Nos. 15-1170, 15-1217

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES HAYES, *et al.*,
Plaintiffs/Appellants/Cross-Appellees,

v.

DELBERT SERVICES CORPORATION,
Defendant/Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION
Civ. No. 3:14-cv-00258-JAG

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-1170
15-1217

Caption: James Hayes et al. v. Delbert Services Corporation

Pursuant to FRAP 26.1 and Local Rule 26.1,

Delbert Services Corporation
(name of party/amicus)

who is appellee/cross-appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Brian J. Fischer Date: 13 Aug 2015

Counsel for: Delbert Services Corporation

CERTIFICATE OF SERVICE

****

I certify that on 13 Aug 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Brian J. Fischer
(signature)

13 Aug 2015
(date)

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INTRODUCTION

This case involves the straightforward application of the parties' arbitration provision—a clause that requires arbitration and grants James Hayes, Debera Grant, and Herbert White ("Plaintiffs") the right to select the American Arbitration Association ("AAA") or Judicial Arbitration and Mediation Services ("JAMS") to arbitrate any dispute they have concerning their loans. Federal courts across the country have repeatedly enforced this exact arbitration provision over objections like those raised here.

Plaintiffs all sought and obtained high-interest installment loans from non-party Western Sky Financial, LLC ("Western Sky"), which is owned by a member of the Cheyenne River Sioux Tribe ("CRST"). The loans were later transferred to non-party Consumer Loan Trust, which assigned Defendant/Appellee/Cross-Appellant Delbert Services Corporation ("Delbert") as the servicing agent on the loans.

When they signed their loan contracts ("Loan Agreements"), Plaintiffs agreed to resolve any disputes regarding the loans through binding arbitration on a non-class basis. Disregarding that contractual obligation, Plaintiffs sued in federal court in Virginia on behalf of themselves and as purported representatives of a putative class.

Although arbitration is mandatory, the Loan Agreements give Plaintiffs the right to choose to arbitrate disputes before, *inter alia*, AAA and JAMS; the selected organization's rules will govern the arbitration. Indeed, AAA and JAMS have both accepted arbitrations involving this *very same arbitration clause*. Recognizing that AAA and JAMS are well-respected arbitral organizations with easily-available and even-handed dispute rules, such that there is an arbitration forum available to hear the parties' dispute, the district court compelled arbitration and dismissed the case.

This Court should affirm the district court's arbitration decision and reject Plaintiffs' arguments that no arbitral forum is available and that the entire arbitration clause should be struck. In support of those mistaken arguments, Plaintiffs offer a convoluted interpretation of the arbitration clause, under which arbitration would somehow be "administered" by AAA or JAMS but actually arbitrated by the CRST. That reading is contrary to the language of the arbitration clause, which clearly states that the parties intended AAA or JAMS to be their "arbitrator." But even if the arbitration clause were ambiguous on this point, the district court's decision would still be correct because the Supreme Court has repeatedly held that, given the Federal Arbitration Act's ("FAA") strong preference in favor of enforcing arbitration clauses, all contractual ambiguities

must be interpreted in *favor* of compelling arbitration. Plaintiffs ask this Court to do the precise opposite to thwart arbitration.

Should this Court not affirm the order compelling arbitration, however, Delbert has conditionally cross-appealed the portion of the district court's order concluding that Plaintiffs were *not* required to bring suit in the CRST tribal courts, despite the parties' judicial forum-selection clause stating that the tribal courts are the exclusive forum for in-court disputes. The district court erroneously held that Delbert lacked standing to enforce the parties' forum-selection clause, even though the clause explicitly requires Plaintiffs to sue exclusively in the CRST courts.

The district court also erroneously concluded that the doctrine of tribal exhaustion did not apply here. Tribal exhaustion requires that, when there is at least a "colorable" claim of tribal jurisdiction over a dispute, the plaintiffs must first sue in tribal court and allow that court to determine if it is the proper venue for the dispute. As two federal district courts have already held in very similar cases, there is at least colorable tribal jurisdiction here because Plaintiffs all entered into consensual commercial contracts with a company that is considered a member of the CRST under tribal law, and Plaintiffs all expressly consented to tribal court jurisdiction in their Loan Agreements.

Accordingly, this Court should affirm the well-reasoned order compelling arbitration, but if not, this Court should address Delbert's conditional cross-appeal

and reverse the portion of the district court's order on the forum-selection clause and tribal exhaustion.[1]

I. JURISDICTIONAL STATEMENT.

Defendant/Appellee/Cross-Appellant Delbert Services Corporation agrees with Plaintiffs/Appellants' jurisdictional statement.

II. STATEMENT OF THE ISSUES.

A. Did the district court correctly hold that the parties must arbitrate their disputes?

B. If this Court reaches the conditional cross-appeal: (1) did the district court correctly hold that Delbert could not enforce the parties' forum-selection clause?; and (2) did the district court correctly hold that tribal exhaustion was not required here?

III. STATEMENT OF THE CASE.

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

Non-party Western Sky is a lending company wholly-owned by non-party Martin A. Webb. (Dkt. 16, ¶ 61.) Mr. Webb is an enrolled member of the CRST, a federally-recognized Indian tribe. (*Id.* ¶ 62; Dkt. 26-1, ¶ 3.) Western Sky's offices are on the Cheyenne River Indian Reservation ("Reservation"), which is located within South Dakota. (Dkt. 16 ¶ 60; Dkt. 26-1, ¶ 3.) Consumers applied

[1] This brief addresses all arguments of substance made by Plaintiffs, as well as their *amici*. *See* Br. of *Amici Curiae* Nat'l Consumer Law Ctr. *et al.*, at 9-19.

for loans from Western Sky either over the internet or telephonically. (Dkt. 26-1, ¶ 4.) Western Sky set the underwriting criteria for loans and made the ultimate decision to fund the loans—and thus to enter into binding contracts with borrowers—from its offices on the Reservation. (*Id.* ¶¶ 4-5; *see also* Dkt. 40.)

Non-party WS Funding, LLC ("WS Funding"), a wholly-owned subsidiary of non-party CashCall, Inc. ("CashCall"), purchased loans that Western Sky originated. (Dkt. 16, ¶ 50; Dkt. 26-3, ¶ 5; Dkt. 26-4, ¶¶ 4-5.) WS Funding assigned CashCall as its servicing agent for these loans. In that capacity, CashCall would oversee payment and collections. (Dkt. 26-4, ¶ 4.) WS Funding later sold certain loans to non-party Consumer Loan Trust, which assigned Delbert as its servicing agent for those loans. (Dkt. 26-4, ¶¶ 8-10.)[2]

B. Plaintiffs' Loans.

As explained below, each Plaintiff borrowed money from Western Sky, which later transferred the loans to WS Funding (where they were serviced by CashCall). WS Funding later transferred all of the loans to Consumer Loan Trust, where they remain and where they were serviced by Delbert at the commencement of this suit.

[2] Contrary to Plaintiffs' repeated assertions, WS Funding, CashCall, and Consumer Loan Trust are not "collection arms," "agents," or "affiliates" of Western Sky. Pl. Br. at 1, 8, 10. Western Sky is separate from these other entities in both corporate form and ownership. (*See* Dkt. 26-3, ¶ 5.)

On or about August 6, 2012, Plaintiff James Hayes entered into his Loan Agreement with Western Sky. (Dkt. 26-1 at 7-12.) On August 9, 2012, Western Sky transferred Mr. Hayes's loan to WS Funding, to be serviced by CashCall. (Dkt. 26-3, ¶ 11.) On August 15, 2013, WS Funding assigned Mr. Hayes's loan to Consumer Loan Trust, which assigned Delbert as the servicing agent. (Dkt. 26-4, ¶ 8.) Mr. Hayes received notice on both occasions that his loan servicer changed. (Dkt. 26-3, ¶ 12; Dkt. 26-5, ¶ 6.)

Plaintiff Debera Grant entered into her Loan Agreement on or about August 18, 2012. (Dkt. 26-1 at 14-19.) On August 23, 2012, Western Sky transferred the loan to WS Funding, to be serviced by CashCall. (Dkt. 26-3, ¶ 14.) On August 2, 2013, WS Funding transferred the loan to Consumer Loan Trust, to be serviced by Delbert. (Dkt. 26-4, ¶ 9.)

Plaintiff Herbert White entered into his Loan Agreement on or about November 20, 2012, (Dkt. 26-1 at 21-26), and on November 29, 2012, Western Sky transferred the loan to WS Funding, to be serviced by CashCall. (Dkt. 26-3, ¶ 17.) WS Funding subsequently transferred the loan to Consumer Loan Trust, to be serviced by Delbert, on September 20, 2013. (Dkt. 26-4, ¶ 10.) Both Ms. Grant and Mr. White received notices when their loan servicers changed. (Dkt. 26-3, ¶¶ 14, 17; Dkt. 26-5, ¶¶ 7-8.)

C. Loan Agreement Dispute Resolution Provisions.

Plaintiffs' Loan Agreements all contain dispute resolution provisions designed to ensure that the parties would arbitrate rather than litigate their disputes.

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

> **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.

(Dkt. 26-1 at 9-10 (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 10.) They define the term "holder" to include "any marketing, servicing, and collection representatives and agents." (*Id.*)

During the relevant time period and also at the commencement of this suit, Delbert was the servicing agent for Plaintiffs' loans. (Dkt. 26-4, ¶¶ 8-10; Dkt. 26-5, ¶ 9.) Covered Disputes include "any claim based upon ... the handling or servicing of [Plaintiffs'] account[s]" regardless of the legal basis of the claim. (Dkt. 26-1 at 10.)

The Loan Agreements also contain a provision ("Delegation Clause") that delegates 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 Arbitration Clause also specifies who 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*." (*Id.* (emphases added).) The paragraph below "provide[s]" that "except[ion]," giving 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.*) This Agreement also provides that arbitration will be "*governed by the chosen arbitration organization's rules and procedures applicable to consumer disputes*, to the extent that those rules and procedures do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate,

including the limitations on the Arbitrator below [regarding waiver of class actions]." (*Id.* (emphasis added).)

The Arbitration Clause therefore allows Plaintiffs to select arbitration before either (a) an authorized representative of the CRST using CRST consumer rules; *or* (b) an arbitrator selected using AAA or JAMS, or another mutually agreeable arbitration organization, using the selected organization's rules.[3] (*Id.*)

The Loan Agreements obligate Delbert to pay all filing fees and any costs or fees of the arbitrator. (*Id.*) 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.*)

Forum-Selection Clause and Choice of Law. Each Plaintiff's Loan Agreement also contains a separate and comprehensive judicial Forum-Selection Clause.[4] The Forum-Selection Clause states that, to the extent disputes are not arbitrated, they must be heard exclusively in the CRST courts. The very first

[3] In *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014), the Eleventh Circuit held that the CRST does not provide authorized representatives to conduct arbitrations and does not have consumer dispute rules. *Id.* at 1354. Unlike *Inetianbor* borrowers, the borrowers here have the right under the Arbitration Clause to select arbitration of their claims through AAA, JAMS, or any mutually agreeable alternative dispute resolution organization. (Dkt. 26-1 at 10.)

[4] Contracts commonly contain both forum-selection and arbitration clauses, and courts interpret them as complementary, requiring arbitration but providing that any in-court litigation (such as to enforce an arbitration award or to undertake any other in-court litigation authorized by the contract) be governed by the forum-selection clause. *See, e.g., Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 554 (3d Cir. 2009); *Montauk Oil Transp. Corp. v. S.S. Mut. Underwriting Ass'n (Bermuda), Ltd.*, 79 F.3d 295, 298 (2d Cir. 1996); *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1204-05 (5th Cir. 1991).

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**." (Dkt. 26-1 at 7 (emphasis in original).) Each Plaintiff further agreed that:

> By executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, *consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court*, and 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 specifying that CRST tribal law governs the parties' agreements:

> 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 9.)

