No. _____

IN THE

Supreme Court of the United States

WESTERN SKY FINANCIAL, *et al.*,

Petitioners,

v.

DEBORAH JACKSON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the validity of an arbitration clause is determined exclusively by the statutory requirements of the Federal Arbitration Act ("FAA"), as held by the First, Fourth, Fifth, and Eleventh Circuits—or by a common-law "reasonableness" test, as held by the Seventh Circuit below?

II. Whether a court may apply a state law defense in a manner that disfavors arbitration by voiding an entire arbitration clause merely because the contractually-designated arbitrator is unavailable, notwithstanding the FAA's express directive to appoint a substitute arbitrator?

III. Whether the Seventh Circuit erroneously—and in conflict with the Second and Eighth Circuits—required a non-tribal-member's physical entry onto the relevant Indian reservation in connection with a transaction with a tribal member before ordering tribal court exhaustion of judicial claims arising from the transaction?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners make the following disclosures:

Petitioners are Western Sky Financial, LLC, Payday Financial, LLC, Great Sky Finance, LLC, Red Stone Financial, LLC, Management Systems, LLC, 24-7 Cash Direct, LLC, Red River Ventures, LLC, High Country Ventures, LLC, Financial Solutions, LLC, Martin A. ("Butch") Webb, CashCall, Inc., and Does 1-5.

Western Sky Financial, LLC, Payday Financial, LLC, Great Sky Finance, LLC, Red Stone Financial, LLC, Management Systems, LLC, 24-7 Cash Direct, LLC, Red River Ventures, LLC, High Country Ventures, LLC, Financial Solutions, LLC, CashCall, Inc., and Does 1-5 are privately held companies. They have no parent companies that are not parties to this proceeding, and no publicly held entity owns 10% or more of any of these entities' stock.

Respondents are Deborah Jackson, Linda Gonnella, and James Binkowski.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Western Sky Financial, LLC, Payday Financial, LLC, Great Sky Finance, LLC, Red Stone Financial, LLC, Management Systems, LLC, 24-7 Cash Direct, LLC, Red River Ventures, LLC, High Country Ventures, LLC, Financial Solutions, LLC, Martin A. ("Butch") Webb, CashCall, Inc., and Does 1-5 (collectively, "Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion (Pet. App. 1a) is reported at 764 F.3d 765. The district court's supplemental order issued upon a limited remand by the Seventh Circuit (Pet. App. 44a) is unreported. The district court's order (Pet. App. 50a) dismissing the complaint is unreported, but is available at 2012 WL 2722024. The Seventh Circuit's denial of rehearing or rehearing *en banc* (Pet. App. 59a) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Seventh Circuit entered its judgment on August 22, 2014, and denied a timely petition for rehearing or rehearing *en banc* on September 19, 2014. On November 12, 2014, Justice Kagan granted an extension of time in which to file a petition for a writ of certiorari, to and including February 16, 2015.

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act ("FAA") provides, in pertinent part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... 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.

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, ... or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy 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 ….

Id. § 5.

INTRODUCTION

Respondents entered into consumer loan agreements over the Internet with Petitioner Western Sky Financial, LLC ("Western Sky"), which is owned by an enrolled member of the Cheyenne River Sioux Tribe ("CRST") and operates on the Cheyenne River Indian Reservation ("Reservation") located within the exterior boundaries of South Dakota. All of the loan agreements at issue contain two distinct dispute resolution provisions that precluded Respondents from bringing suit in federal court. The first provision (the "Arbitration Clause") states that any disputes relating to Respondents' loans must be arbitrated. The second provision (the "Forum-Selection Clause") requires that, to the extent any dispute may be brought in a court—such as to confirm an arbitration award, or if the Arbitration Clause is invalidated—the dispute could be heard only in the courts of the Cheyenne River Sioux Tribe.

Federal law favors arbitration, and the arbitration of consumer disputes is accepted and routine. Federal law also favors the development of Indian tribal courts and economies. Yet, in this case, the Seventh Circuit refused to honor the parties' dispute resolution agreements. In doing so, the circuit court disregarded the plain meaning of the FAA, overlooked this Court's precedent on the permissible grounds for voiding an arbitration clause, and deepened several splits among the circuit courts. The decision below also precludes Indian-owned businesses—and *only* Indian-owned businesses—from selecting their home jurisdiction's

laws and courts in contracts formed in the modern, Internet-based economy.

The Seventh Circuit's decision warrants certiorari on three separate issues. The first question presented is whether an arbitration clause's enforceability is judged exclusively by the express statutory requirements of the FAA, as many lower courts have held; or instead by a common-law "reasonableness" test, as the Seventh Circuit held below. The FAA authorizes a court to void an arbitration clause only upon such grounds "as exist at law or in equity for the revocation of any contract," meaning generally-applicable contract law defenses like fraud or coercion. 9 U.S.C. § 2. Rather than apply this narrow rule, the Seventh Circuit held that an arbitration clause is void if it is merely "unreasonable," as judged by a non-statutory multi-factor test that this Court had fashioned for evaluating the parties' choice of a geographic venue for in-court litigation. A "reasonableness" test for assessing *forum-selection* clauses has no place in evaluating *arbitration* clauses—as confirmed by decisions of the First, Fourth, Fifth, and Eleventh Circuits, all of which have rejected application of a reasonableness standard to arbitration clauses. The Seventh Circuit's application of a "reasonableness" test to an arbitration clause undercuts the FAA by making it considerably easier for a party to void an arbitration clause. That decision warrants plenary review or summary reversal by this Court on this basis alone.

The second question presented is whether a court may—as the Seventh Circuit also did here—employ state law to void an entire arbitration clause merely because the contractually-selected arbitral forum and rules are found to be unavailable. Under Section 5 of the FAA, when the parties' selected arbitrator is unavailable, "the court shall designate and appoint an arbitrator." 9 U.S.C. § 5. Section 5 means that, as a matter of federal law, a court may not void an arbitration agreement under state law on the grounds that the arbitral forum is unavailable. Rather than follow this statute, however, the Seventh Circuit held that the entire arbitration agreement was void and unenforceable under Illinois law simply because the designated forum and rules were not available. The court of appeals thus applied a state law defense in a manner that conflicts directly with the FAA, frustrates its objectives, and disfavors arbitration, all in contravention of this Court's ruling in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747-48 (2011).

The final question presented relates to the scope of tribal jurisdiction over non-tribal-members who do not physically enter the tribe's reservation. The parties agreed in the Forum-Selection Clause that any in-court litigation would occur only in the tribal court. The Seventh Circuit held that the Forum-Selection Clause was unenforceable because Respondents, who are not Indians, never entered the Reservation. In doing so, the Seventh Circuit held that Petitioners lacked even a colorable argument that the tribal court has jurisdiction over this dispute, and thus refused to order Respondents to comply with the tribal exhaustion

doctrine, which would require them to bring suit in the tribal court and allow that court to determine in the first instance whether it has jurisdiction. The Seventh Circuit's holding conflicts with the decisions of at least two other circuit courts, which have refused to impose such a rigid prerequisite for tribal jurisdiction over nonmembers.

The Seventh Circuit thus adopted an unprecedented and unreasonably restrictive view of tribal court jurisdiction that impedes the ability of tribal businesses to compete in a modern economy, where countless transactions now cross jurisdictional boundaries even where the parties themselves do not. Under the Seventh Circuit's rule, a tribal court may *never* exercise jurisdiction over non-tribal-members unless they set foot on the reservation, even if the nonmembers voluntarily enter into commercial relationships with tribal members and sign contracts stating that tribal law will govern their disputes, as Respondents did here. Only Indian-owned businesses are subjected to such a heightened requirement, placing them at a disadvantage compared to non-Indian businesses. This holding therefore imposes significant burdens on tribal commerce, violates the clear language of *Montana v. United States*, 450 U.S. 544 (1981), and conflicts with recent Indian law precedent from other federal courts.

Given the splits in circuit authority and the conflicts between the Seventh Circuit's holdings and this Court's precedent, the Court should grant a writ of certiorari.

STATEMENT OF THE CASE

A. Respondents Signed Comprehensive Dispute Resolution Provisions.

In 2010 and 2011, Respondents all received unsecured installment loans from Petitioner Western Sky, a company owned by Petitioner Martin A. Webb, an enrolled member of the CRST. Pet. App. 1a, 3a-4a. At all relevant times, Western Sky operated on the Reservation within the exterior boundaries of South Dakota. Pet. App. 2a, 51a.

Before receiving the loan funds, each Respondent signed a contract ("Loan Agreement") that listed the terms of repayment and also contained comprehensive dispute resolution provisions. Pet. App. 3a-4a. Each Loan Agreement included an Arbitration Clause stating that any disputes "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." Pet. App. 4a. Arbitration would be conducted by either "(i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council." Pet. App. 4a. The Arbitration Clause stated that Respondents would not have to pay the arbitration filing fee or any other fees charged by the arbitrator,

and it further provided that arbitration could be conducted via phone or video conference. Pet. App. 4a.[1]

The Loan Agreements also contained a Forum-Selection Clause, whereby each Respondent "consent[ed] to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court." Pet. App. 3a n.1. Further, Respondents agreed that their Loan Agreements were "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation." Pet. App. 4a (emphasis omitted).

Western Sky later transferred Respondents' loans to Petitioner WS Funding, LLC, who assigned the servicing rights to Petitioner CashCall, Inc. Pet. App. 3a, 51a-52a.

B. The District Court Initially Enforced The Arbitration Clause.

In October 2011, Respondents brought a putative class action in the Circuit Court of Cook County, Illinois, alleging that their loans violated Illinois civil and criminal statutes, including the Illinois Consumer Fraud and Deceptive Business Practices Act. Pet. App. 5a, 52a. Petitioners timely removed the action to the United States District Court for the Northern District of Illinois and moved to dismiss the case in

[1] Borrowers could opt out of arbitration by emailing Western Sky within sixty days, but no Respondent exercised this right. Pet. App. 3a-4a.

favor of arbitration pursuant to the Arbitration Clause. Pet. App. 5a.[2]

In accordance with Seventh Circuit precedent, the district court treated Petitioners' motion to dismiss and to compel arbitration "as an objection to venue" under Federal Rule of Civil Procedure 12(b)(3). Pet. App. 53a. The district court then analyzed the Arbitration Clause as a type of "forum selection clause" and concluded that the Arbitration Clause was enforceable. The court held that Respondents' claims that the Loan Agreements were illegal could not be addressed before arbitration and rejected the claim that the Loan Agreements were procured by duress. Pet. App. 54a-56a. Finally, the district court concluded that Illinois public policy would not invalidate borrowers' "freely contracted choice to litigate their dispute in the Tribal forum." Pet. App. 56a-57a.

C. Respondents Appealed, And The Seventh Circuit Remanded For Further Factual Findings.

Respondents appealed to the Seventh Circuit, which issued a limited remand for the district court to conduct further fact-finding on whether the CRST has: (1) "applicable tribal law readily available to the public"; and (2) "an authorized arbitration mechanism available

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[2] After the defendants removed the case to federal court, Respondent James Binkowski was added as a plaintiff, and Petitioner CashCall, Inc., was added as a defendant. Pet. App. 52a.

to the parties and whether the arbitrator and method of arbitration required under the contract is actually available." Pet. App. 44a.

On August 28, 2013, the district court issued its findings. It answered the first question in the affirmative, concluding that each party was able to secure a copy of the relevant substantive tribal law. Pet. App. 45a. However, the district court answered the second question in the negative. Relying heavily on arbitration proceedings that had occurred in another case, *Inetianbor v. CashCall, Inc.*, No. 13 CV 60066 (S.D. Fla. 2013), the district court here concluded that arbitration was not possible in accordance with the Arbitration Clause because any arbitrator selected would be biased due to his membership in the CRST. Pet. App. 46a-47a. The district court also concluded that arbitration was not available because the "intrusion of the [CRST] into the [Arbitration Clause] appears to be merely an attempt to escape otherwise applicable limits on interest charges." Pet. App. 49a.

D. The Seventh Circuit Reversed.

On August 22, 2014, the Seventh Circuit issued an opinion concluding that the arbitral forum and procedural rules listed in the Arbitration Clause were unavailable, and, therefore, the entire Arbitration Clause was unreasonable and unenforceable. Pet. App. 13a-32a.

The Seventh Circuit first addressed the Arbitration Clause's validity under federal law.[3] The court stated that an arbitration clause is merely "a specialized forum selection clause," Pet. App. 15a, and throughout its opinion, the court repeatedly referred to the Arbitration Clause as a "forum selection clause," Pet. App. 13a-32a. The court held that the validity of an arbitration clause is therefore gauged by the same test used for a traditional forum-selection clause. Pet. App. 19a-21a. Accordingly, the court held that an arbitration clause is invalid whenever it is "unreasonable" under the multi-prong common-law test this Court set forth in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). Pet. App. 19a-20a. *Bremen* held that a forum-selection clause is "unreasonable" and thus unenforceable if (1) it was procured by fraud, undue influence, or overweening bargaining power; (2) the forum is gravely difficult or inconvenient; or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought. Pet. App. 20a.

Applying the *Bremen* test to the Arbitration Clause, the Seventh Circuit concluded that the arbitrator designated in the Loan Agreements was

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[3] The Seventh Circuit stated that it would evaluate the clause under "the law designated in the choice of law clause," which was CRST law. Pet. App. 16a-17a. Ultimately, though, the court simply applied federal law because the court assumed that federal and CRST law would be identical, given that CRST law "borrow[s]" from federal law "where necessary." Pet. App. 19a (internal quotation marks omitted).

unavailable because the CRST does not "involve itself in the hiring of arbitrators" and does not have readily identifiable consumer dispute rules. Pet. App. 20a-21a (internal quotation marks and alterations omitted). From this, the court concluded that the chosen arbitral forum was illusory, that "an illusory forum is unreasonable under *M/S Bremen*," and that the Arbitration Clause was thus unenforceable. Pet. App. 21a.

