

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:13-CV-00255-WO-JLW

THOMAS BROWN, *et al.*,)
)
)
 Plaintiffs,)
 v.)
)
 WESTERN SKY FINANCIAL, LLC, *et*)
al.,)
)
 Defendants.)

**REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS’
OMNIBUS MOTION TO DISMISS OR STAY**

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Defendants,¹ by and through their attorneys, respectfully submit this reply memorandum of law in further support of their omnibus motion for an order: (1) dismissing the SAC with prejudice; or (2) in the alternative, staying consideration of the SAC pending Plaintiffs' exhaustion of tribal remedies.²

PRELIMINARY STATEMENT

The sufficiency of Plaintiffs' allegations may only be considered by this Court if Plaintiffs can demonstrate each of the following: (1) the Agreements' forum-selection clause is unenforceable; (2) CRST jurisdiction over this suit is not "colorable" such that the tribal exhaustion doctrine does not apply; *and* (3) the Agreements' arbitration provisions are unenforceable. But as Plaintiffs' opposition to the Omnibus Motion makes clear, Plaintiffs cannot overcome any, let alone all, of these three threshold hurdles.

First, the forum-selection clause bars this Court from considering Plaintiffs' suit because Plaintiffs have not demonstrated the "extraordinary circumstances" necessary to void the clause. Just three weeks ago, in a separate dispute involving the same Western Sky forum-selection clause at issue here, the Honorable James C. Dever III of the Eastern District of North Carolina enforced the clause and dismissed a Western Sky borrower's suit. *See Spuller v. CashCall, Inc.*, No. 13-CV-806 (E.D.N.C. March 5, 2014) (Dever,

¹ Capitalized terms not otherwise defined herein have the meanings ascribed to them in Defendants' Memorandum of Law in Support of the Omnibus Motion.

² Defendants file alongside this brief a reply brief in further support of their Motion to Dismiss Mr. Reddam and Payday Financial for Lack of Personal Jurisdiction, and a brief in opposition to Plaintiffs' Motion Requesting Discovery on Preliminary Issues and in support of Defendants' Cross-Motion To Stay Discovery.

C.J.) (“*Spuller* Order”). This Court should follow suit by enforcing the forum-selection clause and dismissing the SAC.

Second, Plaintiffs’ allegations are independently precluded from consideration because Plaintiffs have put forth no plausible facts and cited no controlling law that casts doubt on whether CRST jurisdiction over this dispute is “colorable.” As a result, under the tribal exhaustion doctrine, the Court is required to dismiss or abstain from presiding over this dispute until Plaintiffs exhaust their tribal remedies.

Third, even if Plaintiffs could demonstrate both that the forum-selection clause is deficient and tribal jurisdiction is not colorable, they cannot point to any well-pled facts or controlling law that render the arbitration clause invalid or diminish the Court’s obligation, in the event the parties’ chosen arbitral forum is found to be wanting, to appoint a substitute arbitral forum.

Plaintiffs’ inability to overcome any *one* of these three threshold hurdles is sufficient to require dismissal of the entire case. Nevertheless, should this Court reach the merits, Plaintiffs fail to state a claim on several of their causes of action.

ARGUMENT

I. The Forum-Selection Clause is Enforceable and Requires Dismissal of this Case

In order to avoid dismissal of this case based on the Agreements’ forum-selection clause, recent Supreme Court precedent requires Plaintiffs to establish that “*extraordinary circumstances* unrelated to the convenience of the parties *clearly disfavor*” the forum-selection clause’s enforcement. *Atl. Marine Constr. Co. v. U.S. Dist.*

Ct. for W.D. Tex., 134 S. Ct. 568, 575 (2013) (emphasis added) (cited at Defs. Omnibus Br. 12, 13, and 16). Plaintiffs fail to meet this high burden.

A. North Carolina’s Public Policy is Irrelevant in Light of *Albemarle*

The Fourth Circuit recently held in *Albemarle* that “[f]ederal law explicitly regulates the appropriate venue in cases filed in federal court” and preempts state laws to the contrary. *Albemarle Corp. v. Astrazeneca UK Ltd.*, 628 F.3d 643, 652 (4th Cir. 2010). Plaintiffs ask this Court to create an exception to this clear holding, but do not cite a single case—and Defendants are aware of none—that post-dates *Albemarle* and holds that a state public policy can ever in a federal court override a forum-selection clause.³ *Cf. ACLU of N.C. v. Tata*, 742 F.3d 563, 569 (4th Cir. 2014) (noting only the Supreme Court or the Fourth Circuit sitting *en banc* can “overrule, explicitly or implicitly, the precedent set by a prior panel of” the Fourth Circuit (quotation and citation omitted)).

In the absence of any supporting authority, Plaintiffs attempt to distinguish *Albemarle*, but to no avail. Plaintiffs contend, for example, that the South Carolina statute at issue in *Albemarle* imposed state procedural rules, as opposed to substantive policies, on a federal court and that here, North Carolina’s policies are substantive. Pls. Omnibus Br. 32. But regardless of whether the policies invoked by Plaintiffs are substantive or procedural, the enforceability of a forum-selection clause—a procedural question—cannot “depend on the content of state law.” *Stewart Org., Inc. v. Ricoh*

³ The non-North Carolina state cases Plaintiffs cite, where *Albemarle* and North Carolina public policy were not at issue, are equally unpersuasive. Pls. Omnibus Br. 27-32.

Corp., 487 U.S. 22, 31 n.10 (1988).⁴ Plaintiffs’ related argument that North Carolina’s interest against enforcing forum-selection clauses is “stronger” than the state interest that was at issue in *Albemarle* is likewise immaterial. Pls. Omnibus Br. 32-33. Even if North Carolina’s public policy interest is stronger, it still cannot trump and displace federal law. See U.S. CONST. art. VI, cl. 2 (Supremacy Clause); *Albemarle*, 628 F.3d at 652. North Carolina’s public policy therefore has no effect on the enforceability of the forum-selection clause.