D. Relevant Procedural History.

Plaintiffs filed a putative class-action complaint against Delbert in the Eastern District of Virginia on April 10, 2014 (Dkt. 1), and an amended complaint ("Amended Complaint") on June 27, 2014 (Dkt. 16). The Amended Complaint

alleges five claims for relief under the Fair Debt Collection Practices Act ("FDCPA") and Telephone Consumer Protection Act ("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. (Dkt. 16, ¶ 98.)

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.)

Count 6 seeks a declaratory judgment "that the forum selection and arbitration clauses purportedly contained in their Loan Agreement with their original creditors are void and unenforceable by Delbert under Virginia law." (*Id.*

¶ 3; *see also id.* ¶ 151.) Count 7 seeks a permanent injunction prohibiting Delbert from collecting on Western Sky loans issued to Virginia consumers. (*Id.* ¶ 160.)

On July 28, 2014, Delbert filed a motion to dismiss the Amended Complaint, arguing that the parties' judicial Forum-Selection Clause and the tribal exhaustion doctrine both required Plaintiffs to sue in CRST court; and alternatively, the entire case must be arbitrated pursuant to the Arbitration Clause. (Dkts. 24-26.) Plaintiffs filed their opposition on September 5, 2014 (Dkt. 30), and Delbert filed its reply on September 19, 2014 (Dkt. 31).

On January 21, 2015, the district court issued its order ("Order"). (Dkt. 38.) The Order concluded that (1) Delbert was not the "holder" of Plaintiffs' loan agreements and therefore did not have standing to enforce the Forum-Selection Clause, which required Plaintiffs to sue in the CRST courts; (2) the tribal exhaustion doctrine did not apply because there was not a colorable claim that the tribal courts would have jurisdiction over this dispute; and (3) Delbert could enforce the Arbitration Clause. (*Id.* at 3-8.) Given that AAA and JAMS are available and well-respected arbitration organizations, the district court compelled arbitration and dismissed the case without prejudice. (*Id.* at 8.)

Plaintiffs filed a notice of appeal on February 18, 2015 (Dkt. 42), and Delbert filed a notice of conditional cross-appeal on February 27, 2015 (Dkt. 44). This Court consolidated the two appeals under No. 15-1170. (Dkt. 46.)

IV. SUMMARY OF ARGUMENT.

A. Appeal.

The district court correctly held that the parties must arbitrate all of their disputes on a non-class basis, pursuant to the Arbitration Clause contained within each Plaintiff's Loan Agreement. *See* Part V, *infra*.

In an attempt to render arbitration impossible, Plaintiffs suggest the parties intended to use some kind of hybrid arbitration process where the initial arbitration *administrator* would be from AAA or JAMS, but then—in contravention of AAA and JAMS rules—the administrator would appoint a separate *arbitrator* who must be a CRST representative. This CRST representative would occasionally apply AAA or JAMS rules but sometimes use CRST rules or additional provisions allegedly appearing in the Arbitration Clause itself.

This Court, like the district court, should reject Plaintiffs' convoluted, self-serving interpretation of the Arbitration Clause. *See* Part V.B.1, *infra*. Read in context, the Clause does not require that the arbitrator be a CRST representative. Rather, the Clause lays out a simple procedure whereby, on Plaintiffs' choice, arbitration will be conducted by AAA, JAMS, or any other organization the parties agree upon, and the arbitration would proceed using the selected organization's rules.

Even if the Court were to conclude that there is ambiguity on this issue, the parties still must arbitrate because the Supreme Court has made clear that courts must construe any ambiguous language in favor of compelling arbitration, whereas Plaintiffs go out of their way to construe the Arbitration Clause in a way that could render the arbitration forum unavailable.

Given that the parties agreed that they could arbitrate before AAA or JAMS, and given that those organizations and their rules are indisputably well-known and available, the district court properly concluded that the parties must arbitrate all of their disputes.

Furthermore, even if this Court were to conclude that the parties' selected arbitrator is unavailable to hear this dispute, the district court *still* must be affirmed. *See* Part V.B.3, *infra*. Under Section 5 of the Federal Arbitration Act ("FAA"), "if for *any* … *reason* there shall be a lapse in the naming of an arbitrator," then "the court *shall* designate and appoint an arbitrator … , who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein." 9 U.S.C. § 5. Thus, whenever a selected arbitrator is unavailable, the Court is required to appoint a replacement. This replacement arbitrator has authority to determine his or her own procedures, including which rules will govern the arbitration proceedings. Accordingly, even if Plaintiffs are correct that the parties' selected arbitrator is unavailable to hear

their dispute, FAA § 5 still dictates that Plaintiffs must arbitrate all of their disputes before a substitute arbitrator.

Plaintiffs also attack the Arbitration Clause because it allegedly waives all statutory rights and is unconscionable. The Court should reject these arguments for several reasons. *See* Part V.B.4, *infra*. *First*, Plaintiffs waived these arguments by not raising them below—which explains why the district court never issued a ruling on them. *Second*, beyond waiver, the parties' Delegation Clause requires that only an arbitrator can address them. *Third*, the claims fail on their own merits because the Arbitration Clause allows for a AAA or JAMS arbitrator using AAA or JAMS rules—just like countless consumer contracts across the country—and accordingly the Arbitration Clause is valid.

For all of these reasons, this Court should affirm the district court's order compelling arbitration.

B. Conditional Cross-Appeal.

If this Court does not affirm the district court's order compelling arbitration, the Court should consider Delbert's conditional cross-appeal and conclude that the proper judicial forum for this suit is the CRST tribal courts, pursuant to the parties' Forum-Selection Clause. *See* Part VI, *infra*.

The Forum-Selection Clause provides that the loans are "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne

River Indian Reservation," and that 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." (Dkt. 26-1 at 7 (emphasis omitted).) Under that language, every aspect of this case should be resolved in CRST tribal court (if resolved in any court at all).

The district court concluded that Delbert lacked standing to enforce the Forum-Selection Clause. Respectfully, this decision was erroneous. *First*, regardless of whether the Forum-Selection Clause explicitly binds Delbert, it certainly binds *Plaintiffs*, who instituted this suit and therefore must abide by the Clause's restrictions on proper fora: "[Y]ou, the borrower, hereby acknowledge and consent … to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court." (*Id.*) *Second*, during the relevant period and at the commencement of this suit, Delbert was Consumer Loan Trust's agent for servicing the Loan Agreements, and the law is clear that a nonsignatory agent can enforce a contractual provision to the same extent that its principal could. The district court erred by concluding that Delbert could not enforce the Forum-Selection Clause.

The district court also erred by holding that this case did not satisfy the requirements of tribal exhaustion, which requires private parties whose claims

implicate an Indian tribe's jurisdiction to bring suit first in tribal court, which in turn can determine whether it has jurisdiction over the dispute. Tribal exhaustion is mandatory where there is a "colorable" or "plausible" claim that a dispute falls within tribal jurisdiction. *See* Part VI.C, *infra*. In analyzing identical contracts governing Western Sky loans, two other federal district courts have held that tribal exhaustion was required because the plaintiffs entered into the loan agreements with a company that is wholly owned by an enrolled member of the CRST and operated from the Reservation under CRST law, and also because the plaintiffs had consented to the CRST courts' sole jurisdiction in the Loan Agreements. *See Brown v. W. Sky Fin., LLC*, No. 1:13CV255, ___ F. Supp. 3d ___, 2015 WL 413774, at *8-12 (M.D.N.C. Jan. 30, 2015); *Heldt v. Payday Fin., LLC*, 12 F. Supp. 3d 1170, 1186-87 (D.S.D. 2014). The same reasoning applies here. Accordingly, the district court should have ordered tribal exhaustion because there is at least a colorable claim that the tribal court would have jurisdiction over this dispute.

* * *

This Court should affirm the district court's order compelling this case to arbitration. Alternatively, the Court should reverse the district court's order concluding that Plaintiffs were not required to bring suit in the CRST courts under either the Forum-Selection Clause or the tribal exhaustion doctrine.

V. ARGUMENT.

A. Standard of Review.

The district court's order compelling arbitration is reviewed *de novo*. *See Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 178 (4th Cir. 2013) (compelling arbitration). Courts should interpret arbitration clauses in light of the "strong federal policy in favor of enforcing arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (compelling arbitration).

B. The District Court Properly Compelled Arbitration.

This Court can affirm the district court's order compelling arbitration upon numerous alternative grounds. *First*, the Arbitration Clause permits AAA and JAMS to arbitrate this dispute, *see* Part V.B.1 *infra*, and there is no doubt that those organizations are highly credible and available, *see* Part V.B.2 *infra*. *Second*, even if the parties' selected arbitrator is unavailable, FAA § 5 merely requires that a substitute arbitrator be appointed. *See* Part V.B.3, *infra*. *Finally*, the Court should reject Plaintiffs' other grounds for voiding the Arbitration Clause because those arguments were not raised below, and, in any event, they are meritless. *See* Part V.B.4, *infra*.

1. This Court Should Reject Plaintiffs' Convoluted Interpretation Of The Arbitration Clause.

Plaintiffs propose a convoluted interpretation of the Arbitration Clause, hoping to render arbitration impossible. Plaintiffs' proposed interpretation makes

little sense and ignores established Supreme Court precedent on the proper interpretation of arbitration clauses.

a. The Arbitration Clause Does Not Require Tribal Involvement.

Plaintiffs argue that arbitration must be conducted by a hybrid AAA/JAMS/tribal mechanism. According to Plaintiffs, AAA or JAMS would begin the arbitration using AAA or JAMS rules but then would refuse to apply the AAA and JAMS rules dictating how the arbitrator is appointed: by its rules, AAA selects arbitrators exclusively from its national roster, and JAMS has its own roster of arbitrators.[5] Instead, Plaintiffs contend that AAA or JAMS would have to appoint an arbitrator who is a tribal representative. That tribal representative then works under the AAA/JAMS administrator and follows some combination of AAA/JAMS and tribal rules. *See* Pl. Br. at 42-48.

This interpretation radically overcomplicates the Arbitration Clause, which simply says that the default mechanism will be to arbitrate before the CRST using CRST's "consumer dispute rules," "*except as provided below*." (Dkt. 26-1 at 10.) A subsequent paragraph provides this very exception, giving Plaintiffs the right, "[r]egardless of who demands arbitration, ... to select ... the American Arbitration Association ... ; JAMS ... ; or an arbitration organization agreed upon by

[5] *See* AAA Consumer Arbitration Rules R-15 (2014), *available at* http://tinyurl.com/q4k6cjq; JAMS Comprehensive Arbitration Rules and Procedures Rule 15 (2014), *available at* http://tinyurl.com/nlvh8b2.

[Plaintiffs] and the other parties to the Dispute." (*Id.*) The arbitration would be "*governed by the chosen arbitration organization's rules and procedures applicable to consumer disputes*, to the extent that those rules and procedures do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate, including the limitations on the Arbitrator below [regarding waiver of class actions]." (*Id.* (emphasis added).)

In other words, the Arbitration Clause states that the parties can alternatively arbitrate before the CRST using CRST rules, before AAA using AAA rules, before JAMS using JAMS rules, or before any other agreed-upon organization using that organization's rules. Significantly, this term does not require AAA or JAMS to blend its rule and procedures with the CRST's "consumer dispute rules" for conducting arbitrations; it merely states that AAA or JAMS rules may not contradict CRST substantive law. (*Id.*)

Plaintiffs flippantly suggest that the district court "failed to read the contract." Pl. Br. at 44. But the text of the Arbitration Clause supports the district court's reading of the Clause and directly contradicts Plaintiffs' proffered interpretation. Plaintiffs ignore the Arbitration Clause's prefatory language "*except as provided below*," which directly shows that tribal arbitration is not the sole method of arbitration permitted by the Arbitration Clause. (Dkt. 26-1 at 10.) Additionally, Plaintiffs insist that AAA or JAMS would serve only as the

arbitration "administrator" despite the fact that the title of the section allowing Plaintiffs to select AAA and JAMS is titled "**Choice of Arbitrator**." (*Id.*) Plaintiffs fail to explain why a section titled the "**Choice of Arbitrator**" would actually have *nothing to do with choosing an arbitrator*. Unlike some contracts, the Loan Agreements have *no* provision stating that paragraph headings should not be used in interpreting the terms of the contract. *See CoreTel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 366 (4th Cir. 2014) (enforcing provision "explicitly provid[ing] that headings are to have no substantive effect on the agreement's meaning").

