UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CASE NO.: 2:15-cv-03639-GAM

RODELLA SMITH,

Plaintiff,

v.

WESTERN SKY FINANCIAL, LLC, DELBERT SERVICES CORP., CASHCALL, INC., JOHN DOES 1-10,

Defendants. /

DEFENDANTS WESTERN SKY FINANCIAL, LLC, DELBERT SERVICES CORP. AND CASHCALL, INC.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT OR TO COMPEL ARBITRATION AND STAY OR DISMISS THE CASE AND MEMORANDUM OF LAW IN SUPPORT

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants Western Sky Financial, LLC ("Western Sky"), Delbert Services Corporation ("DSC"), and CashCall, Inc. ("CashCall")[1] move to dismiss the First Amended Civil Action Complaint ("Amended Complaint") [Doc. 13] filed by Plaintiff Rodella Smith ("Smith" or "Plaintiff") under the doctrine of *forum non conveniens* or the doctrine of tribal exhaustion; or alternatively, to compel arbitration of this dispute as required by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* As set forth below, Smith's claims are centered on a consumer loan agreement with a broad forum selection/choice of law provision that requires all in-court disputes to be heard only by the courts of the Cheyenne River Sioux Tribe and a broad arbitration provision through which Smith agreed that "any controversy or

[1] CashCall does not concede that service by certified mail upon it is effective service. However, CashCall will not waste judicial resources contesting service, but rather joins in this Motion.

claim" between she and, *inter alia*, the holder of the note and "any marketing, servicing and collection representatives and agents" – which includes DSC and CashCall – would be arbitrated. Therefore, this action should be dismissed.

I. INTRODUCTION

In bringing suit in this Court for alleged violations of unspecified usury laws, the Fair Debt Collection Practices Act, ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, the Fair Credit Extension Uniformity Act ("FCEUA"), 73 P.S. § 2270.1, *et seq.*, and the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1, *et seq.*, Smith ignores two independent contractual provisions in the underlying loan agreement that render this Court an improper forum. Both require dismissal of the Amended Complaint.

Smith filed a four-count Amended Complaint on August 28, 2015. The Amended Complaint raises an FDCPA claim, which gives rise to federal question jurisdiction. *See* Amended Complaint at ¶ 1 [Doc. 13]. Smith also raises a claim for usury, and claims under the FCEUA and UTPCPL. *Id*. at ¶¶ 24, 32, and 35.

Smith's claims all relate to a loan she obtained from Western Sky, [Doc. 13, ¶ 8], that was subsequently assigned to DSC and CashCall for servicing. [Doc. 13, ¶¶ 16-17]. The loan is memorialized in the "Western Sky Consumer Loan Agreement" executed by Smith on March 7, 2012 ("Loan Agreement"). A copy of the Loan Agreement is attached hereto as **Exhibit A**. The Loan Agreement contains comprehensive dispute resolution provisions that render this Court an improper forum. Further, Indian law requires Smith to bring suit in tribal court because Western Sky is owned by an enrolled member of the Cheyenne River Sioux Tribe ("CRST") and operates from the Cheyenne River Indian Reservation (the "Reservation") under CRST law. This Court should enforce the provisions of the Loan Agreement and dismiss the Amended Complaint for three reasons.

First, the Loan Agreement provides that the loan is "**subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation**." Ex. A, p. 1 (emphasis in original). Moreover, Smith "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." *Id*. Under the terms of the Loan Agreement, every aspect of any dispute relating to the Loan Agreement, the Loan Agreement's enforcement, or the Loan Agreement's interpretation that is not subject to arbitration should be resolved in tribal court. Smith completely ignores this clause, and the Loan Agreement entirely, in her Amended Complaint. Other federal district courts have enforced the identical Forum-Selection Clause and dismissed similar cases. *See, e.g., Spuller v. CashCall, Inc.*, No. 5:13-CV-806-D (E.D.N.C. Mar. 5, 2014) (Dever, J.) (a copy of which is attached as **Exhibit B**). This Court should follow suit and dismiss Smith's Amended Complaint under the doctrine of *forum non conveniens*.