B. The Forum-Selection Clause Was Not Induced By Fraud or Overreaching

Plaintiffs’ contention that the forum-selection clause should not be enforced because the Agreement—rather than the forum-selection clause itself—is a product of fraud and overreaching likewise fails as a matter of law. Pls. Omnibus Br. 33-36. A “forum-selection clause in a contract is not enforceable if the inclusion of *that clause* in the contract was the product of fraud or coercion.” *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974) (emphasis added); see also Defs. Omnibus Br. 14-16. Thus,

⁴ That the enforceability of the Agreements’ forum-selection clause is governed by the doctrine of *forum non conveniens* and not a motion to transfer under 28 U.S.C. § 1404(a) does not mean that state law can abrogate a forum-selection clause. The Supreme Court’s recent holding in *Atlantic Marine* requires courts to evaluate the enforceability of a forum-selection clause pointing to a federal forum pursuant to section 1404(a) and to “evaluate a forum-selection clause pointing to a nonfederal forum in the same way.” 1234 S. Ct. at 580. Just as state law can have no effect on a motion to transfer venue under section 1404(a), *Stewart Org.*, 487 U.S. at 31 n.10, state law also can have no effect on a motion to dismiss brought in federal court under the doctrine of *forum non conveniens*.

even if all of Plaintiffs' allegations are true (which they are not), they are irrelevant because none relates to the *forum-selection clause* in the Agreements.⁵ *Id.*

The cases cited by Plaintiffs are not to the contrary. Plaintiffs primarily rely on the pre-*Albemarle* case of *Dove Air, Inc. v. Bennett*, 226 F. Supp. 2d 771 (W.D.N.C. 2002) (cited at Pls. Omnibus Br. 33-34), which in turn relied exclusively on cases decided under *state*—not *federal*—law to hold that the forum-selection clause at issue was the result of overreaching. *Id.* at 775. The state authorities cited in *Dove Air* are not only inapplicable following *Albemarle*, but also incompatible with the Supreme Court's *Carnival Cruise* case, which held that the non-negotiability of a forum-selection clause does not render it unenforceable.⁶ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-95 (1991) (forum-selection clause in adhesion contract enforceable because plaintiff had notice of clause and retained option of rejecting the contract); *see also Spuller Order*

⁵ Plaintiffs themselves admit that it was economic need—not any alleged misrepresentation—that caused them to assent to the Agreements and agree to the forum-selection clause. SAC ¶¶ 71, 76, 78, 88, 95, 101, 105.

⁶ The Supreme Court observed in *Carnival Cruise* that a forum-selection clause has “the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and *conserving judicial resources that otherwise would be devoted to deciding those motions.*” *Carnival Cruise Lines*, 499 U.S. at 593-94 (emphasis added). The need to conserve judicial resources is particularly acute here. Usury is governed on a state-by-state basis, and the Agreements' forum-selection clause ensures that a predictable set of procedural rules, including choice-of-law and venue rules, will resolve disputes over the enforceability of a loan. *See Bassett Seamless Guttering, Inc. v. Gutterguard, LLC*, No. 1:05CV00184, 2006 WL 156874, at *5 (M.D.N.C. Jan. 20, 2006) (when an entity “does business in many states, it is reasonable for the company to want to limit the potential fora in which it might have to answer suit”).

at 1 (citing *Carnival Cruise* and rejecting plaintiff's argument that the Western Sky forum-selection clause was obtained by fraud or overreaching).

Repeating *Dove Air's* approach, Plaintiffs improperly rely on additional cases decided under state law,⁷ as well as federal cases that either were decided *before Carnival Cruise*,⁸ do not analyze *Carnival Cruise*,⁹ or were reversed on appeal.¹⁰ See Pls. Omnibus Br. 36 n.31. None of these cases alters the well-established principle that allegations of fraud or overreaching must be specific to the forum-selection clause being challenged, and not merely aimed at the contract as a whole.

C. CRST Law Does Not Leave Plaintiffs without a Remedy

Pointing to the CRST's lack of a usury cap, Plaintiffs argue the forum-selection clause should not be enforced because “of the fundamental unfairness of” the chosen forum's law. Pls. Omnibus Br. 36 (quoting *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996)). Plaintiffs do not, however, dispute that the standard for determining whether the chosen forum's laws are fundamentally unfair is whether the forum provides “a remedy” for the harms alleged. Defs. Omnibus Br. 16 (quoting *Gita Sports, Ltd. v. SG*

⁷ See *Preferred Capital, Inc. v. Sarasota Kennel Club*, No. 1:04 CV 2063, 2005 WL 1799900 (N.D. Ohio July 27, 2005); *Cox v. Dine-A-Mate, Inc.*, 501 S.E.2d 353 (N.C. Ct. App. 1998); *Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv., Inc.*, 439 S.E.2d 221 (N.C. Ct. App. 1994); *SRH, Inc. v. IFC Credit Corp.*, 619 S.E.2d 744 (Ga. Ct. App. 2005); *High Life Sales v. Brown-Forman Corp.*, 823 S.W.2d 493 (Mo. 1992).

⁸ See *Colonial Leasing Co. of New England v. Best*, 552 F. Supp. 605 (D. Or. 1982); *Kolendo v. Jerell, Inc.*, 489 F. Supp. 983 (S.D. W. Va. 1980).

⁹ *Jelich v. Warner Bros., Inc.*, No. 95 CIV. 10016(LLS), 1996 WL 209973 (S.D.N.Y. Apr. 30, 1996).

¹⁰ See *Preferred Capital, Inc. v. Aetna Maint., Inc.*, No. 1:04 CV 2511, 2005 WL 1398549 (N.D. Ohio June 14, 2005), *rev'd*, 207 F. App'x 562 (6th Cir. 2006).

Sensortechnik GmbH & Co. KG, 560 F. Supp. 2d 432, 440 (W.D.N.C. 2008) (emphasis in original)). And because Plaintiffs also do not dispute that CRST law recognizes common law causes of action and principles of law and equity, and has the authority to issue damages and injunctive relief, the forum-selection clause cannot be rendered unenforceable based on any claim that it is fundamentally unfair.¹¹ Defs. Omnibus Br. 37; *cf. Allen*, 94 F.3d at 929 (“[T]he fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement.” (citation, quotation, and brackets omitted)).

Moreover, in both of the Supreme Court cases cited by Plaintiffs for the proposition that forum-selection clauses can operate as waivers of statutory rights, the Court *upheld* arbitration clauses—which are a type of forum-selection clause—challenged on the ground that a statutory remedy may not be available under the chosen forum’s laws. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court noted that the potential unavailability of a remedy under the chosen forum’s laws was insufficient to void a forum-selection clause prior to the “award-enforcement stage.” 473 U.S. 614, 638 (1985) (cited at Pls. Omnibus Br. 36-37). The Court similarly rejected a pre-arbitration attack in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* because a

¹¹ To hold otherwise would improperly give this factor dispositive weight in violation of the Supreme Court’s ruling in *Stewart*—extended to the context of a forum-selection clause in *Atlantic Marine*—that state public policy cannot override federal venue law. See *Cable-La v. Williams Comm’ns, Inc.*, 104 F. Supp. 2d 569, 576 (M.D.N.C. 1999) (“A court cannot observe *Stewart*’s pronouncement that state public policies disfavoring forum-selection clauses do not invalidate such clauses, while at the same time holding that such a policy renders a clause at issue *per se* unreasonable and thus unenforceable.”).

“subsequent opportunity for review” existed after any arbitral award would be issued. 515 U.S. 528, 541 (1995) (cited at Pls. Omnibus Br. 37). With no remedy having yet been awarded (or not) by a tribunal from the parties’ chosen forum, Plaintiffs’ allegations of fundamental unfairness may not trump the parties’ forum-selection clause.