By ignoring and misinterpreting such important provisions, Plaintiffs—not Delbert—are "rewriting" the Arbitration Clause to suit their own needs. *See* Pl. Br. at 3. Plaintiffs propose this convoluted reading of the Arbitration Clause for one reason: to attempt to tie the outcome in this case to the outcomes in *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014), and *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014).[6] *Inetianbor* and *Jackson* both refused to enforce a significantly different arbitration clause, which never mentioned AAA or JAMS, but instead limited arbitrators to either "(i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council." *Jackson*, 764

[6] *See also* Br. of *Amici Curiae* Nat'l Consumer Law Ctr. *et al.*, at 15-16 (attempting to tie this case to *Inetianbor* and *Jackson*).

F.3d at 769; *Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303, 1305 (S.D. Fla. 2013) (same).[7]

The district court below properly rejected Plaintiffs' attempts to conflate the arbitration clause in *Inetianbor* and *Jackson* with the Arbitration Clause here. The court held that Plaintiffs' ability to select AAA or JAMS "saves the arbitration agreement from meeting the same fate as those in *Inetianbor* and *Jackson*" because "the parties [here] have recourse to well-recognized arbitration organizations and their procedures." (Dkt. 38 at 7.) *Inetianbor* and *Jackson* remove the possibility of CRST-run arbitration, thereby leaving the parties free to arbitrate before AAA or JAMS.

Other federal courts have likewise distinguished Plaintiffs' Arbitration Clause (with its AAA/JAMS provision) from the arbitration clause in *Inetianbor* and *Jackson* (with no AAA/JAMS provision). In *Kemph v. Reddam*, No. 13-cv-6785, 2015 WL 1510797 (N.D. Ill. Mar. 27, 2015), the Northern District of Illinois faced a suit brought by another Western Sky borrower who had agreed to the same AAA/JAMS clause. In a thorough and well-reasoned order compelling arbitration, the court concluded that "since Plaintiffs' loan agreements permit arbitration to be

[7] Contrary to Plaintiffs' claims, *see* Pl. Br. at 17, the AAA/JAMS clause was not added "[i]n response to court decisions invalidating" the older clause used in *Inetianbor* and *Jackson*. The AAA/JAMS provision was implemented in early 2012—long before the *Inetianbor* and *Jackson* decisions. This is confirmed by the fact that Plaintiffs' Loan Agreements, which were all signed between August 2012 and November 2012, contain the AAA/JAMS provision. (Dkt. 26-1 at 7-12; *id.* at 14-19; *id.* at 21-26.)

administered by a third party such as AAA or JAMS pursuant to that organization's consumer dispute rules, the concerns in *Jackson* are inapplicable." *Id.* at *5, 7. *Kemph* also correctly held that, "[u]nlike in *Jackson*, where there was 'no prospect of a meaningful and fairly conducted arbitration,' the loan agreements here provide the possibility for an unbiased and fair dispute resolution process." *Id.*

In *Williams v. CashCall, Inc.*, No. 14-cv-903, ___ F. Supp. 3d ___, 2015 WL 1219605 (E.D. Wisc. Mar. 17, 2015), the Eastern District of Wisconsin concluded that the very same arbitration clause "provid[es] the option of using the consumer dispute rules of the AAA or JAMS" and "allow[s] the parties to use an arbitrator from either the AAA or JAMS systems," thus eliminating the "concerns that the *Jackson* court had about using a Tribal member as the arbitrator." *Id.* at *6. Accordingly, the court compelled arbitration for a borrower with the same clause that Plaintiffs have.

Similarly, in *Chitoff v. CashCall, Inc.*, No. 0:14-cv-60292, 2014 WL 6603987 (S.D. Fla. Nov. 17, 2014), the Southern District of Florida distinguished *Inetianbor* and held that the AAA/JAMS arbitration clause "only requires that a tribal representative administer arbitration *except as otherwise provided*, and a subsequent portion of the agreement allows for arbitration to be administered by the Arbitration Association of America or by Judicial Arbitration and Mediation

Services." *Id.* at *1 (emphasis in original). Accordingly, the court compelled arbitration. *Id.* at *2.[8]

The rulings in *Kemph*, *Williams*, and *Chitoff* provide persuasive support for the conclusion that Plaintiffs' interpretation of the Arbitration Clause is not tenable. That conclusion is not affected by this Court's recent decision in *Moses v. CashCall, Inc.*, 781 F.3d 63 (4th Cir. 2015), which addressed issues of bankruptcy law, decided in the context of a plaintiff who had borrowed money from Western Sky and whose loan agreement included the same AAA/JAMS provision that Plaintiffs here signed. *Id.* at 65-66 (*per curiam*).[9] Although the judges in *Moses* expressed concern about the proper interpretation of the arbitration clause, they explicitly and repeatedly declined to make any ruling on how to interpret the clause, leaving that issue for another day and another panel. *Id.* at 74 (Niemeyer, J.) ("I submit … that we need not make findings on that issue."); *id.* at 87 (Gregory, J.) ("Without more fulsome briefing and a more developed record, we simply cannot reach the enforceability of the [arbitration] agreement."); *id.* at 94

[8] *But see Parnell v. W. Sky Fin., LLC*, 4:14-cv-24, slip op. at 75 (N.D. Ga. Apr. 28, 2014), ECF No. 25 (refusing to enforce the AAA/JAMS clause on the ground that tribal arbitration is not available). For the reasons discussed above, Delbert respectfully disagrees with the *Parnell* district court's interpretation of the arbitration clause, which does not require tribal involvement. *Parnell* is the only court decision that has refused to enforce the AAA/JAMS clause, and the Eleventh Circuit heard oral argument in *Parnell* on July 30, 2015. *See Parnell v. CashCall, Inc.*, No. 14-12082 (11th Cir.).

[9] All three judges in *Moses* wrote separate opinions, preceded by a brief *per curiam* summarizing the case. *See* 781 F.3d at 65 (*per curiam*); *id.* at 66 (Niemeyer, J.); *id.* at 82 (Gregory, J.); *id.* at 88 (Davis, J.).

(Davis, J.) ("Because Moses never raised this issue in the proceedings below, we lack any factual record upon which to make such a ruling."). Indeed, *Moses* recognized that the AAA/JAMS clause may be "substantially different from" the arbitration clause in *Inetianbor* and *Jackson*, but the panel explicitly refused to issue a ruling on the matter. *Id.* at 87 (Gregory, J.). *Moses* therefore does not undercut the rulings in *Kemph*, *Williams*, *Chitoff*, and by the district court here that the Arbitration Clause allows for arbitration before well-respected organizations like AAA and JAMS.

b. Even If The Arbitration Clause Is Ambiguous, The Court Still Must Order Arbitration.

Critically, even if Plaintiffs were correct that the Arbitration Clause contains ambiguity about whether AAA or JAMS can be the arbitrator, this Court should still affirm. The Supreme Court has repeatedly admonished courts to construe any ambiguity in an arbitration clause to favor arbitration—the exact opposite of what Plaintiffs do here.

Under the Supreme Court's pro-arbitration canon of construction, arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). Thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "construe[ing] ... the

contract language itself." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989). That is, if an arbitration provision can be read in two ways, courts must "resolve th[e] ambiguity *in favor* of arbitration." *Khan v. Dell, Inc.*, 669 F.3d 350, 356 (3d Cir. 2012) (court's emphasis).

Thus, even if Plaintiffs were correct that the Arbitration Clause is ambiguous in terms of who would serve as the "arbitrator" for disputes and which arbitration rules would apply, the Court would have to interpret the Clause in a way that favors arbitration. As discussed above, a reasonable reading of the Arbitration Clause would result in arbitration before well-respected organizations like AAA or JAMS, using those organizations' rules. Given this, *Moses H. Cone* and *Warrior Gulf* require that the Court compel arbitration, which is precisely what the district court did below.

2. The Arbitral Forum Is Available.

For the reasons above, the Arbitration Clause permits arbitration before AAA or JAMS, using a AAA or JAMS arbitrator, with AAA or JAMS rules. AAA and JAMS "are experienced arbitral forums with robust and readily accessible dispute procedures." *Kemph*, 2015 WL 1510797, at *5. Plaintiffs concede that fact, noting that AAA and JAMS are "legitimate arbitral provider[s]." Pl. Br. at 2.

In fact, AAA and JAMS have both accepted arbitrations dealing with this *exact same arbitration clause*: "AAA has already agreed to administer arbitration in *Chitoff v. CashCall Inc.*, which is based on a nearly identical loan agreement," *Kemph*, 2015 WL 1510797, at *6, and the appointed AAA arbitrator (Richard Vura) has experience in over 7,000 prior mediations, *see* Accompanying Addendum at A-1 to A-7.[10] *Kemph* noted that JAMS also has accepted an arbitration involving the same clause that Plaintiffs here signed, *see* 2015 WL 1510797, at *6 (citing "JAMS Notice of Intent to Initiate Arbitration in *Keehn v. CashCall, Inc.*"), and the JAMS arbitrator in that case is former federal district judge David H. Coar, *see* Accompanying Addendum at A-8 to A-10.

Given that the Arbitration Clause permits arbitration before AAA or JAMS, this Court can summarily reject Plaintiffs' claims that the arbitrator is biased. (*See* Pl. Br. at 29.) No one could seriously argue that arbitration before AAA or JAMS is so fundamentally unfair as to render the Clause void. Certainly, Plaintiffs never presented such evidence below.[11]

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[10] The Court can take judicial notice of the identity of the arbitrator. *See* Fed. R. Evid. 201(b)(2) & (c)(2).

[11] In any event, claims of arbitrator bias cannot be raised before arbitration—they can be raised only *after* arbitration in a motion to vacate the award. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999) (holding that "[o]nly *after* arbitration may a party … raise" "objections to the nature of arbitral proceedings," with a very narrow exception, not applicable here, for cases where one party had an explicit contractual duty to provide fair arbitration rules (emphasis added)); *accord Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980) (holding that courts "cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award");

Plaintiffs' argument that Delbert violated a covenant of fair dealing—an argument that Plaintiffs did not raise below and have therefore waived, *see, e.g.*, *Melgar ex rel. Melgar v. Greene*, 593 F.3d 348, 358 (4th Cir. 2010)—is likewise entirely baseless. *See* Pl. Br. at 31-32. The availability of AAA and JAMS arbitration, using AAA and JAMS rules, renders completely inapposite Plaintiffs' invocation of *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999). *See* Pl. Br. at 20-21. There, *after* employees had signed an arbitration agreement, Hooters violated its contractual duties by unilaterally imposing arbitration procedures that were so tilted in its own favor that AAA said that it "would refuse to arbitrate under those rules." 173 F.3d at 939. Here, by contrast, the terms of arbitration are unchanged, and both AAA and JAMS have already accepted arbitrations involving this very same Arbitration Clause. *See Kemph*, 2015 WL 1510797, at *6.

Because the Arbitration Clause permits arbitration before AAA or JAMS, and because those reputable organizations are available to hear the parties' dispute, this Court should affirm the district court's order compelling arbitration.

Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg, 748 F.3d 708, 714 (6th Cir. 2014) (same). Thus, Plaintiffs' unfounded claims of arbitrator bias are premature.

3. Even If The Parties' Selected Arbitrator Were Unavailable, The Court Would Have To Compel Arbitration Before A Substitute Arbitrator, Pursuant To FAA § 5.

