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; CASHCALL, INC; and WS FUNDING, LLC	*	
Defendants.	*	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION

Dated: September 26, 2013

Defendants Payday Financial, Western Sky Financial, LLC, Martin A. Webb, CashCall, Inc., and WS Funding, LLC ("Defendants") respectfully submit this reply in support of their Motion to Stay Proceedings and Compel Arbitration.[1]

PRELIMINARY STATEMENT

Defendants' Motion made five principal arguments:

A. The Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") *requires* the Court to enforce the Parties' Arbitration Agreements because (1) "there is a valid agreement to arbitrate between the parties", and (2) "the dispute falls within the scope of that agreement". *See Kubista v. Value Forward Network, LLC*, Civ. No. 12-4066, 2012 WL 2974675, at *2 (D.S.D. July 20, 2012).

B. Plaintiffs may not avoid the Agreements by attacking their loan contracts or conflating the Agreements' enforceability with the merits of their claims. *See id.* at *4-5 ("a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, 126 S. Ct. 1204, 1208, 163 L. Ed. 2d 1038 (2006) (holding that challenges to an underlying contract are not relevant to the enforceability of an included arbitration agreement).

C. The Court may not consider Plaintiffs' direct challenges to the Arbitration Agreements because the Parties agreed in separate "Delegation Agreements" to arbitrate "any issue concerning the validity, enforceability, or scope of ... the Arbitration agreement." *See Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779, 177 L. Ed. 2d 403 (2010) (courts must enforce delegation agreements that clearly and unmistakably delegate arbitrability issues to the arbitrator). Only challenges to the class waiver provisions are not arbitrable, but Plaintiffs do not challenge the waivers.

D. Plaintiffs' direct challenges to arbitration would be unavailing even if they could be raised in court (which they cannot be). An arbitration agreement may only be voided if the opposing party establishes an arbitration-neutral contract defense to enforcement. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 179 L. Ed. 2d 742 (2011). But none of the contract defenses proffered here have merit.

[1] WS Funding is now a defendant in this action but was not when the underlying Motion to Stay Proceedings and Compel Arbitration was filed. WS Funding now joins the Motion and this Reply in full. With WS Funding's inclusion, the Motion and Reply applies to all Defendants.

Plaintiffs' defenses were (1) the Tribal Court does not conduct arbitration (true, but irrelevant), (2) the Agreements' judicial venue clause contradicts its arbitration forum clause (false, the two clauses complement one another), (3) the specified consumer dispute rules do not exist (irrelevant because they are not integral to the Agreements), (4) the Agreements violate the FAA by specifying tribal arbitrators (false, Plaintiffs are not entitled to a presumption that tribal arbitrators are biased against non-Tribal Members), and (5) the Agreements give Defendants the unilateral right to select arbitrators (false under the Agreements' plain language).

E. Because the Agreements' satisfy the test for enforcement and further because any challenges to the Agreements must be raised in arbitration, the Court must compel arbitration of Plaintiffs' claims on a bilateral (not class) basis. That said, upon ordering arbitration the Court can and should permit the Parties to select mutually-agreeable arbitrators.

Plaintiffs responded to these arguments in four ways. As explained below, none of Plaintiffs' responses alter the fact that the FAA requires the Court to compel arbitration of both Plaintiffs' claims and their anti-arbitration arguments.

First, Plaintiffs drop any pretense that their opposition to arbitration has anything to do with arbitration itself. Indeed, they all but concede that Heldt's Arbitration Agreement is fully enforceable.[2] (*See* Opp. 9 n.3.) And since the only difference (at issue) between Heldt's Agreement and the others is that the former specifies the AAA, JAMS, or any mutually-agreeable arbitrator and the latter specifies a tribal forum, Plaintiffs' entire basis for opposing arbitration melts away given that a mutually-agreeable arbitrator can be used in every case.

Rather than acknowledge this truism, Plaintiffs focus their opposition on the single discontinued arbitration described by the district courts in *Inetianbor v. CashCall, Inc.*, 13-cv-60066, 2013 WL 4494125 (S.D.Fla. Aug. 19, 2013) (attached as Exhibit C to Plaintiffs' Opposition) and *Jackson v. Payday Financial, LLC, et al.*, 11-cv-9288

[2] The only argument Plaintiffs muster against Heldt's Agreement is their misguided attack on the Agreement's reference to the Indian Commerce Clause. This attack is refuted under Point Four on page 24.

(N.D.Ill. Aug. 28, 2013) (attached as Exhibit A to Plaintiffs' Opposition). But since Defendants specifically asked the Court to appoint "mutually-agreeable" arbitrators, any flaws in the tribal arbitration forum at issue in *Inetianbor* and *Jackson* are beside the point and Plaintiffs are being disingenuous by pretending otherwise. (*See, e.g.*, Opp. 3 ["Defendants ask this Court to compel Plaintiffs into an arbitration scheme that is nonexistent."].)

The same is true of Plaintiffs laundry list of unsubstantiated (and hyperbolic) factual allegations that seek to paint Defendants as bad actors. (Opp. 4-7.) Under a long line of Supreme Court cases, these sorts of allegations have no bearing on the Arbitration Agreements. *See, e.g, Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S. Ct. 1801, 1806, 18 L. Ed. 2d 1270 (1967). The only relevant facts, meanwhile, are undisputed: (a) the Agreements were validly formed—there was an offer, acceptance, and consideration, (b) they cover all of Plaintiffs' claims, and (c) Plaintiffs each had 60 days to opt out of arbitration but choose not to.

Second, Plaintiffs ignore the settled Supreme Court case law on delegation agreements and argue theirs are disposable because Plaintiffs "challenge the entire proffered arbitration provision." (Opp. 16.) The Supreme Court has squarely rejected this argument. Only a "direct" and "specific" challenge to a delegation agreement is capable of voiding one. *See Rent-A-Ctr.*, 130 S. Ct. at 2779. A challenge to the entire arbitration agreement will not do. *See id.* at 2778. As Plaintiffs did not specifically and directly challenge the Delegation Agreements, the Agreements must be enforced and all of Plaintiffs' anti-arbitration arguments must be arbitrated.

