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,	*	
Plaintiffs,	*	Case No. 3:13-cv-3023-RAL
v.	*	Hon. Roberto A. Lange
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; CASHCALL, INC; and WS FUNDING, LLC,	*	
Defendants.	*	

DEFENDANTS' REPLY BRIEF
IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS

In this case, four non-South Dakota residents ("Plaintiffs") took out loans from Defendant Western Sky Financial LLC ("Western Sky"), a lender owned by a member of the Cheyenne River Sioux Tribe ("CRST") that operates from the CRST's Reservation pursuant to tribal law. The contracts governing Plaintiffs' loans (the "Loan Agreements" or "Agreements") state in simple language that they are governed exclusively by CRST law and not by any individual state's law; that the parties agreed to resolve any disputes they may have through binding arbitration or, in some circumstances, in litigation in the CRST court system; and that Plaintiffs would not bring any class action claims.

In light of those clear contractual agreements, why is this case in this Court? The short answer is that Plaintiffs have repudiated their contractual obligations, root and branch. They

disclaim any obligation to repay their loans, and have brought a putative class action under the usury and consumer protection laws of Minnesota, Virginia, Texas, and California against Western Sky, a separate tribal lender named PayDay Financial LLC ("PayDay Financial"), and against California companies that purchased and serviced Plaintiffs' loans. Plaintiffs' claims must be dismissed for three principal reasons.

First, Plaintiffs have shown no reason why the forum selection clause requiring that any in-court disputes be heard in the CRST courts is not enforceable. Indeed, they make no serious argument that the forum selection clause is invalid. Instead, Plaintiffs make irrelevant attacks on the Agreements' arbitration clause and choice-of-law provision, without ever explaining why the validity of those provisions would somehow affect the enforceability of the forum selection clause. Plaintiffs' failure to grapple with the forum selection clause is reason enough to enforce the clause and dismiss this case.

In any case, Plaintiffs could not meet their burden to show the forum selection clause is unreasonable even if they tried. For example, there is no plausible argument that this Court is much more conveniently located than the CRST courts because both are in South Dakota. And there is no plausible argument that Defendants defrauded Plaintiffs into agreeing to the clause—it was disclosed in the first two sentences of the Agreements in bold type. At its core, voiding the clause here would imply that it is unreasonable to enforce any forum selection clause in a consumer contract of adhesion, the very argument the Supreme Court rejected in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594-95 (1991).

In their opposition brief, Plaintiffs also argue that the tribal courts do not have jurisdiction. But under the doctrine of tribal exhaustion, respectfully, this Court is powerless to resolve that challenge because binding Supreme Court precedent dictates that tribal courts must

resolve questions of tribal jurisdiction in the first instance. Plaintiffs spend a large chunk of their brief purporting to show that tribal courts do not have jurisdiction. (Opp. 9-17.) But that is not the question before this Court. The only question here is if Defendants have a "colorable" or "plausible" claim that the CRST court has jurisdiction. If so, then this case must be sent to the tribal courts to resolve Plaintiffs' jurisdictional challenge. As explained in Defendants' opening brief and below, Defendants more than meet that challenge here. The tribal exhaustion doctrine thus requires dismissal.[1]

Second, this Court does not have personal jurisdiction over two Defendants, CashCall, Inc. ("CashCall") and WS Funding, LLC ("WS Funding"), because those Defendants are California corporations with insufficient South Dakota contacts. Plaintiffs' entire response is that CashCall and WS Funding have a contractual relationship to purchase and service loans from Western Sky, which is incorporated as a South Dakota limited liability company. But the Supreme Court has held that such a relationship with an entity in the forum does not create the contacts needed for personal jurisdiction. In any case, through those contracts CashCall and WS Funding have purposely availed themselves only of CRST, not South Dakota, law.

Third, if the Court reaches the merits of Plaintiffs' claims, it must dismiss them under Rule 12(b)(6). All of Plaintiffs' claims are based on state law, yet Plaintiffs have not met their burden to show that the choice-of-law provision requiring application of tribal law is unenforceable. To do so, Plaintiffs must show *both* that a particular state has a materially greater interest in this case than the CRST and that enforcing the choice-of-law clause violates a

[1] Defendants have filed a separate motion to compel arbitration to enforce the Agreements' arbitration clause. (Dkt. No. 23.) Should this Court deny this motion, it should still compel arbitration.

This brief discusses the arbitration clause only when necessary to respond to Plaintiffs' opposition. For a fuller discussion of the arbitration issues, Defendants refer the Court to the papers on the motion to compel arbitration. (Dkt. Nos. 23, 46.)

fundamental state public policy. Plaintiffs have not shown that any state has a materially greater interest in this case than the CRST, especially given how important encouraging successful business enterprises is to the impoverished people on the Reservation. Further, respecting the parties' agreement to be governed only by tribal law does not violate fundamental state public policy. In any event, Plaintiffs fail to meet their basic pleading obligations to state a claim.

I. This Court Should Dismiss This Case Due To The Forum Selection Clause.

A. In Accord With Intervening Supreme Court Precedent, Defendants Ask This Court To Dismiss Under The Doctrine Of *Forum Non Conveniens*.

In their opening brief, Defendants argued that this court should enforce the forum selection clause through a motion to dismiss for improper venue under Rule 12(b)(3). (Op. Br. 4.) At the time of that filing a number of other circuits had held that Rule 12(b)(3) was the appropriate vehicle to enforce a forum selection clause. *See Rainforest Cafe, Inc. v. EklecCo, LLC*, 340 F.3d 544, 545 n.5 (8th Cir. 2003) (noting circuit split).

On December 3, 2013, the Supreme Court held that "Rule 12(b)(3) [is] not [a] proper mechanism[] to enforce a forum-selection clause." *Atlantic Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.*, No. 12-929, 2013 WL 6231157, *10 (U.S. Dec. 3, 2013). Instead, "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*." *Id.*

The Court also imposed a higher burden on a plaintiff seeking to void a forum selection clause. In particular, post-*Atlantic Marine*, the district court may "not consider arguments about the parties' private interests" because "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." *Id.* at *12. The court may rely upon "public-interest factors only" in evaluating a forum selection clause, which "will rarely

defeat" a forum selection clause. *Id.* Thus, "a valid forum selection clause [should be] given controlling weight in all but the most exceptional cases," including "in cases involving valid forum-selection clauses pointing to state or foreign forums." *Id.* at *11, *14 n.8 (alteration in original).

In accord with *Atlantic Marine*, Defendants ask that this Court consider their motion to dismiss on the basis of the forum selection clause as one under the doctrine of *forum non conveniens* rather than under Rule 12(b)(3), and to give the forum selection clause the "controlling weight" *Atlantic Marine* requires.

B. Plaintiffs Have Failed To Show The Forum Selection Clause Is Unenforceable.

Defendants demonstrated in their opening brief that the Loan Agreements' forum selection clause requiring that any in-court disputes be heard in the CRST courts is valid and enforceable. (Op. Br. 5-10.) Plaintiffs largely ignore that forum selection clause in their opposition filing. Instead, in the portion of their brief purporting to address the Loan Agreements' "venue" provision, Plaintiffs only argue that the Agreements' arbitration, choice-of-law, and forum selection clauses were part of Defendants' "scheme" to "avoid both United States and tribal law," and most extremely, "any existing law." (Opp. 22-23.) Plaintiffs' tactic is thus to conflate the arbitration, choice-of-law, and forum selection clauses and declare them collectively invalid without ever explaining what in particular is wrong with the forum selection clause itself. That tactic fails for many reasons.

First, the Supreme Court and Eighth Circuit have already rejected such a blunderbuss approach to challenging forum selection clauses. To show a forum selection clause is unenforceable, Plaintiffs must show "that the forum selection clause [is] *itself*" unreasonable. *M.B. Rests., Inc. v. CKE Rests., Inc.*, 183 F.3d 750, 752 (8th Cir. 1999) (emphasis added). It is

thus not enough for Plaintiffs to argue that the Loan Agreements themselves are unlawful or unreasonable, or that other clauses in the Agreement are unreasonable. They must show how the forum selection clause itself is unreasonable. In this case, that means that these out-of-state Plaintiffs must show why it is unreasonable to require them to bring suit in CRST tribal courts (located within the boundaries of South Dakota) rather than in federal district court (also located in South Dakota) to adjudicate claims made under Minnesota, Texas, Virginia, and California law brought by residents of three of those states. Plaintiffs do not even attempt to make that showing.