Even if this Court disagreed with Delbert and concluded that the Arbitration Clause requires tribal involvement and that Plaintiffs have shown that the tribe is not available to hear the dispute, the law would still require affirmance of the district court's order compelling arbitration.

Under FAA § 5, arbitration does not fail simply because the parties' selected arbitrator is unavailable. Section 5 states that "if for *any* ... reason there shall be a lapse in the naming of an arbitrator … or in filling a vacancy," then "the court *shall* designate and appoint" a substitute. 9 U.S.C. § 5 (emphases added). Here, there has been no "lapse" because AAA and JAMS are designated by contract and available. But even if this Court were to conclude that the designated arbitrator is unavailable, arbitration would still proceed because § 5's straightforward language merely requires the district court to appoint a substitute arbitrator.

It is irrelevant that CRST "consumer dispute rules" are unavailable. *See* Pl. Br. at 29-31; Br. of *Amici Curiae* Nat'l Consumer Law Ctr. *et al.*, at 18-19. The substitute arbitrator would have authority to determine substitute rules for the arbitration. As the Supreme Court has held, "[o]nce it is determined … that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute … should be left to the

arbitrator." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). Such "procedural questions" certainly include "dispute[s] aris[ing] over the procedures to be followed" and determining which rules will govern the arbitration. *Id.* at 558. As the Third Circuit held in *Bell Atlantic-Pennsylvania, Inc. v. Communications Workers of America, AFL-CIO, Local 13000*, 164 F.3d 197 (3d Cir. 1999), the arbitrator—not the court—must "determine which procedure will be used" in arbitration. *Id.* at 203; *see also Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715-16 (7th Cir. 1987) (relying on FAA § 5 to order arbitration even though the arbitration clause lacked "such implementing details as who the arbitrator would be, where the arbitration would take place, and what procedures would govern").

Accordingly, the plain language of FAA § 5 directs that the district court's order compelling arbitration should be affirmed even if this Court concludes that the parties' designated arbitrator and rules are unavailable. 9 U.S.C. § 5.

Delbert acknowledges that some courts have held that there is an "exception" to FAA § 5 where the identity of the parties' chosen arbitrator is so "integral" to the contract that the parties would prefer to litigate in court than before a substitute arbitrator. As discussed further below, this "integrality exception" is irrelevant here for two reasons: (a) the text and policy of the FAA flatly forbid such an exception in the first place; and (b) even if the exception does

exist, the choice of one specific arbitrator here was clearly not "integral." In either case, FAA § 5 applies with full force here to require the district court to appoint a substitute arbitrator.

a. The Text And Policy Of The FAA Flatly Prohibit Recognition Of An "Integrality Exception."

Although FAA § 5 contains no exceptions, some courts have created an integrality exception to § 5's mandate to appoint a substitute arbitrator.[12] The Seventh Circuit has correctly held that no such exception exists. In *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013), the parties' contract called for arbitration before the National Arbitration Forum ("NAF"), which had stopped accepting consumer disputes before the case began. *Id.* at 789. The *Green* plaintiffs argued that the contractually selected arbitrator was integral to the arbitration clause, and thus the courts could not appoint a substitute arbitrator. *Id.* The Seventh Circuit rejected that argument and held that in FAA § 5, "Congress ... provided that a judge can appoint an arbitrator when for 'any' reason something has gone wrong." *Id.* at 791. Given Congress's absolute language, the *Green* court was "skeptical" of any argument that "allow[s] a court to declare a particular

[12] *See, e.g.*, *Inetianbor*, 768 F.3d at 1350-51 (following circuit precedent on integrality exception); *Khan*, 669 F.3d at 354; *In re Saloman Inc. Shareholders' Derivative Litig. 91 CIV. 5500 (RRP)*, 68 F.3d 554, 561 (2d Cir. 1995). Delbert is unaware of any Fourth Circuit decision addressing the so-called integrality exception.

aspect of an arbitration clause 'integral' and on that account scuttle arbitration itself." *Id.*

As *Green* noted, "no court has ever explained what part of the text or background of the [FAA] requires, or even authorizes, such an" integrality exception. 724 F.3d at 792.[13] The language of the FAA is plain and clear: a substitute "shall" be appointed whenever the arbitral forum is unavailable for "any ... reason." 9 U.S.C. § 5; *see generally Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755 (2014) (in statutory construction, the Court's "analysis begins and ends with the text" of the statute). The FAA lists no exceptions.

Plaintiffs may argue that recognizing an integrality exception would actually enforce the parties' alleged single-minded intent to arbitrate before the CRST and no one else. But the Supreme Court has directly rejected the argument that parties can somehow contract around mandatory provisions of the FAA. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585-87 (2008), the Court rejected

[13] *Green* observed that all of the cases recognizing the integrality exception were based on dicta from a single district court decision from within the Seventh Circuit: *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359 (N.D. Ill. 1990). *Green* concluded that *Zechman* was incorrect and overruled it. *See* 724 F.3d at 792. Subsequently, *Jackson* addressed, but did not question, the validity of the holding in *Green*. It distinguished *Green* based on the language of Jackson's loan agreement, noting that "a basic protection and essential part of [Jackson's] bargain" was arbitration under "the auspices of a public entity of tribal governance," a protection "for which a substitute cannot be constructed." *Jackson*, 764 F.3d at 781. Unlike in *Jackson*, Plaintiffs in this case all expressly agreed to arbitrate through a private organization of their choosing, like AAA or JAMS.

the parties' efforts to expand contractually the grounds upon which a court could vacate an arbitral award under FAA § 9, because § 9 contains mandatory language listing the only circumstances in which a court may vacate an arbitration award. Courts "must grant" confirmation of any arbitral award unless it is "vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9. The mandatory language of § 9 "unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions" in § 10 or § 11 applies. 552 U.S. at 587. Given § 9's mandatory language, the Supreme Court held that the parties could not contractually alter the list of vacatur grounds. *Id.*

Hall Street's logic applies to § 5, which contains similar mandatory language: the court "*shall* designate and appoint an arbitrator" if "for *any* … reason there shall be a lapse in the naming of an arbitrator … or in filling a vacancy." 9 U.S.C. § 5 (emphases added). Just as there are no exceptions to § 9's mandatory requirements, there are no exceptions to § 5's mandatory requirements; the parties here could no more "contract around" § 5 than the *Hall Street* parties could contract around § 9.

As the Seventh Circuit noted, *Hall Street* "tells courts not to add to, or depart from, the standards in the" FAA. *Green*, 724 F.3d at 791. "An 'integral part' proviso to § 5 sounds like the sort of addendum that *Hall Street* forbids." *Id.*; *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012)

(holding that FAA § 2's "text *includes no exception* for personal-injury or wrongful-death claims" (emphasis added)).

Not only is the integrality exception contrary to the plain *text* of FAA § 5, it also runs counter to the FAA's *policy* of ensuring smooth and efficient arbitration. As the Supreme Court held in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011), "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." But if this Court recognizes an integrality exception to FAA § 5, then whenever a term of an arbitration provision arguably fails, parties will have to litigate whether that particular arbitral detail was "integral." As *Green* noted, "[h]ow could a district judge tell what is 'integral' without a trial at which parties testify about what was important to them and lawyers present data about questions such as whether consumers or businesses shifted from arbitration to litigation when the Forum stopped accepting new consumer disputes for resolution? The process would be lengthy, expensive, and inconclusive to boot." 724 F.3d at 792.

Additionally, in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the Supreme Court rejected just such a requirement to conduct case-by-case determinations: "[I]t would be unwieldy and unsupported by the terms or policy of the [FAA] to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs." *Id.* at 2311-12 (second alteration added)

(internal quotation marks omitted). This Court should refuse to impose such burdens pursuant to an exception that is found nowhere in the FAA.

For all of these reasons, even if this Court concludes that the parties' selected arbitrator is unavailable, the Court should affirm because FAA § 5 requires that a substitute arbitrator be appointed—no exceptions.

b. Even If There Were An Integrality Exception, The Choice Of Arbitrator Here Was Not Integral.

Even if the Court were to conclude that there is an integrality exception to FAA § 5's requirement to appoint a substitute arbitrator, the outcome here would not change: the Court would still affirm the district court because the parties here clearly did not intend tribal arbitration to be "integral."

First, the Arbitration Clause proposes alternative arbitrators. Unlike in *Inetianbor*, where the Eleventh Circuit concluded that the selected arbitrator (listed as the borrower's choice of either a tribal elder or panel of tribal council members) was integral, *see* 768 F.3d at 1350-51, the Arbitration Clause here expressly references AAA, JAMS, or any other organization agreed upon by the parties as alternatives to the CRST. These references to non-tribal arbitration organizations' involvement show that the parties certainly did not consider tribal arbitration to be so important that they would rather litigate in court than arbitrate before a non-tribal substitute arbitrator (in fact, any substitute would likely be from AAA or JAMS anyway—the very entities with which the parties here already have

expressed a desire to arbitrate). Indeed, if the tribal component were integral, then Western Sky never would have altered the arbitration clause language in 2012 to permit borrowers to choose arbitration without tribal involvement. *See supra* at 22 n.7.

Second, the Arbitration Clause has a Severance Provision, which confirms the fact that the identity of the selected arbitrator is not integral. The Severance Provision states, "If any of this Arbitration Provision is held invalid, the remainder shall remain in effect." (Dkt. 26-1 at 11.) This shows that the parties agreed that no part of the Arbitration Clause—including the identity of the arbitrator—was so important that its unavailability would scuttle arbitration entirely. *See, e.g., Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1167-68 (D.S.D. 2010). *Jones* held that the integrality exception did not apply because the "existence of the severance clause in the arbitration agreement is evidence that the parties did not intend for the entire agreement to fail if one portion was invalid or unenforceable."

Indeed, courts often enforce severance provisions and excise unenforceable or unavailable terms in arbitration clauses, leaving the remaining terms in effect. As the Eighth Circuit said in *Franke v. Poly-America Medical & Dental Benefits Plan*, 555 F.3d 656 (8th Cir. 2009): "[T]he severability clause found in the arbitration agreements specifically stated the intent of the parties in the event a provision within the agreement is found invalid, i.e., that arbitration proceed once

any invalid terms have been severed." *Id.* at 658 (internal quotation marks and alteration omitted); *see also Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003) ("The purpose of the arbitration provision is to settle any and all disputes arising out of the [contract] in an arbitral forum rather than a court of law. Even with its [offending provision] lifted, … the arbitration clause remains capable of achieving this goal."). The Virginia Supreme Court has held the same in *Schuiling v. Harris*, 747 S.E.2d 833 (Va. 2013): "The inclusion of this particular severability clause, with its broad scope permitting the severance even of parts of provisions and for any reason, reflects that the parties intended NAF to be the exclusive arbitrator so long as it was available. *However, if its unavailability made its appointment unenforceable, the designation would be severed*." *Id.* at 837 (emphasis added).

Even the Eleventh Circuit, which declined to use the severance provision in *Inetianbor* because it perceived total reliance in the Inetianbor contract on tribal involvement, *see* 768 F.3d at 1352-53, has recognized the importance of a severance provision to preserving an arbitration clause. In *In re Checking Account Overdraft Litigation MDL No. 2036 (Barras)*, 685 F.3d 1269, 1279-84 (11th Cir. 2012), the Eleventh Circuit held a 'borrower-pay-all' fee-shifting provision unconscionable but severed that provision as a matter of law rather than invalidate the accompanying arbitration clause. *Id.* The court noted that the agreement referenced the AAA rules, which included a provision governing fees that could

substitute for the contract's original unconscionable provision. *Id.* at 1283-84. Similarly, the Arbitration Clause here references the rules of AAA and of JAMS, each of which provides a fair alternative means for selecting an arbitrator. (Dkt. 26-1 at 10); *see* AAA Consumer Arbitration Rules R-15; JAMS Comprehensive Arbitration Rules and Procedure Rule 15.