Third, Plaintiffs abandon most of their prior anti-arbitration arguments and instead fall back on claiming the specified arbitration forum and rules were "integral" to their

assent to the Agreements. (Opp. 9-14.) By extension, Plaintiffs argue, if the forum or rules are unavailable, the Agreements cannot be enforced.

This integral forum-type argument is foreclosed by the text and purpose of Section 5 of the FAA, which ensures that an unavailable forum (or its rules) does not defeat an entire arbitration agreement.[3] *See Astra Footwear Indus. v. Harwyn Int'l Inc.*, 442 F. Supp. 907, 910 (S.D.N.Y. 1978), *aff'd*, 578 F.2d 1366 (2d Cir. 1978). The argument also fails because (1) the plain language of the Agreements makes clear they were not intended to self-destruct if the forum or rules were unavailable, and (2) Plaintiffs' suggestion that one or more of Plaintiffs may not have read the Agreements before signing them makes it impossible for the particular forum or rules to have been integral to their assent.

Finally, *fourth*, Plaintiffs make a throw away argument that the Agreements somehow cancel themselves out by saying they are "made pursuant to the Indian Commerce Clause" when they are not. (Opp. 14-15.) Plaintiffs are misquoting the Agreements. The Agreements actually say they are "made pursuant to a transaction *involving* the Indian Commerce Clause". (Ex. 1 at 5; Ex. 2 at 4-5; Ex. 3 at 4-5; Ex. 4 at 4-5) (emphasis added.)[4] That is true, unremarkable, and not a basis for evading arbitration.

As Plaintiffs have no other arguments, the Court should grant Defendants' Motion and order Plaintiffs to arbitrate their claims on a bilateral basis.

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[3] The full text of Section 5 is included as an addendum at the end of this brief.

[4] The exhibits referred to in this brief are the exhibits Defendants attached to their Motion. The numbering is the same.

ARGUMENT

POINT ONE

Plaintiffs Do Not Dispute Any Of The Facts Relevant To Enforcing The Arbitration Agreements. Plaintiffs' Attempts To Distract The Court With Allegations Of Misconduct Are Unavailing.

A. The Facts Relevant to Arbitration Are Not In Dispute.

The law on enforcing arbitration agreements is simple and settled: "1) is there a valid agreement to arbitrate between the parties and, if so, 2) does the dispute fall 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).

Plaintiffs do not dispute the answer to both questions is yes. The Agreements are valid because they satisfy the requirements of offer, acceptance, and consideration. *See Kubista*, 2012 WL 2974675, at *3. And the Agreements apply because Plaintiffs' claims fall squarely within their scope provisions. (Ex. 1 at 4; Ex. 2 at 4; Ex. 3 at 4; Ex. 4 at 4.) Finally, although not an express part of the enforceability test, Plaintiffs had 60 days to opt out of arbitration *but chose not to*. (Ex. 1 at 5; Ex. 2 at 5; Ex. 3 at 5; Ex. 4 at 5.)

Taken together, the Arbitration Agreements must be enforced unless Plaintiffs establish an arbitration-neutral contract defense. *See Kubista*, 2012 WL 2974675, at *6.

B. Plaintiffs May Not Avoid Arbitration By Arguing About The Merits Of Their Claims.

As explained below (*see* Point Two, p. 9), the Parties' Delegation Agreements require any defenses to the Arbitration Agreements to be arbitrated. The Court may not consider them. But because so much of Plaintiffs' Opposition is dedicated to accusing Defendants of misconduct, it bears emphasizing that even if the Parties didn't have Delegation Agreements, Plaintiffs' allegations are not only wrong but irrelevant.

For a contract defense to defeat arbitration, the defense must relate specifically to the arbitration agreement. As the Supreme Court has repeatedly affirmed, attacks to an underlying contract have no bearing on whether an arbitration agreement is enforceable:

> **First**, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.
>
> **Second**, unless the challenge is to the arbitration clause itself the issue of the contract's validity is considered by the arbitrator in the first instance.

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46, 126 S. Ct. 1204, 1209, 163 L. Ed. 2d 1038 (2006) (emphasis added); *Prima Paint*, 388 U.S. at 404.

Nor may a party rely on factual allegations that—though perhaps relevant to the merits of a claim—do not specifically address the arbitration agreement. *See 3M Co. v. Amtex Sec, Inc.*, 542 F.3d 1193, 1199 (8th Cir. 2008) ("the district court does not reach the potential merits of any claim but construes the clause liberally, resolving any doubts in favor of arbitration"); *see also Kubista*, 2012 WL 2974675, at *2 ("the judicial inquiry required to determine arbitrability is much simpler" and is "strictly confined to whether the parties agreed to submit disputes . . . to arbitration.").

Yet that is precisely what Plaintiffs attempt. They spend four pages assailing Defendants' businesses as a "scheme" that Plaintiffs claim to be righteously fighting: "The question this lawsuits seeks to resolve is whether such a scheme can legally circumvent state usury laws." (Opp. 4-7.) This "question" might make for good rhetoric—but it has nothing to do with whether Plaintiffs must arbitrate their claims. *See, e.g.*, *Prima Paint*, 388 U.S. at 404 (holding that under the FAA, fraud allegations are for the arbitrator, not the court). The question can be raised in arbitration, but at this stage the FAA requires that it be ignored.