D. The Forum-Selection Clause Confers Venue on the CRST Courts

Plaintiffs argue baselessly that the forum-selection clause is unenforceable because it confers “jurisdiction” onto a judicial body—namely, the CRST courts—that lacks subject matter jurisdiction over this dispute. Pls. Omnibus Br. 20-24. A forum-selection clause does not operate—as Plaintiffs assume—to confer subject matter jurisdiction on a forum. Rather, a forum-selection clause confers *venue* upon a forum that the parties *ex ante* agreed would be a suitable tribunal to resolve all future disputes. *See Grp. SEB Holdings, Inc. v. Brady Mktg. Co.*, No. 14cv0151, 2014 WL 896801, at *2 (W.D. Pa. Mar. 6, 2014) (applying *Atlantic Marine* to enforce forum-selection clause while leaving jurisdictional issues to be decided by venue designated in contract); *cf. Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 n.3 (4th Cir. 2006) (finding, in pre-*Atlantic Marine* context, that dismissal based on forum-selection clause was proper when district court did not address personal jurisdiction objections).

Whether the parties’ contracted venue may properly exercise subject matter jurisdiction is a matter for the venue itself to decide. As described at length in Defendants’ opening brief and below, Part II, *infra*, CRST tribal courts have at the very least a colorable claim of jurisdiction over this dispute and, as such, the question of whether CRST tribal courts actually have jurisdiction over this dispute is for the tribal

courts to answer—not this Court. *See Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) (tribal courts must be given “a full opportunity to determine [their] own jurisdiction” in the first instance).

* * *

This should be the beginning and the end of the analysis. Plaintiffs are not permitted to prosecute their claims in this Court because they do not properly allege the “extraordinary circumstances” necessary to prohibit enforcement of the Agreements’ forum-selection clause. Although nothing more is required to support dismissal, Defendants demonstrate below two additional and independent threshold bases for disposing of this case, as well as the insufficiency of several of Plaintiffs’ claims.

II. Alternatively, Plaintiffs Must Exhaust Tribal Remedies before This Case May Proceed

Dismissal or abstention is mandatory in this case because two conditions are met: (1) CRST jurisdiction over this dispute is colorable; and (2) Plaintiffs did not pursue tribal remedies before initiating this lawsuit. Defs. Omnibus Br. 19-26. Plaintiffs do not dispute the second condition. On the first condition, Plaintiffs contend the CRST lacks a colorable claim to jurisdiction without confronting the key and argument-ending fact that binding Supreme Court precedent permits a tribe (such as the CRST) to exercise jurisdiction over non-members (such as Plaintiffs) who enter commercial relationships with tribal members (such as Western Sky) on tribal land. Accordingly, CRST jurisdiction over Plaintiffs’ claims is at least colorable, and this case must be dismissed or stayed pending exhaustion of tribal remedies.

A. Tribal Exhaustion is Mandatory if Tribal Jurisdiction is at Least Colorable

Plaintiffs mischaracterize the *mandatory* nature of the tribal exhaustion doctrine by incorrectly portraying it as discretionary. Pls. Omnibus Br. 40. Binding Supreme Court precedent makes clear that federal courts are *required* to dismiss or stay litigation that is plausibly subject to tribal jurisdiction when (as here) litigants have not exhausted tribal court remedies. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (holding that “petitioner *must* exhaust available tribal remedies before instituting suit in federal court” (emphasis added)).

Attempting to sweep this clear precedent under the rug, Plaintiffs latch on to the Supreme Court’s description of the tribal exhaustion requirement as “prudential” and dictated by “comity.” Pls. Omnibus Br. 39, n.32; *id.* at 40. Yet, it is irrelevant that tribal exhaustion is not a jurisdictional prerequisite; deference to tribal courts is “mandatory . . . when a case fits within the policy.” *Gaming World Int’l v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003); *see also Iowa Mut. Ins. Co.*, 480 U.S. at 19.¹² Plaintiffs’ implication to the contrary, relying on cases such as *Iowa Mutual Insurance Company* and *Madewell v. Harrah’s Cherokee Smokey Mountains Casino*, 730 F. Supp. 2d 485 (W.D.N.C. 2010), is misleading. Both of those cases required non-Indians to exhaust tribal remedies, and support Defendants’ robust view of tribal

¹² To the extent that *Fidelity & Guaranty Ins. Co. v. Bradley*, 212 F. Supp. 2d 163 (W.D.N.C. 2002), implies exhaustion is not mandatory, it is mistaken. *See* Pls. Omnibus Br. 40 & n.33. In any event, the court in *Fidelity* dismissed the case for failure to exhaust tribal remedies. 212 F. Supp. 2d at 167.

exhaustion. *See Iowa Mut. Ins. Co.*, 480 U.S. at 19-20; *Madewell*, 730 F. Supp. 2d at 489.

B. Tribal Jurisdiction is At Least Colorable under *Montana*

CRST jurisdiction over the parties' dispute is at least "colorable" because Plaintiffs entered into commercial transactions (1) with an LLC imbued with the privileges and attributes of a tribal member and which (2) took place on the Reservation. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981).

1. Plaintiffs Voluntarily Entered a Commercial Relationship with a Tribal Member

The Supreme Court in *Montana v. United States* identified two exceptions to the general rule that tribal court jurisdiction cannot be exercised over non-tribal members. Only the first exception is relevant here. Under that exception, tribes may exercise jurisdiction over nonmembers "who enter consensual relationships with the tribe or its members[] through commercial dealing[s]." *Montana*, 450 U.S. at 565.¹³

Plaintiffs do not dispute that they voluntarily entered into transactions with Western Sky but attempt to sidestep *Montana's* straightforward holding by claiming incorrectly that Western Sky does not qualify as a tribal member. *See* Pls. Omnibus Br.

¹³ The cases cited by Plaintiffs in an attempt to undermine *Montana* all refused to require tribal exhaustion because tribal jurisdiction was clearly lacking. Pls. Omnibus Br. 39 n. 32. For example, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), involved a highway accident that involved neither a consensual relationship with a tribal member nor an issue that directly implicated tribal self-governance. *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), similarly involved a non-Indian defendant who had not conducted any activities or communicated with anyone on the reservation. And in *Nevada v. Hicks*, 533 U.S. 353 (2001), the Court rejected tribal jurisdiction over state officials investigating *off-reservation* crimes. The remaining cases are similarly distinguishable, and in no way undercut the CRST's clear jurisdiction in this case.

24, 39. Plaintiffs support this claim with no case law to rebut the numerous authorities holding that a company owned by a tribal member takes on the rights and attributes of its owner.¹⁴ Defs. Omnibus Br. 22-23; *see also Carnell Constr. Corp. v. Danville Redev. & Housing Auth.*, --- F.3d ---, 2014 WL 868620, at *6 (4th Cir. Mar. 6, 2014) (holding that a “minority-owned corporation may establish an ‘imputed racial identity’”). Under these authorities, Western Sky has the status of tribal member.