Additionally, the Supreme Court's pro-arbitration canon of construction, *see* Part V.B.1.b, *supra*, extends to the Severance Provision. If there is any ambiguity as to the effect of the Severance Provision, this Court must construe it in favor of arbitration. *See Moses H. Cone*, 460 U.S. at 24-25. This simply means that the Court should interpret the Severance Provision to mean precisely what it says: if any part of the Arbitration Clause is not enforceable, the remaining terms (requiring that the parties arbitrate all of their disputes) stay in effect.

Thus, if the Court concludes that the parties' selected arbitrator is unavailable, FAA § 5 requires that a substitute arbitrator be appointed, regardless of whether the Court recognizes the integrality exception.

* * *

In summary, the Arbitration Clause gives Plaintiffs a right to arbitrate before AAA or JAMS, both of which are reputable organizations available to hear the parties' dispute. But even if the Arbitration Clause had required tribal

involvement, this Court should still affirm because FAA § 5 requires that a substitute arbitrator be appointed.

4. Plaintiffs' Other Arguments In Favor Of Voiding The Arbitration Clause Are Waived, Barred By The Delegation Clause, And Meritless.

Plaintiffs next argue that the Arbitration Clause is independently void because it amounts to a waiver of all statutory rights and is unconscionable. *See* Pl. Br. at 34-42. The Court should reject these arguments.

As a threshold matter, there are two independent reasons why this Court cannot even address these arguments. *First*, Plaintiffs waived these arguments by failing to raise them below. *See, e.g.*, *Melgar*, 593 F.3d at 358 ("This claim was not even raised below and thus has been waived ….") . In the district court, Plaintiffs never argued that the Arbitration Clause was void because it allegedly amounts to a waiver of statutory rights (*see generally* Dkt. 30). Plaintiffs' unconscionability argument is likewise waived. At best, it was raised only briefly and perfunctorily in Plaintiffs' opposition to Delbert's motion to dismiss. (*See* Dkt. 30 at 30.) As this Court has held, "'fleeting references' do not preserve questions on appeal." *Liberty Corp. v. NCNB Nat'l Bank of S.C.*, 984 F.2d 1383, 1390 (4th Cir. 1993). The fact that the district court never ruled on either of these arguments further demonstrates Plaintiffs' failure to raise them sufficiently below.

Second, the Court cannot resolve Plaintiffs' arguments because Plaintiffs never specifically challenged the Arbitration Clause's Delegation Clause while in the district court. The Delegation Clause requires that only the arbitrator can resolve attacks on the enforceability of the Arbitration Clause itself. (Dkt. 26-1 at 10.) 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 made general allegations against the Arbitration Clause in the district court, none targeted the Delegation Clause itself. Even though Delbert argued the Delegation Clause in its motion to dismiss (*see* Dkt. 26 at 36), Plaintiffs' opposition mentioned the Delegation Clause only once (*see* Dkt. 30 at 29), and their Amended Complaint did not address the Clause at all (*see generally* Dkt. 16). Because Plaintiffs failed to challenge the Delegation Clause

specifically, this Court "must treat it as valid" under the FAA and must enforce it. *Rent-A-Ctr.*, 561 U.S. at 72.[14]

For both of these reasons, the Court should refuse even to consider Plaintiffs' arguments about waiver of statutory rights and unconscionability.

Even if this Court chooses to address these arguments, however, they still fail on the merits. Plaintiffs argue that the Loan Agreement's choice-of-law clause (selecting CRST law as exclusive) would deprive them of all remedies during any arbitration. *See* Pl. Br. at 34-35. However, this Court has recognized that "'procedural' questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Dockser v. Schwartzberg*, 433 F.3d 421, 425 (4th Cir. 2006) (Court's emphasis) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)); *accord Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995) (choice-of-law question "must be decided in the first instance by the arbitrator"). Such procedural questions include whether the choice-of-law clause is valid. Indeed, plaintiffs in *Kemph* made the very same argument now offered by Plaintiffs, and the court properly held that "the arbitrator, once chosen, would have

[14] The presence of the Delegation Clause is another fact that distinguishes this case from *Hooters*, where the determination of whether the arbitration clause was valid was left to the court itself. *See* 173 F.3d at 937-38.

the authority to determine whether that choice-of-law provision is valid." *Kemph*, 2015 WL 1510797, at *5.[15]

Plaintiffs' unconscionability argument also fails on its merits because this Court has made clear that the Supreme Court's opinion in *Concepcion*, 131 S. Ct. 1740, "plainly prohibit[s] application of the general contract defense of unconscionability to invalidate an otherwise valid arbitration agreement." *Muriithi*, 712 F.3d at 180. As such, unconscionability simply cannot be used in this Circuit to void an arbitration clause.

Even absent *Muriithi*, Plaintiffs' claim still fails because there is no substantive or procedural unconscionability here. As discussed above, the arbitral forum and rules are available, and those rules are fair. Borrowers completed the loan applications from their own homes, could see the terms before signing them, and could cancel at any time before signing the agreement. (*See* Dkt. 26 at 27.) There was no pressure or untoward behavior by Western Sky or Delbert.

[15] Additionally, Plaintiffs are simply wrong to suggest that application of CRST substantive law would deprive them of any possible recourse. CRST Tribal Court cases are often published in the Indian Law Reporter, whose indices are available online. *See* Indian Law Reporter: Tribal Court Cases Index, http://www.narf.org/nill/ilr/ (last visited August 12, 2015). The CRST also has a Constitution, By-Laws, a Law and Order Code, a version of the Uniform Commercial Code, and Rules of Civil Procedure. *See Parnell*, No. 14-12082 (11th Cir. Oct. 2, 2014), ECF entry titled "Federal Court Non-Published Opinion" (providing copies of significant portions of CRST substantive law). CRST law also recognizes "common law causes of action in such areas as contract and tort law." Frank Pommersheim, *South Dakota Tribal Court Handbook* 19 (rev. ed. 2006), *available at* http://ujs.sd.gov/media/docs/IndianLaw%20Handbook.pdf.

For all of these reasons, the Court should reject Plaintiffs' attempts to raise these meritless arguments for the first time on appeal.

* * *

In their attempt to avoid arbitration, Plaintiffs and their amici repeatedly seize on the unpopularity of Western Sky's lending program. But that is irrelevant to the legal questions here. The fact is that Plaintiffs are trying to escape their agreement to arbitrate disputes using the two most prominent and reputable arbitration organizations in the nation, AAA and JAMS, using AAA or JAMS rules. This the law will not allow. For the reasons above, the district court's well-reasoned order compelling arbitration should be affirmed.

VI. ARGUMENTS IN SUPPORT OF CONDITIONAL CROSS APPEAL.

Delbert cross-appeals on a conditional basis and therefore requests that the Court resolve the issues below only if the Court reverses the district court's order compelling arbitration. *See, e.g., Hatfill v. N.Y. Times Co.*, 532 F.3d 312, 315 n.1 (4th Cir. 2008).

A. Standard of Review.

A district court's interpretation of a forum-selection clause is reviewed *de novo*. *See Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir. 2006) (enforcing forum-selection clause). The scope of tribal exhaustion is

also reviewed *de novo*. *See United States v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996) (ordering tribal exhaustion).

B. The District Court Should Have Enforced The Forum-Selection Clause Under The Doctrine Of *Forum Non Conveniens*.

The parties' Forum-Selection Clause states that to the extent any disputes are not arbitrated, they must be brought solely in the courts of the CRST. (Dkt. 26-1 at 7, 9.)[16] The district court held that only a "holder" of Plaintiffs' Loan Agreements could enforce the Forum-Selection Clause, that Delbert was not such a "holder," and that Delbert therefore lacked standing to argue that Plaintiffs have brought suit in the wrong court. (Dkt. 38 at 3-4.) That conclusion was incorrect for several independent reasons, and the district court should have dismissed this case under the doctrine of *forum non conveniens*.

1. Delbert Can Enforce The Forum-Selection Clause.

Under the plain language of the Forum-Selection Clause, whether Delbert is the "holder" of Plaintiffs' notes is irrelevant. The district court apparently imported the "holder" language from another section of the Loan Agreement, which simply defines "'Lender'" to mean "Western Sky Financial, LLC, … and any subsequent holder of this Note." (Dkt. 26-1 at 7.) This was error, however, as

[16] As discussed above, it is common for contracts to contain both forum-selection and arbitration clauses, and courts interpret them as complementary, requiring arbitration but providing that any in-court litigation (such as to enforce an arbitration award or to undertake any other in-court litigation authorized by the contract) be governed by the forum-selection clause. *See supra* at 9 n.4.

the Forum-Selection Clause never says that only a holder or lender can enforce it. In fact, it never mentions the holder or lender at all. (Dkt. 26-1 at 7.)[17]

Rather than considering whether Delbert is a holder or lender, the district court should have addressed whether the Forum-Selection Clause binds *Plaintiffs*, who selected the forum for this suit and therefore must follow the Clause's requirements. The language of the Forum-Selection Clause clearly binds Plaintiffs and prevents them from suing in federal court: "*[Y]ou*, the *borrower* hereby acknowledge and consent to … the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court." (Dkt. 26-1 at 7 (emphases added).) Because the Forum-Selection Clause unambiguously applies to Plaintiffs and forbids them from suing in this forum, the district court erred by denying the motion to dismiss. Whether Delbert is a "holder" of Plaintiffs' loans is irrelevant.

Independently, Delbert can enforce the Forum-Selection Clause under principles of agency. Non-signatory agents may enforce forum-selection clauses to the same extent that their principals could. *See Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1169-70 (11th Cir. 2009); *Frietsch v. Refco, Inc.*, 56 F.3d 825, 827-28 (7th Cir. 1995); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d

[17] The Forum-Selection Clause states, in full: "**This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation.** By executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation." (Dkt. 26-1 at 7 (emphasis in original).)

1110, 1121-22 (3d Cir. 1993); *Am. Online, Inc. v. Huang*, 106 F. Supp. 2d 848, 857 n.26 (E.D. Va. 2000). Consumer Loan Trust is the holder of Plaintiffs' loans, and during the relevant time period and also at the commencement of this suit, Delbert was Consumer Loan Trust's agent, servicing the loans and collecting payments. (Dkt. 26-5, ¶ 3.) Plaintiffs never disputed that Consumer Loan Trust itself could enforce the Forum-Selection Clause. As Consumer Loan Trust's agent with respect to Plaintiffs' loans, Delbert had that same enforcement authority, regardless of whether Delbert itself is a "holder."

Additionally, Delbert can enforce the Forum-Selection Clause under principles of estoppel. This Court has recognized that a non-signatory to a contract can enforce a forum-selection or arbitration clause where the plaintiff alleges "interdependent and concerted misconduct" between a contract's signatory and a non-signatory. *Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 627 n.3 (4th Cir. 2006). That is precisely what Plaintiffs argue here: "Delbert operates as a debt collection company that works together with Western Sky, CashCall, and other businesses owned by Mr. Webb to systematically perpetrate fraud and to scam consumers." (Dkt. 30 at 3.) Because Plaintiffs accuse Delbert of "substantially interdependent and concerted misconduct" with Western Sky, Plaintiffs are estopped from claiming that Delbert cannot enforce the Forum-Selection Clause to the same extent that Western Sky could. As the initial holder and signatory to the

Loan Agreements, Western Sky had full authority to enforce the Forum-Selection Clause, even under Plaintiffs' cramped reading.

For these three independent reasons, the district court erred by holding that Delbert could not enforce the Forum-Selection Clause, which requires Plaintiffs to sue only in the CRST tribal courts.

2. The Forum-Selection Clause Is Valid.

The Forum-Selection Clause is clearly valid under the Supreme Court's decision in *Atlantic Marine Construction Co. v. United States District Court for Western District of Texas*, 134 S. Ct. 568 (2013).[18] 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.*[19]

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[18] The district court did not rule on whether the Forum-Selection Clause is valid, but Plaintiffs challenged its validity, and the parties briefed that issue below. (Dkt. 26 at 19-26; Dkt. 30 at 14-20; Dkt. 31 at 5-9.)