The Seventh Circuit then held that the Arbitration Clause was also unenforceable under Illinois law regarding forum-selection clauses. Pet. App. 22a-26a. According to the court, the unavailability of the arbitrator and rules meant that Respondents could "not have ascertained or understood the arbitration procedure to which they were agreeing." Pet. App. 32a. The court also stated that the Arbitration Clause allowed Petitioners to "manipulate what purported to be a fair arbitration process by selecting an arbitrator and proceeding according to nonexistent rules." Pet. App. 32a. Rather than remand the case for the district court to appoint a substitute arbitrator in accordance with FAA § 5, the court instead held that the Arbitration Clause was unconscionable and void. Pet. App. 27a-31a. The court thus compelled the parties to litigate despite FAA § 5 and despite the parties' express intention to arbitrate, as evidenced by the extensive Arbitration Clause itself, as well as severance and survival provisions designed to ensure

that all disputes would be channeled into arbitration. *See* C.A. App. 32-33.[4]

Equally important, after deciding that the parties would have to litigate their disputes, the Seventh Circuit proceeded to determine where the case would *not* be litigated. As an alternative ground to affirm the district court's dismissal of this suit, Petitioners had sought to enforce the Loan Agreements' Forum-Selection Clause, which provides that, if claims were not subject to arbitration for any reason, the parties would litigate only in tribal court. At a minimum, under this Court's precedent, Petitioners requested tribal court "exhaustion," *i.e.*, that the tribal court be allowed an initial chance to determine its own jurisdiction before the federal courts weigh in. The court recognized that Respondents sought and accepted the loans at issue from Petitioner Western Sky, which is owned by a tribal member and operated on the Reservation. Pet. App. 11a-12a. Yet the court characterized the loan transactions as not being the kind of "on-reservation" activity amenable to tribal regulation, *see Montana*, 450 U.S. at 565-66, because Respondents never physically entered the Reservation. Pet. App. 34a. Accordingly, the court held that there was not even a colorable claim of tribal jurisdiction here. Pet. App. 42a.

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[4] "C.A. App." refers to Plaintiffs-Appellants' "Short Appendix" filed at the Seventh Circuit.

On September 19, 2014, the Seventh Circuit denied a timely petition for rehearing or rehearing *en banc*. Pet. App. 59a.

REASONS FOR GRANTING THE PETITION

A writ of certiorari is warranted here because the Seventh Circuit's decision disregarded federal statutory law and this Court's teachings, while breaking with authority from other courts of appeals on fundamental issues of arbitration and Indian jurisprudence.

The FAA authorizes courts to set aside an arbitration clause only upon "such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, including, for example, "fraud or coercion," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974). The Seventh Circuit significantly altered these standards by voiding an arbitration clause merely because it is "unreasonable" under *Bremen*. Pet. App. 19a-21a. But *Bremen* sets forth a common-law standard that the Court never intended to apply to FAA-protected arbitration clauses. *See* 407 U.S. at 11 (noting that the case dealt with the question of whether, in "common-law countries," the "parties to a contract may agree in advance to submit to the jurisdiction of a given court"). Indeed, the Seventh Circuit's decision conflicts directly with opinions from four other courts of appeals that explicitly refused to apply the *Bremen* test to arbitration clauses. The vague "reasonableness" test in *Bremen* invites courts hostile to arbitration to invalidate arbitration clauses

even where no generally-applicable contract law defense applies. Under the Seventh Circuit's test, parties will lose the benefits of out-of-court dispute resolution, in effect nullifying the FAA's express language and the strong federal policy in favor of arbitration.

The Seventh Circuit also erred by ruling that the Arbitration Clause is "unconscionable" under state law. Pet. App. 25a. The court voided the entire Arbitration Clause merely because the selected arbitrator and rules were unavailable—despite the FAA's mandate that "the court *shall* designate and appoint an arbitrator" if for "*any* … reason" there is "a lapse in the naming of an arbitrator." 9 U.S.C. § 5 (emphases added). The Seventh Circuit's decision violated this Court's holding in *Concepcion* that courts may not apply a state-law defense "in a fashion that disfavors arbitration" or "stand[s] as an obstacle to the accomplishment of the FAA's objectives." 131 S. Ct. at 1747, 1748.

Finally, splitting from several other circuit courts, the Seventh Circuit imposed a categorical requirement that a nonmember must physically enter an Indian reservation in connection with a transaction before a tribal court can address disputes arising from the transaction, even when both parties agreed in writing to the tribal forum. The Second Circuit expressly has eschewed such a categorical approach to determining the situs of an Internet loan made by an Indian tribe or tribal member, instead looking to the facts and circumstances of the particular transaction. Moreover, the Eighth Circuit requires tribal court exhaustion of a

claim that bears a close nexus to a contract with a tribal member that relates to activities occurring on tribal lands. Breaking ranks, the Seventh Circuit's uncompromising holding—in which a nonmember's physical presence on the reservation is a prerequisite to any possible Indian regulation—threatens tribal commerce, sovereignty, and core tenets of federal Indian law. At a minimum, this Court should intervene now to set a nationwide standard and to prevent this critical area of federal law from falling deeper into disarray.

I. By Using The *Bremen* "Reasonableness" Test To Void An Arbitration Clause, The Seventh Circuit Created A Circuit Split, Contravened Congress's Dictates In The FAA, And Disregarded This Court's Pro-Arbitration Jurisprudence.

1. Section 2 of the FAA provides that courts may void an arbitration clause only upon "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Rather than apply this narrow and straightforward rule, the Seventh Circuit fashioned its own rule that an arbitration clause is void if it is merely "unreasonable," as gauged by a multi-factor, common-law test that this Court developed for forum-selection clauses in *Bremen,* 407 U.S. 1. Pet. App. 19a-21a. The Seventh Circuit's holding split with four other circuit courts that have held that the validity of arbitration clauses is governed exclusively by the FAA and *not* by the *Bremen* test—a test that presumes the parties will litigate their disputes *in court* and concerns

itself solely with the geographic venue in which that litigation will occur.

Almost forty years ago, the Fifth Circuit in *Sam Reisfeld & Son Import Co. v. S. A. Eteco*, 530 F.2d 679 (5th Cir. 1976), rejected the "premise that the *Bremen* unreasonableness test is applicable to arbitration clauses." *Id.* at 680. Rather, "the enforceability of the arbitration clause at issue is governed exclusively by the explicit provisions of the Federal Arbitration Act," under which "a party seeking to avoid arbitration must allege and prove that the arbitration clause itself was a product of fraud, coercion, or 'such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* at 680-81 (quoting 9 U.S.C. § 2).

Since *Sam Reisfeld*, the Fifth Circuit has repeatedly reaffirmed that the *Bremen* test does not apply to arbitration clauses. For example, in *Northrop Grumman Ship Systems, Inc. v. Ministry of Defense of Republic of Venezuela*, 575 F.3d 491 (5th Cir. 2009), the court held that arbitration clauses are subject to "a heightened standard" compared to forum-selection clauses. *Id.* at 503. In other words, unlike a forum-selection clause, "an arbitration provision must be enforced, *even if unreasonable*" under *Bremen*. *Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 332 (5th Cir. 1987) (emphasis added).

That is also the law in the First Circuit, which held over thirty-five years ago that "if every party who signed an arbitration clause could later come into court

and attempt to defeat the clause on the basis of its unfairness or unreasonableness, the advantages attendant on arbitration rather than litigation would be largely lost." *USM Corp. v. GKN Fasteners, Ltd.*, 574 F.2d 17, 20-21 (1st Cir. 1978). Rather, a party can defeat an arbitration clause only for the "specifically recognized reasons" in the FAA, like "fraud, coercion, or such legal or equitable grounds which would give rise to revocation of a contract." *Id.* at 21.

Similarly, in *Liles v. Ginn-La West End, Ltd.*, 631 F.3d 1242 (11th Cir. 2011), the Eleventh Circuit held that it is inappropriate to "'incorporate the *Bremen* standards wholesale to situs selections in arbitration clauses.'" *Id.* at 1250 n.14 (quoting *Sam Reisfeld*, 530 F.2d at 681).

In an unpublished opinion, the Fourth Circuit also refused to apply the *Bremen* test to an arbitration clause, calling the plaintiff's reliance on *Bremen* "misplaced" because "[t]hat case dealt with judicial forum selection, not arbitration." *Silkworm Screen Printers, Inc. v. Abrams*, 978 F.2d 1256, 1992 WL 317187, at *4 (4th Cir. 1992) (unpublished table decision).[5]

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[5] Several state appellate courts have also declined to apply the *Bremen* reasonableness test to an arbitration clause. *See Falls v. 1CI, Inc.*, 57 A.3d 521, 530 (Md. Ct. Spec. App. 2012) ("While it is true that arbitration clauses are a specialized kind of forum selection clause, cases interpreting the scope of forum-selection clauses are not persuasive when interpreting an agreement to arbitrate."); *Goldstein v. Am. Steel Span, Inc.*, 640 S.E.2d 740, 743 (N.C. Ct. App. 2007) ("[F]orum selection clauses in arbitration and

Although the Seventh Circuit appears to be the first circuit court to apply wholeheartedly the *Bremen* test to an arbitration clause, other circuits have applied a reasonableness standard to such clauses. For example, in *Avis Rent A Car System, Inc. v. Garage Employees Union, Local 272*, 791 F.2d 22 (2d Cir. 1986), the Second Circuit held that "the burden was on the [defendant] to show that arbitration ... would have been unfair or unreasonable." *Id.* at 26. Similarly, the Ninth Circuit has assessed "the reasonableness of the 'place and manner' provisions in [an] arbitration clause." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1288 (9th Cir. 2006) (en banc).

As is evident, the courts of appeals disagree about whether they should gauge arbitration clauses solely by the requirements of the FAA, or instead by the common-law *Bremen* reasonableness test. The Seventh Circuit has firmly planted a flag on the side of *Bremen*, with four other circuit courts on the opposite side. Only this Court can resolve the split. Therefore certiorari is warranted.

2. The Seventh Circuit's holding was incorrect. The narrow and clear test that Congress articulated in FAA

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litigation are similar, but ... in the case of arbitration, the courts are bound exclusively by the FAA."); *Black & Pola v. Manes Org., Inc.*, 72 A.D.2d 514, 514 (N.Y. App. Div. 1979), *aff'd*, 407 N.E.2d 1345 (N.Y. 1980). At least one district court from outside of the First, Fourth, Fifth, and Eleventh Circuits has held the same. *See Redshaw Credit Corp. v. Ins. Profs., Inc.*, 709 F. Supp. 1032, 1035 (D. Kan. 1989).

§ 2 is incompatible with the broad and malleable *Bremen* reasonableness test, which significantly lowers the burden required to void an arbitration clause, in violation of the FAA and this Court's precedent.

In the FAA, Congress implemented "an emphatic federal policy in favor of arbitral dispute resolution." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (internal quotation marks omitted). To ensure that the benefits of arbitration are realized, FAA § 2 lays out a very narrow test under which arbitration clauses can be voided: *only upon "such grounds as exist at law or in equity for the revocation of any contract."* 9 U.S.C. § 2 (emphasis added).

The *Bremen* test is incompatible with FAA § 2. While the defenses of fraud and coercion are universally recognized as sufficient to void an arbitration clause, *see, e.g.*, *Northrop Grumman*, 575 F.3d at 503, mere unreasonableness is not a ground "at law or in equity for the revocation of" an entire contract, 9 U.S.C. § 2. Parties have always been "permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side." 8 Richard A. Lord, *Williston on Contracts* § 18:1, at 8 (4th ed. 2010) (internal quotation marks omitted). A party cannot revoke a contract simply because it is unreasonable, imposes a hardship, or is a bad bargain: "[I]t undoubtedly is … a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such." *Columbus Ry., Power & Light Co. v. City of Columbus*, 249 U.S. 399, 414 (1919). More than a century ago in *The Elfrida*, 172 U.S. 186 (1898),

this Court noted that under the common law, "if the contract has been fairly entered into, with eyes open to all the facts, and no fraud or compulsion exists, the mere fact that it is a hard bargain, or that the service was attended with greater or less difficulty than was anticipated, will not justify setting it aside." *Id.* at 198.

At bottom, then, the Seventh Circuit's fundamental error here was in applying a common-law test that contravenes Congress's mandate in the FAA. This Court has warned against introducing federal common-law standards where Congress has spoken on the issue. "[F]ederal common law is subject to the paramount authority of Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (internal quotation marks omitted). The "test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question at issue." *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (alterations and internal quotation marks omitted). In FAA § 2, Congress certainly spoke "directly to the question at issue" here and made clear that courts should only very rarely void arbitration clauses. By contrast, Congress has enacted no "Federal Forum Selection Clause Act" that evinces a strong federal policy in favor of upholding *litigation forum-selection clauses*.