Plaintiffs’ argument that *Montana*’s first exception is inapplicable because Western Sky is not the CRST itself or an “arm” of the CRST misses the point. Pls. Omnibus Br. 22. *Montana* is clear in approving tribal jurisdiction over “the activities of nonmembers who enter consensual relationships with the tribe or *its members*.” *Montana*, 450 U.S. at 565 (emphasis added). Consistent with this precedent, tribal exhaustion is routinely required in cases involving tribal members, such as Western Sky, who are not “arms” of their respective tribes. *See, e.g., Grand Canyon Skywalk Dev., LLC v. ‘Sa’ Nyu Wa Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013) (“While the agreement was between GCSD and SNW, and not the Tribe directly, the first exception applies

¹⁴ Ignoring this key fact, Plaintiffs suggest that the Supreme Court’s decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) (discussed at Pls. Omnibus Br. 38) bars tribal jurisdiction over the parties’ dispute. But as Plaintiffs themselves acknowledge in their summary of *Plains Commerce*, that case centered on the *non-Indian to non-Indian* sale of *non-Indian* land. Pls. Omnibus Br. 38. By contrast, this case centers on a commercial transaction between a non-Indian and an Indian which took place on Indian land. As explained in a recent Fifth Circuit opinion, “any discussion in *Plains Commerce* of tribal authority to regulate nonmember conduct under *Montana* is dicta; its result is based on a holding that *Montana* does not allow a tribe to regulate the sale of land owned by a non-member.” *DolgenCorp, Inc. v. Miss. Band of Choctaw Indians*, --- F.3d ---, 2014 WL 994936, at *7 (5th Cir. Mar. 14, 2014).

equally whether the contract is with a tribe or its members.”). It is thus sufficient under *Montana* that Plaintiffs entered commercial transactions with Western Sky, which possesses the rights and attributes of a tribal member, rather than the CRST itself or its official “arm.”

2. The Commercial Relationships At Issue Occurred on the Reservation

Western Sky’s interactions with Plaintiffs constituted on-Reservation activity. *Iowa Mut. Ins. Co.*, 480 U.S. at 18 (stating that jurisdiction over non-Indian activities occurring on-reservation “presumptively lie[] in the tribal courts”). As demonstrated in Defendants’ opening brief and its attached Lawrence Declaration, after being electronically signed by the consumer, each Agreement was transmitted to Western Sky’s headquarters on the Reservation (offer), where Western Sky employees audited each loan application and made a final determination whether to fund the loan (acceptance). Defs. Omnibus Br. 24-25 (citing Lawrence Decl. ¶ 8). At that juncture, Western Sky remained free to reject the loan application, and until it agreed to fund the loan, no contract existed. *Id.* Accordingly, the commercial relationships between Plaintiffs and Western Sky occurred on the Reservation because Western Sky’s approval of the loans on the Reservation constituted “the last act . . . essential to a meeting of the minds.”¹⁵ *Cole v.*

¹⁵ Plaintiffs argue, without citation to any North Carolina statute, that “by operation of North Carolina statutes, these consumer loans are deemed made in North Carolina.” Pls. Omnibus Br. 52. Plaintiffs are likely referring to the North Carolina Consumer Finance Act (“CFA”), which modifies North Carolina’s common law place-of-formation rules only “[f]or the purposes of” Chapter 24 of the General Statutes—which deals with usury—by declaring that actions brought pursuant to Chapter 24 involving an “extension of credit” are deemed “to have been made in this State” if offered or accepted in North

Champion Enters., Inc., 496 F. Supp. 2d 613, 621 (M.D.N.C. 2007) (cited at Defs. Omnibus Br. 24).

Plaintiffs do not dispute the Lawrence Declaration. They instead assert that their interactions with Defendants definitively occurred off-reservation because Plaintiffs did not physically travel to the Reservation to enter the Agreements and because funds were deposited and withdrawn from Plaintiffs' North Carolina-based bank accounts in connection with the transactions. Pls. Omnibus Br. 34. Yet, even under Plaintiffs' version of events, the loan applications were indisputably reviewed—and the final decision to fund the loans was made—on the Reservation by Western Sky employees. Based on these facts, the record “presents a colorable question whether the alleged [misconduct] arose out of a contractual relationship . . . that commenced on tribal lands.” *Stock W. Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) (en banc) (requiring abstention where potentially fraudulent writing was delivered to plaintiff off-reservation but negotiated and drafted on-reservation). And where such a “colorable question” exists, it is a tribal court—not a federal court—that “get[s] the first chance to decide whether tribal jurisdiction is actually permitted.” *Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x 11, 13 (9th Cir. 2012).

The state court and administrative agency decisions cited by Plaintiffs that subjected Western Sky loans to state regulation do not alter the conclusion that tribal

Carolina “regardless of the situs of the contract specified therein.” N.C. Gen. Stat. § 24-2.1(a). By its own terms, however, the CFA contemplates that activity related to a loan contract (e.g., offer or acceptance) may occur outside the State and does not purport—nor could it purport—to foreclose a separate sovereign’s jurisdiction over the loans.

jurisdiction is colorable. Pls. Omnibus Br. 33. Those decisions focused on the issue of whether states may exercise legislative and adjudicative jurisdiction over economic transactions involving their residents—not the more confined issue (relevant here) of whether CRST courts may exercise concurrent jurisdiction over a private dispute arising from economic transactions involving CRST members and on-Reservation conduct.¹⁶

This distinction is critical. The tribal exhaustion doctrine applies regardless of whether “colorable” tribal court jurisdiction is “concurrent” with a non-tribal court’s jurisdiction. *See, e.g., United States v. Tsosie*, 92 F.3d 1037, 1041-42 (10th Cir. 1996) (affirming dismissal under tribal exhaustion doctrine where tribal jurisdiction was “concurrent” with federal court jurisdiction); *Madewell*, 730 F. Supp. 2d at 488 (dismissing case where “it appears that the Cherokee Court may have concurrent jurisdiction over these claims as well”). Consequently, the uncontroverted facts of the Lawrence Declaration are sufficient to establish that tribal jurisdiction is “colorable” because conduct underlying this dispute occurred on the Reservation.¹⁷

¹⁶ Defendants, through the appeals process, are vigorously contesting state court and administrative agency decisions permitting state legislative and adjudicative jurisdiction over Western Sky loans. In any event, the primary decision relied upon by Plaintiffs (*Colorado ex rel. Suthers v. Western Sky Fin., LLC* (Pls. Omnibus Br. 33)) ascertained the place of contracting by employing a method of analysis that has never been endorsed by the Supreme Court. *F.T.C. v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 941 (D.S.D. 2013) (noting that the approach taken by the Colorado court “considered only one side of a two-sided transaction”); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (“The unique historical origins of tribal sovereignty make it generally unhelpful to apply . . . standards . . . that have emerged in other areas of the law.”).