[19] *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.

Thus, the Court may consider only (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 quotation marks omitted); *see also Jiali Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 252-53 (4th Cir. 2011). The Court may not consider the convenience of the parties. 134 S. Ct. at 582.

Before the district court, Plaintiffs had the burden of showing that the public-interest factors would defeat the Forum-Selection Clause, *see Atl. Marine*, 134 S. Ct. at 582, but in their opposition to Delbert's motion to dismiss, in which Delbert discussed *Atlantic Marine*, *see* Dkt. 26 at 19-21, Plaintiffs never mentioned *Atlantic Marine* or addressed the public-interest factors (*see generally* Dkt. 30).

A review of the *Atlantic Marine* factors shows that the Forum-Selection Clause is valid. *First*, there is no "local law" that supports the trial of this case in Virginia. Plaintiffs' primary claims are under federal, not Virginia, law.[20] Furthermore, Plaintiffs gave up any Virginia claim by agreeing to the Loan

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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, such as the CRST tribal courts.

[20] Plaintiffs brought five claims under the FDCPA and TCPA for alleged debt collection violations and improper phone calls. (Dkt. 16, ¶¶ 98, 108, 118, 128, 138, 140.) There is one claim seeking a declaratory judgment that "the forum selection and arbitration clauses purportedly contained in their Loan Agreement with their original creditors are void and unenforceable by Delbert under Virginia law." (*Id.* ¶ 3; *see also id.* ¶ 151.)

Agreements' choice-of-law provision designating CRST 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, 1360 (2d Cir. 1993) (emphasis in original).

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 provided a significant number of jobs and financial opportunities to CRST members. (Dkt. 26-1, ¶¶ 9-10.) This is critical given that Ziebach County, South Dakota, where most of the Reservation is located, has the second-highest overall percentage of people living in poverty of any county in the entire United States. *See Small Area Income and Poverty Estimates*, U.S. Census Bureau, http://tinyurl.com/ov7znce (last visited Aug. 12, 2015) (follow "est13ALL.xls" hyperlink). Even if Plaintiffs could establish that the CRST and Virginia have an

equal interest in this dispute, that would still fail 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 system militate 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. Further, the CRST court is currently considering two similar lawsuits relating to Western Sky loans. *See Heldt*, 12 F. Supp. 3d at 1186-87 (ordering parties to sue in CRST courts under tribal exhaustion doctrine); *Brown*, 2015 WL 413774, at *10 (same). That court could offer definitive guidance on the scope of its jurisdiction—as is its right under the tribal exhaustion doctrine, discussed below. *See* Part VI.C, *infra*.

The Forum-Selection Clause is valid, and Delbert can enforce it. The district court should have held that Plaintiffs' sole judicial forum is the CRST tribal court and accordingly dismissed this case pursuant to the doctrine of *forum non conveniens*.[21]

[21] In the district court, Plaintiffs initially suggested that the Forum-Selection Clause was invalid because it was "based on fraud and overreaching," (Dkt. 16, ¶ 74), but Plaintiffs abandoned that theory after Delbert persuasively argued that the Forum-Selection Clause could not be the product of fraud, given that (1) the Clause was listed on the first page of the Loan Agreement and therefore was "reasonably communicated" to Plaintiffs, *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009); (2) Plaintiffs never pleaded fraud with particularity, going specifically to the Forum-Selection Clause, as Rule 9(b) requires, *see Byrd v. Int'l Transtech Corp.*, 870 F.2d 654, 1989 WL 21452, at *3 (4th Cir. 1989) (unpublished table decision); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1295-96 (11th Cir. 1998); and (3) Plaintiffs did not and cannot allege justifiable reliance on a material statement of fact,

C. The District Court Should Have Ordered Tribal Exhaustion.

Alternatively, under the tribal exhaustion doctrine, the district court should have ordered Plaintiffs to sue in CRST court and allowed that court to determine whether it has jurisdiction over this dispute. Tribal exhaustion makes federal court abstention "mandatory" as a matter of comity upon a showing of (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 did not file 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).

Indeed, two federal district courts have ordered tribal exhaustion in nearly identical suits. *See Brown*, 2015 WL 413774, at *8-12; *Heldt*, 12 F. Supp. 3d at 1186-87. The district court here should have done the same.

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which is an essential element of any fraud claim, *see Jared & Donna Murayama 1997 Trust v. NISC Holdings, LLC*, 727 S.E.2d 80, 86 (Va. 2012). (*See* Dkt. 26 at 22.)

1. Plaintiffs Entered Consensual Commercial Relationships.

In certain circumstances, Indian tribes may regulate and exercise jurisdiction over non-tribal members. Under what is known as the first "*Montana* exception,"

> [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.

Montana, 450 U.S. at 565-66; *see also id*. at 566 ("agreements or dealings" could constitute a consensual relationship sufficient to "subject [non-Indians] to tribal civil jurisdiction"). Since *Montana*, 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)), *cert. granted sub nom. Dollar General Corp. v. Miss. Band of Choctaw Indians*, 135 S. Ct. 2833 (2015).

In this case, Plaintiffs entered into the kind of consensual commercial relationship with a tribal member contemplated in *Montana*. The Loan Agreements—which borrowers had the opportunity to review before executing—put Plaintiffs on notice that they were engaging in a commercial transaction with a

tribal member that would be considered consummated "within the exterior boundaries of the … Reservation." (Dkt. 26-1 at 7, 9.)[22] *See* Part VI.C.2, *infra; 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").

2. 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. (Dkt. 16, ¶ 62.) Under CRST law, 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 a company owned by an individual Indian is considered "Indian" under tribal law, *even if the company is incorporated under South Dakota law*. *Cheyenne River Tel. Co. v. Pearman*, No. 89-006-A, slip op. at 3 (CRST Ct. App. 1990) (Dkt. 26-10 at 4). This tribal-court interpretation of CRST law defining which entities can claim the rights of tribal membership is dispositive because "Indian tribes retain their

[22] Plaintiffs' Loan Agreements all stated, "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." (Dkt. 26-1 at 9.)

inherent power to determine tribal membership" as a fundamental sovereign right. *Montana*, 450 U.S. at 564.

Further, other courts have 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 (S.D. 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).[23] Accordingly, Plaintiffs' Loan Agreements must be treated as consensual commercial relationships with a tribal member for purposes of *Montana*. *See* 450 U.S. at 565-66.

3. Plaintiffs Engaged In On-Reservation Conduct.

Plaintiffs' interactions with Western Sky constituted on-Reservation activity. It is a universal rule that "the place of the contract is the place where the last act necessary to the completion of the contract was done." 2 Richard A. Lord, *Williston on Contracts* § 6:62 (4th ed. 2007). "To determine where the contract was made, we look to the place where the last act necessary to give validity to the

[23] Contrary to *amici*'s allegations, Western Sky does not claim to be an "arm of the tribe" that possesses sovereign immunity. *See* Br. of *Amici Curiae* Nat'l Consumer Law Ctr. *et al.*, at 9-15. Rather, Western Sky is treated as a *member* of the tribe under the CRST's own caselaw. *See Pearman*, No. 89-006-A, at 3.

contract occurred." *Herrera ex rel. Varela v. Martin*, 642 S.E.2d 309, 312 (Va. Ct. App. 2007) (internal quotation marks and alterations omitted)).

In this case, the last act of contract formation took place on the Reservation. Borrowers electronically signed Loan Agreements and then Western Sky conducted a final audit review and decided whether to fund their loans. (Dkt. 26-1, ¶ 5.) This review and acceptance occurred in Western Sky's offices on the Reservation; 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 the 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. 2 *Williston on Contracts* § 6:62; *Herrera*, 642 S.E.2d at 312; *see also 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 tribal jurisdictional analysis). Further, the Loan Agreements state that they are "fully performed within" the Reservation and are "executed as if [Plaintiffs] were physically present" on the Reservation. (Dkt. 26-1 at 7.) Given these facts, under *Montana*, the CRST has jurisdiction over all disputes involving the Loan Agreements, including disputes over whether Delbert serviced those agreements in accord with the Loan Agreements and governing law.

The district court gave two reasons why it rejected tribal exhaustion: the "conduct at issue in this action did not involve an Indian-owned entity," and the conduct "did not occur on the CRST [R]eservation." (Dkt. 38 at 6.)[24] Respectfully, both of these reasons are incorrect.

First, by alleging that the loans are "unenforceable under Virginia law" (Dkt. 16, ¶ 159), Plaintiffs attack the making and validity of the loans themselves. This allegation *does* involve Indian-owned Western Sky, which originated the loans on the Reservation, as discussed above. (*See id.*, ¶¶ 60-62; Dkt. 26-1, ¶ 3.) Even if the making of the loans were not at issue here, tribal exhaustion would still be required because Delbert (via its principal Consumer Loan Trust) merely stepped into the shoes of the assignor Western Sky and thus can assert the same defenses that Western Sky could. *See, e.g.*, 29 *Williston on Contracts* § 74:47, at 541 (an "assignee stands in the shoes of the assignor" (internal quotation marks omitted)). Plaintiffs cannot circumvent tribal exhaustion merely by selectively choosing which defendants to sue, where the underlying transaction itself has such strong connections to the Reservation and a tribal-member-owned company. *Cf. Mayes v. Rapoport*, 198 F.3d 457, 460-61 (4th Cir. 1999) (discussing doctrine of

[24] The district court gave a third reason—that the conduct "did not threaten the integrity of the tribe" (Dkt. 38 at 6)—but that requirement goes to the so-called "second *Montana* exception," which Delbert did not advance below and which is separate from the first *Montana* exception dealing with "consensual commercial dealings."

fraudulent joinder, where a plaintiff selectively chooses defendants to destroy complete diversity and thus avoid removal to federal court).

Second, as discussed above, there *is* on-Reservation activity here: the Loan Agreements state that they are "fully performed within" the Reservation and are "executed … as if [Plaintiffs] were physically present" on the Reservation (Dkt. 26-1 at 7), and the Loan Agreements were formed on the Reservation when Western Sky made the final decision whether to fund the loan (Dkt. 26-1, ¶ 5). Indeed, two other district courts have ordered exhaustion in nearly identical circumstances. In *Heldt*, the District of South Dakota—which has considerable expertise on issues of tribal law—analyzed the same contractual language at issue here and concluded that exhaustion was required because "[t]ribal courts rarely lose the first opportunity to determine jurisdiction." 12 F. Supp. 3d at 1186 (internal quotations omitted).[25] *Heldt* concluded that the defendants had established a colorable claim to jurisdiction because (a) Western Sky is considered a tribal member for purposes of tribal exhaustion given that 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 1186-87. Accordingly, the court ordered tribal exhaustion.

[25] 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 *Brown*, the Middle District of North Carolina faced a similar suit and likewise concluded that there was at least colorable tribal jurisdiction because "some of Defendants' actions involved alleged tribal entities and/or tribal members" and "'in today's modern world of business transactions through internet or telephone, requiring physical entry on the reservation particularly in a case of a business transaction with a consent to jurisdiction clause, seems to be requiring too much.'" 2015 WL 413774, at *10 (quoting *Heldt*, 12 F. Supp. 3d at 1186). *Brown* ordered tribal exhaustion, refusing to follow the Seventh Circuit's decision in *Jackson*, which, as discussed next, had erroneously concluded that tribal jurisdiction was not colorable. *Id.* at *11.

4. The Seventh Circuit's Decision In *Jackson* Was Erroneous

In the district court, Plaintiffs relied heavily on the Seventh Circuit's opinion in *Jackson*, which held that the CRST courts did not have jurisdiction over Western Sky loans because (1) the borrowers never *physically* "enter[ed] the reservation" during the lending process, 764 F.3d at 782; and (2) there was no showing in *Jackson* that the Loan Agreements "implicate[] any aspect of the tribe's inherent sovereign authority," *id.* at 783 (internal quotation marks omitted). *Jackson* is unpersuasive in the modern Internet economy because it prevents tribal member-owned businesses—and *only* tribal member-owned businesses—from

having their business activities governed by their home jurisdiction's law.[26] Like the court in *Brown*, this Court should reject *Jackson*'s reasoning and hold that the tribal exhaustion doctrine applies.