Second, Plaintiffs could not make the required showing even if they tried. As Defendants demonstrated in their opening brief (at 5), "[f]orum selection clauses are prima facie valid and are enforced unless they are unjust or unreasonable or invalid for reasons such as fraud or overreaching," *M.B. Rests.*, 183 F.3d at 752, or they "contravene a strong public policy of the forum in which suit is brought," *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). That rule applies even to forum selection clauses in consumer contracts of adhesion. *Carnival Cruise Lines*, 499 U.S. at 594-95. "The burden is on the resisting party to make a '*strong showing* ... that enforcement would be unreasonable and unjust.'" *O'Neill Farms, Inc. v. Reinert*, 780 N.W.2d 55, 58 (S.D. 2010) (ellipsis and emphasis in original) (quoting *M/S Bremen*, 407 U.S. at 15). The "public-interest factors" that are now the sole basis for attacking a forum selection clause "will rarely defeat" that clause. *Atlantic Marine*, 2013 WL 6231157 at *12.

Plaintiffs cannot meet that test. There is no reasonable argument that litigating before the CRST courts on the Reservation in South Dakota would be more inconvenient than litigating before this Court in South Dakota. None of the Plaintiffs are South Dakota residents, and

litigating in either court will still require them (or their counsel) to travel to South Dakota for this case. In any case, under *Atlantic Marine* this fact is now irrelevant. *Id.*

Nor is there any plausible argument that the forum selection clause here is the result of "fraud or overreaching." *M/S Bremen*, 407 U.S. at 15. The very first line of the Loan Agreements states, "**This Loan Contract is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation**." (Am. Compl. ¶ 59; *see also* MTD Ex. A at 1 (emphasis in original).)[2] The next sentence states that Plaintiffs "consent[ed] to the sole subject matter and personal jurisdiction of the" CRST courts. (Am. Compl. ¶ 59.) That any disputes about Plaintiffs' loans had to be heard in the tribal courts was not buried in fine print at the end of the contract. A borrower who read only the first two sentences of the Agreements would learn that through clear, plain-English prose. Courts consistently enforce forum selection clauses that were clearly disclosed to the consumer, as here. *See, e.g.*, *Liles v. Ginn-La W. End, Ltd.*, 631 F.3d 1242, 1247 (11th Cir. 2011).

Plaintiffs argue that the combination of the Loan Agreements' forum selection clause and arbitration provisions is confusing because the Agreement "leaves it unclear" whether any litigation would occur in arbitration or in the CRST courts. (Opp. 14.)

There is no contradiction between the arbitration provision and the forum selection clause. The Loan Agreements provide that most "Disputes" between the parties will be resolved through arbitration, but acknowledge that some issues may be resolved in a court. For example, the Agreements provide that the validity of the class action waiver is *not* subject to arbitration. (MTD Ex. A at 4-5.) Similarly, the Loan Agreements provide for judicial review of the

[2] All citations of "MTD Ex. __" are to the exhibits attached to Defendants' opening brief. (Dkt. No. 34.) All of Plaintiffs' Loan Agreements are substantively identical for purposes of this Brief. All references to MTD Ex. A (Plaintiff Heldt's Agreement) should be understood to refer also to the Loan Agreements of the other Plaintiffs.

arbitration award in the tribal courts, and allow claims to proceed in court if they fall within the jurisdiction of the CRST Court's "small claims tribunal." (*Id.* at 5.) Further, the arbitration clause allowed Plaintiffs to opt-out of arbitration entirely, in which case any dispute would have been subject to the exclusive jurisdiction of the CRST Court. (*Id.*)

In short, the arbitration and forum selection clauses are complementary, not contradictory. Courts faced with contracts containing arbitration and forum selection clauses consistently interpret them in a complementary fashion, requiring arbitration but providing that any in-court litigation (such as to enforce the arbitration award or to undertake any other in-court litigation authorized by the contract) be governed by the forum selection clause. *See, e.g.*, *Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 554 (3d Cir. 2009); *Montauk Oil Transp. Corp. v. Steamship Mut. Underwriting Ass'n (Bermuda), Ltd.*, 79 F.3d 295, 298 (2d Cir. 1996); *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1204-05 (5th Cir. 1991); *Patten Secs. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 407 (3d Cir. 1987), *abrogated on other grounds, Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287 (1988); *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971); *NECA Ins. Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 595 F. Supp. 955, 958 (S.D.N.Y. 1984); *W. Shore Pipe Line Co. v. Associated Elec. & Gas Ins. Servs. Ltd.*, 791 F. Supp. 200, 203-04 (N.D. Ill. 1992); *cf. Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278, 284-85 (2d Cir. 2005).

In sum, there is no plausible argument that the Agreements here are so confusing or contradictory as to be fraudulent. They clearly require that any in-court disputes falling outside the arbitration clause must be heard by the tribal courts, not the federal courts. In any event, even if the Agreements were not clear on whether a particular dispute needed to be arbitrated or

submitted to the CRST courts, the Agreement is crystal clear that no other forum is appropriate. Given that, Plaintiffs cannot sensibly argue that the supposed confusion they claim allows them to sue in federal court.[3]

The forum selection clause also does not "contravene a strong public policy of the forum," here South Dakota. *M/S Bremen*, 407 U.S. at 15. Plaintiffs are not South Dakota citizens and do not bring claims under South Dakota law, so a forum selection clause requiring suit outside South Dakota does not violate South Dakota public policy. *See A&B Bus. Equip., Inc. v. Ricoh Corp.*, No. Civ. 06-4184, 2006 WL 3489319, at *4 (D.S.D. Dec. 1, 2006). Thus, Plaintiffs' contention that "South Dakota's laws firmly establish a public policy in favor of consumer protection" is irrelevant. (Opp. 23.) In any case, as Defendants have explained, (Op. Br. 21), the Agreements are consistent with South Dakota policy because South Dakota does not limit interest rates in loan agreements.

Third, Plaintiffs may not launch a pre-suit attack on the forum selection clause on the ground that the forum will not give Plaintiffs a fair opportunity to adjudicate their claims. (Opp. 22-24.) In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, a plaintiff challenged a clause requiring arbitration on the ground that the arbitral forum might not recognize that the plaintiff had an antitrust claim under the Sherman Act. 473 U.S. 614, 638 & n.19 (1985). The Supreme Court rejected that argument because it was premature, explaining: "We … have no

[3] Plaintiffs also argue that the arbitration provision is a "sham," pointing to a district court opinion relating to that provision that found the arbitrator called for by the Agreement to be unavailable. (Opp. 15-16.) Defendants have already explained why the arbitration provision is enforceable, and will not repeat that discussion here. (*See* Dkt. Nos. 23, 46.) In any case, Plaintiffs never explain just how any infirmity in the *arbitration* clause means that the *forum selection clause* is unenforceable. Plaintiffs do not even contend that the confusion they allege surrounding the arbitration and forum selection clauses warrants voiding the forum selection clause under normal choice-of-forum rules. Plaintiffs include that discussion only in their attack on tribal jurisdiction, (Opp. 13-16), a distinct issue from whether the forum selection clause is enforceable under normal choice-of-forum analysis, (Opp. 22-23).

occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award." *Id.* at 637 n.19. Similarly, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, the Supreme Court rejected an argument that an arbitral forum selection clause was unenforceable where the other party sought "only to enforce the arbitration agreement." 515 U.S. 528, 540-41 (1995). There, "mere speculation that the foreign arbitrators might apply [foreign] law" was not enough to void the arbitral forum selection clause. *Id.* at 541.

Those principles apply with equal force here. Plaintiffs argue that the Loan Agreements' choice-of-law clause is invalid, and thus that they should be allowed to bring claims under the laws of four different states. As explained below (at 23-29), Defendants contest that argument. But this Court need not resolve it. The only question here is who is entitled to decide that issue. The Loan Agreements make clear that only an arbitrator, with potential review in the tribal courts, may do so, not this Court. "Mere speculation" that the arbitrator or tribal courts will decide that issue incorrectly is not sufficient to void the forum selection clause. *Vimar Seguros y Reaseguros*, 515 U.S. at 541.

Fourth, Plaintiffs' attacks on the arbitration and choice-of-law clauses are irrelevant and meritless. Plaintiffs argue that the Loan Agreements are fraudulent because they were part of a "scheme that purports to avoid both United States law *and tribal law*" and that results in "a fraudulent private arbitration procedure that is shielded from *any* existing law." (Opp. 22-23 (emphases added).) That is just wrong.