Applying the *Bremen* test also conflicts with this Court's recent decision in *Marmet Health Care Center*, which confirmed that courts are not permitted to create variations or exceptions to FAA § 2's strict requirements. 132 S. Ct. at 1203. In *Marmet*, the West

Virginia Supreme Court of Appeals had voided an arbitration clause that covered claims for personal injury and wrongful death. *Id.* at 1203. This Court reversed and held that courts can void arbitration clauses pursuant to FAA § 2 only "upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* "*The statute's text includes no exception* for personal-injury or wrongful-death claims. It requires courts to enforce the bargain of the parties to arbitrate." *Id.* (internal quotation marks omitted; emphasis added); *see also Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585-88 (2008). Similarly, there is no exception in § 2 for "unreasonableness," and this simple rationale explains why the Seventh Circuit's imposition of the *Bremen* test is incompatible with the FAA.

In addition to the fact that the *Bremen* test is incompatible with the text of the FAA, there are also significant practical reasons why arbitration clauses should be more difficult to void than forum-selection clauses. The two types of clauses serve very different purposes. Forum-selection clauses presume that the parties have agreed to bear the expense of litigating their disputes in court, and the question is merely which court will hear the case. *See, e.g.*, 7 *Williston on Contracts* § 15:15, at 341 (forum-selection clause requires the parties "to sue in a particular court or tribunal"). By contrast, the basic purpose of an arbitration clause is to "avoid[] the courts" altogether. *Concepcion*, 131 S. Ct. at 1752.

Arbitration clauses guarantee parties the time- and cost-saving advantages of arbitration. *See id.* at 1749. Those advantages are often of paramount importance to the economic feasibility of transactions, especially smaller transactions like those at issue here. Litigation costs might well overwhelm either party's ability to address disputes. The party seeking to thwart resolution of disputes in such transactions should not be given resort to a lax standard for evading its contractual agreement to arbitrate such disputes, or else there may be no other tribunal available as a practical matter. These same advantages are not nearly as relevant when considering whether to void a forum-selection clause, where the parties will litigate their dispute in a court no matter what.

Thus, although this Court has stated that an arbitration clause is generally a "species of forum-selection clauses," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 698 (2010), the two types of clauses are certainly *not* subject to the same test for validity, as the Seventh Circuit erroneously held. Rather, courts must follow the directions of Congress by gauging arbitration clauses exclusively by the narrow requirements of the FAA—and not by a broad reasonableness test that significantly lowers the burden required to avoid arbitration.

3. The clear circuit split demonstrates the great need for this Court's guidance in this area of law. In addition, the Seventh Circuit's test, if adopted by other courts, could spell disaster for valid arbitration clauses across the country. Any arbitration clause that a court

believes contains an unreasonable term is at risk of being voided.[6]

For example, under the Seventh Circuit's holding, arbitration clauses that this Court has readily upheld are suddenly at risk of being labeled "unreasonable" and thus unenforceable. In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), this Court upheld an arbitration clause's class waiver even though "the plaintiff's cost of individually arbitrating a federal statutory claim [would] exceed[] the potential recovery." *Id.* at 2307. Similarly, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), this Court upheld an arbitration clause requiring arbitration to occur in Japan, despite the "inconvenience and costs of proceeding" abroad. *Id.* at 532. Again, in *Concepcion*, this Court upheld an arbitration clause that forbid class-wide relief even though it would have the effect of preventing recovery of "small-dollar claims that might otherwise slip through the legal system." 131 S. Ct. at 1753.

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[6] This is especially true because the Seventh Circuit's decision cannot be dismissed as preceding this Court's decision in *Atlantic Marine Construction Co. v. United States District Court for Western District of Texas*, 134 S. Ct. 568 (2013). *Atlantic Marine*, which narrowed *Bremen* by holding that forum-selection clauses can be voided only by reliance on "public interest factors," was issued over eight months *before* the Seventh Circuit's decision, yet the Seventh Circuit never mentioned it. Thus, the Seventh Circuit erred twice—it not only gauged an arbitration clause by an inapplicable common-law test, but it also relied on an outdated and overly broad version of that test.

FAA § 2 requires courts to enforce those arbitration clauses, but those clauses likely would fall victim to a "reasonableness" test that looks to factors like whether the plaintiffs effectively would be "deprived of [their] day in court" or be consigned to a "gravely difficult and inconvenient" forum, or whether the arbitration clauses are contrary to a "strong public policy of the [state] in which the suit is brought." Pet. App. 20a (internal quotation marks omitted). This last consideration would actually permit state law to trump the FAA, which is precisely what the Seventh Circuit did here. *See* Part II, below.

Given the clear split in circuit authority and the Seventh Circuit's contravention of this Court's precedent and the text of the FAA, the Court should grant a writ of certiorari.

II. The Seventh Circuit Violated *Concepcion* By Employing State Law To Void An Entire Arbitration Clause Merely Because The Arbitrator Was Unavailable.

The Seventh Circuit also addressed the Arbitration Clause under Illinois law and concluded that the Clause was unconscionable and void because the selected arbitrator and rules were unavailable. Pet. App. 31a-32a. The FAA mandates, however, that in such a situation a court "shall" appoint substitutes rather than voiding the entire clause. 9 U.S.C. § 5. Thus, the Seventh Circuit's "unconscionability" conclusion violated this Court's ruling in *Concepcion* that courts may not employ state law in a manner that frustrates

the FAA's objectives. *See* 131 S. Ct. at 1747. Accordingly, this issue also necessitates the Court's review.

1. In *Concepcion*, this Court held that the FAA displaces any state law or policy that is "applied in a fashion that disfavors arbitration" or that "stand[s] as an obstacle to the accomplishment of the FAA's objectives." 131 S. Ct. at 1747-48.

One of Congress's primary objectives for the FAA is to ensure that arbitration does not fail simply because the parties' selected arbitrator is unavailable. The FAA therefore requires that when there is a "lapse in the naming of an arbitrator" for "*any* … reason," 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 [she] had been specifically named" in the agreement to arbitrate. 9 U.S.C. § 5 (emphases added).

Here, the Seventh Circuit concluded that because the arbitrator and rules referenced in the Arbitration Clause were unavailable, the entire clause was unconscionable and void under Illinois law, despite FAA § 5's contrary mandate. Pet. App. 22a-26a, 31a-32a.

By equating arbitral unavailability with unconscionability, the Seventh Circuit blessed "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," in direct contravention of *Concepcion*. 131 S. Ct. at 1748. The

clear language of FAA § 5 underscores the impropriety of voiding an entire Arbitration Clause simply because the chosen arbitrator "does not exist," Pet. App. 29a n.39—an impropriety that is not remedied merely by labeling the absence "unconscionable." Certainly, the Illinois General Assembly could not pass a valid state statute declaring all agreements to arbitrate void if the arbitrator and rules mentioned in the agreement turn out to be unavailable. A court may not achieve the same result through state common law.

Further, the requirement to appoint a substitute arbitrator is not excused even if, as the Seventh Circuit characterized it, the Arbitration Clause here were "atypical." Pet. App. 31a. As this Court has unambiguously stated, a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

The Seventh Circuit thought that its ruling was consistent with *Concepcion*, because the state law here supposedly does not single out arbitration clauses, but instead applies "to arbitration provisions in the same manner [as] … clauses designating non-arbitral fora," which was permissible because "the Supreme Court has treated arbitration provisions as [equivalent to] forum selection provisions." Pet. App. 29a n.39. Regardless of how the court characterized the Illinois law in question, the court still used that law to trump the

explicit mandate of FAA § 5, which *Concepcion* flatly forbids. *See* 131 S. Ct. at 1748.[7]

When the Seventh Circuit found that the contractually-selected arbitrator was unavailable here, the court should have remanded for the district court to appoint a substitute arbitrator pursuant to FAA § 5, rather than using Illinois law to void the entire Arbitration Clause.

2. This Court should address this issue because the unavailability of parties' selected arbitrator is a relatively common occurrence. For example, in the wake of the National Arbitration Forum's ("NAF") decision to stop hearing consumer disputes, there has been significant litigation about arbitration clauses that listed NAF as the arbitrator; ever since, the issue "has vexed courts across the country." *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 972 (D. Minn. 2012); *see also, e.g.*, *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 791 (7th Cir. 2013); *Khan v. Dell, Inc.*, 669 F.3d 350, 354-55 (3d Cir. 2012); *In re Liberty Refund Anticipation Loan Litig.*, No. 12-cv-2949, 2014 WL 3639189, at *3-4 (N.D. Ill. July 23, 2014); *GGNSC Lancaster v. Roberts*, No. 13-cv-5291, 2014 WL 1281130, at *6-8 (E.D. Pa. Mar. 31, 2014); *Selby v. Deutsche Bank Trust Co. Ams.*, No. 12-cv-1562, 2013 WL 1315841, at *10-11 (S.D. Cal. Mar. 28, 2013);

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[7] Further, given that the state law here applies only to forum-selection clauses—and not to "contracts generally," *Perry*, 482 U.S. at 492 n.9—it was an improper ground upon which to void an arbitration clause under the FAA, *see* Part I above.

Torrence v. Nationwide Budget Fin., 753 S.E.2d 802, 807 (N.C. Ct. App.), *review denied*, 759 S.E.2d 88 (N.C. 2014).

Outside the context of the NAF, parties inevitably will select persons or organizations to be their arbitrator, only to discover years down the road that the person or organization is not available to hear their dispute—perhaps the arbitrator passed away, the parties failed to identify adequately who would be the arbitrator, or the arbitral organization ceased operations or never came into existence. Under the Seventh Circuit's ruling, all of these arbitration clauses are potentially void under state laws that label as unconscionable any arbitration clause containing an unavailable forum and rules.

The Seventh Circuit's violations of *Concepcion* and FAA § 5 further warrant a grant of certiorari.[8]

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[8] Alternatively, if this Court grants the pending petition for a writ of certiorari in *CashCall, Inc. v. Inetianbor*, No. 14-775—which raises an issue of appointing a substitute arbitrator pursuant to FAA § 5—then Petitioners request that the Court also grant this petition, vacate the Seventh Circuit's ruling, and remand this case for reconsideration in light of the Court's opinion in *Inetianbor*.

III. The Court Should Grant Certiorari To Clarify The Scope Of Indian Tribes' Authority To Adjudicate Claims Of Nonmembers Who Enter Into Consensual Internet Transactions With Tribal Members.

The Seventh Circuit separately erred in refusing to order tribal court exhaustion of Respondents' legal claims. The court of appeals refused to let the tribal court examine the scope of its jurisdiction over the claims asserted in this matter—and, indeed, held categorically that the CRST altogether lacks jurisdiction over the dispute, despite the express written agreement of the parties selecting tribal court and laws. In so holding, the Seventh Circuit adopted legal standards that conflict with the standards adopted by the Second, Fifth, and Eighth Circuits. Worse yet, the Seventh Circuit's standards absolutely prohibit tribal members from selecting the laws of their home jurisdictions to govern their business dealings with customers in other jurisdictions—a right that citizens of every State in the Union enjoy.

Consequently, the law on this vitally important subject is in disarray, and consumers and businesses alike would benefit from nationwide uniformity. This Court therefore should clarify the standards for tribal jurisdiction and tribal court exhaustion in the context of Internet transactions between tribal members and nonmembers.

1. The Seventh Circuit acknowledged that the loans at issue were made by Western Sky, which operated on

the Reservation and is owned by Petitioner Martin A. Webb, an enrolled tribal member. Pet. App. 11a-12a. Nevertheless, the court held that there was "no colorable claim that the courts of the Cheyenne River Sioux Tribe can exercise jurisdiction over [Respondents]" because they never physically entered the Reservation when procuring loans. *Id.* at 42a. By making physical entry onto the reservation a necessary predicate of tribal jurisdiction, the Seventh Circuit altered the core tenets of federal Indian law.

This Court has made clear that if tribal jurisdiction over a case is even plausible, a federal court must stay its hand until a plaintiff has exhausted available tribal remedies. *See Iowa Mutual 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, 856-57 (1985). In such circumstances, the federal case is either dismissed or stayed until a tribal court can examine the claims and record, and then determine if it has jurisdiction. Numerous courts of appeals have recognized the low threshold for invoking the doctrine and its mandatory nature. *See, e.g.*, *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008); *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003).

This Court's decisional law defining the scope of tribal court jurisdiction amply supports tribal court exhaustion. In *Williams v. Lee*, 358 U.S. 217, 220 (1959), this Court held that, as a default rule, tribal courts have exclusive adjudicative jurisdiction over civil cases involving on-reservation transactions with

tribal members on one side of the transaction and nonmembers on the other. Subsequently, the Court in *Montana v. United States* established that tribes may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing [or] contracts." 450 U.S. at 565-66. Neither of these cases forecloses a tribal court from exercising jurisdiction over borrowers like Respondents who willingly choose to transact business over the Internet with a tribal-member-owned company, nor do the cases condone an analysis in which jurisdiction hinges solely on the location of one party to a two-party online transaction.[9] To the contrary, *Williams* emphasized the importance of tribal jurisdiction as embodying "the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220.

Just as certain interstate lenders may take advantage of their home state's laws on interest rate limits when lending to borrowers in states with more

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[9] The Seventh Circuit's reliance on *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), is misplaced for much the same reasons. Important to the Court's ruling there was "the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent." *Id.* at 337. Respondents voluntarily and expressly bestowed consent here. Further, *Plains Commerce Bank* hinged on "[t]he distinction between sale of the land and conduct on it." *Id.* at 334. At issue here is Respondents' conduct in seeking to do business with a tribal member on the Reservation by accessing that member over the Internet. *Plains Commerce Bank* does not speak to conduct at all, let alone Internet conduct.

restrictive laws, *see Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp.*, 439 U.S. 299, 307-19 (1978) (construing 12 U.S.C. § 85 as applied to national banks); *see also Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1209, 1214 (9th Cir. 2001) (construing common law as applied to non-bank lenders), Indian-owned lenders operating on reservations should be able to rely on the laws of their home jurisdictions.