Second, the Court should dismiss this case based on the doctrine of tribal exhaustion, which requires private parties whose claims implicate an Indian tribe's jurisdiction to bring suit in tribal court. Under clear Supreme Court precedent, tribal exhaustion is applicable where there is a "colorable" or "plausible" claim that a dispute falls within tribal jurisdiction. As a federal court in the Middle District of North Carolina held earlier this year in analyzing an identical contract governing a Western Sky loan, tribal jurisdiction is at least colorable here because Smith entered into the Loan Agreement with a company wholly owned by an enrolled member of the CRST and operating from the Reservation under CRST law, and in the Loan Agreement Smith expressly consented to the CRST's sole jurisdiction over disputes such as this one. *See Brown v. Western Sky Financial, LLC, et al.*, No. 1:13CV255, 2015 WL 413774, * 12 (M.D.N.C. Jan. 30,

2015). *See also Heldt v. Payday Fin., LLC*, 12 F. Supp. 3d 1170, 1186-87 (D.S.D. 2014) (requiring determination by tribal court of whether jurisdiction exists over plaintiff). A stay or dismissal pending exhaustion is thus particularly appropriate here given that the tribal court is poised to offer authoritative guidance as to tribal jurisdiction.

Third, the Loan Agreement contains a broad arbitration provision (the "Arbitration Clause") that mandates that this entire case be sent to arbitration. Ex. A, p. 4. The Arbitration Clause applies to all claims relating to the Loan Agreement, and requires arbitration of any dispute as to the validity, enforceability, or scope of the Arbitration Clause itself. Under the Federal Arbitration Act ("FAA"), this Court should enforce the Arbitration Clause and stay or dismiss this case. Several other federal courts have recently enforced the identical Arbitration Clause, referred the matter to arbitration and dismissed the federal court action. *See Kemph v. Reddam*, No. 13 cv 6785, 2015 WL 1510797, at * 6-7 (E.D. Ill. Mar. 27, 2015); *Williams v. CashCall, Inc.*, No. 14-cv-903, 2015 WL 1219605, at * (E.D. Wis. Mar. 17, 2015); and *Chitoff v. CashCall, Inc., et al.*, No. 0:14-CV-60292, 2014WL6603987, * 2 (S.D. Fla. Nov. 17, 2014).

II. FACTUAL BACKGROUND

On or about March 7, 2012, Smith entered into the Loan Agreement with Western Sky (the "Loan"). Ex. A. Smith alleges the Loan was usurious and that Defendants violated the FDCPA, FCEUA and UTPCPL in servicing the Loan. Specifically, she alleges that Defendants, or one or more of them: (1) contacted her through means which were threatening; (2) contacted her after she requested not to be contacted; and, (3) reported a debt she did not owe. [Doc. 13 at ¶¶ 11, 12, 13 and 28].

The Loan Agreement contains a comprehensive Forum-Selection/Choice of Law Clause. The very first sentence of the Loan Agreement states, in clear and conspicuous type, that the Loan Agreement "**is subject solely to the exclusive laws and jurisdiction of the Cheyenne**

River Sioux Tribe, Cheyenne River Indian Reservation." Ex. A, p. 1 (emphasis in original).

Smith further agreed that:

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

Id. The Loan Agreement contains an additional paragraph providing that tribal law governs the parties' agreements:

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

Id. at p. 3.

The Loan Agreement also contains a clearly-identified, broad arbitration provision requiring every dispute relating to the loan to be arbitrated:

> **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.
>
> **Agreement to Arbitrate.** **You agree that any Dispute**, except as provided below, **will be resolved by Arbitration**, which 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.
>
> **Arbitration Defined.** Arbitration is a means of having an independent third party resolve a Dispute. **A "Dispute" is any controversy or claim between you and** Western Sky or **the holder or servicer of the Note. The term Dispute is to be given its broadest possible meaning and includes, without limitation, all claims or demands** (whether past, present, or future, including events that occurred prior to the opening of this Account), **based on any legal or equitable theory** (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief). **A Dispute includes, by way of example and without limitation, any claim based upon** marketing or solicitations to obtain the loan and **the handling or servicing of my account** whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement. For purposes of this Arbitration Agreement, **the term "the holder" shall include** Western Sky or the then-current note holder's employees, officers, directors, attorneys, affiliated companies, predecessors, and assigns, as well as any marketing, **servicing**, and **collection representatives or agents**.