Plaintiffs' argument that the arbitration and choice-of-law clauses were designed to shield Defendants' actions from "tribal law" is bewildering. The Loan Agreements make clear they are governed by tribal law, a proposition with which Defendants have no quarrel. To the extent

Plaintiffs have any claims under tribal law, they may bring them. *See* p. 29 below. There is no reasonable argument that a contract that expressly says it is governed by a particular jurisdiction's law was somehow designed to evade that law.

The arbitration called for by the Loan Agreements will provide Plaintiffs an adequate forum to hear their claims. As Defendants have explained in their motion to stay proceedings and compel arbitration (Dkt. No. 23), the Loan Agreements here contain a clear arbitration clause requiring that all disputes between the parties be resolved in arbitration. In their opposition, Plaintiffs make no argument that the arbitration clause does not apply to this dispute. Instead, Plaintiffs claim that the arbitration clause is unenforceable for a variety of reasons, including because the forum called for by the Loan Agreements is unavailable. (Dkt. No. 29 at 4-5; Dkt. 31.) But as Defendants have already argued (Dkt. No. 33 at 10-13), the arbitration clause here contains a "Delegation Clause" that requires that any disputes about the validity of the arbitration agreement be resolved in the first instance by the arbitrator. Under the Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010), this Court must enforce the Delegation Clause unless Plaintiffs make an argument "directed specifically" at the Delegation Clause. They do not do so here. Thus, this Court may not consider Plaintiffs' arguments that the arbitration will somehow be unfair. And if it is, Plaintiffs can seek to vacate the award in court post-arbitration. 9 U.S.C. § 10.

As explained below, the choice-of-law clause requiring application of tribal law is enforceable under normal South Dakota choice-of-law principles. And tribal law gives Plaintiffs an adequate remedy for the alleged fraud they claim to have suffered. *See* p. 29 below. There is thus no plausible argument that the arbitration and choice-of-law clauses are fraudulent.

For all of these reasons, the forum selection clause is enforceable. This Court should therefore dismiss this case.

II. Alternatively, The Tribal Exhaustion Doctrine Requires This Court To Allow The Tribal Courts To First Determine Whether Tribal Jurisdiction Exists.

Defendants demonstrated in their opening brief that the tribal exhaustion doctrine requires this Court to defer to the tribal courts to address in the first instance any questions as to whether those courts have jurisdiction. (Op. Br. 10-13.) In a single paragraph, Plaintiffs assert that tribal court exhaustion is not appropriate in this case. As lone support, Plaintiffs provide a string of citations to inapposite cases where exhaustion was not required. (Opp. 16-17.) This argument is wrong as a matter of law.

As Defendants have already discussed (Op. Br. 10-13), the Supreme Court has dictated that tribal courts must be given the opportunity to determine their jurisdiction in the first instance. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18-19 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). In order to invoke the tribal exhaustion doctrine, Defendants need not show that a CRST court definitively has jurisdiction over this case; rather, exhaustion is required if tribal jurisdiction is merely "colorable" or "plausible." *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008); *see also DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882-83 (8th Cir. 2013). Defendants have easily made the required showing that tribal jurisdiction is "colorable" here. This Court therefore must defer to the CRST courts to address Plaintiffs' jurisdictional challenge.

A. Tribal Court Jurisdiction Is Proper Under *Montana v. United States*—Or At The Very Least Tribal Court Jurisdiction Is Colorable.

There is no question that the CRST courts have at least colorable jurisdiction over this dispute because it involves a consensual commercial relationship with tribal entities (Western Sky and PayDay Financial) on the Reservation. *See Montana v. United States*, 450 U.S. 544,

565 (1981). In *Montana*, the Supreme Court held that a tribe may exercise jurisdiction over non-Indians under two circumstances, including most significantly to this case, over "the activities of nonmembers who enter consensual relationships with the tribe *or its members*, through commercial dealing, contracts, leases, or other arrangements." *Id.* (emphasis added). "[A]uthority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co.*, 480 U.S. at 18; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("[W]e have held that tribes have the power to manage the use of [their] territory and resources by both members and nonmembers [and] to undertake and regulate economic activity within the reservation.") (citations omitted).

In this case, Plaintiffs were aware that they were entering into agreements with tribal members that would be consummated on the Reservation. As discussed, *see* p. 7 above, the Loan Agreements make clear that they are "subject solely to the exclusive laws and jurisdiction of the" CRST, that Plaintiffs "consent[ed] to the sole subject matter and personal jurisdiction of the" CRST courts, and that "no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or its interpretation." (Am. Compl. ¶ 59 (emphasis omitted).) Given these clear provisions, there can be no question that Plaintiffs entered into the kind of consensual commercial relationship contemplated in *Montana*.

Defendants have also established that Mr. Webb is a member of the CRST, and as such, his companies PayDay Financial and Western Sky are considered tribal members for purposes of federal law.[4] *See, e.g., Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395, 403-06 (S.D. 2003),

[4] CashCall and WS Funding acceded to all the rights and privileges possessed by Western Sky because an "assignment places the assignee in the shoes of the assignor, giving the assignee the same legal rights as the assignor's before the assignment." *Bayside Holdings, Ltd. v. Viracon, Inc.*, 709 F.3d 1225, 1228 (8th Cir. 2013) (Minnesota law); *In re Estate of Wurster*, 409 N.W.2d 363, 365 (S.D. 1987).

vacated in part on other grounds, 674 N.W.2d 314 (2004), *cert. denied*, 541 U.S. 1064 (2004); *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 483-84 (S.D. 1991); *Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1157 (9th Cir. 2013) (holding that a state's authority to impose taxes on a tribal business "cannot be made to turn on the Tribe's decision to give ownership of the Lodge to its limited liability company for the duration of the lease") (quotations omitted).

It is irrelevant that Mr. Webb's companies were incorporated in South Dakota. (Opp. 11-12.) The CRST does not have a mechanism by which individual private companies can incorporate under tribal law, so Mr. Webb had to form his companies under state law. Faced with similar factual circumstances, courts hold that tribal-member-owned companies are entitled to the same protections as their owners. *See, e.g.*, *Pourier*, 658 N.W.2d at 404-05 (holding that a business incorporated under South Dakota law and not tribal law was an enrolled member of the tribe for purposes of tax immunity because it was *owned* by an enrolled member of the tribe and *operated* on the reservation); *Giedosh v. Little Wound Sch. Bd., Inc.*, 995 F. Supp. 1052, 1058-59 (D.S.D. 1997) (finding that school board incorporated as a nonprofit corporation under South Dakota law was nevertheless secure in its status as a Native American tribe); *Sage*, 473 N.W.2d at 483-84 (ruling that a non-profit corporation incorporated under South Dakota law and operated by tribal members was still entitled to the benefits of tribal membership).

Plaintiffs argue that Western Sky and PayDay Financial are not tribal members because they are South Dakota limited liability companies ("LLCs"), and cite the federal diversity jurisdiction statute for the proposition that as LLCs Western Sky and PayDay Financial are "deemed citizens of their respective states of incorporation for the purposes of diversity jurisdiction." (Opp. 11.) Defendants acknowledge this Court's prior statements that the fact that

Western Sky is incorporated as a South Dakota LLC is a factor suggesting that Western Sky should not be considered a tribal member. *FTC v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 936-37 (D.S.D. 2013). However, Defendants respectfully disagree with that conclusion for the following reasons.

First, Plaintiffs' argument improperly merges the separate concepts of state citizenship and tribal membership status. The two are not mutually exclusive; approximately two million individuals in the United States identify as enrolled tribal members while still possessing state citizenship for diversity purposes.[5] That Western Sky and PayDay Financial might be considered state citizens in certain circumstances thus does not preclude finding that they are *also* tribal members that enjoy the protection of tribal law.