Jackson's holding that tribal jurisdiction exists only if a non-member physically entered the reservation is in direct conflict with the Fifth Circuit's ruling in *Dolgencorp*, which held that "the Supreme Court has never explicitly held that Indian tribes lack inherent authority to regulate nonmember conduct that takes place outside their reservations." *Dolgencorp*, 746 F.3d at 176 n.7. *Jackson* also conflicts with the Eighth Circuit's ruling in *Laducer*, which rejected the premise that a nonmember's physical entry onto a reservation is the *sine qua non* of tribal court jurisdiction, instead asking only whether the claim at issue "arises out of and is intimately related to" an agreement that "*relates to* activities on tribal land." 725 F.3d at 884 (emphasis added). Even the dissent in *Dolgencorp* cited *Laducer* as demonstrating that it is incorrect to conclude that tribes lack inherent authority to hear claims against nonmembers based on conduct occurring outside the

[26] Certain interstate lenders may take advantage of their home state's laws on interest rate limits when lending to borrowers in states with more restrictive laws. For example, in *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1209, 1213-14 (9th Cir. 2001), the Ninth Circuit upheld a Nevada lender's choice of Nevada law and upheld a loan made to California residents secured by California property that set interest at a rate usurious under California law, because Nevada has made "a choice to favor individual contract decisions and the free flow of capital." Indian-owned lenders operating on reservations also should be able to rely on the laws of their home jurisdictions.

reservation. *See Dolgencorp*, 746 F.3d at 183 & n.12 (Smith, J., dissenting). *Jackson* thus has little support in case law.

Jackson also ignores modern economic reality and how that reality intersects with the fact that many Indian reservations, including the Cheyenne River Indian Reservation, are in such remote locations that e-commerce is their only viable path to economic development. *Montana* was decided in 1981, when e-commerce was unknown. As *Heldt* and *Brown* both concluded, "in today's modern world of business transactions through [I]nternet or telephone, requiring physical entry on the reservation" for tribal jurisdiction "seems to be requiring too much," especially "in a case of a business transaction with a consent to jurisdiction clause." *Brown*, 2015 WL 413774, at *10 (internal quotation marks omitted); *Heldt*, 12 F. Supp. 3d at 1186.

Further, *Jackson* conflicts with the strong, congressionally mandated policy of furthering Indian economic development. "A key goal of the Federal Government is to render Tribes more self-sufficient ... rather than relying on federal funding." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring). Yet *Jackson* prohibits tribes from applying their own laws to a large swath of commercial transactions—Internet-based activities—that are vital to the ability of on-reservation Indians to conduct their own businesses, which in turn affects directly the economies of many Indian tribes.

If accepted, *Jackson* will put Indian-owned businesses that operate nationally at a competitive disadvantage, forcing them to navigate a hodge-podge of 50 states' laws by precluding them from adopting their home jurisdiction's laws to ensure uniform regulation. Non-Indian owned businesses face no such restraints, giving them an artificial competitive advantage that threatens to destroy the federal policy favoring the development of Indian-owned business operating from Indian lands.[27]

* * *

For all of these reasons, if this Court addresses Delbert's cross appeal, the Court should reject *Jackson* and instead order Plaintiffs to sue in CRST court, pursuant to the logic of *Heldt*, *Brown*, *Dolgencorp*, and *Laducer*.

CONCLUSION

Because AAA and JAMS are available to hear this dispute—and indeed have already accepted arbitrations with this very same arbitration clause—this Court should affirm the district court's order compelling this case to arbitration. However, if the Court disagrees, it should address Delbert's conditional cross-appeal and reverse the district court's order refusing to dismiss the suit on the grounds of *forum non conveniens* and tribal exhaustion.

[27] *Jackson* is unpersuasive for the additional reason that it created a circuit split by concluding that tribal jurisdiction over a non-member was permissible only where the dispute implicated internal tribal relations or self-rule, *see* 764 F.3d at 783 n.43—a position that *Jackson* acknowledged has been rejected by the Fifth Circuit, *see Dolgencorp*, 746 F.3d at 175.

Dated: August 13, 2015

Respectfully submitted,

/s/ Brian J. Fischer

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Counsel for Defendant/Appellee/Cross-Appellant Delbert Services Corporation.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would assist the Court in full consideration of the issues presented here.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 14,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a) & (7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point times New Roman font.

/s/ Brian J. Fischer
BRIAN J. FISCHER

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August 2015, I effected service upon counsel for Plaintiffs by electronically filing the foregoing with the Clerk of the court using the CM/ECF system.

/s/ Brian J. Fischer
BRIAN J. FISCHER

ADDENDUM

INDEX

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January 7, 2015

Christopher S. Carver, Esq.
Akerman, LLP
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Sun Trust International Center
25th Floor
Miami, FL 33131-1714
Via Email to: christopher.carver@akerman.com

Case Number: 01-14-0002-1301

Todd Chitoff
v.
CashCall, Inc., WS Funding, LLC, and
Delbert Services Corporation

RESPONSE DATE: January 21, 2015

Dear Mr. Carver:

The claimant has filed with us a Demand for Arbitration. The American Arbitration Association ("AAA") has determined that the Consumer Arbitration Rules ("Consumer Rules") apply to this dispute. The Consumer Rules may be found on our website at www.adr.org.

We are in receipt of a court order compelling arbitration. Accordingly, we are proceeding on that basis.

Pursuant to the Consumer Rules Fee Schedule, the consumer pays a $200 filing fee. As per the arbitration clause, the business will advance the consumer's filing fees. So that the filing requirements are complete, the business is requested to submit the consumer's fee of $200, the business' administrative fee of $1,500, the expedited consumer clause review fee of $250 and its arbitrator's compensation deposit of $1,500.00, totaling $3,450. Please make the check payable to the American Arbitration Association and include a reference to the case number.

Payment of the filing fees is a filing requirement under the rules. Outstanding payments should be received no later than the above response date. If the parties do not make timely payment of the fees, the AAA may decline to administer this matter. Also note that should either party not pay their fees in accordance with the Consumer Rules, the opposing party has the option to do so, thereby allowing us to proceed with the administration of this case. That party may then request that the arbitrator assess these costs in the award, per the fee schedule. It should be noted that the consumer's satisfaction of the filing requirements triggers the business' obligation to promptly pay its share of the filing fees under the rules and the business may owe all or a portion of the filing fees even if the matter is settled or withdrawn.

Absent receipt of the requested items by the above response date, we may decline to administer this dispute. Please email ConsumerFiling@adr.org if you have any questions.

The AAA appreciates the opportunity to assist you with your dispute resolution needs.

Sincerely,

/s/ Janelle Young-Matias,
on behalf of

Consumer Filing Team
ConsumerFiling@adr.org

Fax (877) 304-8457

CC: Jonathan Z. Kantor, Esq.
Law Office of Jonathan Z. Kantor, PA
304 Indian Trace
#117
Weston, FL 33326
Via Email to: jzkantor@yahoo.com

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Richard H. Vura Jr., Esq.

Profession	Attorney, Mediator, Arbitrator
Current Employer-Title	Self-employed
Work History	Attorney, Arbitrator and Mediator, Self-employed, 1984-present; Vice President, Human Resources/Labor Counsel, Wometco Enterprises, Inc., 1975-84; Labor Attorney, Eastern Air Lines, Inc., 1973-75; Labor Relations, Ford Motor Co. and Gould Inc., 1962-73.
Experience	Represented plaintiffs and defendants in litigation and transactions in employment discrimination and contracts, trials in commercial disputes, real estate, probate, domestic relations, partnership disputes, personal injury, and insurance. Experience in federal appellate cases in labor, National Labor Relations Board, and Social Security disability, as well as state appellate commercial cases. Negotiated over 150 labor and individual employment contracts, representing unions, employers, executives, and professional employees. As an instructor at Cuyahoga Community College, taught Industrial Psychology (1971).
Alternative Dispute Resolution Experience	As hearing officer, resolved grievances involving professional, technical, and rank-and-file employees in the airline and automotive industries. Advocated over 400 arbitrations on behalf of employees and employers. Since 1990, mediated over 7,000 cases concerning personal injury, medical and legal malpractice, probate, real estate, construction disputes, commercial contracts, employment contracts and discrimination, hurricane/insurance, and real estate foreclosures. Court-appointed Special Master in a complex condominium dispute. Completed mediating and arbitrating an extensive volume of life-insurance mass claims disputes as a member of both Florida and national panels. Mediator as part of the U.S. Postal Service Redress Program; Publix employee termination cases, and RV Lemon Law cases. Personnel Appeal Hearing Examiner for Miami-Dade cases involving disciplinary action against county employees. Arbitrated over 200 cases involving commercial and employment/labor issues. Panel member for International Law moot arbitration - Florida International University, 2010.
Alternative Dispute Resolution Training	AAA Ethics 101: Arbitrators, Mediators & Attorneys, 2014; AAA Developing an ADR Plan to Resolve Employment D, 2013; AAA Webinar, Developing an ADR Plan to Resolve Employment Disputes, 2012; AAA Webinar, Developing an ADR Plan to Resolve Employment Disputes, 2012; AAA Get Smart: Issues Surrounding Surveillance in the Workplace, 2010; USF, Foreclosure Mediation Certification, 2010; Fannie Mae and Freddie Mac, Foreclosure Options, 2010; Collins Center for Public Policy, Florida Foreclosure Training, 2009; Collins Center for Public Policy, Insure Umpire Training, 2008; Windstorm Insurance Network, Inc., Windstorm Insurance Conference, 2007; AAA Chairing an Arbitration Panel: Managing Procedures, Process & Dynamics (ACE005), 2005; AAA Arbitration Awards:

Safeguarding, Deciding & Writing Awards (ACE001), 2005; Collins Center for Public Policy, Florida Hurricane Insurance Training; Nova Southeastern University, Advanced Mediation Training Workshop, 2003; AAA Employment Arbitrator II Training, 2002; Collins Center, Florida Road Vehicle Lemon Law ADR Program, 2002; AAA Arbitrator Update, 2001; Florida Dispute Resolution Center, Training in Diversity Mediation, 2001; Publix Pilot Mediation Program Training, 2001; U.S.P.S., Transformative Mediation Training, 1999; John Hancock Life Insurance, ADR Neutral Training, 1999; AAA Commercial Arbitrator Training, 1999; AAA Employment Arbitrator Training, 1996; AAA Introductory Arbitrator Training Workshop, 1995; Florida Department of Insurance, Hurricane Andrew Mediation Training, 1993; AAA Mediation Training, 1991; AAA Florida Arbitration Qualification, 1991; Dispute Management Inc., Florida Supreme Court Mediation Certification, 1990; Florida Dispute Resolution Center, Court-ordered Arbitration Training, 1990.

Education

Bowling Green University (BS, Business Administration-1961); Case-Western Reserve University (MBA-1966); Cleveland State University (JD-1970).

Professional Licenses

Admitted to the Bar: Ohio, 1971; Florida, 1974; U.S. District Court: Southern (1974) and Middle (1991) Districts of Florida; Trial Bar, 1992; District of Arizona, 1990. Supreme Court Certified Mediator, Florida, 1990; Qualified Arbitrator, Florida, 1990. Hurricane Insurance Appraisal Umpire, Florida, 2007; Certified Foreclosure Mediator, Florida (per AOSC09-54), 2010.

Professional Associations

Florida Bar Association; Florida Association of Professional Mediators; Windstorm Insurance Network.

Publications and Speaking Engagements

"Personal Injury Mediation," chapter author, TRAINING COURSE WORKBOOK, Nation's Business Institute, 1994. Presentation before Florida Insurance Task Force regarding hurricane insurance issues - Tallahassee State House, 2005; presentation regarding hurricane insurance issures at Barry University, Miami, 2006.

