UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 6:14-CV-488-ORL-37TBS

EDDIE L. BANKS,

Plaintiff,

vs.

CASHCALL, INC., and DELBERT SERVICES CORP.,

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS OR, ALTERNATIVELY, TO COMPEL ARBITRATION AND STAY OR DISMISS THE CASE, AND MEMORANDUM IN SUPPORT

Defendants CashCall, Inc. ("CashCall") and Delbert Services Corp. ("Delbert") (collectively, "Defendants") hereby move (a) to dismiss the Complaint filed by Eddie L. Banks ("Plaintiff") under the doctrine of *forum non conveniens* or the doctrine of tribal exhaustion; or (b) alternatively, to compel arbitration and stay or dismiss this case under the Federal Arbitration Act ("FAA") and Federal Rule of Civil Procedure 12(b)(6). In support thereof, Defendants submit this memorandum.

INTRODUCTION

In bringing suit in court to void a loan agreement and avoid future payment obligations, Plaintiff ignores three independent reasons that this Court is an improper forum.[1] Each requires dismissal of the Complaint.

[1] Defendants timely and properly removed this case to this Court on March 26, 2014. The state court entered a default against Defendants after Defendants filed their notice of removal. Because Defendants removed the case prior to entry of the default, the default is void. *See Tobias v. O'Neal*, No. 6:00-CV-1083-ORL-22C, 2000 WL 1931373, at *1 (M.D.

First, Plaintiff's loan agreement (the "Loan Agreement") has a provision (the "Forum-Selection Clause") that requires this case to be heard only by the courts of the Cheyenne River Sioux Tribe ("CRST"). That clause states that the Loan Agreement is "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation" and that Plaintiff "consent[ed] to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court" for all in-court disputes. (Compl., Ex. A ("Ex. A") at 1.) Plaintiff ignores this clause entirely. In March of this year, a federal district court enforced the identical Forum-Selection Clause and dismissed a similar case under the doctrine of *forum non conveniens*. *See Spuller v. CashCall, Inc.*, No. 5:13-CV-806-D (E.D.N.C. Mar. 5, 2014) (Dever, J.) (attached as Exhibit 1).[2] This Court should follow suit and dismiss Plaintiff's Complaint for the same reason.

Second, under the doctrine of tribal exhaustion, Plaintiff must exhaust his remedies in tribal court before he can pursue his claims in federal court. Under clear Supreme Court precedent, exhaustion of tribal remedies is required if tribal jurisdiction is merely "colorable." Here, tribal jurisdiction is more than colorable because tribal jurisdiction extends to non-Indians who, as Plaintiff did, enter into a consensual contractual agreement on a reservation with a tribal member. Only a few days ago, a federal district court in South Dakota considering the very same Forum-Selection Clause at issue in this case held that the tribal exhaustion doctrine requires federal courts to defer to the CRST Court to determine in

---

Fla. Dec. 5, 2000). Under Federal Rule of Civil Procedure 81(c)(2)(C), Defendants have until seven days from removal (or today) to answer or otherwise respond to the Complaint.

[2] *Spuller* cites *Atlantic Marine Construction Co. v. United States District Court for Western District of Texas*, 134 S. Ct. 568 (2013), to support dismissal under the doctrine of *forum non conveniens*. *See Spuller*, slip op. at 1-2. As explained further below at pp. 9-10, *Atlantic Marine* made clear 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*." 134 S. Ct. at 580.

the first instance whether that court has jurisdiction. *See Heldt v. PayDay Financial, LLC*, No. CIV 13-3023-RAL, slip. op. at 12-13, 36-37 (D.S.D. Mar. 31, 2014) (attached as Exhibit 2). Thus, to the extent Plaintiff challenges the CRST's jurisdiction over this case, this Court must stay its hand until Plaintiff has exhausted his remedies in the CRST Court.

Third, and in the alternative, this case must be arbitrated. The Loan Agreement contains a broad arbitration clause requiring Plaintiff to arbitrate all of his claims (the "Arbitration Clause"), including any challenge he may make to the Arbitration Clause itself. Plaintiff's Complaint also ignores this provision, the enforcement of which the FAA mandates. Thus, as an alternative to dismissal on *forum non conveniens* or tribal exhaustion grounds, this Court should compel arbitration and, on that basis, stay or dismiss this case.