Second, Plaintiffs' argument misses the mark because "[t]he unique historical origins of tribal sovereignty make it generally unhelpful to apply ... standards ... that have emerged in other areas of the law," such as under the diversity statute. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

Third, even under Plaintiffs' diversity-of-citizenship framework, Western Sky and PayDay Financial still retain their tribal status because "[a]n LLC's citizenship, for purposes of diversity jurisdiction, is the citizenship of each of its members." *OnePoint Solutions, LLC v. Borchert*, 486 F.3d 342, 346 (8th Cir. 2007). In other words, Congress has made clear that courts should look through an LLC to the status of its owner, just as Defendants have argued. *See* pp. 13-14 above. In this case, the complaint alleges that only one person is an owner (and

[5] *See* Bureau of Indian Affairs, Indian Affairs FAQs, http://www.bia.gov/FAQs/ (last visited Dec. 3, 2013).

thus member) of PayDay Financial and Western Sky: Mr. Webb.[6] (Am. Compl. ¶ 13.) Thus, even under Plaintiffs' argument, the Court's focus should be on the status of Western Sky and PayDay Financial's owner, Mr. Webb, who is undoubtedly a member of the CRST.

Plaintiffs' arguments to the contrary do not rebut any of the cases relied upon by Defendants. (Opp. 11-12.) With the exception of *FTC v. PayDay Financial*, discussed above, none of the cases involved an LLC, and so none involved "looking through" the place of incorporation to the citizenship of the company's members, as here. Western Sky and PayDay Financial are tribal citizens by virtue of federal Indian law and principles of tribal sovereignty. *Pourier*, 658 N.W.2d at 404-05; *Giedosh*, 995 F. Supp. at 1058-59; *Sage*, 473 N.W.2d at 483-84.

Tribal jurisdiction is also appropriate because the dispute involves on-reservation conduct. 450 U.S. at 565. All of the Loan Agreements were formed on the Reservation because no contract existed until Western Sky processed and approved a signed application on tribal land. (Ex. 1, Lawrence Aff. ¶ 6.) Under South Dakota law, this fact is dispositive because the place of contracting is the location where the "last act … necessary to complete the contract and give it validity" occurred. *O'Neill Farms*, 780 N.W.2d at 59 (quotations omitted). Plaintiffs cite no federal case law or facts to the contrary.

The fact that the loans were consummated on the Reservation is particularly important given that the CRST Tribal Code and Constitution assert tribal jurisdiction over the entire Reservation and all persons or corporate entities transacting business on the Reservation. CRST Code §§ 1-4-1, 1-4-3; Art. 5, CRST By-Laws. Additionally, the CRST recently reiterated the exclusive nature of tribal jurisdiction over tribal members by passing a resolution reaffirming that "absent Congressional authorization, states have no authority to regulate ... the business

[6] References to the "complaint" refer to Plaintiffs' Amended Class Action Complaint and Demand for Trial by Jury. (Dkt. No. 30.)

activities of enterprises owned by the Tribe or its members." Ex. 2, CRST Resolution No. 350-2013-CR (Nov. 12, 2013). Tribal law thus anticipates and expressly asserts tribal court jurisdiction over disputes involving companies such as PayDay Financial and Western Sky.

Plaintiffs rely on *Plains Commerce Bank v. Long Family Land & Cattle Co.* for the proposition that even tribal regulation stemming from consensual commercial conduct with non-Indians must stem from the "tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." 554 U.S. 316, 337 (2008).

Plaintiffs' interpretation of *Plains Commerce* takes an unduly restrictive view of tribal jurisdiction. As the Fifth Circuit recently explained when faced with similar arguments, *Plains Commerce* does not "require an additional showing that one specific relationship, in itself, intrudes on the internal relations of the tribe or threatens self-rule." *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 732 F.3d 409, 416 (5th Cir. 2013) (quotations and alterations omitted). "Nothing in *Plains Commerce* requires a focus on the highly specific rather than the general," including because "[i]t is hard to imagine how" for example "a single employment relationship between a tribe member and a business could ever have such an impact." *Id.*

Dolgencorp flatly rejects Plaintiffs' narrow reading of *Plains Commerce* and shows that tribal jurisdiction is appropriate where—as is the case here—the company is owned by a tribal member, headquartered on tribal land, licensed by the tribe to do business on the Reservation, consummated loan agreements with consumers on-Reservation, and obtained express consent from non-Indians that tribal law will govern. Indeed, Defendants are not aware of any court (and certainly Plaintiffs do not point to one) that has ever found a consensual relationship with a nexus to a tribal regulation, only to then reject tribal jurisdiction because the relationship did not "implicate tribal governance and internal relations." *Id.* at 417 (quotations omitted). As noted in

Dolgencorp, the "discussion in *Plains Commerce* of tribal authority to regulate nonmember conduct under *Montana* is dicta" and involved a transaction between non-Indians. *Id.* Accordingly, Plaintiffs' reliance on *Plains Commerce* is misplaced.

Even if Plaintiffs were correct that *Plains Commerce* imposed an independent limitation on tribal jurisdiction to the "tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations," 554 U.S. at 337, that requirement is met here. In arguing to the contrary, Plaintiffs artificially limit the scope of tribal court jurisdiction under *Montana* by overlooking the significant tribal interests at stake. The Supreme Court has made clear that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co.*, 480 U.S. at 18. For that reason, courts have routinely upheld the right of tribes to adjudicate disputes that affect tribal members or tribal interests. For example, the Eighth Circuit recently held that tribal jurisdiction was colorable "[e]ven if the alleged ... tort occurred off tribal lands ... because the tort claim ar[ose] out of and [was] intimately related to [the non-Indian company's] contract with [an Indian] and that contract relate[d] to activities on tribal land." *Laducer*, 725 F.3d at 884. *Laducer* controls this case because here non-Indian consumers entered into consensual commercial relationships with Western Sky on the Reservation. Accordingly, tribal court jurisdiction is appropriate under *Montana*. 450 U.S. at 565.

In any event, this Court need not even reach that conclusion to dismiss this case. The only question before this Court is whether Defendants have established a "colorable" claim that tribal jurisdiction exists. *Atwood*, 513 F.3d at 948. For the reasons just discussed, Defendants easily meet that test.

B. Plaintiffs Are Incorrect That Tribal Court Jurisdiction Is Not Foreseeable.

Plaintiffs contend that tribal exhaustion does not apply because borrowers could not "foresee with clarity" that the tribal court would have jurisdiction and because Defendants' arbitration scheme is a "sham." (Opp. 13-16.) This argument can be easily rejected for two reasons.

First, the Loan Agreements are crystal clear that the tribal court would indeed have jurisdiction over Plaintiffs and their claims: "By executing this Loan Agreement, you, the borrower, hereby acknowledge and ... consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court ... ." (Am. Compl. ¶ 59.) Given that clear language, Plaintiffs' contention that they could not foresee tribal court jurisdiction is disingenuous.

Nor can Plaintiffs plausibly claim that they could not foresee litigation in a tribal venue because they claim the Loan Agreements are confusing about whether claims must be arbitrated or heard in the tribal courts. (Opp. 13-16.) As discussed, there is nothing confusing about the arbitration or forum selection provisions. *See* pp. 7-8 above. In any case, even if there were confusion over whether claims should be heard in either tribal arbitration or a tribal court, there is no confusion that those two fora are the only permissible ones, and that this Court is not a proper forum.

Second, Plaintiffs admit in their brief that it is "unclear" whether their dispute should be resolved "through the exclusive jurisdiction of the tribal court." (Opp. 14.) Defendants have argued this dispute *must* be resolved in CRST Court, *see* pp. 7-8 above, but this Court need not resolve that question because Plaintiffs' admission here has conceded the entire issue of tribal exhaustion: if it is "unclear" whether this dispute should be resolved in tribal court, there can be no doubt that there is at least a colorable question as to the tribal court's jurisdiction.

Because the CRST at least has colorable jurisdiction over Plaintiffs' dispute, this Court must dismiss this case due to lack of tribal court exhaustion.[7] *See Iowa Mut. Ins. Co.*, 480 U.S. at 18-19; *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856.

III. Alternatively, This Court Lacks Personal Jurisdiction Over CashCall And WS Funding.

Plaintiffs fail to meet their burden to show that this Court has personal jurisdiction over CashCall and WS Funding due to their business dealings with Western Sky, (Opp. 17-22), for three reasons.

First, any contacts resulting from the relationship between CashCall, WS Funding, and Western Sky do not mean that CashCall and WS Funding have sought the benefits and protections of South Dakota law, the threshold requirement for exercising personal jurisdiction over a non-resident defendant here. The Supreme Court has held that a foreign defendant must have engaged in "'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, *thus invoking the benefits and protections of its laws*'" to be subject to suit in the forum's courts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (emphasis added).