C. Plaintiffs May Not Use The Arbitration In *Inetianbor* As A Boogeyman.

Plaintiffs also aim to distract from the simple FAA analysis at hand by trying to make this case about the arbitration proceeding at issue in *Inetianbor v. CashCall, Inc.*, 13-cv-60066, 2013 WL 4494125 (S.D.Fla. Aug. 19, 2013) and *Jackson v. Payday Financial, LLC, et al.*, 11-cv-9288 (N.D.Ill. Aug. 28, 2013). Plaintiffs quote at length from the two opinions, both of which were based on the lone, never-completed arbitration in *Inetianbor*, a case in which the particular arbitrator's impartiality was called into question.[5] But here Defendants specifically asked the Court to appoint "mutually-agreeable" arbitrators—not the forum at issue in *Inetianbor*. Plaintiffs are simply wrong when they say, "[d]efendants ask this Court to compel Plaintiffs into an arbitration scheme that is nonexistent." (Opp. 3.) By selecting mutually-agreeable arbitrators, as overseen by this Court, there is no risk that Plaintiffs will be prejudiced by arbitration.

[5] Defendants have and will continue to contest this claim, but it is ultimately irrelevant to the case at hand.

Further, because Plaintiffs' Amended Complaint is openly contemptuous of even the idea of a tribal arbitrator—it misreads the Agreements and proclaims that Plaintiffs should not have to arbitrate before a "a panel of non-judicial arbitrators who are chosen solely by Defendants and who are members of the Tribe"(FAC ¶ 39.)—Plaintiffs' hostility to choosing "mutually-agreeable" arbitrators is confounding.

D. Plaintiffs Effectively Concede That Heldt's Agreement Is Enforceable. By Extension, Plaintiffs Concede That Arbitration Before A Mutually-Agreeable Arbitrator Is Fair.

Heldt's Agreement—executed in 2013—is marginally different from the other three—executed in 2011—in that it specifies as the arbitration forum the AAA, JAMS, or any other mutually-agreeable arbitrator. (Ex. 1 at 4.) Plaintiffs concede, effectively if not expressly, that Heldt's Agreement is enforceable. They muster only one argument against it, and that's their easily debunked claim that the Agreement's reference to the Indian Commerce Clause is somehow fatal. (*see* Point Four, p. 24.)

Plaintiffs do not, and cannot, argue that there is anything wrong with arbitrating before the AAA, JAMS, or a mutually-agreeable arbitrator, as set forth in Hedlt's Arbitration Agreement. (Opp. 9 n. 3). That silence speaks volumes as to both Heldt's Agreement in particular and the Arbitration Agreements generally. If Heldt can fairly arbitrate before a mutually-agreeable arbitrator, so can Jones, Curtis, and Martin. That they prefer to bring class action lawsuits is evident, but that preference is not a basis for avoiding their Agreements.

* * * *

With that background, Defendants turn to Plaintiffs' three legal arguments:

- The argument that the Parties' Delegation Agreements should not be enforced is addressed in Point Two;

- The argument that the specified forum and rules were integral to Jones, Curtis, and Martins' assent to the Arbitration Agreements is addressed in Point Three; and

- The argument that the Agreements' reference to the Indian Commerce Clause voided the Agreements is addressed in Point Four.

POINT TWO

Plaintiffs Did Not Challenge The Delegation Agreements. So The Delegation Agreements Must Be Enforced And Plaintiffs' Challenges To The Arbitration Agreements Must Be Sent To Arbitration.

Plaintiffs' Opposition does not challenge the Parties' Delegation Agreements. Instead it attacks the broader Arbitration Agreements. (Opp. 16.) But these attacks have no bearing on the Delegation Agreements. *See Rent-A-Ctr.*, 130 S. Ct. at 2779 ("unless Jackson challenged the delegation provision specifically, we must ... leav[e] any challenge to the validity of the Agreement as a whole for the arbitrator.").

Because Plaintiffs did not challenge the Delegation Agreements, the Agreements must be enforced. *See id*. Plaintiffs may raise their arguments about the Arbitration Agreements in arbitration, but the Court is powerless to address them here.

A. If Plaintiffs Wanted To Contest The Delegation Agreements, They Were Required To Specifically And Directly Challenge Them.

A delegation agreement is an agreement to resolve disputes about an arbitration agreement in arbitration instead of court. *See Rent-A-Ctr.*, 130 S. Ct. at 2777 ("The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement."). It is, in effect, an arbitration agreement within an arbitration agreement.

As with any arbitration agreement, courts determine if a delegation agreement is enforceable by severing it from the contract containing it and reviewing it as a stand-

alone provision. *See id.* at 2779. Critically, though, a delegation agreement is not just severed from the underlying contract (e.g., a loan contract)—it is also severed from the underlying arbitration agreement. *See id*. ("In this case, the underlying contract is itself an arbitration agreement. But that makes no difference.").

So just as an arbitration agreement cannot be voided by challenging the underlying contract, a delegation agreement cannot be voided by challenging the underlying arbitration agreement. *See id.* (*citing Buckeye Check Cashing*, 546 U.S. at 445). Courts may only consider challenges that are "directed specifically" at the delegation agreement. *See Rent-A-Ctr.*, 130 S. Ct. at 2778. This is true even if a challenge to an arbitration agreement applies equally to the delegation agreement. *See Rent-A-Ctr.*, 130 S. Ct. at 2778. (citing *Prima Paint*, 388 U.S. at 404). The "basis of the challenge" must still "be directed specifically" at the delegation agreement. *See Rent-A-Ctr.*, 130 S. Ct. at 2778.

Plaintiffs challenge the existence of this "specifically directed" requirement by ignoring Supreme Court precedent in favor of dicta found in a single footnote ("Footnote Three") in the Eighth Circuit's opinion in *Wootten v. Fisher Investments*. (Opp. 16) (citing *Wootten v. Fisher Investments, Inc.*, 688 F.3d 487, 493 n.3 (8th Cir. 2012) *cert. denied*, 133 S. Ct. 865, 184 L. Ed. 2d 658 (U.S. 2013).) Plaintiffs claim that Footnote Three stands for the proposition that a "party need not challenge a delegation agreement specifically if it instead" challenges the validity of the entire contract. (Opp. 16.)

