IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JAMES HAYES, DEBERA GRANT, and HERBERT WHITE,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 3:14-cv-258-JAG**
DELBERT SERVICES CORPORATION,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DELBERT SERVICES CORPORATION'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT, OR, ALTERNATIVELY, TO COMPEL ARBITRATION

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Defendant Delbert Services Corporation ("Delbert") submits this memorandum of law in support of its motion to dismiss the First Amended Class Action Complaint (the "Amended Complaint") (Dkt. No. 16), or, alternatively, to compel arbitration.

PRELIMINARY STATEMENT

In the Amended Complaint, Plaintiffs renew their original allegation that Delbert violated the Fair Debt Collection Practices Act ("FDCPA") and the Telephone Consumer Protection Act ("TCPA") by attempting to collect Plaintiffs' delinquent obligations under the loans that Plaintiffs took out from non-party Western Sky Financial, LLC ("Western Sky") and that were subsequently assigned to Delbert for servicing. In response to Delbert's motion to dismiss Plaintiffs' original complaint, Plaintiffs filed a new complaint that also alleges their loans are void under Virginia law and that the comprehensive dispute resolution provisions to which Plaintiffs agreed when taking out their loans are unenforceable. Yet the loan documents clearly disclosed each of these provisions, and those documents establish that this Court is not the proper forum to resolve this dispute. As described in this memorandum, this Court should enforce the parties' contracts and dismiss this case.

First, the parties' Loan Agreements contain a provision (the "Forum-Selection Clause"), which Delbert may enforce, providing that the loans are "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation."[1] In addition, plaintiffs "consent[ed] to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court" for all in-court adjudication relating to the "Loan Agreement, its enforcement or interpretation." (Ex. 1, Lawrence Aff., Ex. A ("Ex. A") at 1.)

[1] Plaintiffs' Loan Agreements are attached as Exhibits A, B, and C to the Affidavit of Tawny Lawrence, which is in turn attached as Exhibit 1 to this brief. For ease of reference, this brief will cite only to Mr. Hayes's Loan Agreement (Ex. 1, Ex. A), which is substantively identical to Ms. Grant's Loan Agreement (Ex. 1, Ex. B) and Mr. White's Loan Agreement (Ex. 1, Ex. C).

Under the parties' contracts, every aspect of this case—including Delbert's motion to compel arbitration, detailed below—should be resolved in tribal court if resolved in any court at all.

Plaintiffs contend the Forum-Selection Clause does not apply to claims against Delbert, but ignore that the Forum-Selection Clause states that the "*Loan Agreement* is subject solely to the exclusive . . . jurisdiction" of the Cheyenne River Sioux Tribe ("CRST") and that the Plaintiffs "consent[ed] to the sole subject matter and personal jurisdiction of the [CRST Court]" about disputes relating to the Loan Agreements' "enforcement or interpretation." (*Id.*) The Forum-Selection Clause thus defines its own scope by the nature of the dispute—it encompasses all claims relating to the Loan Agreement—rather than by the particular defendant a plaintiff chooses to sue. Moreover, the law is clear that a nonsignatory can enforce a contractual provision when that nonsignatory has the right to enforce the contract, as Delbert does here. Further, Plaintiffs' argument that the Forum-Selection Clause was procured by fraud is belied by the Clause's conspicuous location in the Agreements. Finally, Plaintiffs' contention that the Clause is unenforceable because the forum is too inconvenient for Plaintiffs is irrelevant under recent Supreme Court case law and, in any event, wrong. The Clause is enforceable and precludes any suit not brought in tribal court.

Second, and alternatively, the Court should dismiss this case based on the doctrine of tribal exhaustion, which requires private parties whose claims implicate an Indian tribe's jurisdiction to bring suit first in tribal court. Tribal exhaustion is appropriate where there is a "colorable" or "plausible" claim that a dispute falls within tribal jurisdiction. As a federal court in the District of South Dakota recently held in analyzing an identical contract governing a Western Sky loan, tribal jurisdiction is at least colorable here because Plaintiffs entered into the Loan Agreements with a company wholly owned by an enrolled member of the CRST that

operates from the Cheyenne River Indian Reservation (the "Reservation") under CRST law, and Plaintiffs consented to the CRST's sole jurisdiction in the Loan Agreements. *See Heldt v. Payday Fin., LLC*, --- F. Supp. 2d ---, No. CIV 13-3023-RAL, 2014 WL 1330924, at *14 (D.S.D. Mar. 31, 2014). Pursuant to the *Heldt* court's order, the defendants there have filed a declaratory judgment action in CRST court to assess whether that court has jurisdiction over disputes arising from Western Sky loans. (*See* Ex. 2, Complaint for Declaratory Judgment, *Webb v. Heldt* (CRST Ct. Apr. 30, 2014).) A stay or dismissal pending exhaustion is thus especially appropriate here given that the tribal court is on course to offer authoritative guidance as to tribal jurisdiction. The *Heldt* court's decision also refutes Plaintiffs' contention that Delbert's assertion of tribal jurisdiction is fraudulent.

Third, as an alternative basis for dismissal, each Loan Agreement contains a broad arbitration provision (the "Arbitration Clause") that requires that this entire case be sent to arbitration. (Ex. A at 3-5.) Plaintiffs argue that Delbert cannot enforce the Arbitration Clause because it did not sign Plaintiffs' Loan Agreements. Again, the Arbitration Clause is not limited to claims against Western Sky; it applies to all disputes with the "holder *or servicer*" of Plaintiffs' loans, "as well as any marketing, servicing, and collection representatives and agents." (*Id.* at 4 (emphasis added).) Delbert plainly meets that definition. Plaintiffs also argue that the Arbitration Clause is not enforceable because the forum designated by the Arbitration Clause is not available, but that argument is based on a fundamental misreading of the contract. Further, even if true, the law is clear that mere failure of the chosen forum is insufficient to void a party's agreement to arbitrate. Under the Federal Arbitration Act ("FAA"), the courts can (and should) appoint a substitute arbitral forum if the parties cannot use the method described in their contract.

STATEMENT OF FACTS[2]

A. Western Sky Loans, CashCall's Role, And Delbert's Servicing Activities

Non-party Western Sky is wholly owned by non-party Martin A. Webb. (Am. Compl. ¶ 61.) Mr. Webb is an enrolled member of the CRST, a federally recognized Indian tribe. (*Id.* ¶ 62; Ex. 1 ¶ 3.)[3] Western Sky's offices are on the Reservation, within the boundaries of South Dakota. (Am. Compl. ¶ 60; Ex. 1 ¶ 3.) Consumers applied for loans from Western Sky either through its website or telephonically. (Ex. 1 ¶ 4.) Western Sky set the underwriting criteria for all loans and made the ultimate decision to fund every loan—and thus to enter into a binding contract with borrowers—from its offices on the Reservation. (*Id.* ¶¶ 4-5.)