FACTUAL BACKGROUND[3]

I. Plaintiff's Claims

Plaintiff alleges that on May 1, 2012, he executed the Loan Agreement and obtained a $9,925 loan from non-party Western Sky Financial, LLC ("Western Sky"). (Compl. ¶ 14.) Plaintiff alleges Western Sky also charged him a $75 "loan origination fee" that was added to the principal amount of his loan. (*Id.* at ¶ 15.) This was Plaintiff's second Western Sky loan;

[3] The following summary is drawn from the allegations in the Complaint, the Loan Agreement attached to the Complaint as Exhibit A, and the affidavits submitted in support of this motion (Exs. 3 & 4). The Court may consider evidence outside the pleadings when resolving a motion to dismiss based on *forum non conveniens* or to enforce an arbitration agreement under the FAA. *AXA Distribs., LLC v. Bullard*, No. 1:08-CV-188-WKW, 2008 WL 5411940, at *4 (M.D. Ala. Dec. 24, 2008) (citing, among others, *Chastain v. Robinson–Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992)); *Webster v. Royal Caribbean Cruises, Ltd.*, 124 F. Supp. 2d 1317, 1320 (S.D. Fla. 2000); 14D CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3828 (3d ed. 2013). Similarly, the Court may consider evidence outside the pleadings when resolving a motion to dismiss for failure to exhaust tribal remedies. *See Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x 11, 13 (9th Cir. 2012) (relying on declarations in requiring exhaustion of tribal remedies); *Dish Network Corp. v. Tewa*, No. CV 12-8077-PCT-JAT, 2012 WL 5381437, at *2 (D. Ariz. Nov. 1, 2012) (classifying a motion to dismiss for failure to exhaust tribal remedies as an "unenumerated 12(b) motion" that allows the court to look beyond the pleadings).

Plaintiff previously obtained a $2,600 loan that was also serviced by CashCall and that was paid in full. (Exhibit 3, Declaration of Daniel Baren ("Baren Decl.") ¶ 5.)

Western Sky is owned by a member of the CRST (*id.* at ¶ 21) and is headquartered on the Cheyenne River Indian Reservation in South Dakota (*id.* at ¶ 19). Western Sky considered loan applications submitted by borrowers either through Western Sky's website or telephonically, and made the ultimate decision to fund every loan—and thus to enter into a binding contract with borrowers—from its offices on the Cheyenne River Indian Reservation. (Exhibit 4, Affidavit of Tawny Lawrence ("Lawrence Aff.") ¶ 5.)

According to the Complaint, CashCall (and not Western Sky) was the "de facto" lender of Plaintiff's loan (*id.* at ¶ 10), and CashCall and Western Sky allegedly had an "arrangement" to engage in "subterfuge . . . to make illegal loans and usurp state lending laws" (*id.* at ¶ 18). The Complaint further alleges that CashCall was "obligated to purchase" all loans issued by Western Sky (*id.* at ¶ 18(g)) and that CashCall services those loans (*id.* at ¶ 18(l)). In fact, Western Sky assigned Plaintiff's loan to one of CashCall's affiliates, and CashCall serviced Plaintiff's loan. (Baren Decl. ¶¶ 4-5.)

The Complaint also alleges that on April 2, 2013 (almost a year after Plaintiff executed the Loan Agreement), Plaintiff received notice that his loan was sold by Western Sky to Delbert. (Compl. ¶ 16.) Plaintiff alleges generally that Delbert services loans made by Western Sky (*id.* at ¶ 6), and Delbert did in fact service Plaintiff's loan (Baren Decl. ¶ 6). Plaintiff made payments on his loan between May 25, 2012 and December 15, 2013. (Compl. ¶ 17.)

Based on these allegations, Plaintiff claims that Defendants violated: (1) Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201, *et seq.*; (2) Florida's Consumer Finance Act, Fla. Stat. § 516.001, *et seq.*; (3) Florida's Interest, Usury,

and Lending Practices, Fla. Stat. § 687.01, *et seq.*; (4) Florida's Consumer Collection Practices Act ("FCCPA"), Fla. Stat. § 559.55, *et seq.*; and (5) the Fair Debt Collection Practices Act, 15 U.S.C. § 1601, *et seq.* Plaintiff's claims are premised on two allegations: (a) that Defendants charged him prohibited amounts of interest, and (b) that Defendants attempted to collect on a debt they knew or should have known was void. (Compl. ¶¶ 27, 35, 38-40, 45, 71, 80-81.) For this, Plaintiff seeks declaratory relief, injunctive relief, restitution, civil penalties, attorney's fees, and costs. (*Id.* at 20-22 (Prayer for Relief).)

II. The Loan Agreement's Dispute Resolution Provisions

The Loan Agreement contains comprehensive dispute resolution provisions that Plaintiff has not honored. Specifically, the Loan Agreement requires: (a) that to the extent any dispute is eligible for resolution in a court, that dispute can be resolved only by the CRST courts; and (b) through its broad Arbitration Clause, that all of Plaintiff's claims and his attacks on his Loan Agreement be resolved in arbitration.

Not only does Plaintiff fail to make any effort in his Complaint to square his decision to bring suit against Defendants in a Florida court with the Forum-Selection and Arbitration Clauses, he makes no mention of these case-dispositive Clauses at all.