Such a proposition simply cannot be squared with the very clear and unmistakable Supreme Court precedent that *Wootten* relies on. Footnote Three quotes a passage in *Rent-a-Center*, itself quoting *Buckeye*, which states that historically there have been two

types of challenge to the validity of an arbitration agreement, one of which is a challenge to "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."[6] *Id.* at 493, n.3 (*quoting Rent-A-Ctr.*, 130 S. Ct. at 2777-78) (itself quoting *Buckeye Check Cashing*, 546 U.S. at 445). After quoting this passage in *Buckeye*, *Rent-a-Center* goes on to state that this type of challenge "to the contract as a whole [] does not prevent a court from enforcing a specific agreement to arbitrate . . . Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Rent-A-Ctr.*, 130 S. Ct. at 2777-78*; see also Buckeye*, 546 U.S. at 445 ("We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.")

To the extent Footnote Three stands for the proposition Plaintiffs put forward, it is an obvious misquote of *Rent-a-Ctr*. Such a misquote, coming in a stray footnote disconnected from the holding in the case, cannot overturn the very Supreme Court precedent that it references, and should be disregarded.[7] Using Footnote Three as Plaintiffs do is even more absurd when one considers that *Wootten* specifically noted

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[6] The other type of challenge is to the arbitration (or delegation) provision specifically. *Rent-A-Ctr*, 130 S. Ct. at 2779. That type of challenge—which is not being made here (*see* Point II.A, p. 15)—is, indeed for a Court to resolve. *Id*.

[7] Notably, no court applying *Wootten* has adopted the principle that Plaintiffs put forward. *See*, e.g. *Vallejo v. Garda CL Southwest, Inc.*, 2013 U.S. Dist. LEXIS 12327 (S.D. Tex. Jan. 30, 2013) (delegating question of arbitrability to arbitrator, citing *Wootten*, despite challenge to agreement as a whole as unconscionable).

that prior Eighth Circuit authority was in accord with *Rent-A-Center*. *See Wootten*, 688 F.3d at 493 ("Even before *Rent-A-Center*, this circuit held that federal courts should defer the question of arbitrability to the arbitrator where the court finds 'a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator.'").

Simply put, Plaintiffs are wrong—they may not evade the Delegation Agreements by challenging the Arbitration Agreements. *See Rent-A-Ctr.*, 130 S. Ct. at 2779; *cf. Kubista*, 2012 WL 2974675, at *5 ("arbitration, not court, is the proper forum for a challenge to a contract containing an arbitration provision as void for illegality"). And because Plaintiffs did not challenge the Delegation Agreements, the Agreements must be enforced.

B. Plaintiffs' Stray Reference To The Delegation Agreements Is Not A Challenge.

Plaintiffs impliedly concede that they do not specifically challenge the Delegation Agreements; rather, they simply include the following stray sentence at the end of their Opposition:

> Plaintiffs challenge the entire proffered arbitration provision, including the supposed delegation provision, as illegal and void.

(Opp. 16.) But this does not carry their burden. The Supreme Court in *Rent-A-Center* addressed almost identical language:

> And before this Court, Jackson describes his challenge in the District Court as follows: He "opposed the motion to compel on the ground that the *entire arbitration agreement*, including the delegation clause, was unconscionable." . . . That is an accurate description of his filings.

Rent-A-Ctr., 130 S. Ct. at 2779. And it rejected the idea that this language was a specific challenge to the delegation agreement. *See id.* at 2779 ("The District Court correctly

concluded that Jackson challenged only the validity of the contract as a whole."). Adding the words "including the delegation clause" to a sentence summarizing Plaintiffs' general challenges to the Arbitration Agreements has no effect.

As Plaintiffs have not made any challenge to the Delegation Agreements, any such argument is waived. *See Milligan v. City of Red Oak, Iowa*, 230 F.3d 355, 360 (8th Cir. 2000) (holding appellant waived issues not supported with argument and legal authority).

C. The Delegation Agreements Satisfy The "Clearly and Unmistakably" Standard.

At last, Plaintiffs do not dispute that the Delegation Agreements "clearly and unmistakably" delegate all questions of arbitrability to the arbitrator. Nor could they. The delegation language closely tracks the language enforced in *Wootten*. *Compare, e.g.*, Ex. 1 at 4 *with Wootten*, 688 F.3d at 493.

With that last box checked, the Delegation Agreements must be enforced.

* * * *

Because the Delegation Agreements are enforceable, all of Plaintiffs' arguments about arbitration (including their Section 5 arguments) are moot. They may not be considered by the Court but must instead be raised in arbitration. The Court should therefore stay merits proceedings and direct the Parties to choose mutually-agreeable arbitrators to resolve Plaintiffs' challenges to the Arbitration Agreements. If the Court does so—and Defendants respectfully submit that the FAA requires that it does—the Court need not consider the remainder of this brief.

POINT THREE

Plaintiffs May Not Avoid Section 5 Of The FAA By Claiming The Specified Forum or Rules Were "Integral" To Their Assent.

The nub of the integrality issue is this: Did the Parties agree to resolve disputes through bilateral arbitration and not litigation or are the Parties' Arbitration Agreements so narrow that they self-destruct and litigation ensues if the specified arbitration forum and rules are unavailable? If it's the former, Plaintiffs' condemnation of the forum and rules is irrelevant because Section 5 of the FAA requires appointment of a substitute arbitrator. Section 5 was enacted, after all, to "provide a solution to the problem caused when the arbitrator selected by the parties cannot or will not perform." *Astra Footwear Indus. v. Harwyn Int'l Inc.*, 442 F. Supp. 907, 910 (S.D.N.Y. 1978), *aff'd*, 578 F.2d 1366 (2d Cir. 1978).