Existing precedent concerning tribal court jurisdiction does not address agreements between tribal members operating businesses on a reservation and nonmembers physically located thousands of miles away. Allowing the Seventh Circuit's decision to stand, however, would indiscriminately carve all reservation-based businesses out of a tribe's regulatory domain to the extent these businesses deal with nonmembers off the reservation. This would mark a drastic shift in the law and undermine the federal goal of "render[ing] Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring). As the Court held in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987): "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."

With increasing frequency, tribes and tribal members are relying on the Internet as a means of supporting their local economies. This is especially true

for tribes like the CRST, whose impoverished reservations are located in remote areas.[10] Given the far-reaching implications of the Seventh Circuit's opinion and its utter unsuitability for the digital age, the Court's input in this area of jurisprudence is necessary.

2. The need for clarity and uniformity is further highlighted by the circuit split created by the Seventh Circuit's decision on tribal court jurisdiction. Notably, the Eighth and Second Circuits have analyzed tribal court jurisdiction in a manner that, if applied to the facts of this case, would require tribal court exhaustion.

Tribal exhaustion controlled the Eighth Circuit's analysis in *DISH Network Service L.L.C. v. Laducer*, 725 F.3d 877 (8th Cir. 2013). In *Laducer*, the court rejected the premise, adopted below by the Seventh Circuit, 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." *Id.* at 884. Applying this standard, the Eighth Circuit held tribal court exhaustion appropriate for a claim for

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[10] Indeed, according to the most recent census, Ziebach County, where most of the Reservation is located, has the highest overall percentage of people living in poverty of any county in the United States. *Small Area Income and Poverty Estimates*, U.S. Census Bureau, http://tinyurl.com/kmw6vzl (last visited Feb. 13, 2015) (follow "est11ALL.xls" hyperlink).

abuse of process that the court assumed had "occurred off tribal lands." *Id.*

In *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014), the Second Circuit acknowledged that the situs of "e-commerce that straddles borders and connects parties separated by hundreds of miles" is an unanswered question in federal Indian jurisprudence. *Id.* at 114. Crediting the view that online consumer loans "could be regarded as on-reservation, based on the extent to which one side of the transaction is firmly rooted on the reservation," *id.* at 115—thus implicitly rejecting the categorical *Jackson* rule requiring physical entry—the court held only that the plaintiff tribe had not made a sufficient factual showing to obtain a preliminary injunction against state regulation, *id.* at 117.

Significantly, two federal district courts have recently ordered tribal exhaustion in cases arising from Internet loan transactions involving Petitioner Western Sky. *See Brown v. Western Sky Fin., LLC*, No. 1:13-cv-255, 2015 WL 413774 (M.D.N.C. Jan. 30, 2015); *Heldt v. Payday Fin., LLC*, 12 F. Supp. 3d 1170 (D.S.D. 2014). In *Heldt*, the District of South Dakota explained: "[I]n today's modern world of business transactions through internet or telephone, requiring physical entry on the reservation" for tribal jurisdiction, "particularly in a case of a business transaction with a consent to jurisdiction clause, seems to be requiring too much." 12 F. Supp. 3d at 1186.

The Seventh Circuit's ruling here is also at odds with the Fifth Circuit's opinion in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3006 (U.S. June 12, 2014) (No. 13-1496). The Fifth Circuit in *Dolgencorp* held that tribal court jurisdiction existed in a civil tort case between a tribal member and a nonmember, even though the underlying consensual relationship did not discernibly affect tribal self-governance. *Id.* at 176. The Seventh Circuit acknowledged *Dolgencorp*'s holding, but nevertheless required Petitioners to make a showing of interference with tribal self-governance, simply to secure a grant of tribal court exhaustion. *See* Pet. App. 36a-37a n.43. This is a clear conflict that only this Court can resolve.

Accordingly, the petition for a writ of certiorari should be granted.[11]

[11] The plaintiffs in *Dolgencorp* have sought certiorari, *see Dollar General Corp. v. Miss. Band of Choctaw Indians*, 83 U.S.L.W. 3006 (U.S. June 12, 2014) (No. 13-1496), and this Court requested the views of the United States Solicitor General in that case. If the Court grants the petition in *Dollar General*, Petitioners respectfully request that this case be held in abeyance pending the outcome of *Dollar General* and then remanded to the Seventh Circuit for reconsideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 13, 2015

APPENDIX

Appendix A

United States Court of Appeals,
Seventh Circuit

DEBORAH JACKSON, et al.,
Plaintiffs-Appellants,

v.

PAYDAY FINANCIAL, LLC, et al.,
Defendants-Appellees.

No. 12-2617
Argued Jan. 22, 2013
Decided Aug. 22, 2014

Before RIPPLE and ROVNER, Circuit Judges, and BARKER, District Judge.

RIPPLE, *Circuit Judge*. Deborah Jackson, Linda Gonnella, and James Binkowski (collectively "the Plaintiffs") initially brought this action in Illinois state court against Payday Financial, LLC, and other defendant entities owned by, or doing business with, Martin A. Webb, an enrolled member of the Cheyenne River Sioux Tribe and also a named defendant (collectively "the Loan Entities" or "the Defendants"). The Plaintiffs alleged violations of Illinois civil and criminal statutes related to loans that they had received from the Loan Entities. After the Loan Entities removed the case to the district court, that court granted the Loan Entities' motion to dismiss for improper venue under Federal Rule of Civil Procedure

12(b)(3). It held that the loan agreements required that all disputes be resolved through arbitration conducted by the Cheyenne River Sioux Tribe on the Cheyenne River Sioux Tribe Reservation, located within the geographic boundaries of South Dakota. The Plaintiffs timely appealed.

Following oral argument, we ordered a limited remand to the district court for further factual findings concerning (1) whether tribal law was readily available to the litigants and (2) whether arbitration under the auspices of the Cheyenne River Sioux Tribe, as set forth in the loan documents, was available to the parties. The district court concluded that, although the tribal law could be ascertained, the arbitral mechanism detailed in the agreement did not exist.

Based on these findings, we now conclude that the Plaintiffs' action should not have been dismissed because the arbitral mechanism specified in the agreement is illusory. We also cannot accept the Loan Entities' alternative argument for upholding the district court's dismissal: that the loan documents require that any litigation be conducted by a tribal court on the Cheyenne River Sioux Tribe Reservation. As the Supreme Court has explained, most recently in *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316 (2008), tribal courts have a unique, limited jurisdiction that does not extend generally to the regulation of nontribal members whose actions do not implicate the sovereignty of the tribe or the regulation of tribal lands. The Loan Entities have not established a colorable claim of tribal jurisdiction, and, therefore, exhaustion in tribal courts is not required.

Accordingly, we cannot uphold the district court's dismissal on this alternative basis.

I

BACKGROUND

A.

The Loan Entities maintain several websites that offer small, high-interest loans to customers. The entire loan transaction is completed online; a potential customer applies for, and agrees to, the loan terms from his computer. Some loan agreements are assigned to CashCall, Inc. ("CashCall"), a California corporation, after they are executed and funds are advanced.

Each plaintiff applied for and received a $2,525 loan through one of the websites belonging to Mr. Webb's entities. Their loan agreements are nearly identical. Each agreement indicates that the plaintiff will pay approximately 139% in interest each year and that a $2,525 loan will cost approximately $8,392. The loan agreements recite that they are "governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe" and are not subject "to the laws of any state." [1] Under the terms of the agreement, unless

[1] R.14-1 at 2; *see also id.* at 2 ("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 further agree that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.").

the plaintiff opts out within sixty days, any disputes arising from the agreement "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."[2] Arbitration will be conducted by either "(i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council."[3] The loan agreements further provide that the Loan Entities will pay the filing fee and any fees charged by the arbitrator; the loan consumer does not have to travel to the reservation for arbitration; and the loan consumer may participate in arbitration by phone or videoconference. The agreements with Ms. Jackson and Mr. Binkowski also provide that the contract "is subject solely to the exclusive laws *and jurisdiction* of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation."[4] Ms. Gonnella's agreement does not contain similar language.

The Plaintiffs executed their loan agreements in 2010 and 2011, received loan funds and made payments on the loans. The record does not indicate whether any of the Plaintiffs have defaulted on the loans.

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[2] *Id.* at 5.

[3] *Id.*

[4] *Id.* at 2 (emphasis added) (bolding in original omitted); *see also* R.14-8 at 23.

B.

The Plaintiffs initially brought this action in Illinois state court and alleged violations of Illinois civil and criminal usury statutes as well as the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. They sought, among other relief, restitution, statutory damages, litigation costs, an injunction precluding the Loan Entities from further lending to Illinois residents, and a declaration that the arbitration clauses contained in the loan agreements are not enforceable. The Loan Entities removed the action to federal court; they then moved to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3) on the ground that the agreements required arbitration on the reservation. In reply, the Plaintiffs submitted that the agreements were void and thus the arbitration clauses were unenforceable. They additionally had argued that they executed the loan agreements under duress and that Illinois public policy precluded enforcement of the arbitration clause.

The district court dismissed the case for improper venue. It determined that (1) "the alleged illegality of the Loan Agreements has no bearing on the validity of the forum selection clause"; (2) the Plaintiffs' agreement to arbitrate was not made under duress; and (3) the Plaintiffs failed to show "that Illinois' strong public policy in favor of enforcing its usury and consumer protection laws precludes enforcement of the forum selection provision."[5]

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[5] R.65 at 6, 7.

The Plaintiffs timely appealed. After oral argument, we determined that several factual matters critical to our resolution of the issues on appeal should be addressed in the first instance by the district court:

> 1. Whether the Cheyenne River Sioux Tribe has applicable tribal law readily available to the public and, if so, under what conditions; and
>
> 2. Whether the Cheyenne River Sioux Tribe has an authorized arbitration mechanism available to the parties and whether the arbitrator and method of arbitration required under the contract is actually available.[6]

In the subsequent proceedings before the district court, the parties submitted arguments and documentary evidence in support of their respective positions. After considering this evidence, the district court found that the first inquiry could be answered in the affirmative. The court observed that "[e]ach party was able to secure a copy of the Tribal Law" and therefore concluded that "the law c[ould] be acquired by reasonable means."[7] Addressing our second inquiry, the district court concluded that "[i]t is abundantly clear that, on the present record, the answer to the second question is a resounding no."[8] The court noted that, other than its disagreement with the Plaintiffs as to the availability of tribal law, the Plaintiffs'

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[6] R.95 at 1.

[7] *Id.* at 2.

[8] *Id.* at 5-6.

submission had "fairly describe[d] what the facts show";[9] included within that submission was the statement that "[t]ribal leadership ... have virtually no experience in handling claims made against defendants through private arbitration."[10] According to the court, "[t]he intrusion of the Cheyenne River Sioux Tribal Nation into the contractual arbitration provision appear[ed] to be merely an attempt to escape otherwise applicable limits on interest charges. As such, the promise of a meaningful and fairly conducted arbitration [wa]s a sham and an illusion."[11]

In reaching its conclusion, the district court examined the manner in which an arbitrator had been selected in a similar dispute being litigated in the United States District Court for the Southern District of Florida. *See Inetianbor v. CashCall, Inc.,* 962 F. Supp. 2d 1303 (S.D. Fla. 2013). The district court observed:

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[9] *Id.* at 6.

[10] R.82 at 8. Although appearing in the Plaintiffs' statement of relevant facts, the documentation supporting this statement actually was supplied by the Loan Entities. The Loan Entities submitted a letter from a Mediator/Magistrate of the Cheyenne River Sioux Tribe stating that "the governing authority does not authorize Arbitration," R.83-5 at 2 (Statement of Magistrate Mona R. Demery, Cheyenne River Sioux Tribal Court), and a later, clarifying statement from the same individual stating that "[a]rbitration, as in a contractual agreement, is permissible. However, the Court does not involve itself in the hiring of the arbitrator or setting dates or times for the parties." R.83-7 at 2.

[11] R.95 at 6.

The arbitrator selected in the *Inetianbor* case was *Robert Chasing Hawk,* a Tribal Elder. He was personally selected by Martin Webb, the man who owns and operates the Webb entities which are run as a common enterprise. Mr. Webb is himself a member of the Tribe. Although denying any preexisting relationship with either party in the case, Robert Chasing Hawk is the father of Shannon Chasing Hawk. Robert Chasing Hawk has acknowledged that his daughter worked for one of the companies run by Martin Webb.

Mr. Chasing Hawk is not an attorney and has not been admitted to the practice of law either in South Dakota or the court of the Cheyenne River Sioux Tribal Nation. He has not had any training as an arbitrator and the sole basis of his selection was because he was a Tribal Elder.

Black's Law Dictionary, DeLuxe Fourth Edition, defines "arbitrator" as "a private, disinterested person, chosen by the parties to a disputed question, for the purpose of hearing their contention, and giving judgment between them; to whose decision (award) the litigants submit themselves either voluntarily, or, in some cases, compulsorily by order of a court." Freedom from bias and prejudice is a stated criteria of the American Arbitration Association's Criteria to serve as an arbitrator. Similar is JAM's Arbitrators Ethics Guidelines which require[ ] freedom from any appearance of a conflict of interest. Illinois Supreme Court

Rule 62 states, in part, that "a judge should respect and comply with the law and should conduct himself or herself at all time[s] in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment." It should be no less for an arbitrator.