A. The Forum-Selection Clause

Plaintiff's Loan Agreement contains comprehensive forum-selection and choice-of-law provisions governing which court, if any, is authorized exclusively to hear claims relating to the Loan Agreement, to the extent those claims fall outside the broad Arbitration Clause discussed in the next section. By signing the Loan Agreement, Plaintiff acknowledged that his "**Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation.**" (Ex. A at 1 (emphasis in original).) Plaintiff further agreed that:

> [b]y executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound by 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.*) Moreover, the Loan Agreement contains an additional paragraph discussing the law governing the parties' agreement:

> 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 3.)

By agreeing to these provisions, including the Loan Agreement's Forum-Selection Clause, Plaintiff waived his right to avail himself of the Florida state courts or the federal district courts sitting in Florida.

B. The Loan Agreement's Arbitration Clause

The Loan Agreement's Arbitration Clause plainly requires arbitration of all of Plaintiff's claims.

1. Jury Trial Waiver and Arbitration Requirement

Plaintiff expressly waived a jury trial and obligated himself to arbitrate this dispute in the Loan Agreement, which provides:

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

(*Id.*)

2. "Disputes" Subject to Arbitration Defined Broadly

The Loan Agreement defines the "Disputes" subject to mandatory arbitration in the "broadest possible" way to cover "any controversy or claim between you and Western Sky or the holder or servicer of the Note," including "all claims or demands . . . 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)." (*Id.* at 4.)

3. Challenges to the Arbitration Clause Delegated to the Arbitrator

The Loan Agreement also 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*.) Thus, challenges to the Arbitration Clause are for an arbitrator, not a court, to resolve.

4. Broad Set of Parties Subject to Arbitration

The Loan Agreement broadly defines the parties against whom Plaintiff must arbitrate any Dispute. The Loan Agreement requires arbitration of "any controversy or claim between you and Western Sky or the holder or servicer of this Note," and further defines the term "the holder" as including "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 and agents." (*Id*.) Plaintiff admits that CashCall and Delbert are or were the owners and servicers of Western Sky loans like his (Compl. ¶¶ 6, 16, 18), and in fact, Plaintiff's loan was owned by one of CashCall's affiliates and serviced by CashCall, and later owned and serviced by Delbert (Baren Decl. ¶¶ 4-6).

5. Specified Bodies to Arbitrate Plaintiff's Claim

The Arbitration Clause provides that, "except as provided below," Plaintiff "agree[d] that any Dispute . . . 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." (Ex. A at 4.) The next paragraph then gave Plaintiff the right, "[r]egardless of who demands arbitration, . . . to select . . . the American Arbitration Association . . . ; JAMS . . . ; or an arbitration organization agreed upon by [Plaintiff] and the other parties to the Dispute." (*Id.*)

6. Unexercised Opt-Out Right

Additionally, the Loan Agreement gave Plaintiff the right to opt out of arbitration entirely by emailing the lender within sixty days of receiving his loan funds to exercise his opt-out right. (*Id.* at 5.) Despite this provision, Plaintiff makes no allegation (and, in fact, cannot claim) that he opted out of the Arbitration Clause.

7. Expenses and Burdens Eased

Notably, the Loan Agreement provides that Defendants are required to "pay the filing fee and any costs or fees charged by the arbitrator regardless of which party initiates the Arbitration," and that "[a]ny arbitration under this Agreement may be conducted either on tribal land or within thirty miles of [Plaintiff's] **residence**, at [his] choice." (*Id.* at 4 (emphasis added).)

ARGUMENT

This Court is not a proper forum for three reasons.

First, to the extent any litigation—including Defendants' motion to compel arbitration—is proper in any court, the Forum-Selection Clause states that only the CRST courts can hear it.

Second, the doctrine of tribal exhaustion requires Plaintiff to exhaust his tribal remedies in tribal court before he can bring suit in federal court, and thus requires this Court to defer to the tribal courts to hear any challenge to the jurisdiction of the CRST.

Third, even if Plaintiff somehow overcomes the Forum-Selection Clause or the tribal exhaustion doctrine, the Court still must enforce the separate Arbitration Clause, compel arbitration, and, consequently, stay or dismiss this case.

I. The Loan Agreement's Forum-Selection Clause Must Be Enforced And This Case Dismissed.

The very first sentence of the Loan Agreement states, in plain English, that it is "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation" and that Plaintiff "consent[ed] to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court" for any in-court adjudication relating to the Loan Agreement. (Ex. A at 1.) That provision requires this Court to dismiss this case.

The Supreme Court recently held that "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568,

580 (2013).[4] The doctrine of *forum non conveniens* allows a court to dismiss a suit on the grounds of administrative efficiency and convenience prior to addressing merits issues. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp*., 549 U.S. 422, 432 (2007); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). "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*, 549 U.S. at 432.

