessed Sept. 9, 2013).

The question this lawsuit seeks to resolve is whether such a scheme can legally circumvent state usury laws. Plaintiffs believe the answer is no, and that, additionally, the scheme violates various state consumer protection laws by concealing the nature of the enterprise to consumers. In opposition to Defendants' Motion to Compel Arbitration, Plaintiffs challenge the legality of the portion of the loan agreements that purportedly requires them to arbitrate disputes arising out of the Indian commerce clause in Tribal arbitration conducted pursuant to Tribal consumer dispute rules. Plaintiffs believe that the proffered arbitration provision is void and nothing more than another of Defendants' efforts to avoid liability for making usurious loans.

II. The Legal Standard

The United States Supreme Court has made clear that arbitration is "a matter of consent, not coercion … ." *Mastrobuono v. Shearson Lehman Hutton Inc.*, 514 U.S. 52, 57 (1995). The general policy in favor of arbitration does not apply to the determination of whether there is a valid agreement. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754 (2002). Rather, in determining whether the parties agreed to arbitrate and whether there is a valid agreement, this Court must apply state law contract principles. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924 (1995). The FAA renders arbitration provisions invalid or unenforceable "upon such grounds as exist

at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (West). Regardless of whether federal or state law applies to the enforcement of the arbitration provision, "[w]hen deciding whether the parties agreed to arbitrate a certain matter … courts generally … should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995). In sum, the role of the Court is to rigorously apply the terms of an arbitration agreement, but only to the extent that the proffered arbitration provision is a valid contract.

III. Argument and Authorities

There are at least three illusory promises in the purported arbitration provision: (1) that the Tribe would conduct the arbitration; (2) that the arbitration would proceed under the Tribe's consumer dispute rules; and (3) the arbitration provision is made as part of a transaction involving the Indian Commerce Clause of the U.S. Constitution. The elements are illusory because none are true (or even possible), but all three are integral to the loan agreement (which repeats the word "tribe" or some variation of it at least twenty-six times).

The proffered arbitration provisions state:

> **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 further agree that no other state or federal law or regulation shall apply to this Loan Agreement.

(Defs. Exs. 1–5., emphasis in original) Later, the provisions state: "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 … ."[3] (Defs. Exs. 2–5., emphasis added) Additionally, the documents provide that:

> Any party to a dispute … 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 … . Arbitration shall be conducted in the Cheyenne River Sioux Tribal Nation by your choice of either (i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council, and shall be conducted in accordance with the Cheyenne River Sioux Tribal Nation's consumer dispute rules and the terms of this Agreement.

(*Id*.) Finally, the proffered provisions state:

> 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.

(*Id*. emphasis in original.) The entire documents are littered with references to the Tribe, Tribal law, or Tribal jurisdiction. The only mention of other venues, laws, forums, or jurisdiction is to say that none of it applies.

A. The Tribal Arbitration Forum is Unavailable and Integral to the Proffered Arbitration Provision.

Defendants admit—as they must—that "the Tribal Court does not itself conduct arbitration … .". (Def. Mem. p. 14.) Other courts have come to the same conclusion. *See Jackson*, No. 11-cv-9288, slip op. at 5–6 (attached hereto as Ex. A); *Inetianbor*, 13-cv-

[3] The proffered agreement for Plaintiff Heldt does not contain this provision, but the proffered arbitration provision is unenforceable against him for all of the other reasons outlined in this Memorandum.

60066, slip op. at 9 (attached hereto as Ex. C). There is no dispute that the forum specified by Defendants does not exist. The only issue is whether this Court may appoint a substitute forum. The answer is a clear "no."