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[2] This statement of facts is derived from the Amended Complaint, and the limited additional materials the Court may consider in this procedural context. The Court may consider evidence outside the pleadings when resolving a motion to dismiss based on a forum-selection clause or to enforce an arbitration agreement under the FAA. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 365-66 (4th Cir. 2012); 14D Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3828 (3d ed. 2013). Similarly, the Court may consider evidence outside the pleadings when resolving a motion to dismiss for failure to exhaust tribal remedies. *See Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x 11, 13 (9th Cir. 2012) (relying on declarations in requiring exhaustion of tribal remedies); *Dish Network Corp. v. Tewa*, No. CV 12-8077-PCT-JAT, 2012 WL 5381437, at *2 (D. Ariz. Nov. 1, 2012) (classifying a motion to dismiss for failure to exhaust tribal remedies as an "unenumerated 12(b) motion" that allows the court to look beyond the pleadings). Under Rule 12(b)(6), the Court may consider, in addition to the complaint and any documents attached to it, any documents that the defendant attaches to the motion to dismiss if documents are referred to in the complaint, integral to it, and authentic. *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009); *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004).

[3] While the Amended Complaint acknowledges that Mr. Webb is an enrolled member of the CRST, it also levies a broadside attack on his relationship with the CRST, his heritage, and his character, alleging that he has "the smallest of Native American ancestry" and that he is a "fraudster." (Am. Compl. ¶ 4.) Because Plaintiffs do not dispute that Mr. Webb is a CRST member, their vitriol has no legal significance. This Court has no basis or authority to question the CRST's determination of tribal membership. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982) ("Tribes may define rules of membership, and thus determine who is entitled to the benefits of tribal citizenship."); *Montana v. United States*, 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership.").

Non-party CashCall, Inc. ("CashCall") purchased loans that Western Sky originated through its wholly-owned affiliate, WS Funding, LLC ("WS Funding"). (Am. Compl. ¶ 50; Ex. 3, Beecroft Aff., ¶ 5; Ex. 4, Bennett Aff., ¶¶ 4-5.) CashCall acts as servicer of those loans. (Ex. 4 ¶ 4.) Plaintiffs allege that because Western Sky sold the loans after funding them, it is "not an actual lender" despite "hold[ing] itself out" as such. (Am. Compl. ¶¶ 51, 59.) Based on allegations made in other legal actions, the Amended Complaint describes Western Sky's business relationship with CashCall as a "sham." (*Id.* ¶¶ 45, 57.) The Amended Complaint further alleges that "Delbert operates as a debt collection company that works together with other entities . . . to systematically perpetrate fraud and to scam consumers." (*Id.* ¶ 44.)

B. Plaintiffs' Loans

As explained below, each Plaintiff borrowed money from Western Sky. Each Plaintiff's loan was transferred to WS Funding (where it was serviced by CashCall), and later transferred to Consumer Loan Trust, where the loan remains and is serviced by Delbert.

On or about August 6, 2012, Plaintiff James Hayes entered into his Loan Agreement with Western Sky. (Ex. A.) On August 9, 2012, Western Sky transferred Mr. Hayes's loan to WS Funding, to be serviced by CashCall. (Ex. 3 ¶ 11.) On August 15, 2013, WS Funding assigned Mr. Hayes's loan to non-party Consumer Loan Trust, which delegated the servicing rights to Delbert. (Ex. 4 ¶ 8.) Mr. Hayes received notice on both occasions that his loan servicer changed. (Ex. 3 ¶ 12; Ex. 5, Guzman Aff. ¶ 6.)

Plaintiffs Debera Grant's and Herbert White's loans were handled similarly. Ms. Grant entered into her Loan Agreement on or about August 18, 2012. (Ex. 1, Ex. B.) Western Sky transferred the loan to WS Funding, to be serviced by CashCall, on August 23, 2012. (Ex. 3 ¶ 14.) WS Funding then transferred the loan to Consumer Loan Trust, to be serviced by Delbert, on August 2, 2013. (Ex. 4 ¶ 9.) Mr. White entered into his Loan Agreement on or about

November 20, 2012. (Ex. 1, Ex. C.) Western Sky transferred the loan to WS Funding, to be serviced by CashCall, on November 29, 2012. (Ex. 3 ¶ 17.) WS Funding subsequently transferred the loan to Consumer Loan Trust, to be serviced by Delbert, on September 20, 2013. (Ex. 4 ¶ 10.) Both Ms. Grant and Mr. White received notices when their loan servicers changed. (Ex. 3 ¶¶ 14, 17; Ex. 5 ¶¶ 7-8.)

C. Loan Agreement Dispute Resolution Provisions

The Loan Agreements contain dispute resolution provisions that are critically relevant to whether this case may proceed in this Court.

Forum-Selection Clause and Choice of Law. Each Plaintiff's Loan Agreement contains a comprehensive Forum-Selection Clause that does not allow suit in this Court. The very first sentence of each Loan Agreement states, in clear and conspicuous type, that each "**Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation**." (Ex. A at 1 (emphasis in original).) Each Plaintiff further agreed that:

> [b]y executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and that no other state or federal law or regulation shall apply to *this Loan Agreement, its enforcement or interpretation.*

(*Id.* (emphasis added).) The Loan Agreements contain an additional paragraph discussing the law governing the parties' agreements:

> This Agreement is governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe . . . Neither this Agreement nor Lender is subject to the laws of any state of the United States of America. By executing this Agreement, you hereby expressly agree that this Agreement is executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native America Tribal Nation. You also expressly agree that this Agreement shall be subject to and construed in accordance only with the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law applies

> to this Agreement. You agree that by entering into this Agreement you are voluntarily availing yourself of the laws of the Cheyenne River Sioux Tribe, a sovereign Native American Tribal Nation, and that your execution of this Agreement is made as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation.

(*Id.* at 3.)

Arbitration. Plaintiffs' Loan Agreements contain a comprehensive Arbitration Clause. In plain language, Plaintiffs agreed to arbitrate all disputes:

> **WAIVER OF JURY TRIAL AND ARBITRATION.**
>
> **PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY.** Unless you exercise your right to opt-out of arbitration in the manner described below, any dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to have a jury, to engage in discovery (except as may be provided in the arbitration rules), and to participate in a class action or similar proceeding. In Arbitration, a dispute is resolved by an arbitrator instead of a judge or jury. Arbitration procedures are simpler and more limited than court procedures. Any Arbitration will be limited to the dispute between yourself and the holder of the Note and will not be part of a class-wide or consolidated Arbitration proceeding.

(*Id.* at 3-4 (emphasis in original).) No Plaintiff exercised the contractual right to opt out of the arbitration provision.