Plaintiffs contend it was the latter. They claim the specified forum and rules were so "integral" to the Agreements that Section 5 cannot apply. But this "integral forum" argument fails for three reasons:

A. *First*, there is no integral forum exception to Section 5. Parties may contract around Section 5 (e.g., by stating that an agreement will self-destruct if the specified arbitrator is unavailable). But Section 5 does not permit courts to ignore it by speculating that an arbitration forum was integral to an agreement. *See Green v. U.S. Cash Advance Illinois, LLC*, --- F.3d ---, 13-1262, 2013 WL 3880219, at *5 (7th Cir. July 30, 2013) ("As far as we can tell, no court has ever explained what part of the text or background of the Federal Arbitration Act requires, or even authorizes, such an approach").

B. *Second*, if there is an integral arbitrator exception to Section 5, it does not apply here. For it to apply, Plaintiffs would have had to establish that the Agreements "unambiguously expressed [the Parties'] intent not to arbitrate their disputes in the event that the [specified forum] is unavailable." *Khan v. Dell Inc.*, 669 F.3d 350, 354 (3d Cir. 2012). But as discussed at length below, the Agreements do not evince *any* intent to self-destruct if the specified forum is unavailable.

C. *Third*, Plaintiffs statement that "[t]here is a reasonable question of whether a consumer sees the . . . arbitration clause before they accept the loan" suggests that Plaintiffs did not read the Agreements before they signed them. If so, it precludes any claim that the forum specified in Agreements was integral to their assent. *See Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1168 (D.S.D. 2010) ("Under such circumstances, the term specifying NAF rules was not integral to Ms. Jones' decision to sign the Arbitration Agreement.").

In short, and as explained more fully below, Section 5 applies and requires the Agreements to be enforced regardless of the availability of the specified forum.

A. There Is No "Integral Forum" Exception To Section 5.

Absent an explicit agreement between the parties prohibiting a court from selecting the arbitral "forum"[8] under Section 5 of the FAA, the court must do so if and when the forum named in the agreement is unavailable for any reason. In recent years, a judicially-created "exception" to this rule has gained traction in some courts, which would require courts to make an ad-hoc determination of whether the particular forum were somehow sufficiently "integral" to the arbitration agreement, and if it were, to invalidate the arbitration agreement if the arbitrator, forum, or rules were unavailable. This "integral forum" exception lacks any statutory basis. As the Seventh Circuit recently found, "no court has ever explained what part of the text or background of the Federal Arbitration Act requires, or even authorizes, such an approach." *See Green*, 2013 WL 3880219, at *5. Simply put, courts may not infer "integrality" to void an arbitration agreement; it must be made explicit by the parties, which it was not here.

The integral forum exception cannot be reconciled with Section 5. Section 5, properly understood, sets forth two default rules that unless opted out of apply to any

[8] By "forum," Defendants refer to both the identity of the arbitrator or method of selecting the arbitrator, and the set of rules under which arbitration will be conducted.

covered agreement. *See generally Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 288 (3d Cir. 2010) (noting that "while parties may opt out of the FAA's default rules, they cannot opt out of FAA coverage"). *First*, Section 5 ensures that if an agreement specifies its own method for naming an arbitrator, "such method shall be followed". 9 U.S.C. § 5. *Second*, Section 5 provides that if no method is specified or it the specified method is ineffective "for any [] reason", including "in the case of an unavailable arbitrator . . . 'upon the application of either party to the controversy the court *shall* designate and appoint an arbitrator.'" *See Khan*, 669 F.3d at 356 (quoting 9 U.S.C. § 5) (emphasis in *Kahn*).

The two defaults can be summarized as follows:

> **Default Rule One** – if the agreement names an arbitral forum, that forum will be enforced;
>
> **Default Rule Two** – if the agreement has no method to select a forum or the specified method cannot be enforced for any reason, the court will determine the appropriate selection method.

Default Rule One applies when the specified forum is available and Default Rule Two is a built-in contingency for when one or more are not (as Plaintiffs contend here).

Default Rule Two cannot be reconciled with an implied integrality exception to Section 5 and therefore, the latter cannot stand. Like other default rules, parties can opt-out of the Default Rule Two by stating a desire to do so. But they cannot opt out through silence. *Cf. City of Geneseo, Illinois v. Utilities Plus*, Civ. No. 05-2689, 2007 WL 1027294, at *8 (D. Minn. Apr. 3, 2007) ("Agreement's silence on the issue can not be construed as affirmatively opting out of this default.") *aff'd sub nom. City of Geneseo. v. Utilities Plus*, 533 F.3d 608 (8th Cir. 2008). As the Eighth Circuit has explained, when an agreement is silent about what happens when a specified forum cannot arbitrate,

Section 5 (and Default Rule Two) applies. *See Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 464 (8th Cir. 2003) ("Because the agreements are silent on this issue, this dispute is governed by 9 U.S.C. § 5").

Plaintiffs do not dispute that the Agreements do not explain what to do if the specified forum is unavailable. But, Plaintiffs argue, the Court should ignore the Agreements' silence—and Default Rule Two—and instead delve into an unbounded inquiry into the "integrality" of the forum. There is no basis for doing so. Indeed, it goes against the very nature of a default rule—particularly one that applies whenever a specified forum cannot perform for *any* reason, s*ee Green*, 2013 WL 3880219, at *5—to use some open-ended metric like integrality to conclude that parties implicitly opted out of a rule they chose not to explicitly and affirmatively opt out of.

Far from an amorphous probe into integrality, the only inquiry permitted by Section 5's statutory scheme is a simple yes-no question: Do the Agreements explain what will happen if the specified forum is unavailable? Since they do not, Default Rule Two applies. *See id.* ("Section 5 applies 'if no method be provided' in the contract" for dealing with an unavailable arbitration forum). And that means the Agreements must be enforced regardless of the availability of the specified forum.