CashCall and WS Funding have done nothing to invoke the protections of South Dakota law. The Loan Agreements state that they are governed only by CRST law, the law of an independent sovereign. In addition, CashCall and WS Funding's contracts with Western Sky each state that they are governed only by CRST law. (Opp., Ex. 1 at 5, 7, 14; Ex. 1, Lawrence Aff. ¶ 6.) Those contracts make clear that CashCall and WS Funding have not invoked the

[7] Under factually similar circumstances, a federal court has required a plaintiff to exhaust tribal court remedies before bringing suit against a company owned by a tribal member and incorporated in Montana. *See Cropmate Co. v. Indian Res. Int'l, Inc.*, 840 F. Supp. 744, 745-48 (D. Mont. 1993). This Court should follow the example of *Cropmate*.

protections of South Dakota law. Where, as here, a contract contains a choice-of-law clause designating non-forum law, a non-resident defendant does not purposely avail itself of forum law by undertaking activity called for by that contract. *See Thompson Hine, LLP v. Taieb*, -- F.3d --, 2013 WL 5976090, at *5 (D.C. Cir. Nov. 12, 2013).

Plaintiffs contend that because Western Sky is incorporated as a South Dakota LLC, contacts with Western Sky effectively amount to contacts with South Dakota itself. (Opp. 19.) That argument fails because Western Sky's incorporation under South Dakota law occurred only because the CRST does not have separate incorporation statutes. The contacts with South Dakota are thus ministerial contacts necessary to establish corporate form. At best, therefore, any connection to South Dakota resulting from Western Sky's incorporation under South Dakota law "create[s] only an 'attenuated' affiliation with the forum," and thus cannot establish personal jurisdiction. *Burger King*, 471 U.S. at 475 n.18 (quoting *Int'l Shoe Co. v . Washington*, 326 U.S. 310, 318 (1945)).

Second, a contractual relationship between a foreign defendant and a company in the forum state is insufficient to convey the forum state's courts with personal jurisdiction. "[A]n individual's contract with an out-of-state party *alone* [cannot] automatically establish sufficient minimum contacts in the other party's home forum." *Id.* at 478 (emphasis in original). The contracts with Western Sky thus cannot give this Court personal jurisdiction as a matter of law.

Perhaps recognizing this, Plaintiffs attempt to show minimum contacts by pointing out that CashCall provided services to Western Sky under those contracts by purchasing and servicing loans from Western Sky, maintaining Western Sky's "communications infrastructure," and participating in the underwriting of Western Sky's loans. (Opp. 19.) But Plaintiffs ignore where CashCall performed those functions: in California. (Op. Br. 15-17.) The only even

arguable connection to South Dakota is that those services were due to a contractual relationship with a company located on a Reservation within South Dakota's exterior borders. But such a contractual relationship is insufficient to convey personal jurisdiction. *Burger King*, 471 U.S. at 478.

Third, and finally, even if Plaintiffs established minimum contacts with South Dakota, the exercise of personal jurisdiction is unreasonable. "[M]inimum requirements inherent in the concept of fair play and substantial justice may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." *Id.* at 477-78 (quotations omitted). In evaluating the reasonableness of jurisdiction, critical factors are "the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 477 (quotations omitted).

All those factors weigh against jurisdiction here. The forum state (South Dakota) has no interest in this case, as Plaintiffs are not residents of South Dakota, they bring no claims under South Dakota law, and Defendants are tribal entities operating under tribal law. Further, Plaintiffs can seek complete relief in arbitration or the tribal courts, thus resulting in an "efficient" administration of justice in those fora. Indeed, in bringing suit here, Plaintiffs are the ones who have wrought inefficiency by requiring pre-suit adjudication of the proper forum rather than a prompt determination of the merits of their claims. Finally, no "fundamental substantive social policies" are at issue here. As described below, no applicable state's usury laws are so fundamental to their public policy to warrant setting aside a contractual agreement to litigate in a particular forum under that forum's law, and to the extent Plaintiffs believe they were defrauded,

they can bring a fraud claim under tribal law. *See* pp. 29 below. There is therefore no reason that the South Dakota courts should hear this case.

IV. Alternatively, Plaintiffs Fail To State Any Claim.

A. This Court Should Dismiss All Claims Because They Are Not Based on Tribal Law.

Should this Court reach the merits, it must dismiss all of Plaintiffs' claims because, contrary to the Loan Agreement's choice-of-law provision, none are based on tribal law. That provision, which specifies that the Loan Agreements are "subject solely to the exclusive laws and jurisdiction of the" CRST, (Am. Compl. ¶ 59), bars Plaintiffs' claims for two reasons. *First*, under normal South Dakota choice-of-law principles, the clause is enforceable. *Second*, the choice-of-law provision implicates deeper tribal sovereignty principles that preclude state law from applying to Defendants' conduct.

1. The Loan Agreements' choice-of-law clause is enforceable and precludes claims based on non-tribal law.

As Defendants demonstrated in their opening brief (at 19-22), the Loan Agreements' choice-of-law clause dictating that they are subject exclusively to CRST law precludes Plaintiffs from bringing claims based on state law. Put simply, where a contract contains a choice-of-law clause designating the law of a particular jurisdiction, that clause precludes claims based on the law of other jurisdictions. *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, 739-40 (8th Cir. 1989), *superseded by statute as stated in Commercial Prop. Investments, Inc. v. Quality Inns Int'l, Inc.*, 938 F.2d 870, 874 (8th Cir. 1991); *Cantu v. Jackson Nat'l Life Ins. Co.*, 579 F.3d 434, 436-38 (5th Cir. 2009); *Midway Home Entm't Inc. v. Atwood Richards, Inc.*, No. 98 C 2128, 1998 WL 774123, at *3 (N.D. Ill. Oct. 29, 1998).

Federal courts apply the choice-of-law principles of the state in which they sit, here South Dakota. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). South Dakota

"generally recognize[s] that parties may agree to be bound by the law of a particular state," but will not enforce a choice-of-law provision that is "contrary to the public policy of South Dakota." *Butler Mach. Co. v. Morris Constr. Co.*, 682 N.W.2d 773, 776, 777 (S.D. 2004). Plaintiffs argue that the choice-of-law provision is unenforceable because it is contrary to South Dakota's consumer protection statutes. (Opp. 23-24.)

That argument fails for the same reason any attack on the forum selection clause fails: South Dakota public policy simply is not violated by this case. *See* p. 9 above. None of the Plaintiffs are South Dakota citizens, the defendant lenders operated from the CRST's Reservation pursuant to tribal (not South Dakota) law, and Plaintiffs bring no claims under South Dakota law. Thus, that "South Dakota's laws firmly establish a public policy in favor of consumer protection" is irrelevant. (Opp. 23.) Where non-South Dakota residents bring claims based on non-South Dakota law, South Dakota public policy is not violated. *See A&B Bus. Equip.*, 2006 WL 3489319, at *4 (citing *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 758 (8th Cir. 2001)).

In any event, even if South Dakota public policy were in play here, the Loan Agreements do not violate it. Before South Dakota eliminated its usury limits, the South Dakota Supreme Court held that it violated South Dakota public policy to enforce a choice-of-law provision in a loan agreement dictating the application of a different jurisdiction's law where the agreement contained an interest rate higher than South Dakota allowed. *See State ex rel. Meierhenry v. Spiegel, Inc.*, 277 N.W.2d 298, 301 (S.D. 1979). But the South Dakota legislature effectively overturned that decision when it repealed South Dakota's usury limit. Act of Mar. 4, 1994, No. 298, § 147, 1994 S.D. Sess. Laws (codified at S.D. Codified Laws § 54-3-1.1). In any event, the clear trend post-*Meierhenry* is to respect the parties' agreement and enforce choice-of-law

clauses in loan agreements even where the interest rate is higher than the forum state allows. *See* pp. 27-28 below. The Eighth Circuit has so held in a more recent case, showing that the *Meierhenry* rule is outdated and likely would not be followed today, even if South Dakota still had usury laws. *See Aetna Life Ins. Co. v. Great Nat'l Corp.*, 818 F.2d 19, 21 (8th Cir. 1987) (Arkansas law); *cf. U.S. Manganese Corp. v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 576 F.2d 153, 156-58 (8th Cir. 1978) (same).[8]

Nor do Plaintiffs even attempt to argue that the public policy of the states under whose laws they bring their claims (Minnesota, Virginia, Texas, and California) warrants voiding the choice-of-law clause. "South Dakota applies the provisions of the Restatement (Second) of Conflict of Laws … in order to resolve questions about which state's laws govern in a particular factual situation." *Stockmen's Livestock Exch. v. Thompson*, 520 N.W.2d 255, 257 (S.D. 1994). Under the Restatement, a choice-of-law provision is enforceable unless the chosen jurisdiction's law is "contrary to a fundamental policy of a state which has a materially greater interest than the chosen" jurisdiction. Restatement (Second) of Conflict of Laws § 187(2)(b) (1971) ("Restatement").