Other sections of the Loan Agreement elaborate upon this Clause. The Loan Agreements define the "Disputes" subject to mandatory arbitration in the "broadest possible" way as "any controversy or claim between you and Western Sky or the holder or servicer of the Note." (*Id.* at 4.) Covered Disputes include "any claim based upon . . . the handling or servicing of [Plaintiffs'] account[s]" regardless of the legal basis of the claim. (*Id.*)

The Loan Agreements delegate to the arbitrator the authority to decide any Dispute as to "the validity, enforceability, or scope of this loan or the Arbitration agreement." (*Id.*)

The Loan Agreements define the parties against whom Plaintiffs must arbitrate to include "any controversy or claim between you and Western Sky or the holder or servicer of the Note." (*Id.*) It defines the term "holder" to include "any marketing, servicing, and collection representatives and agents." (*Id.*) Delbert is the servicer for Plaintiffs' loans. (Ex. 4 ¶¶ 8-10; Ex. 5 ¶ 9.)

Finally, the Clause defines the bodies that may conduct the arbitration. It provides that, "except as provided below," the arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement." (Ex. A at 4.) The following paragraph also gave Plaintiffs the right, "[r]egardless of who demands arbitration, . . . to select . . . the American Arbitration Association . . . ; JAMS . . . ; or an arbitration organization agreed upon by [Plaintiffs] and the other parties to the Dispute." (*Id.*) The Arbitration Clause therefore allows Plaintiffs to select arbitration before either (a) an authorized representative of the CRST or (b) an arbitrator selected using AAA, JAMS, or another mutually agreeable arbitration organization. (*Id.*)

The Loan Agreements obligate Delbert to pay all filing fees and any costs or fees of the arbitrator. They also provide that "[a]ny arbitration under this Agreement may be conducted either on tribal land or within thirty miles of [each Plaintiff's] residence, at [each Plaintiff's] choice." (*Id.*)

D. Plaintiffs' Claims

Plaintiffs filed a seven-count Amended Complaint against Delbert. In Counts 1 through 5, Plaintiffs allege claims for relief under the FDCPA and TCPA:

1. Hayes alleges that Delbert sent him a "debt validation notice that does not contain the name of the creditor to whom the debt is owed" in alleged violation of 15 U.S.C. § 1692g.

(Am. Compl. ¶ 98.) Plaintiffs assert Consumer Loan Trust "is not the name of an actual or identifiable creditor." (*Id.* ¶ 17.)

2. Hayes and Grant allege that Delbert failed to disclose that its "communication[s were] from a debt collector" in violation of 15 U.S.C. § 1692e. (*Id.* ¶ 108.)

3. Hayes and Grant allege that Delbert "misrepresent[ed] in its correspondence . . . that a legal debt existed, that Western Sky approved and issued the loan[s], and that [the] forum-selection clause was valid and enforceable" in violation of 15 U.S.C. § 1692e. (*Id.* ¶ 118.)

4. Hayes alleges that Delbert "used false representations or deceptive means to collect or attempt to collect debts" in violation of 15 U.S.C. § 1692e. (*Id.* ¶ 128.)

5. Hayes and White allege that Delbert violated the TCPA by making phone calls in servicing their loans. (*Id.* ¶¶ 138, 140.)

In Count 6, Plaintiffs seek a declaratory judgment "that the forum-selection and arbitration provisions in the Loan Agreements are void and unenforceable." (*Id.* ¶ 151.) Plaintiffs allege (1) "Delbert is not a signatory to the Loan Agreement[s]" and therefore "lacks standing" to enforce the Arbitration Clause (*id.* ¶ 70); (2) Delbert's servicing of Plaintiffs' loans is "outside the scope of the Loan Agreement[s]" and therefore not subject to the Forum-Selection Clause (*id.* ¶ 71); (3) the Forum-Selection Clause is the product of "fraud and overreaching" and "bad faith" (*id.* ¶ 74); and/or (4) the "arbitral forum does not exist" (*id.* ¶ 84).

Count 7 seeks a permanent injunction prohibiting Delbert from collecting on Western Sky loans issued to Virginia consumers. (*Id.* ¶ 160.)

ARGUMENT

I. The Amended Complaint Should Be Dismissed Under The Forum-Selection Clause.

As described above, each Plaintiff's Loan Agreement contains a comprehensive Forum-Selection Clause that does not allow suit in this Court. (*See* pp. 6-7 above.) By agreeing to this

provision, and the other provisions quoted above, Plaintiffs waived any right to bring suit in this Court for disputes relating to their Loan Agreements. The Supreme Court recently held that "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 580 (2013). The Forum-Selection Clause requires dismissal based on this doctrine.

A. The Forum-Selection Clause Covers Claims Against Delbert.

In the Amended Complaint, Plaintiffs allege Delbert cannot rely on the Forum-Selection Clause because Delbert is not a party to the Loan Agreements. (Am. Compl. ¶¶ 65-70.) This argument ignores the law and the Loan Agreements.

Under basic principles of contract law, Delbert has succeeded to the rights of the original lender, Western Sky, to service the Loans. Western Sky sold Plaintiffs' loans to WS Funding (which thus had all the rights of Western Sky in the loans), which in turn sold the loan to Consumer Loan Trust (which, too, had all the rights of Western Sky), and which designated Delbert to service the loans by managing all collection activities. (Ex. 5 ¶¶ 4-8.)[4] Thus, under the long-established principle that an assignee "stands in the shoes of the assignor and acquires the same rights . . . as if he had been an original party to the contract," Delbert is entitled to invoke the Forum-Selection Clause. *See Pollard & Bagby, Inc. v. Pierce Arrow, L.L.C., III*, 521 S.E.2d 761, 763 (Va. 1999) (internal quotations omitted).

Moreover, Plaintiffs agreed that in-court disputes about their loans would be brought in tribal court. The language of the Forum-Selection Clause states that the "*Loan Agreement* is subject solely to the . . . jurisdiction of the" CRST, and that each Plaintiff "consent[ed] to the

[4] Each Loan Agreement allows Western Sky to "assign or transfer this Loan Agreement or any of our rights under it at any time to any party." (Ex. A at 3.)

sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court." (Ex. A at 1.) Plaintiffs thus agreed to litigate any claims relating to their Loan Agreements in CRST court—to the extent such claims are not covered by the Arbitration Clause—without regard to the particular defendant. The plain language of the Forum-Selection Clause thus applies to Plaintiffs' claims here.

Finally, the Forum-Selection Clause applies to claims against Delbert under basic principles of contract law. A nonsignatory can enforce a forum-selection clause against a signatory to a contract when the nonsignatory is "closely related" to a signatory. *Am. Online, Inc. v. Huang*, 106 F. Supp. 2d 848, 857 n.26 (E.D. Va. 2000) (quoting *Frietsch v. Refco, Inc.*, 56 F.3d 825, 827 (7th Cir. 1995)). Given the contractual relationship between the parties, this standard is satisfied.

B. The Forum-Selection Clause Is Valid Under Federal Law.

In response, Plaintiffs assert the Forum-Selection Clause is unenforceable, but this runs afoul of clear federal law. "[T]he Supreme Court has consistently accorded choice of forum and choice of law provisions presumptive validity," *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 602 n.21 (4th Cir. 2004) (quotations omitted), and "the burden is on the party objecting to enforcement of the clause" to show that it should not be enforced, *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1196 (4th Cir. 1985).