A. Federal Law Governs The Enforceability Of The Forum-Selection Clause.

"[F]orum selection clauses present procedural questions to be resolved by federal law independent of forum state policy." *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1067 (11th Cir. 1987) (en banc), *aff'd on other grounds*, 487 U.S. 22 (1988). The *en banc* Eleventh Circuit has therefore held that if state law would void a forum-selection clause, but federal law would not, state law must give way to federal law, and the court must enforce the forum-selection clause. *Id.* at 1067, 1069-70. As explained below, the Forum-Selection Clause in Plaintiff's Loan Agreement must be enforced under federal law. *See Spuller*, No. 5:13-CV-806-D (E.D.N.C. Mar. 5, 2014) (order dismissing complaint because Forum-Selection Clause in Western Sky Loan Agreement was enforceable).[5]

[4] Prior to *Atlantic Marine,* the Eleventh Circuit held that "in the context of a forum-selection clause which mandated a foreign venue, . . . a motion pursuant to Rule 12(b)(3) is the proper avenue for relief." *Slater v. Energy Servs. Grp. Int'l, Inc.*, 634 F.3d 1326, 1332 (11th Cir. 2011). *Atlantic Marine* overruled that holding. *See* 134 S. Ct. at 579-80.

[5] Even if federal law did not govern this issue, Florida public policy strongly supports enforcement of mandatory forum selection clauses. *See Espresso Disposition Corp. 1 v. Santana Sales & Mktg. Grp., Inc.*, 105 So. 3d 592, 594-95 (Fla. 3d DCA 2013). Thus, under both federal and (albeit inapplicable) Florida state law, the mandatory forum clause must be enforced and this action dismissed.

B. The Forum-Selection Clause Must Be Enforced Under Clear Federal Law.

The Eleventh Circuit has made clear that "[f]orum-selection clauses are presumptively valid and enforceable," *Krenkel v. Kerzner Int'l Hotels Ltd*., 579 F.3d 1279, 1281 (11th Cir. 2009), and that the "burden is on the party opposing the enforcement of the forum selection clause" to show that it should not be enforced, *P&S Bus. Machs., Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003). Enforcing the parties' agreed choice of 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).

In its recent *Atlantic Marine* decision, the Supreme Court made clear that federal courts must enforce forum-selection clauses strictly, thereby curbing significantly the grounds that courts may rely upon to void forum-selection clauses. *See id.* 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." *Id.* at 582. "As a consequence, a district court may consider arguments about public-interest factors only" when evaluating a forum-selection clause, and thus "should not consider arguments about the parties' private interests." *Id.*[6] Those public-interest factors, which "will rarely defeat" a forum-selection clause, *id.*, include (1) "the interest in having the trial . . . in a forum that is at home with the law"; (2) "the local interest in having localized controversies decided at home"; and (3) "the

[6] Although the body of the Supreme Court's opinion in *Atlantic Marine* made these statements 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, the Court made clear that "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.

administrative difficulties" posed by each forum. *Id.* at 581 n.6 (quotations omitted); *see also Membreno v. Costa Crociere S.p.A.*, 425 F.3d 932, 937-38 (11th Cir. 2005).

Here, the public-interest factors weigh overwhelmingly in favor of enforcing the parties' Forum-Selection Clause, and accordingly this Court should dismiss Plaintiff's action.[7]

1. The Need to Apply CRST Law Strongly Favors Dismissal.

The Eleventh Circuit has held that the "need to apply foreign law is a public-interest factor that mitigates strongly in favor of dismissal." *Membreno*, 425 F.3d at 937-38; *see also 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 Plaintiff's action. Plaintiff 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 at 1.) Plaintiff 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[] strongly in favor of dismissal." *Membreno*, 425 F.3d at 938; *see also Piper Aircraft*, 454 U.S. at 260 n.29.

2. The CRST's Interest in This Case Is Significant.

The CRST's interest in this case outweighs the State of Florida's, tipping the second public-interest factor in favor of dismissal as well. That factor balances the "sovereigns'

[7] As noted above, because Plaintiff's Complaint does not even mention his own Loan Agreement's Forum-Selection Clause, his pleading makes no attempt to explain how any public-interest factor favors the Forum-Selection Clause's abrogation.

interests in deciding the dispute"[8] and gives preferences to the forum with the strongest ties to the case.[9]

The CRST's superior interest in this case is highlighted by the language of the Loan Agreement, which makes clear that Plaintiff entered into his contractual relationship as if on the Cheyenne River Indian 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 Plaintiff agreed that his "execution of this Agreement [was] made as if [he was] physically present within the exterior boundaries of the Cheyenne River Indian Reservation." (Ex. A at 3.) Moreover, as discussed above, the parties agreed that the Loan Agreement is subject solely to the exclusive 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 1.)