¹⁷ Plaintiffs erroneously imply that tribal exhaustion cannot be required because their claims are not based on tribal law. But courts have routinely required exhaustion in cases involving common law claims and federal statutes, including cases that properly invoke

C. Plaintiffs' Attack on CRST Jurisdiction Must First Be Raised in a CRST Tribunal

Plainly applicable Supreme Court precedent and the undisputed facts establish that tribal jurisdiction is, at minimum, "colorable." Plaintiffs' blanket allegations to the contrary are nowhere near sufficient to establish that tribal court jurisdiction definitively does not exist. *See, e.g., Bank of Oklah. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992) ("[Plaintiff] cannot simply assert that it is not subject to tribal court jurisdiction; rather, it must actually seek adjudication of this issue in tribal court."). This is particularly so in the face of clearly-worded CRST by-laws and jurisdictional provisions that provide for tribal jurisdiction over the entire Reservation and Reservation-based commercial transactions. Defs. Omnibus Br. 25-26. The Court must therefore dismiss or stay this case because Plaintiffs have yet to exhaust their tribal remedies.

III. Alternatively, Dismissal Is Required Because the Arbitration Provision is Enforceable

As an alternative to dismissing this case based on *forum non conveniens* or the tribal exhaustion doctrine, this case may be dismissed on account of Plaintiffs' failure to abide by the Agreements' arbitration provisions. Defendants provided in their opening brief several independent reasons explaining why the arbitration provision requires dismissal. Rather than confront Defendants' argument, Plaintiffs parrot the same

federal question jurisdiction. *See, e.g., Iowa Mut. Ins., Co.*, 480 U.S. at 16; *Warn v. E. Band of Cherokee Indians*, 858 F. Supp. 524, 527 (W.D.N.C. 1994) (requiring tribal exhaustion in suit alleging common law breach of contract and violation of federal statutes). Although *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 80 (2d Cir. 2001) implies this may not be the case, the Second Circuit's position is an outlier.

conclusory and irrelevant facts alleged in the SAC that Defendants have already demonstrated are insufficient to void the arbitration provision.¹⁸

A. Threshold Issues of Arbitrability Are Delegated to Arbitration

Plaintiffs’ challenge to the arbitration provision is principally barred by the fact that the parties separately agreed to delegate “the validity, enforceability or scope” of the arbitration provision not to any court, but to arbitration. SAC Ex. 1 at 4. As the Supreme Court explained in *Rent-A-Center, West, Inc. v. Jackson*, an agreement to arbitrate gateway issues of enforceability “is simply an additional, antecedent agreement” to the larger arbitration provision. 130 S. Ct. 2772, 2777 (2010). Thus, a “delegation clause”—like that here—“is severable from the remainder of the” arbitration provision. *Id.* at 2778. As such, a court is required to enforce a delegation clause unless the challenging party can demonstrate the *delegation clause itself* is unenforceable. *Id.* at 2778-79; accord *United States ex rel. Beauchamp v. Academi Training Ctr., Inc.*, No. 1:11cv371, 2013 WL 1332028, at *6 (E.D. Va. Mar. 29, 2013).

As provided in Defendants’ opening brief, the SAC’s only allegations aimed directly at the delegation clause are utterly conclusory and provide no basis for its disregard. Defs. Omnibus Br. 30-31. Plaintiffs make no effort to salvage this pleading deficiency. Nor do they grapple with *Rent-A-Center*, daring only to cite it for the banal proposition that “arbitration is a matter of contract.” Pls. Omnibus Br. 41. The closest

¹⁸ Plaintiffs’ contention that North Carolina law—and not the FAA—governs the enforceability of the arbitration clause (Pls. Omnibus Br. 42) is meritless. *See* Defs. Omnibus Br. 27 & n.21 (citing cases).

Plaintiffs come to directly addressing the delegation clause is to assert that they could not have agreed to submit threshold issues of arbitrability to arbitration because there is no “clear and unmistakable” evidence that the contracted-for arbitration rules exist.¹⁹ *Id.* at 49. Plaintiffs “mistake[] the subject of the . . . ‘clear and unmistakable’ requirement.” *Rent-A-Ctr.*, 130 S. Ct. at 2777 n.1 (quotation omitted). That requirement, which was announced in a case that predates *Rent-A-Center*, “pertains to the parties’ manifestation of *intent*, not the agreement’s *validity*.”²⁰ *Id.* (emphasis in original).

Here, Plaintiffs’ allegation regarding the absence of rules of arbitral procedure speaks to the validity of the arbitration provisions themselves, and not to the parties’ intent to delegate disputes over enforceability to arbitration. This case must therefore be dismissed in favor of the parties’ agreement to delegate threshold issues of enforceability.

B. The Arbitration Provisions Are Not Confusing or Contradictory

Repeating the same conclusory allegations put forth in the SAC, Plaintiffs assert that the Agreements are unenforceable because the arbitration provision is confusing. Pls. Omnibus Br. 49. But as Defendants outlined in their opening brief, to the extent the

¹⁹ In so arguing, Plaintiffs conveniently lump Plaintiff Brown’s Agreement together with the Agreements of the other Plaintiffs. The SAC does not allege the absence of any arbitral rules of procedure provided by Plaintiff Brown’s Agreement.

²⁰ The “clear and unmistakable” requirement derives from *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995) (cited at Pls. Omnibus Br. 49), in which the Supreme Court declined to refer threshold questions of arbitrability to arbitration where there was no “clear and unmistakable” evidence that the party resisting arbitration had signed the governing arbitration agreement. In contrast to *First Options*—and as discussed in Defendants’ opening brief—each Plaintiff electronically signed the Agreements and attested to the fact that they “READ AND UNDERSTOOD THE ARBITRATION SECTION OF THIS NOTE.” Defs. Omnibus Br. 8.

Agreements are ambiguous (which Defendants dispute), the FAA commands this Court to construe the Agreements in favor of arbitration. *See* Defs. Omnibus Br. 31-34.

Further supporting Defendants' arguments is Chief Judge Dever's recent decision requiring enforcement of a Western Sky arbitration provision identical to the one in Plaintiff Brown's Agreement. *See Spuller* Order. Chief Judge Dever rejected the same argument Plaintiff Brown advances here that there was no mutual assent to the arbitration provision. *Id.* Without any difference between Plaintiff Brown's Agreement and the agreement at issue in *Spuller*, Defendants respectfully submit that there is no basis to void Plaintiff Brown's arbitration provision.²¹

C. Section 5 of the FAA Renders Irrelevant the Non-Brown Plaintiffs' Allegations that the CRST Arbitral Forum is Unavailable

Section 5 of the FAA requires a district court to appoint a substitute arbitral forum "if for any . . . reason there shall be a lapse" in the parties' naming one. 9 U.S.C. § 5. Rather than confront Section 5's clear mandate, Plaintiffs ignore it and simply conclude that purportedly "egregious circumstances existent in this case are not what the FAA drafters meant to protect." Pls. Omnibus Br. 46.