1. Under *Atlantic Marine*, The Public-Interest Factors Require Dismissal.

In *Atlantic Marine*, the Supreme Court significantly narrowed the grounds that parties may assert to void a forum-selection clause. Specifically, the Supreme Court held that where the "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." 134 S. Ct. at 582. "As a consequence, a district court may consider arguments about public-interest factors only," and "should not consider arguments about the parties' private interests." *Id.*[5] The factors that the court may consider include (1) "the interest in having the trial of a diversity case in a forum that is at home with the law"; (2) "the local interest in having localized controversies decided at home"; and (3) "the administrative difficulties" posed by each forum. *Id.* at 581 n.6 (internal quotations omitted); *see also Jiali Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 252-53 (4th Cir. 2011). Those public-interest factors "will rarely defeat" a forum-selection clause. *Atl. Marine*, 134 S. Ct. at 582.

Plaintiffs' Amended Complaint seeks a declaration that the Forum-Selection Clause is unenforceable, but never even addresses the public-interest factors. *See generally id.*; *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991). In any event, the public-interest factors plainly require enforcing the Clause here.

First, there is no "local law" that supports the trial of this case in Virginia. Plaintiffs' primary claims are under *federal* law, and the Loan Agreements' choice-of-law provision designating CRST law precludes Plaintiffs' new claims under Virginia law. Plaintiffs may not remain in this forum by asserting claims under inapplicable law. "It defies reason to suggest that a plaintiff may circumvent [a] forum selection . . . clause[] merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of *his* [home jurisdiction's] law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction." *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993) (Court's emphasis).

[5] *Atlantic Marine* made clear that these statements apply in the context of "a court evaluating a defendant's § 1404(a) motion to transfer based on a forum-selection clause," 134 S. Ct. at 582, and "the same standards should apply to motions to dismiss for *forum non conveniens* in cases involving valid forum-selection clauses pointing to state or foreign forums," *id.* at 583 n.8.

Second, the CRST's "local interest" in having this case heard on the Reservation is compelling. The CRST has an interest in this case superior to that of a federal district court in Virginia given that Plaintiffs' challenge to Delbert's attempts to collect on Western Sky loans threatens a business authorized by CRST law, which provides jobs and opportunity to CRST members. (Ex. 1 ¶¶ 9-10.) At most, Plaintiffs could establish that both the CRST and Virginia have an equal interest in this dispute. By definition, therefore, Plaintiffs cannot meet their burden to show this factor "clearly disfavor[s]" enforcing the Clause. *Atl. Marine*, 134 S. Ct. at 575.

Third, no administrative concerns of court congestion in the CRST court mitigate against sending this case to its courts. Indeed, the Eastern District of Virginia has one of the busiest federal dockets in the country, tilting this factor strongly in favor of enforcing the Forum-Selection Clause.[6] Further, the CRST court is currently considering a similar lawsuit relating to Western Sky loans and will soon have the opportunity to offer definitive guidance on the scope of tribal jurisdiction—as is its right under the tribal exhaustion doctrine, discussed below. There is thus considerable efficiency in sending this case to the tribal court for litigation alongside that already-pending case.

2. The Forum-Selection Clause Was Not The Result Of Fraud.

Plaintiffs suggest that the Forum-Selection Clause is invalid because it was "based on fraud and overreaching." (Am. Compl. ¶ 74.) This Court should reject this unsupported, conclusory allegation summarily for three independent reasons. First, the clause was

[6] Additionally, if the Amended Complaint is not dismissed, this Court would be in the position of having to apply CRST law, which exclusively governs the Loan Agreements. As the Fourth Circuit has held, the "'most compelling public interest factor favoring dismissal may be the challenge of applying foreign law.'" *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F.3d 189, 195 (4th Cir. 2009) (quoting and affirming the district court); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 n.29 (1981) (same).

"reasonably communicated" to Plaintiffs. Second, Rule 9(b) requires that Plaintiffs plead fraud with particularity, which Plaintiffs fail to do. Third, Plaintiffs do not allege an essential element of any fraud claim: justifiable reliance.

First, a forum-selection clause is not fraudulent if it "was reasonably communicated to the consumer . . . , tak[ing] into account the clause's physical characteristics and whether the plaintiffs had the ability to become meaningfully informed of the clause and to reject its terms." *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009); *see also Smith v. Aegon USA, LLC*, 770 F. Supp. 2d 809, 812 (W.D. Va. 2011) (contract need only "reasonably communicate the provision"). The fact that the Forum-Selection Clause is contained in a consumer contract of adhesion—presented on a take-it-or-leave-it basis—does not render the clause fraudulent. *See Carnival Cruise Lines*, 499 U.S. at 594-95; *Torres v. SOH Distribution Co.*, No. 3:10-CV-179, 2010 WL 1959248, at *3 (E.D. Va. May 13, 2010). The Forum-Selection Clause was prominently disclosed to Plaintiffs on the first page of their Loan Agreements in clear, plain-English prose. (Ex. A at 1.) Because that clause was "not hidden or ambiguous," it "was not signed as a result of fraud or overreaching." *Krenkel*, 579 F.3d at 1281, 1282.

Two federal courts recently held that the Forum-Selection Clause at issue was not procured by fraud. In the Eastern District of North Carolina, Chief Judge James C. Dever III held that the plaintiff there "ha[d] not plausibly alleged that [the defendants] obtained the forum selection clause by fraud or overreaching." Ex. 6, *Spuller v. CashCall, Inc.*, No. 5:13-CV-806-D, slip op. at 1 (E.D.N.C. Mar. 5, 2014); *see also* Ex. 7, *Milam v. CashCall, Inc.*, No. 5:13-CV-768-D (E.D.N.C. Mar. 4, 2014) (Dever, C.J.). Similarly, Judge Roberto A. Lange of the District of South Dakota rejected any argument that the same Forum-Selection Clause resulted from

"fraud or overreaching." *See Heldt*, 2014 WL 1330924, at *7. In a separate case relating to identical loan agreements, Judge Lange held that the forum-selection and choice-of-law provisions are "not unfair and deceptive when the non-Indian has entered into consensual relationships with tribal members with a sufficient connection to on-reservation activities." *Fed. Trade Comm'n v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 928 (D.S.D. 2013) (internal quotations omitted). The Forum-Selection Clause is not fraudulent.[7]