By comparison, Florida's interest in this case is minimal. The parties agreed that, as a reservation-based company, Western Sky did "not have a presence in" any state of the United States and that "[n]either th[e] [Loan] Agreement nor Lender is subject to the laws of any state of the United States of America." (*Id*. at 3.) There are no references to Florida in any of the choice-of-law, forum-selection, personal jurisdiction, or location-of-contract provisions.

Even putting aside the specific terms of the Loan Agreement, courts have repeatedly affirmed that tribes have a sovereign interest in ensuring that they have authority over acts occurring on their land, and that tribes and their members enjoy a sovereign right to "make

---

[8] *Membreno*, 425 F.3d at 937 (quotations omitted); *see also Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 953 (11th Cir. 1997).

[9] *See BCCI Holdings*, 119 F.3d at 953; *see also Atl. Marine*, 134 S. Ct. at 581 n.6.

their own laws and be ruled by them." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973) (quotations omitted); *see also Montana v. United States*, 450 U.S. 544, 565 (1981) ("To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations . . . . 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." (emphasis added)). Further, "tribal courts have exclusive jurisdiction over suits against tribal members on claims arising on the reservation." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 940 (9th Cir. 2009). To this, as the Supreme Court said in *Williams v. Lee*, 358 U.S. 217, 223 (1959), "[i]t is immaterial that [Plaintiff] is not an Indian[;] [h]e was on the Reservation and the transaction with an Indian took place there." *See also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Civil jurisdiction . . . presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.").

Recognizing and upholding tribal sovereign interests over activities occurring on their own territory promotes "respect for comity and deference to the tribal court as the appropriate court of first impression to determine its jurisdiction." *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa, Inc.,* 715 F.3d 1196, 1200 (9th Cir. 2013). Indeed, tribal courts routinely "exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants." *Williams*, 358 U.S. at 222. That authority makes clear that the CRST has a great interest in resolving disputes over the legality of Western Sky loans, which were issued by a company operating from the Cheyenne River Indian Reservation under CRST law. (Compl. ¶¶ 19, 21.)

Given the contracting parties' intent, as well as the CRST's sovereign interests, it is clear that the Tribe has a significantly greater interest in this case than does Florida. Accordingly, this public-interest factor supports dismissal.

3. The Administrative Burdens Favor Dismissal.

Consideration of the administrative costs of keeping this suit in this Florida court also militates in favor of 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 Plaintiff—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 a particular *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 Plaintiff's 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.[10] This last public-interest factor thus weighs heavily in favor of dismissal.[11]

---

[10] Notably, although Plaintiff contends primarily that Florida law governs his claims (even though the Loan Agreement's choice-of-law clause specifies that CRST law controls), the Complaint questions the legality of Plaintiff's Loan Agreement under CRST law (*see* Compl. ¶¶ 22-23), a disputed allegation that would further increase the administrative burden on this Court.

[11] *Heldt* made statements in *dicta* implying that the Forum-Selection Clause may not apply to CashCall or its subsidiary, WS Funding LLC, because they were not parties to the original Loan Agreement. *See Heldt*, slip. op. at 27. But the Forum-Selection Clause makes

II. The Tribal Exhaustion Doctrine Requires Dismissal Of The Complaint.

As a federal district court held only days ago in a case involving the very same Forum-Selection Clause as this case, Plaintiff must exhaust his tribal court remedies before pursuing claims in federal court. *See Heldt*, slip. op. at 12-13, 36-37. Under the tribal exhaustion doctrine, federal courts must defer to tribal courts to address the scope of tribal court jurisdiction in the first instance. *LaPlante*, 480 U.S. at 18-19; *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 Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008).

CRST jurisdiction is more than colorable in this case. The Supreme Court in *Montana* identified two exceptions to the general rule that tribal courts cannot exercise jurisdiction over non-tribal members. Under one exception, tribes may exercise jurisdiction over nonmembers "who enter [into] consensual relationships with the tribe or its members[] through commercial dealings." 450 U.S. at 565. Tribal jurisdiction may thus be invoked here, because Plaintiff entered into a commercial transaction with (1) a tribal member (2) that took place on a reservation. *Id.*

It is not disputed that the Plaintiff consensually entered into the Loan Agreement, free of any fraud or overreaching. The Complaint raises no allegations suggesting otherwise. Likewise, there is no basis for contesting that Western Sky's conduct was equivalent to that

---

clear that the *Loan Agreement* is "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe," and thus covers all of Plaintiff's claims relating to the Loan Agreement, no matter the particular defendants. In addition, as assignees of the Loan Agreement, CashCall and Delbert "stand[] in the shoes of the assignor and may enforce the contract against the original obligor in [their] own name[s]." *MDS (Canada) Inc. v. Rad Source Tech., Inc.*, 720 F.3d 833, 857 (11th Cir. 2013) (internal quotations omitted). Thus, the district court in *Spuller* enforced the Forum-Selection Clause in a materially identical case to this one, brought only against CashCall and Delbert. *See Spuller*, slip op. at 1-2.

of a tribal member. Martin Webb, the sole member of Western Sky, is an enrolled member of the CRST, a federally-recognized Indian tribe (*see* Compl. ¶ 21), and by extension, Western Sky possesses the rights and protections of a tribal member. Courts have consistently recognized that, as a result of sharing their owners' identities, Indian-owned companies also enjoy the privileges of tribal membership. *See Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395, 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); *Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1157 (9th Cir. 2013).