Under the Restatement, therefore, Plaintiffs could attempt to argue that the fundamental public policies of Minnesota, Virginia, Texas, and California warrant voiding the choice-of-law clause. But they do not, focusing exclusively on South Dakota public policy. (Opp. 23-24.)

[8] Plaintiffs argue that the Loan Agreements violate current South Dakota public policy because Defendants are not licensed to lend under South Dakota law and they loaned more than the $500 limit under South Dakota law. (Opp. 23, 24 n.9.) But that merely establishes that *if* the loans were governed by South Dakota law they might be unlawful. It does not establish, however, that the Loan Agreements are contrary to *fundamental* South Dakota public policy. *See Vencor, Inc. v. Webb*, 33 F.3d 840, 845 (7th Cir. 1994). Accepting Plaintiffs' argument would mean that *any* difference between the contractually designated jurisdiction's law and South Dakota's law would warrant voiding a choice-of-law clause, which would eviscerate the general rule in South Dakota that "parties may agree to be bound by the law of a particular state." *Butler Mach.*, 682 N.W.2d at 776.

Plaintiffs therefore have "waived [that] choice of law argument by not raising the issue" of whether Minnesota, Virginia, Texas, and California public policy warrant ignoring the clause. *St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp.*, 539 F.3d 809, 824 (8th Cir. 2008).

In any case, Plaintiffs could not meet their burden to show that the public policies of those states warrant ignoring the choice-of-law clause even if they tried. To invalidate the choice-of-law provision under the Restatement approach, Plaintiffs must show *both* (1) that a state has a "materially greater interest" in this case than the CRST; and (2) that tribal law is contrary to a *fundamental* state public policy. Restatement § 187(2)(b). Plaintiffs cannot show either.

First, there is no serious argument that Minnesota, Texas, Virginia, or California have a "materially greater" interest in this case than the CRST. (Opp. 23-24.) Where, as here, two defendants' headquarters are in the contractually designated jurisdiction and decisions to lend are made from there, courts have held that the contractually designated jurisdiction has a materially greater interest in the transaction than the plaintiff's jurisdiction. *See Freeze v. Am. Home Prods. Corp.*, 839 F.2d 415, 417 (8th Cir. 1988).

Further, the CRST has a significant interest in regulating businesses that are run by and provide employment to tribal members in light of the limited economic opportunities and high unemployment on the Reservation. Western Sky was once the largest private employer on the Reservation, employing over 100 people, many of whom are tribal members, but has been forced to suspend lending due to recent litigation and to lay off the majority of its workforce. (Ex. 1, Lawrence Aff. ¶¶ 7-8.) With the Tribe experiencing more than 80% unemployment and largely dependent on federal assistance, the loss of this type of business will further impoverish the

people of the Tribe.[9] The CRST thus has a greater interest in this case than any other state because the CRST "will suffer greater impairment of its policies if the other state's law is applied" to declare unlawful business activities that provide tribal members vital economic opportunities. *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1004 (9th Cir. 2010).

Second, Plaintiffs cannot establish that tribal law is contrary to the fundamental public policy of any state. As another court has put it, "there is a long way between, on the one hand, finding a [contractual provision] unenforceable and, on the other, declaring that its enforcement is so odious that a court will not respect the parties' election to be governed by the law of a [jurisdiction] that would." *Vencor, Inc. v. Webb*, 33 F.3d 840, 845 (7th Cir. 1994).

The Loan Agreements do not violate any state's fundamental public policy. Plaintiffs' principal claims hinge upon their allegation that the Loan Agreements violate the usury statutes of Minnesota, Virginia, Texas, and California. (Am. Compl. ¶¶ 64, 70-78, 86, 96.) But the weight of authority holds that the mere fact that a loan agreement contains an interest rate in excess of a particular state's usury limit does not warrant ignoring a choice-of-law provision dictating the application of the law of a jurisdiction that would enforce the agreement.[10] As the Florida Supreme Court explained after surveying case law nationwide, "it is generally held that usury laws are not so distinctive a part of a forum's public policy that a court, for public policy reasons, will not look to another jurisdiction's law which is sufficiently connected with a

[9] *See* Cheyenne River Reservation, http://www.sdtribalrelations.com/new/tribalstatprofiles/crststatprofile2011.pdf (last visited Dec. 3, 2013) (listing 88% unemployment for the members of the CRST).

[10] The CRST does not have a limitation on interest rates in loan agreements because the CRST repealed the usury limit established in its 1978 Law and Order Code when it adopted Tribal UCC § 16-3-112 in 1997. (Ex. 3, Emery Aff. ¶¶ 8-14.) To the extent there is any lack of clarity on whether the adoption of the Tribal UCC repealed the CRST's prior usury statute, that only heightens the need for a tribal forum to hear this case in the first instance.

contract and will uphold the contract." *Cont'l Mortg. Investors v. Sailboat Key, Inc*., 395 So.2d 507, 509 (Fla. 1981) (citing cases).[11] That is clearly the rule in Virginia, Texas, and California. *See Settlement Funding, LLC v. Von Neumann-Lillie*, 645 S.E.2d 436, 438-39 (Va. 2007); *Woods-Tucker Leasing Corp. of Ga. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 751-53 (5th Cir. 1981) (Texas law); *Sarlot-Kantarjian v. First Pa. Mortg. Trust*, 599 F.2d 915, 918 (9th Cir. 1979) (California law).[12] Thus, even if the Loan Agreements here violated a particular state's usury limit, that is not enough to show a violation of the *fundamental* public policy of any state. Plaintiffs have not pointed to a single court decision holding otherwise.

As discussed, South Dakota applies the Restatement in choice-of-law cases. *See* p. 25 above. The Restatement's particular provision regarding conflicts of law in usury cases requires enforcing the Loan Agreement's choice-of-law provision. The Restatement recognizes that because "the parties will expect on entering a contract that the provisions of the contract will be binding upon them," courts should choose the law of the jurisdiction that would validate rather than "strike down" a contract. Restatement § 203 cmt. b. "Usury is a field where this policy of validation is particularly apparent." *Id.* Under the Restatement, where a choice-of-law provision exists the court must "examine the general usury statutes of all states which have a substantial relationship to the contract and apply the statute which either sustains the contract in full or else imposes the lightest penalty for usury." *Id.* cmt. e. Courts following the Restatement "generally enforce a contractual choice of law provision even as to contracts that would be usurious under

[11] *See also Kronovet v. Lipchin*, 415 A.2d 1096, 1106 (Md. 1980); *Sarlot-Kantarjian v. First Pa. Mortg. Trust*, 599 F.2d 915, 918 (9th Cir. 1979); *FMC Fin. Corp. v. Reed*, 592 F.2d 238, 241-42 (5th Cir. 1979); *Clarkson v. Fin. Co. of Am. at Balt.*, 328 F.2d 404, 407 (4th Cir. 1964); *Consol. Jewelers, Inc. v. Standard Fin. Corp.*, 325 F.2d 31, 34-35 (6th Cir. 1963); *MoneyForLawsuits V LP v. Rowe*, No. 4:10-CV-11537, 2012 WL 1068171, at *7 (E.D. Mich. Jan. 23, 2012); *Boulder Santa Rosa, LLC v. Henry*, No. 07-10846, 2008 WL 687413, at *2-3 (D. Mass. Mar. 7, 2008); *Nat'l Sur. Corp. v. Inland Props., Inc.*, 286 F. Supp. 173, 187-90 (E.D. Ark. 1968).

[12] We have found no authority addressing this question under Minnesota law.

the forum state's law." *MoneyForLawsuits V LP v. Rowe*, No. 4:10-CV-11537, 2012 WL 1068171, at *7 (E.D. Mich. Jan. 23, 2012). Plaintiffs claim that the Loan Agreements' interest rates violate the usury statutes of four states (Minnesota, Virginia, Texas, and California), which, according to Plaintiffs, renders the Agreements unenforceable. (Am. Compl. ¶¶ 67-82.) But this Court cannot apply those laws because they would essentially invalidate the Loan Agreements—which is precisely what the Restatement forbids.