Second, Plaintiffs must meet the "rigorous standard for pleading" common-law fraud to plead that a forum-selection clause is unenforceable on fraud grounds. *See Strum v. Exxon Co., U.S.A., a Div. of Exxon Corp.*,15 F.3d 327, 331 (4th Cir. 1994); *see also Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1296 (11th Cir. 1998). To plead fraud, "a party must state *with particularity* the circumstances constituting fraud." Fed. R. Civ. P. 9(b) (emphasis added). Therefore, a "plaintiff seeking to avoid a choice provision on a fraud theory must, within the confines of Fed. R. Civ. P. 9(b) and 11, plead fraud going to the specific provision." *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 960 (10th Cir. 1992); *see also Jalee Consulting Grp., Inc. v. XenoOne, Inc.*, 908 F. Supp. 2d 387, 394-95 (S.D.N.Y. 2012) ("[T]he Rule 9(b) pleading requirements apply to fraud in the inducement claims concerning forum

[7] Delbert acknowledges that a district court judge in the Northern District of Georgia recently found the Forum-Selection Clause to be invalid. *See* Ex. 8, *Parnell v. W. Sky Fin., LLC* ("*Parnell I*"), No. 4:14-cv-24-HLM, slip op. at 32-35 (N.D. Ga. Apr. 28, 2014). Delbert respectfully disagrees with *Parnell*. In particular, *Parnell* cited no case law in support of its conclusion that the Forum-Selection Clause was the result of fraud or overreaching or bad faith, never addressed the proper test for this issue, and ignored *Atlantic Marine*. Moreover, in response to a motion filed by the defendant, the *Parnell* court authorized an interlocutory appeal of its decision regarding the Forum-Selection Clause, as well as a related tribal exhaustion question discussed below. In so doing, the court recognized that reasonable jurists can differ on the Forum-Selection Clause's enforceability, noting that "a substantial ground for difference of opinion exists concerning the Court's resolution of" the Forum-Selection Clause's validity. Ex. 9, Order at 9, *Parnell v. W. Sky Fin., LLC* ("*Parnell II*"), No. 4:14-cv-24-HLM (N.D. Ga. May 29, 2014). (Without explanation, however, the Eleventh Circuit denied permission to appeal on July 23, 2014.)

selection clauses."). To meet Rule 9(b)'s strict pleading requirements, Plaintiffs must plead the "who," "what," "when," and "where" of the fraud—such as which statements were false or misleading, who made them, and when (or whether) Plaintiffs heard them. *See United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008). For example, the Amended Complaint never alleges with particularity just what fraudulent statements the Loan Agreements include. In light of the heightened pleading standard, the Amended Complaint flunks the Rule 9(b) test.

Third, the Amended Complaint fails to allege—even in conclusory fashion—that Plaintiffs justifiably relied on any alleged misrepresentations. Virginia law requires plaintiffs to plead and prove they justifiably relied on the allegedly false or misleading statement in entering into their contracts to invoke a fraudulent inducement defense. *See Metrocall of Del., Inc. v. Continental Cellular Corp.*, 437 S.E.2d 189, 193-94 (Va. 1993). "Absent such reasonable or justifiable reliance, no fraud is established." *Jared & Donna Murayama 1997 Trust v. NISC Holdings, LLC*, 727 S.E.2d 80, 86 (Va. 2012) (internal quotations omitted). Nowhere does the Amended Complaint allege, even conclusorily, that Plaintiffs relied—much less relied *justifiably*—on the (unstated) misrepresentations that form the basis for their claim. Thus, even accepting as true that the Forum-Selection Clause included material misrepresentations (which it did not), Plaintiffs' failure to allege that they justifiably relied on those misrepresentations is fatal to their claim that the Clause was induced by fraud. *See William v. AES Corp.*, --- F. Supp. 2d ---, No. 1:14CV343, 2014 WL 2896012, at *16 (E.D. Va. June 26, 2014) (dismissing fraud claim that was "devoid of factual allegations concerning Plaintiffs' reliance").

3. Plaintiffs' "Bad Faith" Argument Fails.

Plaintiffs allege Western Sky "included the forum-selection clause in bad faith—as a means of discouraging borrowers from pursuing legitimate claims." (Am. Compl. ¶ 74 (internal

quotations omitted).) Plaintiffs do not allege what aspects of the Clause reflect bad faith, other than perhaps the location of the forum. This spurious argument is insufficient to void the Clause.

Atlantic Marine forecloses an attack on a forum-selection clause based on the argument that the designated forum is inconvenient. In *Atlantic Marine*, the Supreme Court held that when agreeing to a forum-selection clause, the parties "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." 134 S. Ct. at 582. Thus, this Court may not consider such "private interests." *Id.*

The Forum-Selection Clause was not procured in "bad faith" even without regard to *Atlantic Marine*. As a matter of law, there can be no bad faith where the clause selects a forum with a legitimate connection to the dispute: the Supreme Court has held that a forum-selection clause in a consumer adhesion contract designating a forum over 3,000 miles from the plaintiff's preferred forum was not a bad faith attempt to discourage claims given that the designated forum was located where the defendant "ha[d] its principal place of business." *Carnival Cruise Lines*, 499 U.S. at 595. Even where "factors may make Plaintiffs' suit prospects more difficult, and less appealing" in the designated forum, "requiring suit in [a jurisdiction] for a contract" with a connection to that jurisdiction does not "evince[] a bad-faith motive of discouraging Plaintiffs from pursuing legitimate claims." *Liles v. Ginn-La W. End, Ltd.*, 631 F.3d 1242, 1255 (11th Cir. 2011). The CRST is the home jurisdiction of the lender, Western Sky, and thus has just such a connection to the Loan Agreements, defeating allegations of "bad faith."

Further, the Forum-Selection Clause should be read in the context of the entire Loan Agreement. That agreement provides for limited litigation in the tribal courts over certain issues, such as whether the class action waiver is valid or whether any arbitration award should be confirmed. (Ex. A at 5.) The Loan Agreement requires arbitration, which may be heard within

30 miles of Plaintiffs' residences, if Plaintiffs so choose. (*Id.*) The Loan Agreement also obligates *Delbert* to pay the costs of arbitration entirely. (*Id.*) These provisions greatly increase Plaintiffs' ability to bring claims.

II. Alternatively, The Doctrine Of Tribal Exhaustion Requires Dismissal.

Plaintiffs allege that this Court should refuse to enforce the Forum-Selection Clause because the CRST does not have jurisdiction over this case. (*E.g.*, Am. Compl. ¶¶ 5, 75.) This Court is not the proper forum for Plaintiffs to present that argument. Because the CRST court has at least colorable jurisdiction over this case, Plaintiffs must exhaust their remedies in that court, and Plaintiffs may there assert that the tribe lacks jurisdiction. Under what is known as the "tribal exhaustion doctrine," federal court abstention is "mandatory" as a matter of comity if Delbert can establish (a) at least a colorable claim that tribal jurisdiction is appropriate and (b) that Plaintiffs have not first pursued remedies in tribal court before turning to a federal forum. *See 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). As to the latter, Plaintiffs do not and cannot claim that they first pursued suit in tribal court. As to the former, CRST jurisdiction over Plaintiffs' claims is at least colorable because this dispute arises from (1) a consensual commercial relationship with (2) a tribal member and (3) the commercial conduct underlying the dispute occurred on the Reservation. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981).