Id. at pp. 3-4 (heading bold in original; all other emphasis added). Accordingly, pursuant to this arbitration provision, Smith agreed to arbitrate all claims arising from the Loan Agreement, including all claims against the holder of the underlying note "as well as any marketing, servicing, and collection representatives or agents." *Id*. at p. 4. The Loan Agreement further provided that Western Sky "may assign or transfer this Loan Agreement or any of our rights under it at any time to any party." *Id*. at p. 3. Smith agreed to be bound by the terms and conditions of the Loan Agreement by signing it in accordance with the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, *et seq*. *Id.* at pp. 3, 6.

In executing the Loan Agreement, Smith affirmatively agreed to the following by placing a "√" in the box beside each statement:

> YOU HAVE READ AND UNDERSTAND THE ARBITRATION SECTIONS OF THIS NOTE AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THAT SECTION.
>
> **YOU HAVE READ ALL OF THE TERMS AND CONDITIONS OF THIS PROMISSORY NOTE AND DISCLOSURE STATEMENT AND AGREE TO BE BOUND THERETO. YOU UNDERSTAND AND AGREE THAT YOUR EXECUTION OF THIS NOTE SHALL HAVE THE SAME LEGAL FORCE AND EFFECT AS A PAPER CONTRACT.**

Id. at p. 6 (capitals and bold in original).

On March 10, 2012, Western Sky sent Smith a "Notice of Assignment, Sale or Transfer or Servicing Rights" ("Notice of Assignment;" copy attached hereto as **Exhibit C**) informing her that her loan had been sold, that the loan would be serviced and handled by CashCall, and that CashCall would collect all payments under the Loan Agreement. *See* Ex. C. The Notice of Assignment also confirmed that "the terms and conditions of [Smith's] Promissory Note and Disclosure Statement will not change in any way," except that payments would now be made to CashCall. *Id*. At that time, CashCall was the holder's servicer with the right to service, handle, and collect on Smith's loan. *Id.*

Subsequently, on September 30, 2013, DSC sent Smith a "Notice of Transfer of the Servicing of Your Loan" ("Notice of Transfer;" copy attached hereto as **Exhibit D**) informing her that her loan had been sold, that the loan would be serviced and handled by DSC, and that DSC would collect all payments under the Loan Agreement. *See* Ex. D. The Notice of Transfer also confirmed that "the terms and conditions of [Smith's] loan as set forth in [Smith's] Promissory Note and Disclosure Statement will not change in any way," except that payments

would now be made to DSC. *Id.* At that time, DSC was the holder's servicer with the right to service, handle, and collect on Smith's loan. *Id.*[2]

Furthermore, Smith has alleged the Loan was serviced by CashCall and DSC. [Doc. 13, ¶¶ 16-17]. As the servicer, the provisions of the Loan Agreement apply to CashCall and DSC.

Smith improperly brought suit in this Court despite the clear and comprehensive dispute resolution provisions in the Loan Agreement, and as a result, this Court should require the claims be dismissed under the doctrine of *forum non conveniens*, the doctrine of tribal exhaustion or, alternatively, in favor of arbitration.

III. ARGUMENT

A. The Forum-Selection Clause Compels Dismissal Of The Amended Complaint.

The Loan Agreement contains a comprehensive Forum-Selection Clause that bars Smith from bringing suit in this Court. Ex. A, p. 1. By agreeing to the Forum-Selection Clause and the other provisions quoted above, Smith waived any right to bring suit in this Court for disputes relating to the Loan Agreement.