Finally, Plaintiffs are wrong that Defendants have "effectively insulate[d]" themselves from consumer fraud claims through the Loan Agreements' provision stating that they are governed by tribal law. (Opp. 24 n.9.) Put simply, Plaintiffs can bring a fraud claim under tribal law if they believe they were defrauded. "[C]ommon law causes of action in … tort law are well recognized" under CRST law. Frank Pommersheim, *South Dakota Tribal Court Handbook* 19 (rev. ed. 2006), *available at* http://ujs.sd.gov/media/docs/IndianLaw%20Handbook.pdf. For example, in *Bank of Hoven v. Long Family Land & Cattle Co.*, the CRST Court of Appeals held that CRST law recognizes private causes of action for "tortious conduct," which necessarily includes fraud claims. 32 Indian L. Rep. 6001, 6002-03 n.3 (CRST Ct. App. 2004). It therefore does not violate any state's public policy to apply tribal law, because tribal law affords Plaintiffs a remedy for their alleged consumer fraud claims.

In sum, tribal law governs this dispute. Because all of Plaintiffs' claims are based on state law, each must be dismissed.

2. Principles of tribal sovereignty and federal preemption prohibit applying any state's law to regulate the on-Reservation conduct of tribal members.

As Defendants argued in their opening brief, state law cannot be applied to the loans at issue in this case because doing so would interfere with tribal sovereignty and Congress's intent that tribes remain economically self-sufficient. (Op. Br. 23-32.) Plaintiffs' opposition argument

is merely a one-sentence reference back to their claims that Defendants are not tribal members and that the conduct at issue here took place off-reservation. (Opp. 28.) As discussed above (at 12-18), those contentions are incorrect.

The Supreme Court has recognized for over 180 years that tribes are "distinct, independent political communities, retaining their original natural rights." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973) (tribal "sovereignty long predates that of our own Government"); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). Thus, absent explicit Congressional limitation of tribal sovereignty, tribes *alone* possess legislative authority over on-reservation conduct by Indians. *See Duro v. Reina*, 495 U.S. 676, 685-86 (1990).[13] In recognition of this principle, the Supreme Court has held that tribal sovereignty, standing alone, can provide a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. *See Mescalero Apache Tribe*, 462 U.S. at 334 n.16; *see also McClanahan*, 411 U.S. at 181.

Thus, states are precluded from exercising legislative authority over the on-reservation conduct of non-Indians who enter into consensual commercial relationships with tribal members. As the Supreme Court explained in *Montana*, in which it considered the Crow Nation's authority to regulate hunting and fishing on tribal land by non-members:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has

[13] In addition to the insulation from regulation afforded tribal members acting on-reservation, there exists so-called "arm of the tribe" or tribal sovereign immunity. Defendants do not assert immunity as an "arm of the tribe."

> some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-66 (citations omitted); *see also id.* at 566 (noting that "agreements or dealings" could constitute consensual relationship sufficient to "subject [non-Indians] to tribal civil jurisdiction"). Recent cases have reaffirmed these core principles. *See Mescalero Apache Tribe*, 462 U.S. at 335; *Dolgencorp*, 732 F.3d at 415.

McClanahan, *Montana*, and many decades of Supreme Court precedent make apparent that any attempt to apply state law to the conduct at issue here would infringe upon the CRST's self-governance rights. The CRST has never agreed that Minnesota, Texas, Virginia, or California law could be applied to on-Reservation conduct by its members, and Congress has not granted any of those states permission to exercise civil jurisdiction over Indians and reservations outside the state. *See* 25 U.S.C. § 233. Indeed, the CRST Code asserts territorial jurisdiction over the entire Reservation and all persons or corporate entities transacting business on the Reservation. *See* CRST Code §§ 1-4-1, 1-4-3. Moreover, the Tribe recently passed a resolution reaffirming that "absent Congressional authorization, states have no authority to regulate ... the business activities of enterprises owned by the Tribe or its members." *See* Ex. 2, CRST Tribal Resolution 350-2013-CR (Nov. 12, 2013).

The Indian Commerce Clause acts as a further bar to any attempt to apply state law to the on-Reservation activities of CRST members. By its terms, the Indian Commerce Clause dictates that Congress shall have the power to "regulate Commerce with ... the Indian tribes." U.S. Const. art. I, § 8, cl. 3. For over a century, the Supreme Court has interpreted this clause as providing Congress "with plenary power to legislate in the field of Indian affairs." *United States v. Lara*, 541 U.S. 193, 200 (2004) (quotations omitted); *see also White Mountain Apache Tribe*

v. Bracker, 448 U.S. 136, 142-43 (1980) (identifying preemption under Indian Commerce Clause as basis for holding state law inapplicable).

As with other aspects of the Commerce Clause, the Constitution's exclusive delegation of authority over Indian commerce to Congress precludes states from interfering with federal statutes or policies related to Indian commerce. Unlike traditional Commerce Clause preemption analysis, however, courts applying the Indian Commerce Clause must account for tribal sovereignty and the overriding "policy of leaving Indians free from state jurisdiction and control," a policy "deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945).

Courts have traditionally analyzed preemption under the Indian Commerce Clause by looking to a federal policy, statute, or treaty, and engaging in a particularized inquiry into the nature of the state, federal, and tribal interests at stake to determine if the state regulation is preempted. *See Cabazon Band of Mission Indians*, 480 U.S. at 215-19. The Supreme Court has rejected the "proposition that preemption requires an express congressional statement to that effect." *Mescalero Apache Tribe*, 462 U.S. at 334 (quotations omitted). Rather, courts must be guided by "broad considerations ... of the federal and tribal interests." *Id.*

The tribal interests at stake here clearly favor preemption. As discussed, *see* pp. 26-27 above, the CRST has a significant interest in regulating businesses that are run by and provide employment to tribal members in light of the limited economic opportunities and high unemployment on the Reservation. Even beyond these tangible financial implications, the tribe also has a vested interest in preserving its right of self-governance from undue state interference. *Dolgencorp*, 732 F.3d at 416-17.

The federal interest is similarly compelling. Congress has guaranteed the right of the CRST and its members to be free from state regulation through multiple treaties and statutes, and Congress has an interest in seeing its intent vindicated. The Supreme Court has long recognized a "firm federal policy of promoting tribal self-sufficiency and economic development." *Bracker*, 448 U.S. at 143. This policy is manifested in statutes such as the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*, the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*, and the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*, which were intended to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism," *Bracker*, 448 U.S. at 143 n.10 (citations omitted); *see also* 25 U.S.C. § 2702(1) (Congress intended to provide tribes with a "means of promoting tribal economic development, self-sufficiency, and strong tribal governments"). These Congressional pronouncements make clear that Congress intended for the CRST to govern its territory free from state regulation and interference, a right that Congress has proactively safeguarded for over a century.

By comparison, the four states whose laws Plaintiffs seek to invoke have minimal interest in regulating out-of-state reservations. Though the United States Supreme Court has acknowledged that state interests may be affected by tribal activities, such acknowledgments have been in the context of reservations *contained within the states* seeking to impose their regulations. *See, e.g.*, *Cabazon Band of Mission Indians*, 480 U.S. at 220; *Mescalero Apache Tribe*, 462 U.S. at 341-42.

Balancing these interests, any desire by the states to have their laws apply to conduct occurring hundreds or thousands of miles away cannot possibly override the tribal interests in revenue and self-governance, and the federal interest in vindicating Congress's express intent

that the CRST govern its territory free from state interference. *See Hoopa Valley Tribe v. Hongkong & Shanghai Banking Corp.*, 30 F.3d 1138, 1142 (9th Cir. 1994) (noting in preemption analysis that "rather meager" state interests were "diminished with respect to those dealing with Indian entities or in Indian country").

For the reasons stated above, Plaintiffs' attempts to apply state law to the loans at issue in this case should be rejected as an attempt to interfere with the Tribe's sovereignty and with Congress's clear intent that the CRST remain economically self-sufficient with a strong internal government.

B. This Court Should Dismiss The Civil Conspiracy Claim (Count I) And The Minnesota False Advertising Claim (Count IV) Because These Fraud-Based Claims Fail To Meet Rule 9(b)'s Heightened Pleading Standards.