A. Plaintiffs Entered Consensual Commercial Relationships With Western Sky.

Plaintiffs knowingly engaged in commercial transactions with a tribal member that were consummated on the Reservation. In *Montana v. United States*, the Supreme Court held that:

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

450 U.S. at 565-66 (internal citations omitted); *see also id.* at 566 ("agreements or dealings" could constitute a consensual relationship sufficient to "subject [non-Indians] to tribal civil jurisdiction"). Recent cases have affirmed these core principles and upheld tribal court jurisdiction over non-Indians. *See Iowa Mut. Ins. Co.*, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."); *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 173 (5th Cir. 2014) (upholding tribal jurisdiction over non-Indian company that employed unpaid Indian interns, which "unquestionably [constituted] a relationship of a commercial nature" under *Montana* (internal quotations omitted)).

In this case, Plaintiffs entered into the kind of consensual commercial relationship with a tribal member as contemplated in *Montana*. The Loan Agreements—which borrowers had the opportunity to review before executing—put Plaintiffs on notice that they were engaging in commerce with a tribal member that would be consummated on the Reservation. (Ex. A at 1, 3.) *Cf. Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa, Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013) (finding that a clear contractual relationship favors application of tribal law, and that "the first [*Montana*] exception applies equally whether the contract is with a tribe or its members"); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1315 (9th Cir. 1990) (upholding tribal jurisdiction over a non-Indian company operating on tribal land that violated tribal hiring ordinance).

B. Western Sky Is Considered A CRST Member For Purposes Of Tribal Jurisdiction.

Mr. Webb, the sole member of Western Sky, is an enrolled member of the CRST, a federally recognized Indian tribe. (Am. Compl. ¶ 62.) By extension, Western Sky possesses all

of Mr. Webb's rights and protections as a tribal member. The CRST tribal court has made clear that the "key to the identity or character of [a] corporation is in its ownership," and recognized that companies owned by individual Indians are "Indian" under tribal law even if they are incorporated under state law. Ex. 10, *Cheyenne River Tele. Co. v. Pearman*, No. 89-006-A, slip op. at 3 (CRST Ct. App. 1990). This tribal-court interpretation of CRST law defining which entities can claim the rights of tribal membership is dispositive. Significantly, the Supreme Court has acknowledged that "the Indian tribes retain their inherent power to determine tribal membership" as a fundamental sovereign right. *Montana*, 450 U.S. at 564.

Further, other courts have consistently recognized that, as a result of sharing their owners' identities, Indian-owned companies also enjoy the privileges of tribal membership. *See Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395 (S.D. 2003), *aff'd in part and vacated in part on other grounds*, 674 N.W.2d 314 (2004), *cert. denied*, 541 U.S. 1064 (2004); *Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1157 (9th Cir. 2013); *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 483-84 (S.D. 1991).[8]

C. Plaintiffs Engaged In On-Reservation Conduct.

Plaintiffs' interactions with Western Sky constituted on-Reservation activity. "To determine where the contract was made, we look to the place where the last act necessary to give validity to the contract occurred." *Herrera ex rel. Varela v. Martin*, 642 S.E.2d 309, 312 (Va. Ct. App. 2007) (internal quotations and alterations omitted); *see also Maggard v. Essar Global Ltd.*, --- F. Supp. 2d ---, No. 2:12CV00031, 2014 WL 1654936, at *4 (W.D. Va. Apl. 25, 2014).

[8] South Dakota courts address issues of tribal law with frequency and their opinions are especially authoritative on such issues. *See, e.g., McGuire v. Aberle*, 826 N.W.2d 353 (S.D. 2013); *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163 (D.S.D. 2012).

In this case, the last act of contract formation took place on the Reservation. Consumers electronically signed Agreements and submitted them via Western Sky's website for final audit review and acceptance by Western Sky. (Ex. 1 ¶ 5.) This review and acceptance occurred in Western Sky's offices on the Reservation, and until Western Sky accepted an agreement on the Reservation, no contract existed between Western Sky and a prospective borrower, and Western Sky was not obligated to fund a loan. (*Id.*) Critically, because the final act necessary to consummate each Agreement—Western Sky's acceptance—occurred on the Reservation, the Reservation is the place of contracting. *Cf. DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 884 (8th Cir. 2013) (applying state law to determine whether a tort occurred on- or off-reservation for the purpose of a similar jurisdictional analysis). That gives the CRST jurisdiction over all disputes over the Loan Agreements, including disputes over whether Delbert serviced those agreements in accord with the Agreements and governing law.

Consistent with the principles of inherent tribal sovereignty and self-governance, tribal courts are vested with exclusive jurisdiction over civil disputes relating to the on-reservation conduct of tribal members. *Iowa Mut. Ins. Co.*, 480 U.S. at 14 ("Tribal courts play a vital role in tribal self-government."); *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) ("Indian tribes . . . exercise inherent sovereign authority." (internal quotations omitted)). As the Supreme Court explained in *Williams v. Lee*, tribal courts "exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants." 358 U.S. 217, 222 (1959). Codifying this principle, the CRST Code asserts jurisdiction over the entire Reservation and all persons or corporate entities transacting business on the Reservation. *See* Ex. 11, CRST Code §§ 1-4-1, 1-4-3, & 1-4-5. The CRST Constitution and By-Laws endow tribal courts with exclusive jurisdiction over claims and disputes arising on the Reservation. *See* Ex. 12, CRST

By-Laws, Art. V.[9] Combined with Plaintiffs' voluntary commercial interaction with Western Sky, the CRST Constitution, By-Laws, and Code leave no question that CRST tribal courts have at least a "colorable" claim of jurisdiction over this case.

Judge Lange's order in *Heldt* underscores that conclusion. Analyzing the same contractual language at issue here, *Heldt* concluded that exhaustion was required unless exercising tribal jurisdiction would be "patently violative of express jurisdictional prohibitions." 2014 WL 1330924, at *14 (internal quotations omitted). Under that standard, "[t]ribal courts rarely lose the first opportunity to determine jurisdiction because of an express jurisdictional prohibition." *Id.* (internal quotations omitted). Judge Lange held that the defendants in *Heldt* had established a colorable claim that (a) Western Sky is considered a tribal member for purpose of tribal exhaustion because it is wholly-owned by an enrolled tribal member and operates from the Reservation; and (b) the plaintiff consented to tribal court jurisdiction. *Id.* at *15.[10]

In conflict with *Heldt*, *Parnell* held that CRST courts do not have jurisdiction over Western Sky loan agreements. Ex. 8, *Parnell I*, slip op. at 36-44, 51-52. *Parnell* ignored clear Supreme Court and Circuit Court precedent from throughout the country holding that tribal exhaustion is mandatory whenever there is a colorable claim of tribal court jurisdiction.