Put differently, Plaintiffs cannot defeat enforceability by claiming integrality—under Section 5, the forum's integrality is irrelevant.

B. Even If There Were An Integral Arbitration Exception To Section 5, It Would not Apply Here.

As discussed above, even assuming the notion of an integral forum exception can be squared with Section 5, the exception would not apply here. Under those cases that have imposed an "integral forum" exception, Plaintiffs would have had to establish that the Agreements "***unambiguously*** expressed [the parties'] intent not to arbitrate their disputes in the event that the [specified forum] is unavailable." *Khan*, 669 F.3d at 354 (emphasis added); *see also Schuiling v. Harris*, --- S.E.2d ---, Civ. No. 121582, 2013 WL 4854364, at *2 (Va. Sept. 12, 2013) ("The dispositive question in this case, then, is whether Schuiling and Harris limited their agreement to arbitrate by making it conditional upon NAF conducting the arbitration."). Such an intent must be unambiguous because under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, *whether the problem at hand is the construction of the contract language itself* or an allegation of waiver, delay or a like defense to arbitrability". *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983) (emphasis added).

Plaintiffs cannot satisfy the intent requirement. Contractual intent is determined by applying state law contract principles. *See Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1167 (D.S.D. 2010).[9] These principles require the Agreements to be "read as a whole, making every effort to give effect to all provisions." *Id.* (citing *Crowley v. Texaco*,

[9] Although the Agreements require application of CRST law, rather than engage in an unnecessary choice of law analysis for the limited purpose of determining which set of contract principles to apply, Defendants cite to the South Dakota principles on which this court would typically rely when sitting in diversity, since CRST courts will look to federal guidance when interpreting CRST law. *See, e.g. Ducheneaux v. Cheyenne River Sioux Tribe Election Bd.*, 2 Am. Tribal Law 39 (Cheyenne River Sioux C.A. May 25, 1999); *Deschuquette v. Cheyenne River Sioux Housing Auth.*, 1 Am. Tribal Law 53 (Cheyenne River Sioux C.A. Feb. 20, 1998).

Inc., 306 N.W.2d 871 (S.D.1981)). In addition, they forbid the Agreements from being interpreted in a manner that causes an "absurd result." *Nelson v. Schellpfeffer*, 2003 S.D. 7, 656 N.W.2d 740, 743 (S.D. 2003). An absurd result is one that is "ridiculously incongruous or unreasonable; a result that the parties, presumed to be rational persons pursuing rational ends, are very unlikely to have agreed upon." *Id.* (internal citations and quotations omitted).

Here, Plaintiffs ask the Court to find that the Agreements evince an intent to resolve disputes through litigation and not arbitration if the specified forum is unavailable. Under the plain language of the Agreements, this is an absurd result. In all capital letters and without reference to any arbitral forum or rules, the Agreements unconditionally waive the following litigation rights:

> **Waiver of Rights.** YOU HEREBY AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL, TO HAVE A COURT DECIDE YOUR DISPUTE, TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT.

(Ex. 1 at 4; Ex. 2 at 4; Ex. 3 at 4; Ex. 4 at 4.)

This alone conclusively demonstrates Plaintiffs cannot satisfy the intent requirement. Under no reasonable reading of that language can one conclude that the Agreements unambiguously intended to send the Parties to court if the specified arbitration forum was unavailable.

What is more, if the Agreements are read as a whole it is clear they were not intended to self-destruct if the specified forum were unavailable. This is evidenced by the fact the Agreements contemplate the dissolution of the Parties' arbitration obligations in two sets of circumstances—and neither of those is the unavailability of the specified forum. First, the Agreement provides that if a borrower properly opts out, the Parties'

arbitration obligations shall cease. (Ex. 1 at 5; Ex. 2 at 5; Ex. 3 at 5; Ex. 4 at 5.) Second, the Agreement states that if the tribal court (the court designated in the judicial venue clause) finds the class action waiver unenforceable, any disputes shall be resolved in tribal court. (Ex. 1 at 4; Ex. 2 at 4; Ex. 3 at 4; Ex. 4 at 4.)

Under the doctrine of *expressio unius est exclusio alterius*—"the express mention of one thing implies the exclusion of another"—Plaintiffs may not infer a separate and silent intent for the Agreements to also self-destruct if the specified forum is unavailable. *See Haman v. First Nat. Bank in Sioux Falls*, 79 S.D. 565, 573-74, 115 N.W.2d 883, 887-88 (1962) (Hanson, J.) (dissenting); *see also Chicago Title Ins. Co. v. Arkansas Riverview Dev., LLC*, 573 F. Supp. 2d 1152, 1165 (E.D. Ark. 2008).

In addition, the Agreements contain severance provisions that require *any* invalid terms to be severed. (Ex. 1 at 5; Ex. 2 at 5; Ex. 3 at 5; Ex. 4 at 5. ("If any of this Arbitration Provision is held invalid, the remainder shall remain in effect").) As this Court has found, a severance provision signifies that an arbitration agreement is fundamentally concerned with arbitration versus litigation and not with arbitration in any particular forum. *See Jones*, 684 F. Supp. 2d at 1167-68 ("[t]he existence of [a] severance clause in [an] arbitration agreement is evidence that the parties did not intend for the entire agreement to fail if one portion was invalid or unenforceable."). Indeed, the fact that the forum and rules provisions can be severed is proof they are not integral. *See Schuiling*, 2013 WL 4854364, at *3 (finding that terms subject to severance are, by definition, not integral).