As Defendants have explained, (Op. Br. 34-37), Plaintiffs' civil conspiracy (Count I) and Minnesota False Advertising (Count IV) claims must be dismissed because they are grounded in fraud, and thus must meet the heightened pleading requirements of Rule 9(b). To meet that standard, Plaintiffs must plead the "who, what, when, where, and how" of the fraud. *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011) (quotations omitted). Both claims fail to meet that standard because Plaintiffs have not alleged who engaged in allegedly deceitful conduct, when they did so, or how they did so.

Plaintiffs argue that they meet Rule 9(b)'s standard because they alleged who committed the alleged fraud ("Defendants"); what they allegedly did wrong ("Civil conspiracy to conduct business as a deceptive Internet consumer loan lender violating state usury laws, and false advertising to promote this business"); where they did it ("In Minnesota, Texas, Virginia, and other states where Defendants provide loans and where their advertisements appear on the Internet, television, and radio"); and how they did it ("By agreeing with one another to deceive

consumers through the placement of these advertisements and the loaning of money with usurious interest rates"). (Opp. 30-31; *see also id.* at 32 n.15.)

Those allegations are woefully insufficient because they simply restate the elements of a fraud claim, rather than outlining with "particularity" what Defendants did wrong. Plaintiffs allege that Defendants were "deceptive," "deceive[d] consumers," and engaged in "false advertising." (Opp. 31.) But *how*? What about Defendants' conduct was "deceptive"? Plaintiffs do not say. It could not be, for example, that Defendants misstated the loans' interest rates. The Loan Agreements lay out their interest rates and the precise amount of money required for Plaintiffs to pay off the loans on-schedule. (MTD Ex. A at 1.) Plaintiffs do not even generally allege the conclusion—much less any supporting facts with "particularity"—that Defendants deceived Plaintiffs about their interest rates. Given that, how can Plaintiffs claim they were defrauded into taking out the loans? Without alleging facts to support their claims, this Court (and Defendants) are left to guess. "[T]he particularity required by Rule 9(b) is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations." *United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003). After reading both the amended complaint and Plaintiffs' opposition brief, Defendants are still at a loss to understand just how Plaintiffs were deceived.[14]

Perhaps recognizing that they cannot adequately allege fraud, in their opposition brief Plaintiffs argue that "Defendants mischaracterize and misunderstand Plaintiffs' underlying tort claim as fraud," arguing that the torts underlying their conspiracy claim are the "consumer protection and usury laws." (Opp. 32.) The complaint tells a different story. In the paragraphs

[14] As described below, the closest thing to a deceptive statement Plaintiffs allege in their complaint is that Defendants misled Plaintiffs into thinking the agreements are governed by tribal, rather than state, law. (Am. Compl. ¶ 96.) That cannot support any fraud claim because it is a representation of law, not fact. *See* pp. 36-37 below.

describing the civil conspiracy claims, Plaintiffs state that the claim is based on Defendants' "agree[ment] … to *deceive consumers* and violate usury laws," and to "shield its *deceptive* business practices from prosecution." (Am. Compl. ¶¶ 64, 65 (emphasis added).) "It is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Gallagher v. City of Clayton*, 699 F.3d 1013, 1022 (8th Cir. 2012) (quotations omitted). Plaintiffs' "*post hoc* interpretation" of the complaint as not grounded in fraud is therefore improper. *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006).

Even putting aside Rule 9(b)'s strict particularity requirements, however, Plaintiffs still fail to properly plead their civil conspiracy and false advertising claims. The closest Plaintiffs come to pleading a false or deceptive act by Defendants is the allegation that Defendants engaged in "untrue, deceptive, and misleading assertions … about their affiliation with the Tribe and its right to charge usurious interest." (Am. Compl. ¶ 96.) In other words, Plaintiffs argue that Defendants deceived them in contending the Agreements are governed by tribal law. But that is a representation of law, and "fraud requires a misrepresentation of fact." *Sejnoha v. City of Yankton*, 622 N.W.2d 735, 739-40 (S.D. 2001). Thus, "no claim of fraud can be maintained on a misrepresentation as to what the law would allow or require." *Id.* at 740; *see also Evans v. Dynasty Transp., Inc.*, 133 S.W.3d 672, 677 (Tex. Ct. App. 2003) (same); *Gatz v. Frank M. Langenfeld & Sons Constr., Inc.*, 356 N.W.2d 716, 718 (Minn. Ct. App. 1984) (same); *Bledsoe v. Watson*, 30 Cal. App. 3d 105, 110 (Cal. Ct. App. 1973) (same); *Hicks v. Wynn*, 119 S.E. 133, 135-36 (Va. 1923) (same) (cited with approval in *Unity Farm Constr., Inc. v. Slabtown Ltd. P'ship*, No. C-90-918, 1991 WL 835044, at *3 (Va. Cir. Ct., Spotsylvania Cnty. June 26, 1991)).

Because Plaintiffs' claims are predicated on legal representations, not factual ones, they cannot allege the fraud necessary to plead their civil conspiracy or false advertising claims.

C. Plaintiffs Cannot Bring A California Usury Claim.

Plaintiffs also allege that Defendants violated the California constitution by charging excessive interest. That claim fails because (1) the Loan Agreements here were not "form[ed]" in California, and thus there can be no California usury claim as a matter of law; and (2) Defendant CashCall is exempt from California's usury limit because it is licensed by the California Department of Corporations. (Op. Br. 37-38.).

Plaintiffs do not contest either ground in their opposition. Notably, Plaintiffs do not argue that the Loan Agreements are subject to California usury laws despite being formed elsewhere. They could not do so because under basic choice-of-law principles the California courts have refused to apply California's usury laws to loan agreements formed outside California that contain choice-of-law clauses pointing to another jurisdiction's law. *Ury v. Jewelers Acceptance Corp.*, 227 Cal. App. 2d 11, 16 (Cal. Ct. App. 1964). To the contrary, to Defendants' knowledge, the California Court of Appeal has applied California's usury laws only to a loan agreement that "was executed in California," that related to "personal property … [that] was and remained in the State of California," and where "the act which effectuated the … agreements was the payment of the money to [parties] in California for the personal property subsequently leased through an escrow executed and completely performed in California." *Rochester Capital Leasing Corp. v. K&L Litho Corp.*, 13 Cal. App. 3d 697, 702-03 (Cal. Ct. App. 1970).

Nothing even remotely close to that is at issue here: Plaintiffs are not California residents; Western Sky (the lender here) does not do business from California; the Agreements are not secured by property in California, and they do not call for Plaintiffs to make payments to

California. Perhaps for those reasons, Plaintiffs do not even argue that the Loan Agreements here were formed in California. They only argue that the Loan Agreements bear a "nexus" to California because, for example, CashCall and WS Funding—neither of which were parties to the original Loan Agreements—are based there. (Opp. 34.) But under the law a "nexus" is not enough. *See Ury*, 227 Cal. App. 2d at 16; *Rochester Capital Leasing*, 13 Cal. App. 3d at 702-03.

Plaintiffs cite no authority for their argument that CashCall is subject to California usury law despite the fact that CashCall is a licensed lender specifically exempt from those very same usury laws. Because Plaintiffs do "not support [their] assertion with any argument or legal authority, [they have] waived the issue." *Milligan v. City of Red Oak, Iowa*, 230 F.3d 355, 360 (8th Cir. 2000). This Court therefore must take it as uncontroverted that CashCall's California lender license precludes Plaintiffs' California usury claim.

CONCLUSION

For the reasons stated above and in Defendants' Motion to Dismiss Amended Complaint and Memorandum of Points and Authorities, (Dkt. No. 34), this Court should dismiss the Amended Complaint.

Dated: December 4, 2013

Respectfully submitted,

Defendants PayDay Financial LLC, Western Sky Financial LLC, CashCall, Inc., and WS Funding, LLC

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D.S.D Civ. LR 7.1.(B)(1) WORD COUNT COMPLIANCE CERTIFICATE

I, Cheryl Laurenz-Bogue, certify that Defendants' Reply Brief in Further Support of Their Motion to Dismiss complies with the word count limitation in D.S.D. LR 7.1.(B)(1) specifying that a court filing shall not be longer than 12,000 words. In preparing this Motion, 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 Reply Brief contains 11,999 words.

DATED: December 4, 2013

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CERTIFICATE OF SERVICE

I hereby certify that, on December 4, 2013, I caused a copy of the foregoing Defendants' Reply Brief in Further Support of Their Motion to Dismiss to be served via the Court's electronic filing system upon the following:

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