Section 5 of the FAA allows a court to appoint a substitute arbitrator in certain circumstances. 9 U.S.C. § 5. Some courts have held that Section 5 only applies when the parties fail to name any arbitrator at all. *E.g. In re Salomon Inc. Sareholders' Derivative Litig.*, 68 F.3d 554, 560–61 (2d Cir. 1995) (refusing to apply FAA § 5 to replace named but unavailable arbitrator; Section 5 only applies when parties fail to name arbitrator from outset). Other courts apply Section 5 to appoint an arbitrator when the named arbitrator is unavailable. *E.g. Ranzy v. Tijerina*, 393 Fed. Appx. 174, 175 (5th Cir. 2010) (holding Section 5 may permit a court to appoint an arbitrator if the named arbitrator is unavailable). However, the authority to appoint a substitute arbitrator is not limitless—arbitration remains "a matter of consent, not coercion" *Mastrobuono v. Shearson Lehman Hutton Inc.*, 514 U.S. 52, 57 (1995) and court must "rigorously enforce" such agreements. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Accordingly, even where Courts apply Section 5, they do not do so in every case where an arbitrator is unavailable. Instead, those courts "hold that § 5 applies only if the selection of the specific arbitral forum is an ancillary logistical concern." *Klima v. Evangelical Lutheran Good Samaritan Soc.*, 10-CV-1390-JAR-JPO, 2011 WL 5412216 (D. Kan. Nov. 8, 2011) (collecting cases that support the proposition). "Section 5 does not, however, permit a district court to circumvent the parties' designation of an exclusive arbitration forum when the choice of that forum 'is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern.' " *Ranzy* , 393 at 176 citing *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000); *In re Saloon Inc. S'holders' Derivative Litig.*, 68 F.3d 554, 561 (2d Cir. 1995) (citing *Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 333-34 (5th Cir.), *cert. denied*, 484 U.S. 943 (1987). *See also In re Salomon Inc. Shareholders' Derivative Litig. 91 Civ. 5500 (RRP)*, 68 F.3d 554, 561 (2d Cir. 1995)

("we read the agreements here as providing for arbitration only before the NYSE. … In such a case, where 'it is clear that the failed [forum selection] term is not an ancillary logistical concern but rather is as important a consideration as the agreement to arbitrate itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail.' " citations omitted). Accordingly, if the selection of the Tribal representative is integral to the proffered arbitration agreements, there can be no arbitration of this matter.

In this case, the only possible interpretation of the proffered arbitration provision is that the Tribe must conduct the arbitration. The proffered contracts state that the arbitration **shall** be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative. (Defs. Exs. 2–5., emphasis added.) Put differently, the proffered provisions explicitly state that the Tribe shall be the exclusive forum. Numerous courts have found that use of the word "shall" in selection of an arbitrator renders the selection integral to the agreement. *E.g. Ranzy*, 393 Fed. Appx. at 175 ("the arbitration agreement plainly states that Ranzy 'shall' submit all claims to the NAF for arbitration."). *See also Kilma*, 2011 WL 5412216 *2–4 (collecting cases); *Intianbor*, 13-cv-60066, slip op at 2–5 (S.D. Fla. April 1, 2013) (attached hereto as Exhibit D). But the Tribe does not conduct arbitrations. (Am. Compl. at Ex. A.[4]) Additionally, the arbitrator that Defendants selected in a similar matter stated, on the record, that "because again this is a private business deal. The Tribe has nothing to do with any of this business." *Inetianbor*, 13-cv-60066, slip op. at 7–8 (attached hereto as Ex. C). The plain language of

[4] Defendants offer a "clarified" letter by the author of the letter attached to Plaintiffs' Amended Complaint. The "clarification" reiterates the fact that the Tribe does not conduct arbitrations, but that the Tribe will enforce contracts. The distinction is the same as in any federal or state court—federal or state governments do not conduct arbitrations—they merely enforce them through their courts.

the proffered arbitration provisions shows that the only possible arbitration forum is a Tribal representative.

Other Courts considering the same arbitration provision proffered by configurations of the same Defendants as in this case have concluded that arbitration by a Tribal representative is integral to the agreement and unavailable. The Southern District of Florida concluded, "it is clear that the choice of the tribal forum was integral to the parties' agreement to arbitrate." *Intianbor*, slip op. 7 (Exhibit D). The court also concluded, "the instant agreement makes clear that it is to be governed solely by tribal law and that Plaintiff can consent only to the personal jurisdiction of the tribe. Moreover, the language of the agreement is mandatory, not permissive, stating that arbitration 'shall be conducted by the Cheyenne River Sioux Tribal Nation.' " *Id.* In the end, the Florida court held, "[t]herefore, § 5 of the FAA does not apply in this case, and the unavailability of the designated arbitrator will void the arbitration agreement." *Id.* Similarly, the Seventh Circuit asked the Northern District of Illinois to make findings of fact with respect to "Whether the Cheyenne River Sioux Tribe has an authorized arbitration mechanism available to the parties and whether the arbitrator and method of arbitration required under the contract is actually available." *Jackson*, slip op. 1 (Ex. A.) The district court answered, "It is abundantly clear that, on the present record, the answer to the [appellate court's question] is a resounding no." *Id.* at 6. This Court should come to the same conclusion. The proffered arbitration agreements unmistakably name the Tribe and its authorized representative as the only acceptable arbitrators. Without the available of such a forum, the arbitration agreements must fail.