The Supreme Court has held that "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 580 (2013). "A district court . . . may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007) (citation omitted).

[2] For the sake of completeness, DSC advises that subsequently, on December 3, 2014, CashCall sent Smith a "Notice of Transfer of the Servicing of Your Loan" ("Notice of Transfer;" copy attached hereto as **Exhibit E**) informing her that the owner of the loan transferred servicing, that

1. The Forum-Selection Clause Should Be Enforced Under Federal Law.

Under federal law, forum-selection clauses are prima facie valid, and the party opposing enforcement bears a heavy burden of proof. *SKF USA, Inc. v. Okkerse*, 992 F. Supp. 2d 432, 444-45 (E.D. Pa. 2014). Enforcing the parties' agreed-upon forum "protects their legitimate expectations and furthers vital interests of the justice system," and "a valid forum-selection clause should be given controlling weight in all but the most exceptional cases." *Atl. Marine*, 134 S. Ct. at 581 (quotations and alteration omitted).

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

In *Atlantic Marine*, 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." *Id.* 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.*[3] A court may considering the following factors: (1) "the interest in having the trial of a diversity case in a forum that is at home with the law"; (2) "the local interest in having localized controversies decided at home"; and (3) "the administrative difficulties" posed by each forum. *Id.* at 581 n.6 (internal quotations omitted).

The public-interest factors "will rarely defeat" a forum-selection clause. *Id.* at 582. Here, the public-interest factors support enforcement of the Forum-Selection Clause.

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the loan would be serviced and handled by CashCall, and that CashCall would collect all payments under the Loan Agreement. *See* Ex. E.

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

First, the need to apply CRST law favors dismissal. The need to apply foreign law is a public-interest factor that mitigates in favor of the alternative forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 n.29 (1981) ("Many *forum non conveniens* decisions have held that the need to apply foreign law favors dismissal."). There is no doubt that foreign law would apply to Smith's action. Smith contractually agreed that the "Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation." Ex. A, p. 1. Smith also agreed "that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation." *Id.* These facts mitigate in favor of dismissal of Plaintiff's action.

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 court in Pennsylvania given that Western Sky was authorized by the CRST to do business on the Reservation and provided jobs and opportunity to CRST members. At best, Smith might be able to establish that both the CRST and Pennsylvania have an interest in this dispute. By definition, then, Smith cannot meet her burden to show the second public-interest factor "clearly disfavor[s]" enforcing the Forum-Selection Clause. *Atl. Marine*, 134 S. Ct. at 574-75.

Furthermore, the CRST's superior interest in this case is highlighted by the language of the Loan Agreement, which makes clear that the Agreement was formed on the Reservation. The parties agreed that execution and performance of the Loan Agreement were "solely within the exterior boundaries of the Cheyenne River Indian Reservation," and Smith agreed that her "execution of this Agreement [was] made as if [she was] physically present within the exterior boundaries of the Cheyenne River Indian Reservation." Ex. A, p. 3; *see also* Ex. A, p. 1. Moreover, as discussed above, the parties agreed that the Loan Agreement is subject exclusively

to the laws and jurisdiction of the CRST, and that "the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court" would apply to any dispute involving the Loan Agreement. *Id.* at p. 1.

Third, no administrative concerns of court congestion in CRST court counsel against sending this case to tribal court. Consideration of the administrative costs of keeping this suit in this Pennsylvania federal court also favors dismissal. In assessing this factor, courts look to the "commitment of judicial time and resources that would inevitably be required if the case were to be tried" in the current forum, *Piper Aircraft*, 454 U.S. at 261, as well as "the administrative difficulties flowing from court congestion," *Atl. Marine*, 134 S. Ct. at 581 n.6 (quotations omitted). Importantly, this factor does not consider the burden on any *party* -- including Smith -- in litigating in the pre-selected forum, because *Atlantic Marine* squarely held that factor is irrelevant. *Id.* at 581. The only question here is whether administrative burdens on the selected *court* militate against enforcing the Forum-Selection Clause. They plainly do not.