²¹ Defendants reiterate their willingness to reform the Non-Brown Plaintiffs' Agreements so that, like Plaintiff Brown's Agreement, disputes would be resolved before AAA, JAMS, or any other agreed-upon organization. Defs. Omnibus Br. 34 & n.25; *cf. Muriiti v. Shuttle Express, Inc.*, 712 F.3d 173, 183 n.10 (4th Cir. 2013) ("A party's agreement to pay all arbitration costs, when made in a timely manner such as before a district court has ruled on the enforceability of the arbitration clause, moots the issue and forecloses the possibility that the opposing party could endure any prohibitive costs in the arbitration process." (quotations and brackets omitted)).

Putting aside that Plaintiffs provide no explanation as to how they were able to divine the intent of Section 5's drafters, the Court need not consider Plaintiffs' contention of "egregious" conduct because it is irrelevant. As Defendants demonstrated in their opening brief, without any controlling authority from the Fourth Circuit, the Court should follow the Seventh Circuit's recent decision in *Green v. U.S. Cash Advance Illinois, LLC*, and find that Section 5 requires a court to reform an arbitration agreement by appointing a substitute arbitral forum "when for 'any' reason something has gone wrong." 724 F.3d 787, 791 (7th Cir. 2013) (Easterbook, J.) (cited at Defs. Omnibus Br. 35-36).

Plaintiffs' response to *Green* is silence. They do not cite or otherwise address *Green*, much less provide a rationale as to why Judge Easterbook's interpretation of Section 5 is incorrect. Instead, Plaintiffs primarily attack the Court's authority under Section 5 by repeating the same conclusory claims made in the SAC that the arbitration provision is tainted with fraud and cannot be reformed. *See, e.g.*, Pls. Omnibus Br. 47 (arguing that Defendants "deliberately designed" the arbitration clause to "mislead[]"). Fundamentally lacking from Plaintiffs' argument is reference to *any* allegations (let alone well-pled allegations) in the SAC that support such a serious allegation.

Plaintiffs are thus left to argue that Section 5 contains an "integral part" exception to its command that judges "supply details in order to make arbitration work." *Green*, 724 F.3d at 793; Pls. Omnibus Br. 46. Although Defendants dispute that any such exception should be read into Section 5, out-of-circuit cases that have found one to exist require the party seeking to avoid arbitration to demonstrate that the arbitral forum in

question is explicitly referenced as “exclusive” in the contract, or otherwise “clearly integral” to the parties’ arbitration agreement. Defs. Omnibus Br. 36 (citing cases).

As Defendants’ opening brief demonstrates, any claim of integrality as to the CRST arbitral forum is belied by the Agreements’ themselves, which nowhere state that the contracted arbitral forum is “exclusive.”²² Moreover, the Agreements contain a severance clause making clear the parties’ intention to arbitrate their disputes irrespective of the contracted arbitral forum’s availability.²³ Defs. Omnibus Br. 36-37.

Plaintiffs do not refute or even address the high standard for demonstrating an “integral part” exception. Their only contention that is remotely related to the issue is

²² In fact, the Agreements do not even designate arbitration as the “exclusive” means of dispute resolution. Each of the Agreements contains a “small claims exception” permitting Plaintiffs to seek adjudication of their disputes in the CRST small claims court as an alternative to arbitration. *See* Defs. Omnibus Br. 10; SAC Ex. 1 at 4.

²³ Without engaging *any* of the cases cited by Defendants in which courts within the Fourth Circuit have appointed substitute arbitral fora, Defs. Omnibus Br. 34-35, Plaintiffs cite four out-of-state cases and four out-of-circuit federal cases that are not binding on this Court and have held, in some circumstances, that the unavailability of a contracted forum voids an arbitration clause. Pls. Omnibus Br. 46 n.37. Three of the state court cases based their conclusions on findings—not present here—that the contracted arbitral fora were designated as “exclusive” in the relevant contract. *Carr v. Gateway, Inc.*, 918 N.E.2d 598, 600 (Ill. App. 5th Dist. 2009) (contract required dispute to be “resolved exclusively” by National Arbitration Forum); *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 131-32 (2009) (contracted forum identified as “exclusive”); *QuickClick Loans, LLC v. Russell*, 943 N.E.2d 166, 173-74 (Ill. App. 1st Dist 2011) (contract found to “exclusively designate[]” only two fora). The fourth state case does not cite or discuss Section 5. *Bedford Health Props., LLC v. Estate of Davis ex rel. Davis*, 50 So. 3d 362 (Miss. App. Ct. 2010). The only two federal court of appeals cases cited are unpersuasive because neither actually discusses an integral part exception to Section 5. *See In re Salomon Inc. Shareholders’ Derivative Litig.*, 68 F.3d 554, 557-58 (2d Cir. 1995); *Nat’l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 331-32 (5th Cir. 1987). And the two district court cases cited (both unpublished) are not persuasive in the face of several cases from within the Fourth Circuit that appointed substitute arbitral fora pursuant to Section 5. Defs. Omnibus Br. 34-35.

that the tribal consumer dispute rules contemplated by the Non-Brown Plaintiffs' Agreements, which Plaintiffs allege are unavailable, were "important" because those rules "cause[] a reasonable consumer to believe the arbitration will afford some measure of protection." Pls. Omnibus Br. 48 n.38. This argument is at best feeble and at worst disingenuous. Plaintiffs do not identify any portion of the Agreements that label the rules as "important" (let alone "integral") or any allegations suggesting that any Plaintiff regarded them as such in deciding to assent to the Agreements. This failure to provide any plausible basis to conclude that the contracted arbitral forum was "clearly integral" to the parties requires the Court to appoint a substitute arbitral forum in the event it finds the contracted forum lacking for any reason.²⁴

IV. Several of Plaintiffs' Causes of Action Fail to State a Claim

A. Plaintiffs' Claims against Payday Financial Are Unsupported

All claims against Payday Financial should be dismissed because Plaintiffs do not—and cannot—point to any allegations specific to Payday Financial that state a claim for relief. Plaintiffs' only argument connecting Payday Financial to this dispute is the company's status as sole member of Western Sky (an LLC) when Western Sky—not Payday Financial—issued loans to two of the seven named Plaintiffs. Pls. Omnibus Br. 50-52. This factual contention is insufficient to state a claim because Plaintiffs do not

²⁴ Additionally, as Defendants demonstrated in their opening brief, the Non-Brown Plaintiffs' allegations of bias and corruption by the contracted arbitral forum are entitled to no weight because Section 2 of the FAA only permits arbitrator-bias defenses *after* an arbitration award has been issued. Defs. Omnibus Br. 38-39. Plaintiffs concede this point by failing to address it. *Brand v. N.C. Dep't of Crime Control & Public Safety*, 352 F. Supp. 2d 606, 618 (M.D.N.C. 2004) (failure to respond considered concession).

identify, as Rule 12(b)(6) requires, any specific acts taken by Payday Financial to issue the subject loans.²⁵ See Defs. Omnibus Br. 40-41.

B. North Carolina Law Does Not Govern Plaintiffs' Claims

Plaintiffs deny enforceability of the Agreements' CRST choice-of-law clause *as to all claims* simply because it purportedly violates North Carolina public policy only *as to Plaintiffs' usury claim*. Pls. Omnibus Br. 52. The argument fails.