Defendants ask this Court to apply *Green v. U.S. Cash Advance Illinois*—a non-precedential case from the Seventh Circuit that breaks from other appellate courts that have considered the issue. In *Green*, the Court appointed a substitute arbitrator because the National Arbitration Forum ("NAF"), the forum named in the agreement, was no longer conducting consumer arbitrations. 2013 WL 3880219 (7th Cir. Jul. 30, 2013). The

Seventh Circuit required the substitute arbitrator to apply the rules that the original arbitrator would have applied. *Id.* at *5. The facts here are different in two important ways: (1) the purported arbitration agreement requires the application of arbitration rules that do not exist, and (2) unlike the NAF, Tribal arbitration is a thing of fiction. The court in *Green* reasoned that a substitute arbitrator could apply NAF rules to conduct the arbitration in a way that is substantially similar to what the NAF would have done. A similar result is impossible here.

Any agreement to arbitrate that may have been made is void because the forum selection is integral to the proffered arbitration agreements. Every other court that has considered the exact same agreement has come to the same conclusion: there is no such thing as Tribal arbitration. Accordingly, Defendants motion to compel arbitration must be denied.

B. The Specified Rules Governing the Supposed Arbitration Do Not Exist.

Just as the existence of a Tribal arbitration forum is integral to the proffered arbitration provision, so too is the procedure by which the arbitration is to be conducted. And just as the Tribe does not authorize arbitrations, it does not have consumer dispute rules. Defendants do not claim that the Tribe has consumer dispute rules, instead they side step the issue by arguing that *if* they don't exist, they can't be integral to the arbitration agreement. Defendant CashCall played a similar game of hide-the-ball to the United States District Court for the Southern District of California, where it failed to respond to the merits of the plaintiff's argument that the rules do not exist. In its August 28th order, the Court stated, "At the August 16, 2013 hearing, CashCall conceded that, while the Tribe has rules concerning consumer relations—e.g., usury statutes—it does not have any consumer dispute rules." With that information, the court concluded, "Without such rules, it is obvious that arbitration cannot be conducted 'in accordance with [Tribal] consumer

dispute rules' as required by the arbitration agreement." *Inetianbor v. CashCall, Inc.*, 13-cv-60066, slip op. at 10 (S.D. Fla. Aug. 19, 2013) (Exhibit C).

At some point, perhaps the Defendants will admit in this case, as they eventually had to in Florida, that the Tribe's consumer dispute rules are nothing at all. Until then, Plaintiffs will address Defendant's hypothetical argument with an argument. The existence of the Tribal dispute rules shows that arbitration cannot proceed as stated in the proffered arbitration provisions. The agreement requires that the arbitration proceed "in accordance with its consumer dispute rules." Without those rules, how can the Plaintiffs have possibly consented to arbitration? Defendants do not answer that question. Instead, they analogize to a case in which the forum was unavailable. Here, Defendants said that the arbitration would proceed according to rules that do not—and did not—exist. The promise of arbitration according to the Tribe's consumer dispute rules was a lie.

C. The Proffered Arbitration Applies only to a Transaction Involving the Indian Commerce Clause of the U.S. Constitution.

The proffered arbitration provision states, "THIS ARBITRATION PROVISION IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSITITION OF THE UNITED STATES OF AMERICA … ." (Def. Exs. 1–4 at p. 4., emphasis in original.) The Indian Commerce Clause of the U.S. Constitution states, "[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." Article I, Section 8, Clause 3. The clause, then, applies only to Congressional regulation of commerce involving Indian tribes.

The transaction at issue in this litigation has nothing to do with an Indian tribe; it involves transactions between individuals living in Minnesota, Texas, and Virginia; and South Dakota LLCs (owned by one person) and a California Corporation (also owned by one person). The scheme uncovered by the New Hampshire Department of Banking during its investigation of Defendants' relationship shows that the conspiracy to violate

United States laws was made between CashCall (a California corporation) and Western Sky (a South Dakota LLC) and their subsidiaries. (*See* Exhibit B-17.) The only relationship to the Tribe is that *some* calls made to the Defendants went through a call center (paid for by CashCall) on tribal land, but were forwarded on to CashCall employees in California for substantive action. (*See id.*) The fact that the provision was made pursuant to a transaction involving the Indian commerce clause of the constitution was so important to Defendants that they printed it in all capital letters so that it would stand out above all other terms of the agreement.