As discussed above, the mere fact that this Court would have to interpret and apply the law of the CRST is a significant burden on judicial resources that strongly favors dismissing the case. Likewise, there is little reason for this Court to maintain jurisdiction over this action. To the extent the Amended Complaint is properly brought in any court, the CRST court can most easily construe the Loan Agreement in accordance with the law of the CRST. This last public-interest factor thus weighs heavily in favor of dismissal.

B. The Doctrine Of Tribal Exhaustion Requires Dismissal.

As federal district courts have recently held in cases involving the very same Forum-Selection Clause as in this case, plaintiff must exhaust her tribal court remedies before pursuing claims in federal court. *See Brown*, 2015 WL 413774, at * 12; *Heldt*, 12 F. Supp. 3d at 1187. Under the tribal exhaustion doctrine, federal courts in the first instance must defer to tribal courts

to address the scope of tribal court jurisdiction. *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). Exhaustion is required whenever a party raises a "colorable" or "plausible" claim that the tribal courts have jurisdiction over a dispute. *Atwood v. Fort Peck Tribal Ct. Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008).

Because the CRST court has, at a minimum, colorable jurisdiction over this case, Smith must exhaust her remedies in tribal court. Specifically, under the "tribal exhaustion doctrine," federal court abstention is "mandatory" as a matter of comity if Defendants can establish (a) a colorable claim that tribal jurisdiction is appropriate; and (b) that Smith has not first pursued remedies in tribal court before turning to a federal forum. *See LaPlante*, 480 U.S. at 18-19; *Nat'l Farmers*, 471 U.S. at 856. As to the latter requirement, Smith does not and cannot claim that she first pursued suit in tribal court.

As to the former requirement, CRST jurisdiction over Smith's claims is, at the very least, colorable because (1) Western Sky, as an entity owned by a tribal member, enjoys the rights and privileges of tribal membership; (2) the instant dispute relates to Smith's consensual commercial relationship with Western Sky; and (3) the commercial conduct underlying the dispute occurred on the Reservation. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981).

1. Western Sky Is Treated As A CRST Member For Purposes of Tribal Jurisdiction.

Western Sky is wholly owned by Martin A. Webb, an enrolled member of the CRST, a federally recognized Indian tribe. Western Sky possesses all of Mr. Webb's rights and protections as a tribal member and is authorized under the laws of the CRST. Indeed, courts have consistently recognized that, as a result of sharing their owners' identities, Indian-owned companies also enjoy the privileges of tribal membership. *See Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1157 (9th Cir. 2013); *Pourier*

v. S.D. Dep't of Revenue, 658 N.W.2d 395, 403-06 (S.D. 2003), *aff'd in part and vacated in part on other grounds*, 674 N.W.2d 314 (2004); *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 483-84 (S.D. 1991).

2. Smith Entered Into A Consensual Commercial Relationship With Western Sky.

In *Montana v. United States*, the Supreme Court held that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565-66 (internal citations omitted); *see also id*. at 566 ("agreements or dealings" could constitute a consensual relationship sufficient to "subject [non-Indians] to tribal civil jurisdiction"). Recent cases have reaffirmed these core principles and upheld tribal court jurisdiction over non-Indians. *See LaPlante*, 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)).

Here, Smith plainly entered into a consensual commercial relationship with Western Sky, an entity imbued with the rights and privileges of tribal membership. The Loan Agreement -- which Smith represented she reviewed before executing (Ex. A, p. 6) -- made clear to Smith that she was engaging in commerce with a tribal member that would be consummated on the Reservation. *Id.* at pp. 1, 3. *Cf. Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa, Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013) (finding that a clear contractual relationship favors application of tribal law, and that "the first [*Montana*] exception applies equally whether the contract is with a tribe or its members"); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1315 (9th Cir. 1990)

(upholding tribal jurisdiction over a non-Indian company operating on tribal land that violated tribal hiring ordinance).