Under North Carolina choice-of-law rules, if the parties' chosen law conflicts with forum law, the Court must determine whether application of the parties' chosen law would violate a fundamental policy of the law which would otherwise apply in the absence of a choice-of-law clause. Defs. Omnibus Br. 42. Defendants demonstrated in their opening brief that, for all but Plaintiffs' usury claim, the parties' chosen law (CRST law) and the otherwise applicable law (CRST law) are the same because the Agreements were "made" on the Reservation. *Id.* at 43-44. Plaintiffs disagree on the basis that Plaintiffs entered the Agreements while physically present in North Carolina. Pls. Omnibus Br. 52. Plaintiffs are incorrect. For all but their usury claim, the Agreements were "formed in the place at which the last act was done by either of the parties essential to a meeting of the minds." *Cole*, 496 F. Supp. 2d at 621; *cf. I-Conn Healthcare Solutions, LLC v. Advanced Internet Techs., Inc.*, 201 N.C. App. 726 (Table) (Jan. 5, 2010) (applying traditional contract law principles to contract formed online); *CoStar*

²⁵ Plaintiffs' reference to general findings regarding Payday Financial's nationwide lending business—as opposed to Western Sky's practices—in an unrelated case involving none of the Plaintiffs in this case does not support a claim against Payday Financial for conduct involving any Plaintiff in this case. Pls. Omnibus Br. 51.

Realty Info., Inc. v. Field, 612 F. Supp. 2d 660, 669 (D. Md. 2009) (noting that when considering “the legal effect of online agreements,” courts “apply traditional principles of contract law”). That place was the Reservation.

While Defendants concede that the parties’ chosen law conflicts with the otherwise applicable law for purposes of Plaintiffs’ usury claim, the otherwise applicable law—North Carolina’s—still does not apply to that claim because the public policy interests of North Carolina are outweighed by those of the CRST.²⁶ Defs. Omnibus Br. 42, 44-47. Plaintiffs question the CRST’s interest in having its laws applied to this case because Western Sky did not offer loans to tribal members. Pls. Omnibus Br. 52. But Plaintiffs offer no reason why that fact is relevant to the CRST’s significant sovereign interest in seeing its own laws applied to a dispute involving on-Reservation conduct that directly affects the economic well-being of tribal members. Defs. Omnibus Br. 45-46. Plaintiffs also do not articulate any North Carolina interest in regulating interest rates in private, voluntary contracts entered into on an Indian Reservation over one thousand miles outside the State. Pls. Omnibus Br. 52.

²⁶ Plaintiffs’ contention that, “by the operation of North Carolina statutes, these consumer loans are deemed made in North Carolina,” for *all claims* is unsupported by the plain language of North Carolina’s statutes. Pls. Omnibus Br. 52. The CFA modifies the place-of-contracting rules for claims codified under Chapter 24 of the General Statutes only, and the only claim Plaintiffs bring pursuant to Chapter 24 is their usury claim. *See* pp. 13-14 n.15, *supra*. Thus, the only conceivable role that “North Carolina statutes” can have on the applicability of the choice-of-law clause involves Plaintiffs’ sole claim of usury. *See Mosteller Mansion, LLC v. Mactec Eng’g & Consulting of Ga., Inc.*, 190 N.C. App. 674 (May 20, 2008) (conducting claim by claim analysis and applying North Carolina law to tort claims and Georgia law to contract claims).

Without advancing any coherent argument to challenge Defendants’ showing that North Carolina’s choice-of-law rules result in the application of CRST substantive law, Plaintiffs cannot sustain any claim based on North Carolina law.

C. Plaintiffs Otherwise Offer No Additional Support for Their Conspiracy Allegation

In their opposition brief, Plaintiffs argue—for the first time—that the agreement giving rise to a civil conspiracy is actually a series of written agreements between WS Funding and Western Sky. Compare SAC ¶¶ 216-19, with Pls. Omnibus Br. 54. As described by an exhibit list appended to the SAC, those agreements are an “Agreement for the Assignment and Purchase of Promissory Notes,” a “Promissory Note” and an “Agreement for Service.” SAC p. 71. This new assertion that these written agreements support Plaintiffs’ civil conspiracy claim is not entitled to any deference. *Bryant v. Wells Fargo Bank, Nat’l Ass’n*, 861 F. Supp. 2d 646, 653 (E.D.N.C. 2012) (Dever, C.J.) (“[P]laintiffs may not amend their pleading by raising new allegations in response to a Rule 12(b)(6) motion.”). The argument also fails on the merits: the relevant agreements are between only two of the Defendants, and Plaintiffs conspiracy claim is against *all* Defendants. Plaintiffs’ new allegation of an agreement thus fails because they fail to “identify specific acts or conduct taken by *each* defendant to state a claim.”²⁷ *Boykin Anchor, Inc. v. AT&T Corp.*, No. 5:10-CV-591-FL, 2011 WL 1456388, at *4 (E.D.N.C. Apr. 14, 2011) (emphasis added).

²⁷ Plaintiffs’ new contentions also fail to specify an agreement to perform an “unlawful act.” Defs. Omnibus Br. 48-49.

D. Plaintiffs Still Have Not Identified a Predicate Act, As Required to State a Claim for NC RICO Liability

The NC RICO statute requires Plaintiffs to plead two or more acts of “racketeering activity,” which is exclusively defined as an act chargeable by indictment if accompanied by the necessary *mens rea* or criminal intent under four categories of laws.²⁸ Plaintiffs identify in their opposition brief (again, for the first time) that making small loans without a license in violation of the CFA (N.C. Gen. Stat. § 53-166) is the predicate act on which their NC RICO claim rests. Pls. Omnibus Br. 56. This argument fails because it was not alleged in the SAC and because violations of the CFA do not fall within *any* of the four categories of laws set forth in the NC RICO statute defining “racketeering activity.”²⁹ Accordingly, Plaintiffs’ NC RICO claim must be dismissed.³⁰

E. Plaintiffs Fail to State a Fraudulent Conveyance Claim

Plaintiffs’ fraudulent conveyance claim fails because it does not comply with Rule 9. Without citing any well-pled allegations, Plaintiffs contend they “have alleged a detailed chronology under which Defendants deliberately set up a sham Tribal lending business in an effort to evade the application of North Carolina law and make usurious

²⁸ The NC RICO statute also required Plaintiffs to notify the Attorney General of their claim in writing upon initiating this action and allege compliance with the notification requirement. Defs. Omnibus Br. 52. Plaintiffs concede, but offer no explanation for, their non-compliance with this requirement. Pls. Omnibus Br. 56-57. Dismissal of the NC RICO claim is therefore independently required. *See* Defs. Omnibus Br. 52.

²⁹ Crimes under the CFA are codified under Chapter 53 of the General Statutes, and the only crimes under the General Statutes that qualify as “racketeering activity” are codified under Chapters 14 and 90, or involve money laundering.