The conduct at issue here likewise occurred on the Cheyenne River Indian Reservation. Under Florida law, a "contract is created where the last act necessary to make a binding agreement takes place." *D.L. Peoples Grp., Inc. v. Hawley*, 804 So. 2d 561, 563 (Fla. 1st DCA 2002); *see also Jemco, Inc. v. United Parcel Serv., Inc.*, 400 So. 2d 499, 500-01 (Fla. 3d DCA 1981) (Connecticut law applied to contract when agreement was signed by one party in Texas and sent to Connecticut for the counterparty to sign). Like other potential borrowers, Plaintiff submitted his executed Loan Agreement to Western Sky's offices on the Cheyenne River Indian Reservation, where it was reviewed and ultimately accepted for funding. (Lawrence Aff. ¶¶ 4-5.) Thus, the "last act" necessary to form a contract—Western Sky's acceptance of Plaintiff's Loan Agreement—occurred on the Cheyenne River Indian Reservation. Plaintiff himself agreed that his Loan Agreement was executed "as if [he] were physically present within the exterior boundaries of the Cheyenne River Indian Reservation." (Ex. A. at 3.)

Under the facts of this case and clear language of *Montana*, there is no doubt that a "colorable" claim of tribal court jurisdiction has been raised. This serves as an additional,

independent basis for dismissing Plaintiff's suit. *See*, *e.g.*, *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882-83 (8th Cir. 2013).

The District of South Dakota's ruling in *Heldt* underscores this conclusion. There, the court concluded that the Forum-Selection Clause was unenforceable only if CRST tribal courts lacked jurisdiction, but that the tribal court's jurisdiction should be decided *by the tribal court*. *See Heldt*, slip op. at 12-13. *Heldt* emphasizes the need for federal courts to defer to tribal courts to determine jurisdiction when a "colorable" claim has been raised. This Court should follow the lead of the District of South Dakota in *Heldt* and hold that the tribal exhaustion doctrine requires this Court to refer this case to the tribal courts to resolve any questions of tribal jurisdiction in the first instance. *See id.* at 36-37.[12]

*****

The Forum-Selection Clause is valid and enforceable under federal law, and designates the courts of the CRST as the only courts that may hear Loan Agreement disputes. In addition, the tribal exhaustion doctrine requires this Court to allow the CRST courts to decide whether they have jurisdiction before it may consider any challenge to CRST jurisdiction. This Court therefore may and should dismiss this case without reaching Defendants' alternative contention that the Arbitration Clause requires dismissal.

[12] The *Heldt* court's acknowledged "skepticism" concerning tribal court jurisdiction over Western Sky loan agreements does not alter this analysis, as the Court ordered tribal exhaustion to occur notwithstanding that skepticism. *See id.* at 26. Further, *Heldt*'s discussion of tribal court jurisdiction was *dicta* because the court ultimately held that the plaintiffs must exhaust their tribal court remedies before a federal court could consider the question. Similar concerns about the enforceability of the Arbitration Clause are also undermined by the court's holding that tribal remedies must be exhausted as to that question. *See id.* at 36-37. In any event, for the reasons set out in this brief, Defendants respectfully disagree with these portions of *Heldt*, and believe this case falls squarely within the *Montana* exception authorizing tribal court jurisdiction over non-members who have entered into a contractual agreement with tribal members on tribal land. *Heldt* nonetheless underscores the importance of tribal exhaustion even if the existence of tribal jurisdiction is unclear.

III. This Court Must Enforce The Arbitration Clause.

A. The Loan Agreement Requires That This Dispute—Including The Issue Of Whether The Arbitration Clause Is Enforceable—Be Sent To Arbitration.

As detailed above, the Loan Agreement includes a broad Arbitration Clause that covers Plaintiff's Complaint in its entirety and requires arbitration, not court adjudication, of Plaintiff's claims. (*See* pp. 6-8 above.)

"The FAA's primary substantive provision provides that a written agreement to arbitrate a controversy arising out of [a] contract 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Walthour v. Chipio Windshield Repair, LLC*, No. 13-11309, --- F.3d ---, 2014 WL 1099286, at *3 (11th Cir. Mar. 21, 2014) (quoting 9 U.S.C. § 2). Thus, the central purpose of the FAA "is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quotations omitted); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995). The Supreme Court has explained that the FAA enunciates a "strong federal policy in favor of arbitration agreements" that requires courts to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 221 (1985). That federal policy applies "notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). A party challenging an arbitration clause bears the heavy burden of showing that it is unenforceable, and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "constru[ing] . . . the contract language itself." *Id.* at 24-25; *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315 (11th Cir. 2002).