3. Smith Engaged In On-Reservation Conduct.

"A contract is made at the time when the last act necessary for its formation is done, and at the place where that final act is done." Restatement (First) of Contracts § 74 (1932). In this case, the last act of contract formation took place on the CRST Reservation. Smith electronically signed her Loan Agreement and submitted it via Western Sky's website for final audit review and acceptance by Western Sky. Ex. A, p. 3 (E-SIGN provision). This review and acceptance occurred in Western Sky's offices on the Reservation, and until Western Sky accepted an agreement on the Reservation, no contract existed between Western Sky and Smith, a prospective borrower, and Western Sky was not obligated to fund a loan. Critically, because the final act necessary to consummate each Agreement -- Western Sky's acceptance -- occurred on the Reservation, the Reservation is the place of contracting. *Cf. DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 884 (8th Cir. 2013) (applying state law to determine whether a tort occurred on- or off-reservation for the purpose of a similar jurisdictional analysis). Moreover, Smith plainly agreed that she entered into the Loan Agreement as if she were physically present within the boundaries of the CRST and that the Loan was fully performed within the boundaries of the CRST. Ex A., p. 1. As such, the CRST has jurisdiction over all disputes relating to the Loan Agreement.

Consistent with the principles of inherent tribal sovereignty and self-governance, tribal courts are vested with exclusive jurisdiction over civil disputes relating to the on-reservation conduct of tribal members. *LaPlante,* 480 U.S. at 14 ("Tribal courts play a vital role in tribal self-government."); *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) ("Indian tribes . . . exercise inherent sovereign authority." (quotations omitted)). As the Supreme

Court explained in *Williams v. Lee*, tribal courts "exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants." 358 U.S. 217, 222 (1959). Smith's voluntary interaction with Western Sky leaves no question that CRST tribal courts have at the very least a "colorable" claim of jurisdiction over this case.

The language of Judge Lange of the United States District Court for the District of South Dakota in *Heldt* underscores that conclusion. Analyzing the same contractual language at issue here, Judge Lange concluded that exhaustion was required unless exercising tribal jurisdiction would be "patently violative of express jurisdictional prohibitions." *Heldt*, 12 F. Supp. 3d 1170 at 1186 (internal quotations omitted). Under that "patently violative" standard, "[t]ribal courts rarely lose the first opportunity to determine jurisdiction because of an express jurisdictional prohibition." *Id.* (internal quotations omitted). Judge Lange held that the defendants in *Heldt* had established a colorable claim that (a) Western Sky is considered a tribal member for purpose of tribal exhaustion because it is wholly-owned by an enrolled tribal member and operates from the Reservation, and (b) the plaintiff consented to tribal court jurisdiction. *Id.* at 1186-87.

In sum, it is clear that tribal jurisdiction is at the very least "colorable" here, and it follows that Smith cannot demonstrate "it is 'plain' that tribal jurisdiction does not exist." *Laducer*, 725 F.3d at 883. Western Sky, DSC and CashCall respectfully submit that this Court should dismiss or stay this case pending tribal exhaustion. *See Brown*, 2015 WL 413774 at * 12; *Heldt*, 12 F. Supp. 3d 1170 at 1187.

C. Alternatively, Smith's Claims Should Be Arbitrated And This Case Dismissed.

As discussed above, the Loan Agreement contains a broad Arbitration Clause. The Arbitration Clause mandates that *all* disputes arising out of the Loan Agreement be resolved in binding arbitration. The Arbitration Clause also allows Smith to select an arbitrator using AAA,

JAMS, or another mutually agreeable arbitration organization. Because the Arbitration Clause requires Smith to arbitrate the claims raised in the Amended Complaint, this Court should dismiss this case.

1. The Arbitration Clause Requires Arbitration Of This Entire Case.

The plain language of the Loan Agreement requires that this case be resolved in arbitration. Specifically, the Loan Agreement defines the "Disputes" subject to mandatory arbitration in the "broadest possible" manner, including (but not limited to): (a) "all claims or demands . . . based on any legal or equitable theory (tort, contract, or otherwise)"; and (b) "any claim based upon . . . the handling *or servicing* of [Smith's] account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law." Ex. A, p. 4 (emphasis added).