³⁰ Plaintiffs’ NC RICO claim may also be dismissed because the SAC’s generalized allegations that Defendants “used agreements containing false and fraudulent statements and omissions” do not comply with Rule 9. Defs. Omnibus Br. 51-52.

loans.” Pls. Omnibus Br. 54. Because this contention provides not even a hint as to “(1) the property subject to the [allegedly fraudulent] transfer, (2) the timing and, if applicable, frequency of the transfers and (3) the consideration paid with respect thereto,” Plaintiffs’ fraudulent conveyance claim must be dismissed.³¹ *Ivey v. First-Citizens Bank & Trust Co. (In re Whitley)*, No. 12-02028, 2013 WL 486782, at *13 (Bankr. M.D.N.C. Feb. 7, 2013).

F. Plaintiffs Fail To State Federal RICO and TILA Claims³²

1. Plaintiffs Allege No Predicate Act or Conspiratorial Agreement To Support Their Federal RICO Claim

The fatal flaw of Plaintiffs’ federal RICO claim—brought on behalf of a nationwide class of borrowers—is that the SAC does not adequately allege a predicate act. To the extent Plaintiffs base their RICO claim on a violation of the federal mail or wire fraud statutes, Defendants have demonstrated—and Plaintiffs offer no opposition—that the SAC pleads neither offense with sufficient particularity. *Compare* Defs. Omnibus Br. 53-54, *with* Pls. Omnibus Br. 57-58. Nor do Plaintiffs contest that a violation of EFTA—which the SAC alleges as an alternative predicate act—cannot, by statutory definition, serve as a predicate act. *Id.*

³¹ Although Plaintiffs appear to qualify as creditors, their claim still fails under Rule 9.

³² Plaintiffs concede that the EFTA claim is brought only on behalf of Plaintiff Brown. Pls. Omnibus Br. 59. If Plaintiff Brown’s case is dismissed for any threshold issue, the SAC’s EFTA claim must be dismissed in its entirety. *See O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (“[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.”).

While Plaintiffs do contest whether they can state a RICO claim predicated on the collection of an unlawful debt, no debt at issue in this case was unlawfully collected because each Agreement is lawful under controlling CRST law. Defs. Omnibus Br. 41-47; pp.6-8, *supra*. But even if CRST law is found not to apply to the subject loans, the SAC does not adequately allege predicate acts of unlawful debt collection in any state outside North Carolina. SAC ¶¶ 237-39.

Plaintiffs do not dispute this failure but contend it is irrelevant at the pleading stage. Pls. Omnibus Br. 57. This contention ignores that “the issue of whether the plaintiff is pursuing a claim upon which relief can be granted is a purely legal question that can be determined *at virtually any stage of the federal process.*” *Teachers’ Retirement System of La. v. Hunter*, 477 F.3d 162, 169, 170 (4th Cir. 2007) (emphasis added) (affirming dismissal of class-action complaint pursuant to Rule 12(b)(6)). And given that usury laws are far from uniform across all 50 states (Defs. Omnibus Br. 56 n. 35), Plaintiffs’ detail-free allegations that Defendants “violated state usury laws” cannot sustain a nationwide RICO claim predicated on unlawful debt collection. SAC ¶ 239.

Plaintiffs also do not properly allege a conspiratorial agreement. “To prove a RICO conspiracy, the [plaintiff] must establish (1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant[s] knew of and agreed to the overall objective of the RICO offense.” *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) (quotation and original alteration omitted). Plaintiffs contend they satisfy these requirements through the same three agreements between WS Funding and Western Sky which they claim satisfy their civil conspiracy claim. Pls. Omnibus Br. 58 (citing

SAC Ex. 6). The SAC contains only two paragraphs which reference those agreements, neither of which alleges *any* facts that explain how the documents reflect an agreement to commit a substantive RICO offense or that any of the Defendants—let alone the only two Defendants that are parties to the agreements³³—knew of and agreed to the RICO offense. SAC ¶¶ 68-69. Indeed, in describing the contents of the agreements, the SAC does not specify *any* illegal act to which two or more Defendants agreed to commit.³⁴

2. Plaintiffs' TILA Claim Fails as a Matter of Law

Plaintiffs allege a TILA violation premised on the notion that the subject loans are illegal and, as a result, the Agreements' interest-rate disclosures cannot “be based on the [borrower's] actual legal obligation” as required by TILA. Pls. Omnibus Br. 58. There is no basis to this argument.

First, as discussed above, the loans are not illegal under the only law—CRST law—that applies to them. *Second*, authoritative Federal Reserve Board Official Staff Commentary to Regulation Z unequivocally states that “[t]he fact that a term or contract may later be deemed unenforceable by a court on the basis of equity or other grounds does not, by itself, mean that disclosures based on that term or contract did not reflect the

³³ To plead a violation of § 1962(d), a plaintiff must allege that “*each defendant* agreed that another coconspirator would commit two or more acts of racketeering.” *Taylor v. Bettis*, --- F. Supp. 2d ---, 2013 WL 5460755, at *11 (E.D.N.C. Sep. 30, 2013) (emphasis added) (quoting *United States v. Pryba*, 900 F.2d 748, 760 (4th Cir. 1990)).

³⁴ An independent basis to dismiss Plaintiff Brown's RICO claim is that the SAC does not adequately alleged an injury because, as Plaintiffs concede, he made only three payments of \$294 each (a total of \$882) on a loan with a principal of \$2,525. *See* Pls. Omnibus Br. 58; Defs. Omnibus Br. 57. Although Plaintiff Johnson appears to satisfy RICO's injury requirement, her claim nonetheless fails for the reasons outlined above.

legal obligation.” 12 C.F.R. pt. 226.5(c), Supp. I, cmt. 5(c)(1)(ii);³⁵ *see also Adams v. Plaza Fin. Co., Inc.*, 168 F.3d 932, 936 (7th Cir. 1999) (Posner, J.) (TILA “is not a usury law; it does not limit interest rates; all it requires is truthful and (it is hoped) informative disclosure of the interest rate and the other terms of credit.”). TILA liability thus cannot rest upon *post hoc* conclusions about the legality of an underlying transaction, and Plaintiffs’ TILA claim must be dismissed.³⁶

CONCLUSION

For the aforementioned reasons, as well as those set forth in their opening brief, Defendants respectfully request the Court: (1) dismiss the SAC with prejudice; or (2) in the alternative, stay the SAC’s consideration pending Plaintiffs’ exhaustion of tribal remedies.

This the 31st day of March, 2014.

³⁵ “Unless demonstrably irrational, Federal Reserve Board staff opinions construing [TILA] or [Regulation Z] should be dispositive.” *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

³⁶ Plaintiffs do not refute that their TILA claims against Delbert, Payday Financial, and Mr. Reddam must also be dismissed because none is alleged to qualify as a creditor or assignee. *See* Defs. Omnibus Br. 59 n.36.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the **REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' OMNIBUS MOTION TO DISMISS OR STAY** with the Clerk of Court using the CM/ECF, which will send notification of such filing to the following:

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