[9] The CRST Tribal Council recently affirmed the broad scope of tribal jurisdiction in passing a Tribal Resolution stating that "absent Congressional authorization, states have no authority to regulate the property or activities of the Tribe or its members on the Reservation, including the business activities of enterprises owned by the Tribe or its members." *See* Ex. 13, CRST Tribal Resolution No. 350-2013-CR, at 2 (Nov. 12, 2013).

[10] The Amended Complaint cites the *allegation* of the Federal Trade Commission (the "FTC") that the Forum-Selection Clause contains "false" statements "because the tribal court does not have subject-matter jurisdiction over Defendants' claims against nonmembers." (Am. Compl. ¶ 72-73.) The Amended Complaint further states that the FTC "established" that fact. (*Id.*) But that is not true. The same judge that presided over the action in which the FTC made those allegations, Judge Lange, subsequently held that there is a plausible argument that tribal jurisdiction exists over Western Sky loans and thus ordered Plaintiffs to exhaust their tribal remedies first. *See Heldt*, 2014 WL 1330924, at *14. Plaintiffs' reliance on the FTC's allegations is therefore misleading.

Notwithstanding that law, *Parnell* decided for itself whether tribal jurisdiction exists in the first instance. *Parnell* addressed tribal exhaustion only as an afterthought in a single, conclusory footnote, and in doing so wrested from tribal courts their established right to determine tribal jurisdiction before federal courts may consider that question. *See id.* at 44 n.5.[11] The *Parnell* court shortly thereafter acknowledged that there are substantial grounds to disagree with its decision, and therefore authorized an interlocutory appeal on the tribal exhaustion issue.[12] Delbert respectfully submits that this Court should follow the *Heldt* court's lead—a court with unique expertise in tribal law issues given its location in South Dakota.

In sum, Delbert has shown that tribal jurisdiction is at least "colorable" here. Plaintiffs cannot demonstrate that "it is 'plain' that tribal jurisdiction does not exist." *Laducer*, 725 F.3d at 883. Delbert respectfully submits that this Court should dismiss or stay this case pending tribal exhaustion. *See Heldt*, 2014 WL 1330924, at *14-15.

III. Alternatively, Plaintiffs' Claims Should Be Arbitrated.

In the event that the Court rejects Delbert's arguments in favor of dismissing the case under the doctrines of *forum non conveniens* or tribal exhaustion, Delbert alternatively moves the Court to compel arbitration. Plaintiffs' Loan Agreements contain a comprehensive Arbitration

[11] Further, *Parnell* relied upon a ground for refusing to order tribal exhaustion that is not in play here. The court "decline[d] to consider" whether it should stay the action and require tribal exhaustion because the defendants had not "offered to file a tribal court action to determine jurisdiction." Ex. 8, *Parnell I*, slip op. at 44 n.5. To whatever extent such an offer is necessary—*Parnell* cites no legal authority for this requirement, and the *Heldt* defendants made no similar offer—Delbert hereby offers to file an action similar to the tribal court action required by *Heldt* should this Court consider such an order appropriate. The more appropriate course, however, is to order *Plaintiffs* to exhaust their tribal remedies, as required by well-established precedent.

[12] *Parnell* also refused to enforce the Forum-Selection Clause because that court concluded the CRST does not have jurisdiction. Ex. 8, *Parnell I*, slip op. at 36-44, 51-52. As described above, Delbert contends that the *Parnell* court erred in reaching that question under the tribal exhaustion doctrine, and the *Parnell* court certified that court for an interlocutory appeal, acknowledging that "substantial grounds" for disagreement as to that decision exists.

Clause. (*See* pp. 7-8 above.) The Loan Agreements' Arbitration Clause fully requires that all disputes arising out of the Agreement be resolved in binding arbitration.

A. Plaintiffs' Claims Are "Disputes" Under The Arbitration Clause.

The plain language of the Loan Agreements require that every aspect of this case be sent to arbitration. As noted above, the Loan Agreements define the "Disputes" subject to mandatory arbitration in the "broadest possible" manner, including (but is not limited to): (a) "all claims or demands . . . based on any legal or equitable theory (tort, contract, or otherwise)"; and (b) "any claim based upon . . . the handling or servicing of [Plaintiffs'] account[s] whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law." (Ex. A at 4.)

The Arbitration Clause requires arbitration of Plaintiffs' entire Amended Complaint. In *Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566, 569 (4th Cir. 1998), the Court held that an "extremely broad arbitration clause" calling for arbitration of "[a]ny controversy or claim arising out of or relating to . . . any aspects of the relationship," covered all conflicts between the parties. Similarly, *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 267-69 (4th Cir. 2011), held that broad language referring to "[a]ny dispute" encompassed all disputes, past or present, between the parties.

B. The Arbitration Clause Covers Claims Against Delbert Because It Is The Loan "Servicer" And "Collection Agent."

The Arbitration Clause applies to claims against Delbert. The Arbitration Clause covers "any Dispute" and defines "Dispute" to include "any controversy or claim between you and Western Sky or the holder or servicer of the Note." (Ex. A at 4.) "Holder" is further defined to include "any marketing, servicing, and collection representatives and agents." (*Id.*) Plaintiffs themselves acknowledge that Delbert is a "debt collector" and "operates as a debt collection

company." (Am. Compl. ¶¶ 11, 44.) Delbert is also the current "servicer" of each Plaintiff's loan. (Ex. 4 ¶¶ 8-10; Ex. 5 ¶ 9.)

To dispute the clear applicability of the Arbitration Clause, Plaintiffs point to a case holding that Delbert could not enforce an arbitration clause contained in another Western Sky loan agreement. (Am. Compl. ¶ 70.) *See Scott v. Delbert Servs. Corp.*, No. 12-C-0871, 2013 WL 1192012 (E.D. Wis. Mar. 21, 2013). However, *Scott* address only whether Delbert, in that particular case, had "produced evidence from which [the court] could reasonably conclude that [Delbert had] any rights under the agreement." *Id.* at *2. Delbert has plainly produced such evidence in this case, establishing by affidavit that Plaintiffs' loans were (1) originated by Western Sky (Ex. 3 ¶¶ 9-10, 12-13, 15-16); (2) transferred to WS Funding to be serviced by CashCall (Ex. 4 ¶¶ 8-10); and (3) transferred again to Consumer Loan Trust to be serviced by Delbert (Ex. 5 ¶ 6-8). That evidence shows that Delbert is both a loan "servicer" and a "collection agent" and thus may enforce the Arbitration Clause.

C. An Arbitral Forum Is Available.

Plaintiffs allege that even if the Arbitration Clause encompasses their claims, it is nonetheless invalid because the CRST neither conducts arbitrations nor has consumer dispute rules as described in the Loan Agreements. Specifically, Plaintiffs allege that the CRST does not "conduct arbitrations through 'authorized representative(s)' as required by" the Arbitration Clause because "no such authorized representative exists." (Am. Compl. ¶¶ 76, 78.) Further, Plaintiffs allege that the CRST "does not have any consumer dispute rules" that would apply to arbitration under the Arbitration Clause. (*Id.* ¶ 82.)