In the words of Tribal Elder Robert Chasing Hawk, "The Tribe has nothing to do with any of this business." *Inetianbor*, 13-cv-60066, slip op. at 8 (Ex. C). Accordingly, the arbitration provision does not apply to the dispute at issue in this litigation. The proffered arbitration provisions require that the transaction be made pursuant to the Indian Commerce Clause. The transaction here was not made pursuant to the Indian commerce clause; rather, it was made between private individuals and private companies. Accordingly, Defendants' motion to compel arbitration must be denied.

For the same reasons as above, Defendants' argument that the arbitrator must determine the arbitrability of the proffered arbitrations fails: there is no such thing as an arbitrator authorized by the Tribe to make the decision under Tribal consumer dispute rules. Defendants' superficial argument is that because the language in the proffered provisions delegates threshold arbitration issues to the arbitrator, this Court has no ability to review the validity of the Agreement. To support this argument, Defendants rely exclusively on *Wootten v. Fisher Investments, Inc.*, 688 F.3d 487 (8th Cir. 2012). In *Wootten*, the court held, in part, that the language in the arbitration agreement was "a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator." *Id.* at 494. Defendants argue that because the language in the proffered arbitration provisions is similar to that in *Wootten*, this Court is not a proper forum to determine arbitrability.

The problem with Defendants' argument is that it completely misses the mark. The question at bar is not whether the language in the proffered arbitration provisions is "clear and unmistakable," the question is whether the agreement to arbitrate is valid. As stated by the Eighth Circuit in *Wootten*, "an exception exists where a party 'challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.' *See Id*. at 493 ftn. 3 citing *Rent–A–Center v. Jackson,* 130 S.Ct. 2772, 2777–78 (2010). Plaintiffs' challenge to the proffered arbitration provision fits soundly within this exception because the validity of the agreement is the issue at bar. The Supreme Court has held, "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777–78 (2010). Here, Plaintiffs challenge the entire proffered arbitration provision, including the supposed delegation provision, as illegal and void. Remarkably, Defendants ignore this exception, fail to apprise the Court of the relevant case law, and instead argue about language in a "Delegation Agreement" that is nothing more than a few words in a document littered with deception, fictional forums, and imaginary procedures. There is no arbitrator to whom the parties may submit the issue of arbitrability because the entire promise of an arbitration is a sham and an illusion.

IV. Conclusion

Defendants ask this Court to compel arbitration when they have offered a supposed arbitration agreement that is nothing more than one element of a larger scheme to circumvent the law to take advantage of unsuspecting consumers. Just as two other district courts and many state regulatory agencies have already done—this Court should put a stop to the scam. There is no arbitration agreement in this case because the

document that Defendants ask this Court to enforce is nothing more than a tool of deception that was created by a California businessman and a single American Indian for the purpose of avoiding the law. The arbitration provision cannot be enforced because there is nothing to enforce. There is no Tribal arbitration, there are no Tribal consumer dispute rules, and there is no Tribe involved in the transaction. Defendants now attempt to pass off their deceit as minor drafting errors, all of which be cured and blessed by this Court. But they have not given the Court any reason to exercise its discretion to cure their errors. That is because the only reason there can be is that the Defendants want to avoid liability. They have wound up their fraudulent scheme and now want to slink away into the abyss that is a fictional Tribal "arbitration."

That must not happen. Plaintiffs—and all consumers—deserve justice. They deserve to have Defendants' illegal interest rates remedied pursuant to state law. They deserve to have their credit reports corrected to reflect the true nature of the loans. And they deserve to hold Defendants accountable for their illegal deeds.

DATED: September 9, 2013

Respectfully submitted,

/s/ Wade L. Fischer .

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D.S.D. CIV. LR 7.1(B)(1) WORD COUNT COMPLAINCE CERTIFICATE

I, Wade L. Fischer, certify that Plaintiff's Memorandum in Opposition to Defendants' Motion to Compel Arbitration complies with the word count limitations in D.S.D. Civ. LR 7.1(B)(1) specifying that briefs shall not exceed 12,000 words. In preparing this Memorandum, I used Microsoft Word 2010, and this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. I certify that this Memorandum contains 5,375 words.

DATED: September 9, 2013

Respectfully submitted,

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