The selection of Robert Chasing Hawk as the arbitrator in the only comparable case is instructive. No arbitration award could ever stand in the instant case if an arbitrator was similarly selected, nor could it satisfy the concept of a "method of arbitration" available to both parties. The selection of Chasing Hawk in the *Inetianbor* case was a purely subjective selection by only one of the parties to the arbitration. The process was not "methodized" in any reasonable sense of the word. Webb and Chasing Hawk are members of the same tribe. The Plaintiffs are not. The employment by Webb of the arbitrator's daughter cannot be ignored. The conduct permitted by the arbitration provisions in this case could never satisfy the straightforward definition in Black's Law Dictionary.[12]

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[12] R.95 at 3-4.

The parties submitted supplemental briefs in response to the district court's findings.[13]

II

DISCUSSION

A.

We now turn to the merits of the Plaintiffs' appeal and begin by examining our jurisdiction and the applicable standard of review.

1.

The jurisdiction of the district court was premised on the Class Action Fairness Act. *See* 28 U.S.C. § 1332(d). Under the terms of that statute,

> The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
>
> > (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
> >
> > (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a

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[13] At our invitation, the Federal Trade Commission and the Attorney General of Illinois submitted briefs as amici curiae. *See* Brief for the Federal Trade Commission as Amicus Curiae [hereinafter FTC Br.]; Brief for the Illinois Attorney General as Amicus Curiae Supporting Appellants [hereinafter Illinois Att'y Gen. Br.]. The court deeply appreciates their assistance in this matter.

> foreign state and any defendant is a citizen of a State; or
>
> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

Id. § 1332(d)(2). Another provision of the Act forbids a district court from exercising jurisdiction if the plaintiff class numbers less than one hundred. *See id.* § 1332(d)(5).

In this putative class action, the Plaintiffs are all citizens of Illinois who have borrowed money at usurious rates from the Loan Entities. According to the Loan Entities' removal papers, they have made loans to over one hundred individuals in Illinois.

Turning to the requirements for the Defendants, Mr. Webb is an enrolled member of the Cheyenne River Sioux Tribe and resides on its reservation. Mr. Webb is the sole member of the majority of the named entities.[14] Mr. Webb's entities are all limited liability companies organized under the laws of South Dakota[15]

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[14] The named defendants that belong to Mr. Webb are: Payday Financial, LLC; Western Sky Financial, LLC; Great Sky Finance, LLC; Red Stone Financial, LLC; Management Systems, LLC; 24-7 Cash Direct, LLC; Red River Ventures, LLC; High Country Ventures, LLC; and Financial Solutions, LLC.

[15] The loan agreements state that Western Sky Financial is "authorized by the laws of the Cheyenne River Sioux Tribal Nation." R.14-1 at 2. In their removal papers, however, the Defendants state that the Loan Entities "were all formed under the laws of South Dakota." R.1 at 4, ¶10. Similarly, the Plaintiffs'

and have the same business address in Timber Lake, South Dakota, which is within the reservation. Defendant CashCall is a California corporation that purchases loans from Mr. Webb's companies, but is otherwise unconnected to Mr. Webb.

The threshold amount in controversy also is met. In an affidavit submitted with the Loan Entities' removal papers, Mr. Webb states that he "ha[s] knowledge of and ready access to the business records of the [Loan Entities]" and that he examined the data from those records.[16] According to Mr. Webb's review of those records, there were "substantially more than 100 individuals" making up the putative class and "the total of all amounts collected from putative class members and cancellation of all outstanding balances for these same individuals significantly exceeds $5,000,000."[17]

Our appellate jurisdiction is premised upon 28 U.S.C. § 1291, which gives us jurisdiction over the final

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jurisdictional statement asserts that the lenders controlled by Mr. Webb "are chartered under South Dakota law as limited liability companies" and "are South Dakota Citizens," Appellants' Br. 1-2; for their part, the Defendants agreed that the Plaintiffs' jurisdictional statement was "complete and correct," Appellees' Br. 1.

[16] R.1-1 at 2, ¶5. Our case law requires that the removing defendant, as the proponent of jurisdiction, show "by a preponderance of the evidence facts that suggest the amount-in-controversy requirement is met." *Oshana v. Coca-Cola Co.,* 472 F.3d 506, 511 (7th Cir. 2006). Here, Mr. Webb's statement is based both on personal knowledge and also on his review of the applicable records. This evidence is not contested by the Plaintiffs.

[17] R.1-1 at 2, ¶7.

decisions of the district courts. It is clear that the decision of the district court granting the Defendants' motion to dismiss for improper venue was a final decision of that court. *Brady v. Sullivan,* 893 F.2d 872, 876 n.8 (7th Cir. 1989) ("[W]hen the dismissal is for want of jurisdiction, either of the person or subject matter, or because of improper venue, the judgment is final and may be appealed." (internal quotation marks omitted)).

2.

The loan agreements' forum selection clause was the basis for the district court's dismissal for improper venue.[18] An agreement to arbitrate is a type of forum selection clause. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 630-31 (1985) (treating an arbitration clause in an international agreement as it would other "freely negotiated contractual choice-of-forum provisions"); *Sherwood v. Marquette Transp. Co.,* 587 F.3d 841, 844 (7th Cir. 2009) ("An arbitration agreement is a specialized forum-selection clause.").

The parties agree that our review of the enforceability of a forum selection clause is de novo. *See Cont'l Ins. Co. v. M/V Orsula,* 354 F.3d 603, 607 (7th Cir. 2003). They disagree, however, as to whether the Plaintiffs are entitled to inferences in their favor. In

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[18] The loan agreements require that all "[d]ispute[s] ... 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." R.14-1 at 5.

Faulkenberg v. CB Tax Franchise Systems, LP, 637 F.3d 801, 806 (7th Cir. 2011), we stated that in reviewing a district court's grant of a Rule 12(b)(3) motion, reasonable inferences from the facts should be construed in the plaintiffs' favor. This approach is consistent with that of other courts of appeals and commentators.[19]

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[19] *See Petersen v. Boeing Co.,* 715 F.3d 276, 279 (9th Cir. 2013) (per curiam) (stating that, in reviewing a Rule 12(b)(3) motion, a court "must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the nonmoving party" (internal quotation marks omitted)); *TradeComet.com LLC v. Google, Inc.,* 647 F.3d 472, 475 (2d Cir. 2011) ("We review *de novo* a district court's dismissal of a complaint pursuant to Rules 12(b)(1) and 12(b)(3), viewing all facts in the light most favorable to the non-moving party."); *Ambraco, Inc. v. Bossclip B.V.,* 570 F.3d 233, 237 (5th Cir. 2009) ("Our de novo review under either Rule 12(b)(1) or Rule 12(b)(3) requires us to view all the facts in a light most favorable to the plaintiff." (internal quotation marks omitted)); 5B Charles Alan Wright, et al., *Federal Practice & Procedure* § 1352, at 324 (3d ed. 2004).

The Loan Entities argue that *Faulkenberg v. CB Tax Franchise Systems, LP,* 637 F.3d 801 (7th Cir. 2011), is "an outlier" and note that "*Faulkenberg* itself cites *Kochert v. Adagen Med. Int'l, Inc.* for the standard of review, but *Kochert* makes no mention of drawing facts or inferences in any party's favor. 491 F.3d 674, 677 (7th Cir. 2007)." Appellees' Br. 8. We are not persuaded. *Faulkenberg* cites *Kochert* for the proposition that a district court's dismissal under Rule 12(b)(3) is subject to de novo review; the fact that *Kochert* does not mention inferences in the non-moving party's favor does not render *Faulkenberg*'s statement an outlier, as demonstrated by the number of cases from our sister circuits that clearly state this proposition.

B.

As the Supreme Court noted in *Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 67 (2010), the Federal Arbitration Act ("FAA") reflects the overarching principle that arbitration is a matter of contract. As a general rule, courts must "'rigorously enforce'" arbitration agreements according to their terms. *Am. Express Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304, 2309 (2013) (quoting *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 221 (1985)). Having determined that our jurisdiction is secure and having examined the standard of review question, we now turn to an examination of the validity of the forum selection clause, the contractual provision at issue in this case.

1.

In addressing this question, we first must identify the law that governs the validity of the arbitration clause, which, as we have noted, is a specialized forum selection clause. Here, the district court's jurisdiction over the Plaintiffs' claims is based on the parties' diversity of citizenship.[20] As a general rule, "[i]n diversity cases, we look to the substantive law of the state in which the district court sits, *Erie R. Co. v.*

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[20] The Class Action Fairness Act requires "minimal diversity," *see, e.g.,* 28 U.S.C. § 1332(d)(2)(A) (permitting district courts to exercise jurisdiction over class actions in which "any member of a class of plaintiffs is a citizen of a State different from any defendant"); it therefore does not run afoul of the constitutional diversity requirement, *see State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523, 531 (1967) ("Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.").

Tompkins, 304 U.S. 64, 78 (1938), including choice of law rules, *Klaxon Co. v. Stentor Elec. Mfg.,* 313 U.S. 487, 496-97 (1941)." *Wachovia Sec., LLC v. Banco Panamericano, Inc.,* 674 F.3d 743, 751 (7th Cir. 2012) (parallel citations omitted).

When applied to the circumstances here, however, we are without clear guidance from the Supreme Court: It has not yet decided "the *Erie* issue of which law governs when," as here, "a federal court, sitting in diversity, evaluates a forum selection clause in the absence of a controlling federal statute." *Wong v. PartyGaming Ltd.,* 589 F.3d 821, 826 (6th Cir. 2009). At present, the majority of federal circuits hold "that the enforceability of a forum selection clause implicates federal procedure and should therefore be governed by federal law." *Id.* at 827 & n. 5 (collecting cases);[21] *see also* 14D Charles Alan Wright, et al., *Federal Practice & Procedure* § 3803.1, at 107-12 (4th ed. 2014). We have taken a different approach. In *Abbott Laboratories v.*

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[21] *See, e.g., Doe 1 v. AOL LLC,* 552 F.3d 1077, 1081 (9th Cir. 2009) ("We apply federal law to the interpretation of the forum selection clause."); *Phillips v. Audio Active Ltd.,* 494 F.3d 378, 384 (2d Cir. 2007) ("[T]he rule set out in *M/S Bremen* [*v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972),] applies to the question of enforceability of an apparently governing forum selection clause, irrespective of whether a claim arises under federal or state law."); *P & S Bus. Machs. v. Canon USA, Inc.,* 331 F.3d 804, 807 (11th Cir. 2003) ("Consideration of whether to enforce a forum selection clause in diversity suit is governed by federal law...."). Most of these cases rest, at bottom, on the premise that "[q]uestions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature." *Jones v. Weibrecht,* 901 F.2d 17, 19 (2d Cir. 1990).

Takeda Pharmaceutical Co., 476 F.3d 421 (7th Cir. 2007), we stated:

> Simplicity argues for determining the validity and meaning of a forum selection clause, in a case in which interests other than those of the parties will not be significantly affected by the choice of which law is to control, by reference to the law of the jurisdiction whose law governs the rest of the contract in which the clause appears, rather than making the court apply two different bodies of law in the same case.

Id. at 423 (citations omitted). In contracts containing a choice of law clause, therefore, the law designated in the choice of law clause would be used to determine the validity of the forum selection clause. *See id.; IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union,* 512 F.3d 989, 991 (7th Cir. 2008) ("Abbott Laboratories ... held that the validity of a forum-selection clause depends on the law of the jurisdiction whose rules will govern the rest of the dispute.").

Applying the rule in *Abbott Laboratories,* we look to the choice of law clause in the loan agreements, which provides that the agreements are "governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe."[22] Assuming the validity of this choice of law provision,[23] the Defendants have informed

[22] R.14-1 at 4; *see also id.* at 2.

[23] Both the Plaintiffs and the Attorney General of Illinois maintain that the choice of law provision and the forum selection clause

work in tandem to create an unconscionable result. *See* Appellants' Br. 13, 25; Illinois Att'y Gen. Br. 22. We agree that a more-than-colorable argument can be made that the loan agreements' choice of law clause should not be enforced and that Illinois law ought to govern the parties' dispute.

The courts of Illinois will respect a choice of law clause if the contract is valid and if the law chosen is not contrary to Illinois public policy. *Thomas v. Guardsmark,* 381 F.3d 701, 705 (7th Cir. 2004). Here, the Plaintiffs and amici maintain that several provisions of the loan agreements violate Illinois public policy. First, the Attorney General argues that "Illinois has a strong public policy against enforcing provisions requiring plaintiffs to adjudicate claims in a distant, inconvenient forum where, as in this case, the clause is embedded in contracts 'involving unsophisticated consumers in small transactions in the marketplace without any real opportunity to consider [whether to accept the clause].'" Illinois Att'y Gen. Br. 12 (alteration in original) (quoting *IFC Credit Corp. v. Rieker Shoe Corp.,* 378 Ill.App.3d 77, 317 Ill.Dec. 214, 881 N.E.2d 382, 394 (2007)); *see also infra* pp. 22-26. The Plaintiffs maintain that the contracts violate Illinois public policy against usury because they exceed the allowable interest rate under state law. *See* 815 ILCS 205/4(1) (stating that "in all written contracts it shall be lawful for the parties to stipulate or agree [to] 9% per annum, or any less sum of interest"). Small consumer loans, however, are exempted from this requirement, to the extent that they comply with the State's Consumer Installment Loan Act. *See id.* ("It is lawful to receive or to contract to receive and collect interest and charges as authorized by this Act and as authorized by the Consumer Installment Loan Act....").