The Arbitration Clause requires arbitration of Smith's entire Amended Complaint, which alleges that Western Sky, CashCall and DSC all violated federal and state law in the course of servicing Smith's loan. The Arbitration Clause includes all of the claims against Western Sky, CashCall and DSC. The Arbitration Clause requires Smith to arbitrate "any controversy or claim between you and Western Sky or the holder or servicer of the Note." *Id*. As demonstrated in Exhibit C, the Loan was serviced by CashCall. As demonstrated in Exhibit D, the Loan was also serviced by DSC. And as demonstrated in Exhibit E, the Loan is currently being serviced by CashCall. Moreover, by Smith's own allegations, CashCall and DSC were servicers of the Loan. [Doc. 13, ¶¶ 16-17]. As such, Smith's claims against Western Sky, CashCall and DSC are all within the ambit of the Arbitration Clause.

2. The Federal Arbitration Act Requires This Court To Enforce The Arbitration Clause.

The FAA governs the enforcement, interpretation, and validity of arbitration clauses in commercial contracts, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983), and establishes a "strong federal policy in favor of the resolution of disputes through arbitration," *Clerk v. Ace Cash Express, Inc.,* No. 09-05117, 2010 WL 364450, at *3 (E.D. Pa. Jan. 29, 2010) (citations omitted). "[F]ederal law 'presumptively favors the enforcement of arbitration actions.'" *Id*. (quoting *Alexander v. Anthony Intern., L.P.*, 341 F.3d 256, 263 (3d Cir. 2003)). Accordingly, the FAA requires the courts to "'rigorously enforce agreements to arbitrate.'" *Id.* at *4 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

"[T]he Supreme Court [has] made clear that the strong federal preference for arbitration of disputes expressed by Congress in the [FAA] must be enforced where possible." *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1258 (11th Cir. 2003) (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000)) (emphasis added). Thus, "any doubts concerning the scope of arbitral issues should be resolved in favor" of arbitrating Smith's claims. *Moses H. Cone*, 460 U.S. at 24-25. A claim should not be excluded from arbitration absent "the most forceful evidence of a purpose to exclude the claim from arbitration." *Miron v. BDO Seidman, LLP*, 342 F. Supp. 2d 324, 329 (E.D. Pa. 2004) (quoting *AT&T Tech, Inc. v. Comms. Workers of Am.*, 475 U.S. 643, 650 (1986) (citation omitted)). Here, the Loan Agreement clearly expresses the parties' intent to arbitrate every claim that could arise from that agreement; no claims are excluded and all of Smith's claims are encompassed. Ex. A, pp. 3-4.

The FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate . . . ." *Moses H. Cone*, 460 U.S. at 25 n.32. It "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial

forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Section 2 of the FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Thus, Section 2 of the FAA requires courts to enforce arbitration agreements according to their terms, and the FAA's preemption of conflicting state law has frequently been recognized and enforced.[4] *See Preston v. Ferrer*, 552 U.S. 346, 353 (2008) ("The FAA's displacement of conflicting state law 'is now well-established,' and has been repeatedly reaffirmed.") (quoting *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272 (1995)) (citations omitted).

In order for the FAA to apply to an arbitration provision, the transactions subject to the parties' contract must "involv[e] commerce." *Southland*, 465 U.S. at 10-11 (citing 9 U.S.C. § 2). As interpreted by the United States Supreme Court, the FAA's term "'involv[e] commerce' [is] the functional equivalent of the more familiar term 'affecting commerce'-words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (citing *Allied-Bruce*, 513 U.S. at 273-74). In *Citizens Bank*, the Court held that, "[b]ecause the [FAA] provides for 'the enforcement of arbitration agreements within the full reach of the Commerce Clause,' it is perfectly clear that

[4]FAA Section 3 allows a party to move for a stay in federal court of "an action 'upon any issue referable to arbitration under an agreement in writing for such arbitration,'" and Section 4 allows a party to "petition a federal court 'for an order directing that such arbitration proceed in the

the FAA encompasses a wider range of transaction than those actually 'in commerce'-that is, 'within the flow of interstate commerce.'" *Id.* at 56 (citations omitted). The Court also noted that "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" *Id.* at 56-57 (citations omitted).