The plain language of the Loan Agreement and federal law's emphatic preference for arbitration require that every aspect of this case—including any challenge Plaintiff may make to the Arbitration Clause—be sent to arbitration. As noted above, the Loan Agreement defines the "Disputes" subject to mandatory arbitration in the "broadest possible" manner, and includes (but is not limited to) both: (1) "claim[s] based upon marketing or solicitations to obtain the loan and the handling or servicing of [Plaintiff's] account" that are "based on a . . . federal or state . . . statute"; and (2) disputes about the "validity, enforceability, or scope of . . . the Arbitration agreement." (Ex. A at 4.)

That language covers this entire case. Plaintiff's Complaint alleges that Defendants serviced Plaintiff's loan in an illegal manner by attempting to enforce an unenforceable contract and by attempting to charge excessive interest and fees. (Compl. ¶¶ 27, 35, 45, 71, 80-81.) Plaintiff's Complaint thus is covered by the Arbitration Clause's requirement that Plaintiff arbitrate all claims "based on . . . the handling or servicing" of his account. (Ex. A at 4.) To the extent Plaintiff also attempts to challenge the validity of the Arbitration Clause (which, in his Complaint, he fails to do), that challenge is covered by the language requiring the arbitrator to decide the "validity, enforceability, or scope of . . . the Arbitration agreement." (*Id.*)

B. Plaintiff's Claim That The Loan Agreement Is Voidable Under Florida Law Can Only Be Heard By The Arbitrator.

Plaintiff's principal claim—premised on the allegation that the Loan Agreement is voidable under Florida law—is insufficient even if true (which it is not) to void the Arbitration Clause contained within the Loan Agreement.

Specifically, Plaintiff's Complaint alleges that (a) Defendants committed misdemeanors by "de facto" offering and/or servicing Plaintiff's loan because its interest rate

exceeds Florida's rate cap; and therefore (b) the Loan Agreement is unenforceable under Florida law, rendering attempts to collect on that loan illegal. (Compl. ¶¶ 27, 35, 38-40, 45, 71, 80-81.) But the Supreme Court has made clear that *a court* may not void an arbitration clause based on arguments about a contract's unenforceability as a whole. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

In *Prima Paint*, the Supreme Court held that under the FAA "a federal court may consider only issues relating to the making and performance of the *agreement to arbitrate*," not defenses that go to the enforceability of the entire contract. 388 U.S. at 404 (emphasis added). Thus, "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006); *see also Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 998 (11th Cir. 2012) (same). The Eleventh Circuit thus has held that defenses seeking to void the contract as a whole must be heard by the arbitrator, not a court. *See Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877 (11th Cir. 2005) (citing *Benoay v. Prudential-Bache Secs., Inc.*, 805 F.2d 1437, 1441 (11th Cir. 1986)).

Indeed, the Supreme Court has rejected any attempt to void an arbitration clause through argument that the contract containing that clause violates Florida's lending statutes. In *Buckeye*, the loan transactions at issue were allegedly illegal under Florida law. *See* 546 U.S. at 442. The Florida Supreme Court refused to enforce an arbitration clause in the loan agreements governing those transactions, "reasoning that to enforce an agreement to arbitrate in a contract challenged as unlawful could breathe life into a contract that not only violates state law but also is criminal in nature." *Id.* at 443 (internal quotations and citations omitted). The Supreme Court reversed because the ground relied upon by the Florida Supreme Court was "that the contract as a whole (including its arbitration provision) is rendered invalid by

the usurious finance charge." *Id.* at 444. Under the FAA, such a "challenge should . . . be considered by an arbitrator, not a court." *Id.* at 446. So too here.

In short, the Loan Agreement's Arbitration Clause covers this case—completely. The Complaint does not even bother to mention the Clause, much less allege facts to meet Plaintiff's burden to show the Arbitration Clause is not enforceable. And, per *Buckeye*, the Complaint's allegations that the Loan Agreement in its entirety is illegal under Florida law provide no basis for this Court to void the Arbitration Clause. The FAA thus requires this Court to enforce the clause.