Plaintiffs premise their argument on a fundamentally mistaken interpretation of their Loan Agreements. The Arbitration Clause does not require that the arbitration be conducted before an "authorized representative" of the CRST in all instances. Instead, the next paragraph

of the Arbitration Clause states that Plaintiffs have the right to replace arbitration before a tribal "representative" under the tribe's "consumer dispute rules" with arbitration before the "Arbitration Arbitration Association . . .; JAMS . . .; or an arbitration organization agreed upon by you and the other parties to the Dispute. The arbitration will be governed by the chosen arbitration organization's rules and procedures applicable to consumer disputes[.]" (Ex. A at 4.) Thus, the Arbitration Clause does not require arbitration before the CRST or that arbitration occur under its "consumer dispute rules" in all cases; rather, it authorizes Plaintiffs to select arbitration before neutral, reputable arbitration organizations (AAA or JAMS) under the consumer dispute rules of *those organizations*.[13]

In any event, the Arbitration Clause must be enforced even if the contractually designated fora were unavailable. Under Section 5 of the FAA, this Court should appoint a substitute arbitral forum whenever the contractually-designated forum is unavailable for "any . . . reason." 9 U.S.C. § 5. Under Section 5, an arbitration clause is enforceable even if the designated forum is not available because a court can appoint a substitute arbitrator. *See Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 793 (7th Cir. 2013); *see also Wolverine Fire Prot. Co. v. Atl. Marine Constr. Co.*, No. 2:08cv75, 2008 WL 1847512, at *2 (E.D. Va. Apr. 24, 2008) ("The FAA . . . operates to provide the terms of arbitration on which the contract is silent."). Various courts within the Fourth Circuit have so held. *See, e.g., Montgomery v. Applied Bank*, 848 F. Supp. 2d 609, 614 (S.D. W. Va. 2012); *McNeil v. Haley S., Inc.*, No. 3:10cv192, 2010 WL 3670547, at *5 (E.D. Va. Sept. 13, 2010).

[13] For that reason, the decision in *Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303 (S.D. Fla. 2013), is irrelevant to the issues before this Court. Unlike Plaintiff's Loan Agreement, Mr. Inetianbor's did not allow the borrower to select arbitration before the AAA or JAMS. *Id.* at 1305.

Delbert acknowledges that *Parnell* refused to apply Section 5 of the FAA and enforce the Arbitration Clause because it found (without analysis) that the "choice of forum" was "an integral part" of the Arbitration Clause. Ex. 8, *Parnell I*, slip op. at 73. But as the Seventh Circuit recently held, there is no "integral part" exception to Section 5. *Green*, 724 F.3d at 791. The FAA thus requires courts to appoint substitute arbitrators at a party's request, whether the unavailable forum is deemed "integral" to the clause or not.

Further, even if a court could avoid its obligation to appoint a substitute arbitrator under Section 5 on "integrality" grounds, the designated fora here were not integral. The Arbitration Clause makes this clear through its severance clause, which provides that "[i]f any of this Arbitration Provision is held invalid, the remainder shall remain in effect." (Ex. A at 6.) "[A] severability provision . . . evidences the parties' intention to enforce the remainder of the [arbitration] agreement in the event any portion of it" cannot be implemented. *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1031 (11th Cir. 2003); *see also Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005). A provision stating that the "Arbitration Provision will survive," *inter alia*, "termination or changes in this Agreement" and "any transfer, sale or assignment of my note or any amounts owed on my account, to any other person or entity," (Ex. A at 5), further establishes the importance of arbitration. *See Khan v. Dell Inc.*, 669 F.3d 350 (3d Cir. 2012); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000). The contract also twice recites that arbitration replaces court proceedings and any trials. (Ex. A at 3, 4.) Individually and collectively, those provisions demonstrate "that the last place where the parties intended this dispute to be adjudicated is in court before a jury." *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1323 (11th Cir. 2002). Respectfully, therefore, this Court should reject the *Parnell* court's reasoning and enforce the Arbitration Clause.

D. The Arbitrator Should Decide Whether The Arbitration Clause Is Valid.

In addition, the Arbitration Clause's "Delegation Clause" requires the arbitrator to decide whether the Arbitration Clause itself is valid. (Ex. A at 4.) The Supreme Court has upheld such clauses and requires them to be enforced unless the plaintiff makes a challenge *specifically directed* at the delegation clause itself. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010). In *Rent-A-Center*, the arbitration agreement contained a delegation provision requiring the arbitrator to "resolve any dispute relating to the interpretation, applicability, enforceability or formation of" the arbitration agreement. *Id.* at 66. The Supreme Court held that unless a party "challenge[s] the delegation provision specifically, [courts] must treat it as valid under [FAA] § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the [arbitration] Agreement as a whole for the arbitrator." *Id.* at 72.

Here, while Plaintiffs make may allegations against the Arbitration Clause generally, none target the Delegation Clause itself. Because Plaintiffs have failed to challenge the Delegation Clause specifically, this Court "must treat it as valid" under the FAA and must enforce it. *Id.* Accordingly, the Delegation Clause precludes this Court from even considering whether the Arbitration Clause here is enforceable. Because Plaintiffs' attacks on the Arbitration Clause, as well as their underlying claims, are covered by the broad language of the Arbitration Clause, this entire case should be sent to arbitration.

E. Plaintiffs' Defenses Fail On The Merits.

FAA § 2 provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. To avoid their obligation to arbitrate under the FAA, therefore, Plaintiffs must show that a generally applicable defense allows them to invalidate the Arbitration Clause. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

It is not clear if the Plaintiffs even lodge an attack on the Arbitration Clause, other than the legally incorrect argument that the forum is not available. To the extent Plaintiffs argue that the Arbitration Clause was procured by fraud or in bad faith, those arguments fail for the reasons discussed above in addressing the Forum-Selection Clause. *See* Part I.B.2, 3 above.

F. The Entire Case Should Be Dismissed.

The FAA mandates that trial courts "*shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (Court's emphasis). When a party to an arbitration agreement elects to file a lawsuit rather than pursue arbitration, that party has refused to arbitrate and the district court should compel arbitration. *See* 9 U.S.C. § 4. In addition, as the Fourth Circuit has held, "dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable," as is the case here. *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001).

CONCLUSION

For the foregoing reasons, this Court should (1) dismiss this case under the doctrine of *forum non conveniens* pursuant to the Forum-Selection Clause; (2) dismiss or stay this case under the tribal exhaustion doctrine; or (3) compel arbitration and dismiss or stay this case.

Dated: July 28, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2014, I served a copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF DELBERT SERVICES CORPORATION'S MOTION TO DISMISS THE FIRST AMENDED CLASS ACTION COMPLAINT, OR, ALTERNATIVELY, TO COMPEL ARBITRATION via the Court's electronic filing system, which will automatically send email notification of such filing to the following counsel of record:

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