The Defendants seize on this exception and note that, when the Plaintiffs entered into the loan agreements, "Illinois law imposed no cap on the interest rate allowed for small consumer loans," and, when the General Assembly amended the law, it imposed a maximum rate of ninety-nine percent. Reply Brief of Defendants-Appellees to Briefs of Amici Curiae [hereinafter Defendants' Reply Br.] 21. Defendants cannot invoke this exception, however,

us in their supplemental briefing that they "have been unable to locate tribal precedent addressing forum selection clauses."[24] In such circumstances, they note, tribal courts borrow from "federal law to stand in or amplify tribal law where necessary."[25] We therefore turn to the federal guidelines for determining the validity of a forum selection clause.

We have held that "[t]he presumptive validity of a forum selection clause can be overcome if the resisting party can show it is 'unreasonable under the circumstances.'" *Bonny v. Soc'y of Lloyd's,* 3 F.3d 156, 160 (7th Cir. 1993) (quoting *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 10 (1972)). Relying on the Court's decisions in *M/S Bremen* and *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991), we have identified

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because they are not licensed providers as required by 205 ILCS 670/1; moreover, they do not maintain that they otherwise have complied with the consumer-protection provisions of the Consumer Installment Loan Act, *see, e.g.,* 205 ILCS 670/14 (prohibiting a lender from "pledg[ing], hypothecat[ing] or sell[ing] a note entered into under the provisions of this Act by an obligor except to another licensee under this Act"). The Loan Entities tacitly admit that the licensure requirements may call the contract into question, but maintain that "[w]hether the licensure requirements cited by Plaintiffs apply here must still be decided[ ]in the forum the Parties agreed to." Appellees' Br. 19. n. 12. We need not decide the question of what law governs the validity and interpretation of the loan agreements, however, because whether federal, tribal, or Illinois law applies, the same result obtains. *See infra* pp. 19-26.

[24] Defendants' Reply Br. 22.

[25] *Id.* (internal quotation marks omitted).

three sets of circumstances that will render a forum selection clause "unreasonable":

> (1) if their incorporation into the contract was the result of fraud, undue influence or overweening bargaining power; (2) if the selected forum is so "gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court[ ]"; or (3) if enforcement of the clauses would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision.

Bonny, 3 F.3d at 160 (first alteration in original) (citations omitted) (quoting *M/S Bremen,* 407 U.S. at 18).

Applying this standard, we believe enforcement of the forum selection clause contained in the loan agreements is unreasonable. The loan agreements specify that disputes arising from the agreement "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."[26] Arbitration will be conducted by "either (i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council."[27] The record clearly establishes, however, that such a forum does not exist: The Cheyenne River Sioux Tribe "does not authorize

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[26] R.14-1 at 5.

[27] *Id.*

Arbitration,"[28] it "does not involve itself in the hiring of ... arbitrator[s],"[29] and it does not have consumer dispute rules.[30] We have no hesitation concluding that an illusory forum is unreasonable under *M/S Bremen*.[31]

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[28] R.83-5 at 2.

[29] R.83-7 at 2.

[30] Defendants' Reply Br. 4 ("Nor does it matter that the CRST does not have any 'consumer dispute rules,' which the Agreements presuppose.").

[31] *Cf. BP Marine Ams. v. Geostar Shipping Co. N.V.,* No. 94-2118, 1995 WL 131056, at *4 (E.D.La. Mar. 22, 1995) (applying *M/S Bremen* and refusing to enforce a forum selection clause on the ground that the designated forum, "High Court in New York," did not exist).

In their supplemental submission, the Defendants try to characterize the Illinois Attorney General's amicus brief as stating that "under federal law (and thus tribal) law, the forum selection clause is valid." Defendants' Reply Br. 23. The Defendants misread the Attorney General's submission. In her brief to this court, the Attorney General reviewed our decision in *IFC Credit Corp. v. Aliano Brothers General Contractors,* 437 F.3d 606 (7th Cir. 2006), which noted that

> "Illinois law on validity is more lenient toward the [party challenging the forum selection clause] than the federal law when there is significant inequality of size or commercial sophistication between the parties, especially if the transaction is so small that the unsophisticated party might not be expected to be careful about reading boilerplate provisions that would come into play only in the event of a lawsuit, normally a remote possibility."

Illinois Att'y Gen. Br. 13 (alteration in original) (quoting *IFC Credit Corp.,* 437 F.3d at 611). The Attorney General then proceeds to argue that, under Illinois law, the choice of forum

If, however, the choice of law provision is invalid,[32] Illinois law would govern the question of the validity of the choice of forum provision. Illinois, like many states, has used *M/S Bremen* and its touchstone concept of reasonableness to evaluate the enforceability of a forum selection clause. *See Calanca v. D & S Mfg. Co.,* 157 Ill.App.3d 85, 109 Ill.Dec. 400, 510 N.E.2d 21, 23 (1987).

Under Illinois law, "[a] forum selection clause in a contract is *prima facie* valid and should be enforced unless the opposing party shows that enforcement would be unreasonable under the circumstances." *IFC Credit Corp. v. Rieker Shoe Corp.,* 378 Ill.App.3d 77, 317 Ill.Dec. 214, 881 N.E.2d 382, 389 (2007). This is true, however, only of "agreement[s] reached through arm's-length negotiation between experienced and sophisticated business people"; "a forum selection clause contained in boilerplate language indicates unequal bargaining power, and the significance of the provision is greatly reduced." *Id.*

In an effort to make more concrete the standard of reasonableness articulated in *M/S Bremen,* Illinois courts typically have looked to six factors:

> (1) the law that governs the formation and construction of the contract; (2) the residency of the parties; (3) the place of execution and/or performance of the contract; (4) the location of

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provision is invalid. The Attorney General does not analyze the choice of forum provision under federal law, nor does she make any predictions about what the outcome of such an analysis might be.

[32] *See supra* note 23.

> the parties and their witnesses; (5) the inconvenience to the parties of any particular location; and (6) whether the clause was equally bargained for.

Id., 317 Ill.Dec. 214, 881 N.E.2d at 389-90 (citing *Dace Int'l, Inc. v. Apple Computer, Inc.,* 275 Ill.App.3d 234, 211 Ill.Dec. 591, 655 N.E.2d 974, 977 (1995)). Even assuming that tribal law governs the formation and construction of the contract, another key element weighs against enforcement of the clause, namely that the clause was not the product of equal bargaining: It imposes on unsophisticated consumers a nonexistent forum for resolution of disputes in a location that is remote and inconvenient.

Although helpful in evaluating the mine-run of forum selection clauses that a court may encounter, these criteria are ill-suited for evaluating the forum designated in these particular loan agreements. The factors set forth in *IFC Credit Corp.* presuppose that the designated forum exists and is available to resolve the underlying dispute. Such is not the case here.

We do find helpful, however, the closely allied yet distinct concept of unconscionability. *See Phoenix Ins. Co. v. Rosen,* 242 Ill.2d 48, 350 Ill.Dec. 847, 949 N.E.2d 639, 647 (2011). Under Illinois law, a contractual provision may be unconscionable on either procedural or substantive grounds. *Razor v. Hyundai Motor Am.,* 222 Ill.2d 75, 305 Ill.Dec. 15, 854 N.E.2d 607, 622 (2006). "Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account

a lack of bargaining power." *Id.* "Factors to be considered in determining whether an agreement is procedurally unconscionable include whether each party had the opportunity to understand the terms of the contract, whether important terms were hidden in a maze of fine print, and all of the circumstances surrounding the formation of the contract." *Phoenix Ins. Co.,* 350 Ill.Dec. 847, 949 N.E.2d at 647 (internal quotation marks omitted). Substantive unconscionability, by contrast,

> concerns the actual terms of the contract and examines the relative fairness of the obligations assumed.... Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity.

Kinkel v. Cingular Wireless LLC, 223 Ill.2d 1, 306 Ill.Dec. 157, 857 N.E.2d 250, 267 (2006) (internal quotation marks omitted). Like other contractual provisions, forum selection clauses—even those designating arbitral fora—are not immune from the general principle that unconscionable contractual provisions are invalid.[33]

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[33] *Potiyevskiy v. TM Transp., Inc.,* No. 1-13-1864, 2013 WL 6199949, at *7-10 (Ill.App.Ct. Nov. 25, 2013) (holding that arbitration agreement in employment contract was substantively unconscionable because it required a plaintiff to challenge individually each biweekly pay period during which an allegedly improper deduction occurred, it required arbitration of disputes in Illinois despite an employee's state of residence, and the

The choice of forum provision at issue here is both procedurally and substantively unconscionable. Turning first to procedural unconscionability, although the district court held on remand that the substantive commercial law of the Cheyenne River Sioux Tribe was reasonably ascertainable, it did not reach this conclusion with respect to tribal rules for conducting arbitrations. Indeed, the record establishes that such procedures do not exist. The Tribe has neither a set of procedures for the selection of arbitrators nor one for the conduct of arbitral proceedings. Consequently, it was not possible for the Plaintiffs to ascertain the dispute resolution processes and rules to which they were agreeing. Moreover, even if the described arbitral forum were functional and its rules ascertainable, we agree with the Federal Trade Commission that "[t]he inconsistent language in the loan contracts, specifying both exclusive Tribal Court jurisdiction and exclusive tribal arbitration without reconciling those provisions, also ma[de] it difficult for borrowers to understand exactly what form of dispute resolution they [we]re agreeing to."[34] Finally, the Loan Entities' claims concerning the scope of tribal jurisdiction, as well as

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arbitration fees made claims cost-prohibitive); *Timmerman v. Grain Exch., LLC,* 394 Ill.App.3d 189, 333 Ill.Dec. 592, 915 N.E.2d 113, 120 (2009) (holding that arbitration provision was procedurally unconscionable where "[t]he contracts themselves made no direct mention of arbitration," and the rules that incorporated the arbitration provision "were not set forth in the contracts, nor had they been provided to or made available to the plaintiffs prior to their entering into the contracts").

[34] FTC Br. 27.

their invocation of an irrelevant constitutional provision, "may [have] induce[d] [the Plaintiffs] to believe, mistakenly, that they ha[d] no choice but to accede to resolution of their disputes on the Reservation."[35]

With respect to substantive unconscionability, the dispute-resolution mechanism set forth in the loan agreements—"conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules"[36]—did not exist. As the district court "resounding[ly]" concluded, there simply was no prospect "of a meaningful and fairly conducted arbitration"; instead, this aspect of the loan agreements "[wa]s a sham and an illusion."[37]

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[35] *Id.*

[36] R.14-1 at 5.

[37] R.95 at 6. Our conclusion would not change if we were to apply tribal law as opposed to Illinois law, as urged by the Defendants. According to the Defendants, the courts of the Cheyenne River Sioux Tribe would employ "'traditional contractual principles,' including the Restatement," to determine if the forum selection provision were unconscionable. Defendants' Reply Br. 9. They explain that the Restatement, unlike Illinois law, requires a showing of *both* procedural and substantive unconscionability. However, as we already have demonstrated, the forum selection clause here is both substantively and procedurally unconscionable.

We note that other courts have refused to honor agreements to arbitrate, where the rules are inherently biased or are not formulated in good faith. *See, e.g., Hooters of Am., Inc. v. Phillips,* 173 F.3d 933, 940 (4th Cir. 1999) ("By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty."). Indeed, we have

2.

The Loan Entities nevertheless maintain that these state-law-based shortcomings are irrelevant because Section 2 of the Federal Arbitration Act "preempts arbitrator bias defenses because such defenses are not applicable to all contracts."[38] They point out that section 2 of the FAA provides that arbitration clauses are "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 (emphasis added). They then submit that, because arbitrator bias is a "defense[] that appl[ies] *only* to arbitration or that derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue," *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 1746 (2011) (emphasis added), it is not applicable to "any contract" and is therefore preempted.

We cannot accept this argument. The arbitration clause here is void not simply because of a strong possibility of arbitrator bias, but because it provides that a decision is to be made under a process that is a sham from stem to stern. Although the contract language contemplates a process conducted under the

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refused to enforce an arbitration agreement where the obligation was so one-sided as to make any genuine obligation illusory. *Cf. Penn v. Ryan's Family Steak Houses, Inc.,* 269 F.3d 753, 756, 758-61 (7th Cir. 2001) (observing that the agreement to arbitrate is "hopelessly vague and uncertain as to the obligation EDS has undertaken" and concluding that, "[f]or all practical purposes, *EDS's promise under this contract makes performance entirely optional with the promisor*" (emphasis added) (internal quotation marks omitted)).

[38] Defendants' Reply Br. 5.

watchful eye of a legitimate governing tribal body, a proceeding subject to such oversight simply is not a possibility. The arbitrator is chosen in a manner to ensure partiality, but, beyond this infirmity, the Tribe has *no rules* for the conduct of the procedure. It hardly frustrates FAA provisions to void an arbitration clause on the ground that it contemplates a proceeding for which the entity responsible for conducting the proceeding has no rules, guidelines, or guarantees of fairness. *See Hooters of Am., Inc. v. Phillips,* 173 F.3d 933, 940 (4th Cir. 1999) ("By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty."); *cf. Penn v. Ryan's Family Steak Houses, Inc.,* 269 F.3d 753, 756, 758-61 (7th Cir. 2001) (refusing to enforce an arbitration clause that is "hopelessly vague and uncertain as to the obligation EDS has undertaken" because it, "[f]or all practical purposes, ... makes performance entirely optional with the promisor" (internal quotation marks omitted)).[39]

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[39] The Loan Entities also make the claim that, "[b]ecause Illinois enforces adhesion contracts despite unconscionability claims, it may not use [the] unconscionability doctrine to void arbitration provisions in those contracts." Defendants Reply Br. 6 (citing *Koveleskie v. SBC Capital Mkts., Inc.,* 167 F.3d 361, 366-67 (7th Cir. 1999)). *Koveleskie* does not support such a sweeping conclusion. In *Koveleskie,* we commented that Illinois courts do not consider disparity of bargaining power, standing alone, as a reason to invalidate contracts. Consequently, "the disparity in the size of the parties entering into the agreement ... without some wrongful use of that power, is not enough to render an arbitration agreement unenforceable." 167 F.3d at 367 (alteration in original) (internal quotation marks omitted). Here, as we have discussed, the Loan Entities used the disparity in bargaining power to

The Loan Entities also contend that section 5 of the FAA prevents our voiding the arbitration clause. That section provides, in relevant part, that, "if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators[,] ... the court shall designate and appoint an arbitrator or arbitrators ... 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.