C. The Court Should Dismiss Plaintiff's Complaint Pursuant To The Arbitration Clause.

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*, 470 U.S. at 218 (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 a district court may compel arbitration. 9 U.S.C. § 4. But when, as here, all of a plaintiff's claims are subject to arbitration, the court should go further and dismiss the complaint with prejudice pursuant to 9 U.S.C. § 3 and Rule 12(b)(6) for failure to state a claim. "The weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration." *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992). The Eleventh Circuit thus has held that "the FAA requires a court to either stay *or dismiss* a lawsuit and to compel arbitration" when the claims are all subject to mandatory arbitration. *Lambert v. Austin Indus.*, 544 F.3d 1192, 1195 (11th Cir. 2008) (emphasis added). The Eleventh Circuit

has also affirmed dismissal on those grounds. *See Caley v. Gulfstream Aerospace Corp.*, 333 F. Supp. 2d 1367 (N.D. Ga. 2004), *aff'd*, 428 F.3d 1359 (11th Cir. 2005).[13] Respectfully, if not dismissed on *forum non conveniens* or tribal exhaustion grounds, Defendants submit that dismissal pursuant to the Arbitration Clause is the proper course here.

[13] "The Eleventh Circuit, at one point, suggested only a stay of litigation is appropriate. *See Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992). However, more recently, the Circuit affirmed dismissal when all claims were subject to arbitration [citing *Caley*]." *Perera v. H & R Block E. Enters., Inc.*, 914 F. Supp. 2d 1284, 1289-90 (S.D. Fla. 2012). In addition, a number of other district court cases that were decided after *Bender* have dismissed (rather than merely stayed) claims subject to arbitration including *Kivisto v. National Football League Players Association*, No. 10-24226-CIV, 2011 WL 335420, at *2 (S.D. Fla. Jan. 31, 2011), which was affirmed by the Eleventh Circuit in an unpublished decision, *see* 435 F. App'x 811 (11th Cir. 2011). *See also Athon v. Direct Merchs. Bank*, No. 5:06-CV-1, 2007 WL 1100477, at *6 (M.D. Ga. Apr. 11, 2007); *Samadi v. MBNA Am. Bank, N.A.*, No. CV 104-137, 2005 WL 6111467, at *4 (S.D. Ga. June 10, 2005); *Olsher Metals Corp. v. Olsher*, No. 01-3212-CIV, 2003 WL 25600635, at *9 (S.D. Fla. Mar. 26, 2003).

CONCLUSION

For the foregoing reasons, Defendants request that the Court dismiss the Complaint under the doctrines of *forum non conveniens* or tribal exhaustion or, alternatively, compel arbitration and dismiss or stay this case under the FAA and Rule 12(b)(6).

Respectfully submitted,

Date: April 2, 2014

AKERMAN LLP
One S.E. Third Avenue — 25th Floor
Miami, FL 33131-1714
Tel.: 305-374-5600
Fax: 305-374-5095

By: s/Christopher S. Carver
Christopher S. Carver
Florida Bar No. 993580
E-mail: christopher.carver@akerman.com

Thomas R. Yaegers
Florida Bar No. 0021351
E-mail: thomas.yaegers@akerman.com
AKERMAN LLP
420 S. Orange Avenue – Suite 1200
Orlando, FL 32801
Tel.: 407-423-4000
Fax: 407-254-4215

Neil M. Barofsky
Brian J. Fischer
Katya Jestin
(*Pro hac vice* motions forthcoming)
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022-3908
Tel.: 212-891-1681
Fax: 212-909-0881
E-mail: NBarofsky@jenner.com
E-mail: BFischer@jenner.com
E-mail: KJestin@jenner.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of *Defendants' Motion to Dismiss or, Alternatively, to Compel Arbitration and Stay or Dismiss the Case, and Memorandum in Support* were served on April 2, 2014, on all counsel or parties of record on the following Service List via CM/ECF.

s/Christopher S. Carver
Attorney

SERVICE LIST

Banks v. Cashcall, Inc.
CASE NO. 6:14-cv-488-ORL-37-TBS
U.S. District Court, Middle District of Florida

Counsel for Plaintiff
(service by CM/ECF)

N. James Turner, Esq.
37 N. Orange Avenue, Suite 500
Orlando, FL 32801
Tel.: 888-8775103
E-mail: njtlaw@gmail.com

Counsel for Defendants
(service by CM/ECF)

Christopher S. Carver, Esq.
AKERMAN LLP
One S.E. Third Avenue – 25th Floor
Miami, FL 33131-1714
Tel.: 305-374-5600
Fax: 305-374-5095
E-mail: christopher.carver@akerman.com

Thomas R. Yaegers, Esq.
AKERMAN LLP
420 S. Orange Avenue – Suite 1200
Orlando, FL 32801
Tel.: 407-423-4000
Fax: 407-254-4215
E-mail: thomas.yaegers@akerman.com

Neil M. Barofsky, Esq.
Brian J. Fischer, Esq.
Katya Jestin, Esq.
(*Pro hac vice* motions forthcoming)
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022-3908
Tel.: 212-891-1681
Fax: 212-909-0881
E-mail: NBarofsky@jenner.com
E-mail: BFischer@jenner.com
E-mail: KJestin@jenner.com