Citizenship

United States of America

Locale

Weston, Florida, United States of America

Compensation

Hearing:	$175.00/Hr
Study:	$175.00/Hr
Travel:	$0.00/Hr
Cancellation:	$1000.00/Hr
Cancellation Period:	5 Days
Comment:	Per diem for hearing. Study time charged at hourly rate. Cancellation fee of $1000 charged when final hearing date cancelled within five (5) days of scheduled final hearing.

AMERICAN ARBITRATION ASSOCIATION | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

Case Number: 01-14-0002-1301

Todd Chitoff
-vs-
CashCall, Inc., WS Funding, LLC, and
Delbert Services Corporation

NOTICE OF APPOINTMENT

To: Richard H Vura

It is most important that the parties have complete confidence in the arbitrator's impartiality. Therefore, please disclose any past or present relationship with the parties, their counsel, or potential witnesses, direct or indirect, whether financial, professional, social or of any other kind. This is a continuing obligation throughout your service on the case and should any additional direct or indirect contact arise during the course of the arbitration or if there is any change at any time in the biographical information that you have provided to the AAA, it must also be disclosed. Any doubts should be resolved in favor of disclosure. If you are aware of direct or indirect contact with such individuals, please describe it below. Failure to make timely disclosures may forfeit your ability to collect compensation. The Association will call the disclosure to the attention of the parties.

You will not be able to serve until a duly executed Notice of Appointment is received and on file with the AAA. Please review the attached Disclosure Guidelines and, after conducting a conflicts check, answer the following questions and complete the remainder of this Notice of Appointment:

1.	Do you or your law firm presently represent any person in a proceeding to any party to the arbitration?	YES	(NO)
2.	Have you represented any person against any party to the arbitration?	YES	(NO)
3.	Have you had any professional or social relationship with counsel for any party in this proceeding or the firms for which they work?	YES	(NO)
4.	Have you had any professional or social relationship with any parties or witnesses identified to date in this proceeding or the entities for which they work?	YES	(NO)
5.	Have you had any professional or social relationship of which you are aware with any relative of any of the parties to this proceeding, or any relative of counsel to this proceeding, or any of the witnesses identified to date in the proceeding?	YES	(NO)
6.	Have you, any member of your family, or any close social or business associate ever served as an arbitrator in a proceeding in which any of the identified witnesses or named individual parties gave testimony?	YES	(NO)
7.	Have you, any member of your family, or any close social or business associate been involved in the last five years in a dispute involving the subject matter contained in the case, which you are assigned?	YES	(NO)

8.	Have you ever served as an expert witness or consultant to any party, attorney, witness or other arbitrator identified in this case?	YES	NO
9.	Have any of the party representatives, law firms or parties appeared before you in past arbitration cases?	YES	NO
10.	Are you a member of any organization that is not listed on your panel biography that may be relevant to this arbitration?	YES	NO
11.	Have you ever sued or been sued by either party or its representative?	YES	NO
12.	Do you or your spouse own stock in any of the companies involved in this arbitration?	YES	NO
13.	If there is more than one arbitrator appointed to this case, have you had any professional or social relationships with any of the other arbitrators?	YES	NO
14.	Are there any connections, direct or indirect, with any of the case participants that have not been covered by the above questions?	YES	NO

Should the answer to any question be "Yes", or if you are aware of any other information that may lead to a justifiable doubt as to your impartiality or independence or create an appearance of partiality, then describe the nature of the potential conflict(s) on an attached page.

Please indicate one of the following:

- ✓ I have conducted a check for conflicts and have **nothing to disclose.**
- I have conducted a check for conflicts and have **made disclosures on an attached sheet.**

THE ARBITRATOR'S OATH

State of Florida

SS:

County of Broward

I attest that I have reviewed my AAA resume which the AAA provided to the parties on this case and confirm it is current, accurate and complete.

I attest that I have diligently conducted a conflicts check, including a thorough review of the information provided to me about this case to date, and that I have performed my obligations and duties to disclose in accordance with the Rules of the American Arbitration Association, Code of Ethics for Commercial Arbitrators and/or all applicable statutes pertaining to arbitrator disclosures.

I understand that my obligation to check for conflicts and make disclosures is ongoing for the length of my service as an arbitrator in this matter, and that failing to make appropriate and timely disclosures may result in my removal as arbitrator from the case and/or my removal from the AAA's Roster of Neutrals.

The Arbitrator being duly sworn, hereby accepts this appointment, and will faithfully and fairly hear and decidethe matters in controversy between the parties in accordance with their arbitration agreement, the Code of Ethics, and the rules of the American Arbitration Association will make an Award according to the best of the arbitrator's understanding.

Dated: 2-12-15 Signed: Richard H. Vuce, Jr

Sworn before me this day of , 20

JAMS

THE RESOLUTION EXPERTS®

NOTICE OF INTENT TO INITIATE ARBITRATION

March 4, 2015

NOTICE TO COUNSEL

RE: **Justin Keehn v. CashCall, Inc. and Delbert Services Corp.**
Reference #: 1340011326
Sent Via Email and US Mail

Dear Parties:

JAMS has received a Demand for Arbitration in the above-referenced matter pursuant to a mandatory pre-dispute arbitration clause contained in a contract between the parties.

Pursuant to the parties' pre-dispute arbitration agreement and JAMS policy, this arbitration shall be conducted in accordance with the JAMS Comprehensive Arbitration Rules. It is important to familiarize yourself with the arbitration rules. A copy of these rules can be obtained by visiting our website at www.jamsadr.com. Please note that this matter, being filed by a consumer against a corporation, will be further governed by JAMS Minimum Standards for Procedural Fairness in Consumer Arbitrations (enclosed).

Under JAMS Minimum Standards, the Consumer may only be required to pay $250.00 toward the arbitration. All other fees associated with this Arbitration shall be borne by the company/non-consumer party. Thus, Respondent is required to pay the remaining case management fees associated with initiating the arbitration. Under appropriate circumstances, the Arbitrator may award JAMS fees and expenses against any party. JAMS agreement to render services is not only with the parties, but extends to the attorneys or other representatives of the parties in arbitration.

Upon receipt of the initial Case Management Fee from the parties, JAMS will formally commence this matter and proceed with the arbitrator selection process.

Contact me at 612-332-8225 or by email at dlewis@jamsadr.com if you have questions.

Sincerely,

Debra A. Lewis
Case Manager

333 SOUTH SEVENTH STREET SUITE 2550 MINNEAPOLIS, MN 55402 TEL 612-332-8225 FAX 612-332-9887

T: 312-655-0555
F: 312-655-0644

- *Best Lawyers in America*, 2014

Case Manager
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JAMS
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ljones@jamsadr.com

Hon. David H. Coar (Ret.)

Hon. David H. Coar (Ret.) served as United States District Judge for the Northern District of Illinois for 16 years and as a United States Bankruptcy Judge for 8 years. From 1979 to 1982, he served as the first United States Bankruptcy Trustee in the Northern District of Illinois. As Associate Professor of Law at DePaul University College of Law, Judge Coar taught courses on ethics, corporations, corporate finance, constitutional law, labor law, and professional responsibility. As a practicing lawyer, Judge Coar represented private plaintiffs in the case that determined how Title VII impacted the merger of previously segregated lines of progression in the steel industry.

Judge Coar has traveled extensively across the globe to consult on judicial and economic issues and has participated in educational programs for foreign judges in the U.S. and overseas. He has participated in programs in China, Russia, Nigeria, and Cameroon sponsored by law schools, the National Center for State Courts, the U.S. Department of State, and the U.S. Department of Commerce. The Bar has praised Judge Coar for his excellent legal ability, handling of complex cases, integrity, and independence.

ADR Experience and Qualifications

- As a U.S. District Judge, he has tried and settled hundreds of cases involving the full array of matters subject to federal jurisdiction including class action Multi District Litigation, complex corporate, commercial, employment, intellectual property, mass tort, and securities cases. Maintaining a special interest in automation within the courts, he was a member of the Information Technology Committee, heading the Budget Subcommittee.
- Prior to being appointed to the District Court, Judge Coar was appointed a U.S. Bankruptcy Judge in 1986, where he oversaw large corporate reorganization and bankruptcy cases.
- In 1979, pursuant to the newly enacted Bankruptcy Code, Judge Coar became one of ten U.S. Trustees in the country, under a pilot program established within the U.S. Department of Justice. In that capacity, he monitored cases and appointed and supervised trustees and examiners in bankruptcy proceedings.
- As a former member of the Bankruptcy and District Judge Education Committees of the Federal Judicial Center, he has been a frequent presenter at its programs.

Representative Matters

- **Bankruptcy:**
  - Presided over the first large (and most successful) asbestos bankruptcy case resulting in a consensual plan that has served as a model for subsequent cases. Claims totaling over $92 billion dollars were resolved. Over 90% of the stock of the reorganized company was issued to a trust for asbestos injury claimants. Complicated (and at the time, unresolved) issues of future claims, corporate governance, and liability of the trust were successfully navigated.
  - Successfully settled a $30 million dollar avoidance action in a bankruptcy case involving a foreign creditor of a debtor.
- **Class Action MDL Cases:**
  - Served as assignee judge in three large class action multi-district litigation cases involving alleged product liability, antitrust, and securities/breach of fiduciary duties issues.
- **Employment:**
  - Resolved case of first impression under the Wage and Hour law after a five week trial and remand after appeal.
  - Presided over several large Title VII class action cases involving claims of race, sex, and age discrimination, all of which were resolved short of trial.
- **Intellectual Property:**
  - Presided over many complex intellectual property cases including patent, copyright and trademark/trade dress matters. Several of the trade dress cases involved the rights of franchisees after termination of the franchise agreements. They were resolved during trial by addressing the matter of settlement at the conclusion of each trial day.
- **Lender Liability:**
  - Presided over and resolved many lender cases including counterclaims for equitable

subordination and claims of breach of fiduciary duty by the lender.

- **Securities:**
  - Resolved complex securities matters including cases alleging breach of fiduciary duty, violations of the Williams Act, and fraud under federal and state securities law. Some of these cases included determining whether a particular instrument was a security within the meaning of the securities laws.

Honors, Memberships, and Professional Activities

- Member, *Chartered Institute of Arbitrators*
- *Best Lawyers in America*, 2014
- Member, Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States, 2007-2010
- Member, Information Technology Committee, Judicial Conference of the United States, 1999-2005 (served as chair of the budget subcommittee)
- Visiting Committee, University of Chicago Law School, 1998-2000
- Conferee, Emeritus, National Bankruptcy Conference
- Member, American Bankruptcy Institute
- Member, American College of Bankruptcy
- Past board member, Federal Judges Association
- Past board member, National Conference of Bankruptcy Judges
- Served on the editorial board of the *American Bankruptcy Law Journal*
- Speaker on topics ranging from bankruptcy, intellectual property, sentencing, employment discrimination, and the use of technology in the courts
- Law360's Minority Powerbrokers Q&A series with Judge David Coar, December 3, 2014
-

Background and Education

- Judge, United States District Court, Northern District of Illinois, 1994-2010
- Judge, United States Bankruptcy Court, Northern District of Illinois, 1986-1994
- Visiting Professor of Law, Marshall-Wythe Law School, College of William and Mary, 1985
- Associate Dean and Associate Professor of Law, DePaul University College of Law, 1974-1979 and 1982-1994
- United States Trustee, United States District Court for the Northern District of Illinois, 1979-1982
- Private law practice, Mobile and Birmingham, AL, 1971-1974
- Carnegie Foundation Intern, NAACP Legal Defense and Education Fund, Inc., 1970-1971
- LL.M., Harvard Law School, 1970
- J.D., Loyola University Law School, 1969
- B.A., Syracuse University, 1964
- United States Marine Corps Reserves, 1965-1971
- Sergeant, United States Marine Corps, 1965