Like the Loan Entities' earlier argument, this submission assumes that the arbitration provision's only infirmity is the disability of a particular arbitrator or class of arbitrators. Here, however, the likelihood of

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impose on the Plaintiffs a dispute-resolution mechanism that does not exist.

We also cannot accept the Loan Entities' suggestion that the FAA preempts Illinois's rules on unconscionability with respect to the forum selection clause because they have a "'disproportionate impact on arbitration agreements.'" Defendants' Reply Br. 16 (quoting *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 1747 (2011)). According to the Loan Entities, subjecting arbitration agreements to unconscionability rules for forum selection clauses "would give States free rein to gut the FAA by labeling their policy applicable to 'forum selection clauses' rather than arbitration provisions." *Id.* at 17. However, because the Supreme Court has treated arbitration provisions as forum selection provisions, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 630-31 (1985) (treating an arbitration clause in an international agreement as it would other "freely negotiated contractual choice-of-forum provisions"), we perceive no impediments in allowing states to apply their generally applicable unconscionability rules to arbitration provisions in the same manner they would apply those rules to clauses designating non-arbitral fora.

a biased arbitrator is but the tip of the iceberg. Although the arbitration provision contemplates the involvement and supervision of the Cheyenne River Sioux Tribe, the record establishes that the Tribe does not undertake such activity. Furthermore, there are no rules in place for such an arbitration. Under these circumstances, the court cannot save the arbitral process simply by substituting an arbitrator.

This case is therefore distinctly different from the situation that we faced in *Green v. U.S. Cash Advance Illinois, LLC,* 724 F.3d 787 (7th Cir. 2013). In *Green,* a lender moved to dismiss a plaintiff's claims under the Truth in Lending Act on the ground that the lending contract required submission of disputes to "arbitration by one arbitrator by and under the Code of Procedure of the National Arbitration Forum." *Id.* at 788 (internal quotation marks omitted). The National Arbitration Forum, however, had stopped taking consumer cases for arbitrations. The district court, therefore, denied the motion to dismiss on the ground that "the identity of the Forum as the arbitrator [wa]s 'an integral part of the agreement'" and that the arbitration provision was therefore void. *Id.* at 789. We reversed. We noted that the language of the agreement called for the arbitration to be conducted in accordance with the National Arbitration Forum's procedures, not necessarily under its direct auspices. The district court, therefore, could invoke section 5 of the FAA to appoint an arbitrator, who then could "resolve this dispute using the procedures in the National Arbitration Forum's Code of Procedure." *Id.* at 793.

In *Green,* we noted that, if the particular arbitration clause before us had been shorn of all detail as to the number of arbitrators, the identity of the arbitrators or the rules that the arbitrators were to employ, the mere existence of the arbitration clause would have made it clear that the parties still would have preferred to submit their dispute to arbitration. *Id.* at 792-93.

Although such mutuality of intent might have been apparent in the contractual relationship in *Green,* it is not at all apparent in the situation before us today. The contract at issue here contains a very atypical and carefully crafted arbitration clause designed to lull the loan consumer into believing that, although any dispute would be subject to an arbitration proceeding in a distant forum, that proceeding nevertheless would be under the aegis of a public body and conducted under procedural rules approved by that body. The parties *might* have chosen arbitration even if they could not have had the arbitrator whom they had specified or even if the rules to which they had stipulated were not available. But even if these circumstances had been tolerable, a far more basic infirmity would have remained: One party, namely the loan consumer, would have been left without a basic protection and essential part of his bargain—the auspices of a public entity of tribal governance. The loan consumers did not agree to arbitration under any and all circumstances, but only to arbitration under carefully controlled circumstances—circumstances that never existed and for which a substitute cannot be constructed.

In sum, the arbitration clause is both procedurally and substantively unconscionable under Illinois law. It

is procedurally unconscionable because the Plaintiffs could not have ascertained or understood the arbitration procedure to which they were agreeing because it did not exist. It is substantively unconscionable because it allowed the Loan Entities to manipulate what purported to be a fair arbitration process by selecting an arbitrator and proceeding according to nonexistent rules. It is clearly "unreasonable" under the standard articulated in *M/S Bremen.* Under such circumstances, the FAA does not preempt state law, nor does it operate to permit the creation, from scratch, of an alternate arbitral mechanism.

C.

Having concluded that the arbitration clause contained in the loan agreements is unenforceable, we now turn to the Loan Entities' alternative argument for affirmance—that the agreements' forum selection clause requires any litigation to be conducted in the *courts* of the Cheyenne River Sioux Tribe.

1.

"[T]he inherent sovereign powers of an Indian[40] tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States,* 450 U.S. 544, 565 (1981). Nevertheless, "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations,

[40] Throughout this opinion, we use the term "Indian" rather than "Native American," reflecting the fact that both tradition, governing statutes, and cases follow that practice.

even on non-Indian fee lands." *Id.* Recognizing this limited right, the Court in *Montana* articulated two narrow situations in which a tribe may exercise jurisdiction over nonmembers: (1) "[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"; and (2) "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565, 566. The Loan Entities maintain that the tribal courts have jurisdiction over the present dispute under the first exception.

The Loan Entities have not met their burden of establishing tribal court jurisdiction over the Plaintiffs' claims.[41] We begin with the Supreme Court's initial observation in *Montana* that tribal court jurisdiction over non-Indians is limited: "Indian tribes retain inherent sovereign power to exercise *some* forms of civil jurisdiction *over non-Indians on their reservations,* even on non-Indian fee lands." *Id.* at 565 (emphasis

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[41] *Cf. Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa,* 609 F.3d 927, 936 (8th Cir. 2010) ("Because 'efforts by a tribe to regulate nonmembers ... are presumptively invalid,' the Tribe bears the burden of showing that its assertion of jurisdiction falls within one of the *Montana* exceptions." (alteration in original) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 330 (2008))).

added). "[A] tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction"; therefore, if a tribe does not have the authority to regulate an activity, the tribal court similarly lacks jurisdiction to hear a claim based on that activity. *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 330 (2008) (internal quotation marks omitted).

In *Plains Commerce Bank,* the Court explicitly noted that the nature of tribal court authority over non-Indians is circumscribed: "We have frequently noted, however, that the sovereignty that the Indian tribes retain is of a unique and limited character. *It centers on the land held by the tribe and on the tribal members within the reservation.*" *Id.* at 327 (emphasis added) (citation omitted) (internal quotation marks omitted). In short, "*Montana* and its progeny permit tribal regulation of nonmember *conduct inside the reservation* that implicates the tribe's sovereign interests." *Id.* at 332 (additional emphasis added).

Here, the Plaintiffs have not engaged in *any* activities inside the reservation. They did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents. They applied for loans in Illinois by accessing a website. They made payments on the loans and paid the financing charges from Illinois. Because the Plaintiffs' activities do not implicate the sovereignty of the tribe over its land and its concomitant authority to regulate the activity of

nonmembers on that land, the tribal courts do not have jurisdiction over the Plaintiffs' claims.[42]

2.

We also are unpersuaded by the Defendants' argument that the Plaintiffs "consented to tribal jurisdiction." Appellees' Br. 37. As the Court has noted on more than one occasion, tribal courts are not courts of general jurisdiction. *See Nevada v. Hicks*, 533 U.S. 353, 367 (2001). Moreover, a tribal court's authority to adjudicate claims involving nonmembers concerns its subject matter jurisdiction, not personal jurisdiction. *See id.* n. 8. Therefore, a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court. As the Court explained in *Plains Commerce Bank:*

> Tribal sovereignty, it should be remembered, is a sovereignty outside the basic structure of the Constitution. The Bill of Rights does not apply to Indian tribes. Indian courts differ from

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[42] Because we rest our determination of tribal court jurisdiction on this basis, we need not consider whether any of the Loan Entities would be considered a member of the tribe for purposes of the first *Montana* exception. *See* Appellees' Br. 31.

We also note that, at several places in their submissions, the Loan Entities suggest that the dispute concerns "on reservation" activities because that is where Western Sky executed the contracts. *See, e.g.,* Appellees' Br. 36; Defendants' Reply Br. 24. The question of a tribal court's *subject matter jurisdiction* over a nonmember, however, is tethered to the *nonmember's* actions, specifically the *nonmember's actions on the tribal land.* There simply is no allegation here that the dispute involves activities of the Plaintiffs on the reservation.

> traditional American courts in a number of significant respects. And nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. *Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.*

554 U.S. at 337 (emphasis added) (citations omitted) (internal quotation marks omitted). The Loan Entities, however, have made no showing that the present dispute implicates *any* aspect of "the tribe's inherent sovereign authority."[43]

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[43] *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians,* 746 F.3d 167 (5th Cir. 2014), is not to the contrary. *Dolgencorp* concerned the tribal court's authority over tort claims brought by a thirteen-year-old tribal member against the corporate owner of a Dollar General store located on reservation land. The tribal member was participating in a tribe-operated job training program at the store when he was sexually molested by the store manager. The tribal member sued Dolgencorp in tribal court and alleged that the corporation was vicariously liable for the manager's actions and that it negligently had hired, trained, or supervised the manager. Dolgencorp unsuccessfully sought an injunction against the tribal action in federal district court. In holding that the tribal court had jurisdiction over these claims, the Fifth Circuit rejected Dolgencorp's argument "that *Plains Commerce* narrowed the *Montana* consensual relationship exception, allowing tribes to regulate consensual relationships with nonmembers only upon a showing that the *specific*

3.

The Loan Entities maintain, however, that the doctrine of tribal exhaustion requires that the issue of jurisdiction be decided, in the first instance, by a tribal court. The concept of federal court abstention in cases involving Indian tribes known as the "tribal exhaustion rule" generally "requires that federal courts abstain from hearing certain claims relating to Indian tribes until the plaintiff has first exhausted those claims in a tribal court." *Garcia v. Akwesasne Hous. Auth.,* 268 F.3d 76, 79 (2d Cir. 2001). It is not at all clear, however, that the doctrine of tribal exhaustion requires a federal court to abstain from exercising jurisdiction when that exercise will not interfere with a pending tribal court action. *See Altheimer & Gray v. Sioux Mfg. Corp.,* 983 F.2d 803, 814 (7th Cir. 1993) ("It is unclear as to how broadly *Iowa Mutual* [*Insurance Co. v. LaPlante,* 480 U.S. 9 (1987),] and *National Farmers* [*Union Insurance Cos. v. Crow Tribe of Indians,* 471 U.S. 845 (1985),]

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relationships 'implicate tribal governance and internal relations.'" *Id.* at 174 (emphasis added) (quoting *Plains Commerce Bank,* 554 U.S. at 334-35). It stated:

> It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact. On the other hand, at a higher level of generality, the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government. Nothing in *Plains Commerce* requires a focus on the highly specific rather than the general.

Id. at 175. In the present situation, there is no equivalent tribal concern that satisfied the requirement of *Plains Commerce Bank.*

should be read.... [T]he two Supreme Court cases dealt only with the situation where a tribal court's jurisdiction over a dispute has been challenged by a later-filed action in federal court.").[44] Even assuming

[44] The courts of appeals that have addressed the issue have reached opposite conclusions. In *Garcia v. Akwesasne Housing Authority,* 268 F.3d 76, 80 (2d Cir. 2001), the Court of Appeals for the Second Circuit held that tribal exhaustion was not required absent an ongoing tribal proceeding. It explained its rationale accordingly:

> This Court and the Supreme Court have required abstention under the tribal exhaustion rule on just three occasions: [*Iowa Mutual Insurance Co. v.*] *LaPlante,* 480 U.S. [9,] 14-20[(1987)]; *National Farmers* [*Union Insurance Companies v. Crow Tribe of Indians*], 471 U.S. [845,]853-56 [(1985)]; and *Basil Cook Enters. v. St. Regis Mohawk Tribe,* 117 F.3d 61 (2d Cir. 1997). In each instance, the plaintiff was litigating a previously-filed, ongoing tribal court action, and was asking the federal court to interfere with those tribal proceedings. These cases are procedurally distinguishable from Garcia's case because Garcia's claims have not been in tribal court. We conclude that the reasoning of these cases and the policy considerations that underlie them militate in favor of the opposite result in this case: the comity and deference owed to a tribal court that is adjudicating an intra-tribal dispute under tribal law does not compel abstention by a federal court where a non-member asserts state and federal claims and nothing is pending in the tribal court.