In the instant case, the Loan Agreement and the servicing, handling, and collection of the loan implicate interstate commerce within the meaning of the FAA. First, the business of consumer lending indisputably impacts interstate commerce and is, consequently, subject to federal control under the Commerce Clause. *See, e.g.*, *Citizens Bank*, 539 U.S. at 58 ("No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause."); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 874-75 (11th Cir. 2005) (finding the "FAA's broad interstate commerce requirement" was satisfied when lending transactions took place between a Georgia resident and a national bank located in South Dakota and that the bank's role in analyzing loan applications, sending the approved loan applications, funding the loans, and accepting the loan proceeds constitutes sufficient interstate commerce under the FAA). Second, Smith is a resident of Pennsylvania, Western Sky is a South Dakota limited liability company, DSC is a Nevada corporation, and CashCall is a California corporation. [Doc. 13, ¶¶ 4-7].

Consequently, the transactions between Smith and Western Sky, Smith and DSC and Smith and CashCall, indisputably flowed through interstate commerce in such a manner as to

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manner provided for in such agreement.'" *Rent–A–Center, West, Inc. v. Jackson*, 130 S.Ct.

"involv[e] commerce" within the meaning of the FAA. As a result, the FAA applies to require enforcement of the arbitration provision in the Loan Agreement. Therefore, Smith's Amended Complaint must be compelled to arbitration.

3. Because The Entire Case Must Be Arbitrated, It Should Be Dismissed, Not Merely Stayed.

The FAA "leaves no place for the exercise of discretion" by a trial court, but instead mandates that trial courts "*shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original). When a party to an arbitration agreement elects to file a lawsuit rather than pursue arbitration, that party has refused to arbitrate and so a district court must compel arbitration. 9 U.S.C. § 4. But when, as here, all of Smith's claims are subject to arbitration, the court should go further and dismiss the Amended Complaint with prejudice pursuant to 9 U.S.C. § 3 and Rule 12(b)(6) for failure to state a claim. *See, e.g.*, *Montgomery v. Decision One Financial Network, Inc.*, No. Civ. A. 04-4551, 2005 WL 475427, at *1 (E.D. Pa. Mar. 1, 2005). Respectfully, if not dismissed on *forum non conveniens* grounds, Western Sky and DSC submit that dismissal pursuant to the Arbitration Clause is proper.

IV. CONCLUSION

Notwithstanding Smith's express agreement to the jurisdiction of the CSRT, her failure to exhaust her tribal remedies and her express agreement to arbitrate all claims arising from the Loan Agreement, including any claim regarding servicing or handling of the loan, Smith filed the action in this Court. On their face, Smith's claims arise out of and are inextricably connected with her Loan Agreement with Western Sky's, DSC's and CashCall's handling, servicing, and collection of that Loan. The Loan Agreement has a broad forum-selection/choice of law

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2772, 2776 (2010) (quoting 9 U.S.C. §§ 3 & 4).

provision and a broad arbitration provision encompassing all of Smith's claims. Therefore, the entire case should be dismissed under the doctrines of *forum non conveniens* and tribal exhaustion, or in favor of arbitration.

WHEREFORE, Defendants WESTERN SKY FINANCIAL, LLC, DELBERT SERVICES CORPORATION and CASHCALL, INC. respectfully requests that this Court dismiss the Amended Complaint under the doctrines of *forum non conveniens* or tribal exhaustion or, alternatively, compel arbitration and stay or dismiss this case, and grant it such other and further relief as the Court deems just and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 11, 2015, a true and correct copy of the foregoing was served via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing, on all counsel or parties of record on the Service List below.

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