Plaintiffs' only response is that because the Agreements say arbitration "shall" be conducted by the specified forum the forum must be integral. (Opp. 11.) In support, Plaintiffs cite to a handful of decisions whose Section 5 analysis turned entirely on the

fact an agreement designated a forum and said the forum "shall" be used. *See, e.g, Ranzy v. Tijerina*, 393 Fed. Appx. 174, 175 (5th Cir. 2010); *Klima v. Evangelical Lutheran Good Samaritan Soc.*, 10-cv-1390, 2011 WL 5412216 (D. Kan. Nov. 8, 2011). Plaintiffs also seek to rely on a similar integrality finding in *Inetianbor*, but they do not inform the Court that integrality was never briefed in *Inetianbor*; it was simply addressed sua sponte by the Court in summary fashion.[10] (Opp. 11.)

Defendants contend that these cases were wrongly decided, because they confuse Default Rules One and Two. Even other cases which apply the "integral forum" exception have chosen not to follow the reasoning of *Ranzy, Klima* and their ilk. For example, in *Carr v. Gateway*, the Illinois Supreme Court reviewed a consumer sale agreement containing an arbitration agreement stating that "resolved exclusively and finally by arbitration administered by the National Arbitration Forum (NAF) and conducted under its rules . . . ." *See Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20, 944 N.E.2d 327, 330 (2011). But *Carr* scorned the notion that this language rendered the NAF integral. If it did, *Carr* reasoned, all specified forums would be integral and Section 5 would be read out of existence. *See id.* at 30, 944 N.E.2d at 335; *see also Brown v. Delfre*, 2012 IL App (2d) 111086, 968 N.E.2d 696, 703 ("Even where parties explicitly specify in their arbitration agreement both an arbitral service to handle arbitration and the rules to be applied, that fact does not, standing alone, make the forum designation integral to the agreement."). *Carr* did ultimately find the designated forum integral, but it did so because the agreement had a provision penalizing "any party for bringing a

[10] The integrality ruling in *Inetianbor*, now on appeal, was also based on the court concluding that because the Agreement contains a tribal choice of law clause, only a tribal arbitrator can be used. (*See* Opp. Ex. D at 5-7.) But the court provided no explanation for why only a tribal arbitrator can apply tribal law or why the choice of law issue—which is distinct from any choice of forum issue—is relevant to integrality.

dispute in any forum other than the NAF." *Carr*, 241 Ill. 2d at 32, 944 N.E.2d at 336.[11]

The Agreements here do not penalize the Parties for arbitrating outside of the specified forum. So under *Carr*, the specified forum is not integral and Section 5 applies. Plaintiffs have no other argument.

Taken together, the following facts:

1) the Agreements' waiver of litigation rights is not conditioned on the availability of the specified arbitration forum;

2) the Agreements set forth two situations in which the Parties' arbitration obligations will dissolve—and neither of those situations is the unavailability of the specified forum; and

3) the Agreements contain a severance provision,

all independently make it *impossible* to find that the Parties unambiguously intended for the Agreements to fail if the specified forum was unavailable.

The specified forum is not integral. Section 5 applies and the Agreements must be enforced.

B.1. The Proviso That Arbitration Be Conducted "In Accord" With Specified Rules Does Not Make The Rules Integral To The Agreements.

The above analysis about the non-integrality of the specified forum applies equally to the specified rules. *See, e.g, Jones*, 684 F. Supp. 2d at 1166 (performing the same integrality analysis regardless of whether dispute is over "arbitration rules or an

[11] *Carr* is just one of many cases holding that courts should not decide integrality based on a single factor, but rather should consider the entire agreement and surrounding circumstances to determine the parties' intent. *See, e.g., Wright v. GGNSC Holdings LLC*, 808 N.W.2d 114, 121-22 (S.D. 2011) (holding that integrality "turns on the parties' intent at the time the agreement was executed, as determined from the language of the contract and the surrounding circumstances"); *Great Earth Cos. v. Simons*, 288 F.3d 878, 890 (6th Cir. 2002) (same); *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 975 (D. Minn. 2012) (the court "must review the agreement to determine *whether the overarching purpose* was to submit to arbitration") (emphasis added).

arbitration forum"). But the specified rules are not integral for the additional reason that the Agreements merely say arbitration should be conducted "in accord" with the rules. (Ex. 1 at 4; Ex. 2 at 4; Ex. 3 at 4; Ex. 4 at 4.) This is a far cry from the sort of phrasing—e.g., "arbitration shall be conducted by and under" certain rules—that courts have found necessary to trigger an integrality finding. For example, the district court in *Meskill v. GGNSC* considered similar "in accordance" language and ruled that "something more direct is required before we, in effect, annihilate an arbitration agreement." *See Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 972, 976 (D. Minn. 2012) (quoting *Reddam v. KPMG LLP*, 457 F.3d 1054, 1061 (9th Cir. 2006)).

Similarly, in *GAR Energy v. Ivanhoe Energy*, the district court confronted an agreement providing for arbitration "in accordance" with rules that turned out not to exist. *See GAR Energy & Associates, Inc. v. Ivanhoe Energy Inc.*, 1:11-CV-0090, 2011 WL 6780927, at *4 (E.D. Cal. Dec. 27, 2011) *report and recommendation adopted,* 1:11-CV-00907, 2012 WL 174952 (E.D. Cal. Jan. 20, 2012). Yet the court rejected the argument that without the rules arbitration under the agreement was impossible: "Here, the 'nature of the thing to be done' is arbitration, and impossibility does not attach to the procedure by which the arbitration is accomplished." *See id.*

So too here, where the critical purpose of the Arbitration Agreements is that disputes be resolved through arbitration, and not that arbitration be conducted under a particular set of rules.

C. Because Plaintiffs Suggest They Did Not Read The Arbitration Agreements Before Signing Them, They Cannot Claim The Terms Were Integral To Their Assent.

Plaintiffs' integrality claims also fail as a direct result of Plaintiffs' allegation that "[t]here is a reasonable question of whether a consumer sees the . . . arbitration clause before they accept the loan." (FAC ¶ 58.) There is no question, based on the documentary evidence Defendants attached to their Motion, that Plaintiffs received the full Agreements before signing them. First, Defendants produced an affidavit from Western Sky explaining how all loan agreements (and the included Arbitration Agreements) must be scrolled through in their entirety (at the whatever pace the borrower decides) before a borrower can electronically sign them. (Ex. 5 at ¶¶ 3-5.) Second, Defendants attached copies of Plaintiffs' Agreements, which include statements attested to by Plaintiffs that they each had read and understood the Agreements before signing them. (Ex. 1 at 6; Ex. 2 at 5; Ex. 3 at 5; Ex. 4 at 6.) Therefore, the only possible explanation for the allegation is that Plaintiffs are suggesting that some borrowers simply chose not to read the Arbitration Agreements before signing them.

If, in fact, some borrowers did not see the Arbitration Agreement—which was written in bold-faced capital letters and placed directly before them— it simply cannot be the case that the specified terms of an unread Agreement were "integral" to their decisions to sign it. How could the particular provisions of the Arbitration Agreement have been critical to Plaintiffs' decision to sign those Arbitration Agreements when there is a "reasonable question" whether the Plaintiffs ever read those provisions in the first place? The very fact that Plaintiffs even speculate that borrowers have not reviewed the Arbitration Agreement is dispositive proof that the particulars of the Arbitration Agreement could not have been integral to any borrower's decision to enter into the

Agreements; likewise, dispositive proof that the forum provision in question was ancillary to all such decisions. In a similar case, *Jones*, this Court ruled that an integrality claim was undercut by the claimant's testimony that "she did not remember the Arbitration Agreement itself." *See Jones*, 684, F.Supp.2d. at 1168. Under such circumstances, the Court explained, the choice of arbitral forum "was not integral to [the party's] decision to sign the Arbitration Agreement." *Id.*; *see also Meskill*, 862 F. Supp. 2d at 966 ("there is nothing in the record indicating that [the party claiming integrality] was even aware of the [forum] (or its [rules]) when he signed the Arbitration Agreement."); *Wright v. GGNSC Holdings LLC*, 2011 S.D. 95, 808 N.W.2d 114, 122 (similar).

The same is true of Plaintiffs here. Indeed, Plaintiffs have not even attempted to put forth an explanation for why the choice of arbitral forum was integral to *their own* decision to sign the Agreements.[12] *See, e.g.*, *Meskill*, 862 F. Supp. 2d at 975 (noting that a forum clause can be integral only when "designation of a specific arbitral forum was of great import to *the parties*," but the plaintiff had failed to introduce evidence showing why he personally considered the forum to be "an important consideration" in his decision to enter into the contract) (emphasis added).

Finally, for its part Western Sky revised the Arbitration Agreement in 2012 to include the AAA or JAMS as available forums. (*Compare* Jones' Agreement [Ex. 2], executed in 2011, with Heldt's Agreement [Ex. 1], executed in 2013.) So just as the choice of forum was not integral to Plaintiffs' assent, it was also not integral to Western Sky's.

[12] Notably, Plaintiffs put forward no affidavit in which they claim to have read the Agreements or made their decision to sign the Agreements on the basis of the Agreements' specified forum or rules.

In short, because the specified forum was not integral to Plaintiffs' (or Defendants') assent to the Agreements, Plaintiffs cannot object to arbitration in another forum. The Agreements must be enforced and the Court should direct the Parties to choose mutually-agreeable arbitrators to resolve Plaintiffs' claims.

POINT FOUR

The Agreements' Reference To The Indian Commerce Clause Does Not Limit The Agreements' Scope Or Plaintiffs' Obligations to Arbitrate.

Plaintiffs' final attack on the Agreements targets a single sentence stating "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." (Ex. 1 at 5; Ex. 2 at 4-5; Ex. 3 at 4-5; Ex. 4 at 4-5.) In Plaintiffs' view, this sentence means the Agreements have no effect because, in Plaintiffs' words, "[t]he transaction here was not made pursuant to the Indian commerce clause; rather it was made between private individuals and private companies." (Opp. 15.) This is a non-starter.

Plaintiffs' argument only arises (if it arises at all) because they slice "involving" out of the sentence.[13] When correctly quoted, the sentence says the Agreements are "made pursuant to a transaction *involving* the Indian Commerce Clause ... and shall be governed by the law of the Cheyenne River Sioux Tribe." (Ex. 1 at 5; Ex. 2 at 4-5; Ex. 3 at 4-5; Ex. 4 at 4-5) (emphasis added.). This is accurate as a matter of law; the Indian Commerce Clause dictates that that Congress shall have plenary power to "regulate Commerce with . . . the Indian tribes." U.S. Const. art. I, § 8, cl. 3. On numerous

[13] Apart from the fact that Plaintiffs' are misquoting the Agreements, their argument also fails because they are asking to the Court to interpret the Agreements to an absurd end.

occasions, the Supreme Court has interpreted this provision as limiting state regulatory authority over commercial transactions involving Native Americans. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 343-44 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151-52 (1980); *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959). In light of this case law, the provision is justified in informing consumers that the loan transactions fall beyond the regulatory jurisdiction of the states.

Moreover, Plaintiffs do not even attempt to explain how or why this particular provision of the Arbitration Agreements would have been integral, or in any way meaningful, to their decision to arbitrate. It is akin to a standard, boilerplate phrase often included in agreements subject to the Federal Arbitration Act. *See, e.g. Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.)*, 554 F.3d 300, 307 (2d Cir. N.Y. 2009), *rev'd* 559 U.S. 1103 (U.S. 2010). That is neither remarkable nor a basis for avoiding arbitration.

CONCLUSION

Because Plaintiffs' challenges to arbitration must be arbitrated under the Parties' Delegation Agreements—and because those challenges lack merit even if they were properly before the Court (which they are not)—the Court should stay proceedings, direct the Parties to select mutually-agreeable arbitrators, and compel Plaintiffs to arbitrate their claims on a bilateral and not class basis.

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Respectfully submitted by,

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