Id. (parallel citations omitted). *But see, e.g., United States v. Plainbull,* 957 F.2d 724, 728 (9th Cir. 1992) (rejecting the Government's argument that "the district court abused its discretion by abstaining from the merits of this case because there was no concurrent action pending in the tribal courts" because "[w]hether a tribal action is pending, however, does not determine whether abstention is appropriate").

that the tribal exhaustion doctrine applies where there are no pending tribal court proceedings,[45] we do not believe that exhaustion is required in this case.

The Loan Entities argue that, "[t]o trigger the tribal exhaustion rule, only a 'colorable' claim of tribal subject matter jurisdiction need be asserted."[46] Even a cursory look at the cases on which the Loan Entities rely, however, reveals that the assertion of tribal jurisdiction here is not "colorable."

In *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority,* 207 F.3d 21, 33 (1st Cir. 2000), a case decided before *Plains Commerce Bank,* a dispute had arisen between a tribal entity, the Narragansett Indian Wetuomuck Housing Authority, and the Ninigret Development Corporation (a Rhode Island corporation in which a member of the Tribe was a principal) concerning the construction of a low-income, off-reservation housing development for tribal members. On appeal from the district court's dismissal of the development company's action, the court addressed whether the doctrine of tribal exhaustion applied. After reviewing the policy considerations underlying this "prudential doctrine," the court observed that "the tribal exhaustion doctrine d[id] not apply mechanistically to every claim brought by or

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[45] Neither party addressed the issue whether the tribal exhaustion doctrine applies in the absence of a pending tribal proceeding.

[46] Appellees' Br. 28 (citing *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 33 (1st Cir. 2000), and *Elliott v. White Mountain Apache Tribal Court,* 566 F.3d 842 (9th Cir. 2009)).

against an Indian tribe" and that "scope-related" objections to exhaustion could be raised. *Id.* at 31-32. The court explained that, although "activities of non-Indians *on reservation lands* almost always require exhaustion *if they involve the tribe,*" where the "dispute arises out of activities conducted elsewhere[,] ... an inquiring court must make a particularized examination of the facts and circumstances attendant to the dispute in order to determine whether comity suggests a need for exhaustion of tribal remedies as a precursor to federal court adjudication." *Id.* at 32 (emphasis added). "'[O]ff-the-reservation'" conduct, the court observed, "*must at a bare minimum impact directly upon tribal affairs* " in order to trigger the exhaustion requirement. *Id.* (emphasis added). In *Ninigret,* the court determined that this requirement had been met because "Ninigret's dealings with the Authority bore directly on the use and disposition of tribal resources (land and money)." *Id.* Here, the Loan Entities do not posit any way in which the present dispute "impact[s] directly upon tribal affairs." *Id.*[47] There has been no showing that the present dispute involves questions of tribal self-governance or use of tribal resources in the manner present in *Ninigret.*

Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842 (9th Cir. 2009), is equally unhelpful to the

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[47] The Loan Entities do argue that "the Tribe has an interest in claims against a local, member-owned business for its on-Reservation conduct." Appellees' Br. 30. It goes without saying that a dispute in which the tribe takes an "interest," *id.,* is markedly different from a dispute which "impact[s] directly upon tribal affairs," *Ninigret,* 207 F.3d at 32.

Loan Entities in establishing a "colorable" claim of tribal court authority. *Elliott* concerned an action brought by the White Mountain Apache Tribe against a non-Indian, who had gotten lost *on reservation lands.* In an effort to attract attention, Elliott had set a signal fire, which grew into a substantial forest fire, burned over 400,000 acres, and caused millions of dollars in damage. The tribe brought suit in tribal court for damages, "alleging violations of tribal executive orders, the tribal game and fish code, the tribal natural resource code, and common law negligence and trespass." *Id.* at 845. The Ninth Circuit agreed with the tribe that this scenario raised a colorable claim of tribal jurisdiction:

> The tribe seeks to enforce its regulations that prohibit, among other things, trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands. The Supreme Court has strongly suggested that a tribe may regulate nonmembers' conduct on tribal lands *to the extent that the tribe can "'assert a landowner's right to occupy and exclude.'"* The tribal regulations at issue stem from the tribe's "landowner's right to occupy and exclude."

Id. at 849-50 (emphasis added) (citations omitted) (quoting Hicks, 533 U.S. at 359). Again, the Loan Entities have asserted nothing akin to the Tribe's right, as a landowner, "to occupy and exclude."[48]

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[48] Indeed, the other cases relied upon by the Loan Entities for the proposition that tribal exhaustion is required concern regulation

The present dispute does not arise from the actions of nonmembers on reservation land and does not otherwise raise issues of tribal integrity, sovereignty, self-government, or allocation of resources. There simply is no colorable claim that the courts of the Cheyenne River Sioux Tribe can exercise jurisdiction over the Plaintiffs. Tribal exhaustion, therefore, is not required.

CONCLUSION

The arbitration provision contained in the loan agreements is unreasonable and substantively and procedurally unconscionable under federal, state, and tribal law. The district court, therefore, erred in granting the Defendants' motion to dismiss for improper venue based on that provision. Additionally, the courts of the Cheyenne River Sioux Tribe do not have subject matter jurisdiction over the Plaintiffs' claims. Nor have the Defendants raised a colorable claim of tribal jurisdiction necessary to invoke the rule of tribal exhaustion. The district court's dismissal, therefore, cannot be upheld on the alternative basis that this dispute belongs in tribal court. We therefore reverse the judgment of the district court granting the Defendants' motion to dismiss and remand for further

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of, or actions on, tribal land. *See, e.g., Iowa Mut. Ins.* Co., 480 U.S. at 11 (concerning insurance company's liability to a tribe-owned business and its tribe-member employee for injuries sustained on the reservation); *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold,* 27 F.3d 1294, 1295 (8th Cir. 1994) (concerning tribal court's authority over a dispute involving tribal taxation of commercial property on reservation land and tribal regulation of employment on reservation land).

proceedings consistent with this opinion. The Plaintiffs may recover their costs in this court.

REVERSED and REMANDED

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DEBORAH JACKSON, et al.,	)	
	)	
Plaintiff-Appellants,	)	
	)	
vs.	)	11 C 9288
	)	
PAYDAY FINANCIAL, LLC., et al.,	)	
	)	
Defendant-Appellees.	)	

DISTRICT COURT'S RESPONSE TO COURT OF APPEALS REMAND FOR FINDINGS OF FACT

The United States Court of Appeals has remanded two questions to this Court while still retaining jurisdiction of the case. This Court has been asked to make findings of fact as to the following:

1. Whether the Cheyenne River Sioux Tribe has applicable tribal law readily available to the public and, if so, under what conditions; and

2. Whether the Cheyenne River Sioux Tribe has an authorized arbitration mechanism available to the parties and whether the arbitrator and method of arbitration

> required under the contract is actually available.

The parties were asked to submit their own responses to these questions with any documentary exhibits or attachments they desired to accompany their responsive legal briefs. Each party was content to rely on its submissions without the conduct of additional discovery or presentation of testimony. It is on that record that this Court has prepared the requested findings of fact. The parties' submissions shall accompany the Court's findings of fact.

As to the question of whether there is applicable tribal law readily available to the public, the parties' submissions differ. After a number of failed attempts, the Plaintiffs acknowledged having obtained a copy of the tribe's 1978 Law and Order Code at a cost of $125 from the National Indian Law Library. Defense counsel avers that a copy of the Cheyenne River Sioux Tribal Code was requested by telephone from the National Indian Law Library and received without any payment required, along with PDF copies of Tribal Resolutions and Ordinances enacted between 1981 and 2000, including the Tribe's Commercial Code.

It is this Court's finding that the answer to the first of the remanded questions is in the affirmative. Each party was able to secure a copy of the Tribal Law, although the Plaintiff's did so less readily. Nevertheless, we believe the law can be acquired by reasonable means.

The second of the remanded questions requires consideration of multifaceted aspects of the concept of

arbitration and its mechanisms, and its actual availability to the parties before the Court.

Claims relating to Defendants' loans have been the subject of only one arbitration proceeding which is currently pending. That arbitration is the subject of the case entitled *Inetianbor v. Cash Call, Inc.* No. 13 CV 60066 (S.D. Fla. 2013). The procedural history of that case and relevant associated materials are included in the Plaintiff's submissions. That lawsuit involved a loan of $2,525 for three years with the total payments due under the contract of $11,024.82. As the contract states, the cost of the credit at a yearly rate was 139.31%. By anybody's definition, this is a usurious rate of interest.

The arbitrator selected in the *Inetianbor* case was *Robert Chasing Hawk*, a Tribal Elder. He was personally selected by Martin Webb, the man who owns and operates the Webb entities which are run as a common enterprise. Mr. Webb is himself a member of the Tribe. Although denying any preexisting relationship with either party in the case, Robert Chasing Hawk is the father of Shannon Chasing Hawk. Robert Chasing Hawk has acknowledged that his daughter worked for one of the companies run by Martin Webb.

Mr. Chasing Hawk is not an attorney and has not been admitted to the practice of law either in South Dakota or the court of the Cheyenne River Sioux Tribal Nation. He has not had any training as an arbitrator and the sole basis of his selection was because he was a Tribal Elder.

Black's Law Dictionary, DeLuxe Fourth Edition, defines "arbitrator" as "a private, disinterested person, chosen by the parties to a disputed question, for the purpose of hearing their contention, and giving judgment between them; to whose decision (award) the litigants submit themselves either voluntarily, or, in some cases, compulsorily by order of a court." Freedom from bias and prejudice is a stated criteria of the American Arbitration Association's Criteria to serve as an arbitrator. Similar is JAM's Arbitrators Ethics Guidelines which requires freedom from any appearance of a conflict of interest. Illinois Supreme Court Rule 62 states, in part, that "a judge should respect and comply with the law and should conduct himself or herself at all time in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment." It should be no less for an arbitrator.

The selection of Robert Chasing Hawk as the arbitrator in the only comparable case is instructive. No arbitration award could ever stand in the instant case if an arbitrator was similarly selected, nor could it satisfy the concept of a "method of arbitration" available to both parties. The selection of Chasing Hawk in the *Inetianbor* case was a purely subjective selection by only one of the parties to the arbitration. The process was not "methodized" in any reasonable sense of the word. Webb and Chasing Hawk are members of the same tribe. The Plaintiffs are not. The employment by Webb of the arbitrator's daughter

cannot be ignored. The conduct permitted by the arbitration provisions in this case could never satisfy the straightforward definition in Black's Law Dictionary.

Equally telling about Payday Financial LLC, Cash Call, Inc., and the Webb Entities operations is the State of New Hampshire Banking Department's Cease and Desist Order. The Department first conducted a routine examination of Cash Call. This was followed by the issuance of an administrative subpoena duces tecum to Cash Call seeking a variety of documents related to Cash Call's relationship with Western Sky. Cash Call complied and produced the requested documents.

Among other findings made by the Department, it determined that the respondents were engaged in a business scheme and took substantial steps to conceal the business scheme from consumers and state and federal regulators. The findings included the fact that Western Sky was nothing more than a front to enable Cash Call to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive practices from prosecution by state and federal regulators. The Department found a reasonable basis to believe the business scheme described constituted an unfair or deceptive act or practice used as a shield to evade licensure from the Department by exploiting Indian Tribal Sovereign Immunity.

While this Court recognizes that no trial has been held to permit a full exposition of all relevant facts, each party was afforded the opportunity to present whatever evidence it wished. It is abundantly clear that, on the present record, the answer to the second

question is a resounding no. Other than this Court's disagreement with Plaintiffs' position as to the availability of tribal law, pages 8 through 10 of "Plaintiffs' Statement of Relevant Facts, and On Further Discovery Required on Limited Remand by Court of Appeals" fairly describe what the facts show. The scheme described in the New Hampshire Banking Department's Cease and Desist Order has been apparently devised for the purpose of evading federal and state regulation of Defendants' activities. The intrusion of the Cheyenne River Sioux Tribal Nation into the contractual arbitration provision appears to be merely an attempt to escape otherwise applicable limits on interest charges. As such, the promise of a meaningful and fairly conducted arbitration is a sham and an illusion.

We respectfully submit our responses to the questions posed.

/s/
Charles P. Kocoras
United States District Judge

Dated: August 28, 2013

Appendix C

United States District Court
Northern District of Illinois,
Eastern Division

DEBORAH JACKSON, et al.,
Plaintiffs,
v.

PAYDAY FINANCIAL, LLC, et al.,
Defendants.

No. 11 C 9288.
July 9, 2012.

CHARLES P. KOCORAS, District Judge.

MEMORANDUM OPINION

This matter is before the Court on Defendants' motion to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3). For the reasons set forth below, the Court grants the motion for improper venue.[1]

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[1] Defendant CashCall, Inc. filed a motion to dismiss Plaintiff Deborah Jackson from the lawsuit for lack of standing. Also, Defendants assert that we should dismiss or stay the instant suit under the tribal exhaustion doctrine, Federal Rule of Civil Procedure 12(b)(6), or Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3. Because we find that the Loan Agreement's forum selection clause is enforceable and that the Cheyenne River Sioux

BACKGROUND[2]

Three Illinois consumers are suing an internet lender, his several businesses, and two debt collectors for allegedly charging annual interest rates well above 100%, in violation of Illinois' civil and criminal usury statutes and consumer fraud statute. In 2010 and 2011, Illinois residents Deborah Jackson ("Jackson"), Linda Gonnella ("Gonnella"), and James Binkowski ("Binkowski") (collectively "Plaintiffs") each obtained loans for $2,525 from Western Sky Financial, LLC ("Western Sky"), a "pay day loan" business chartered in Timber Lake, South Dakota. The interest rate on Jackson's and Binkowski's loans was 139.33%, while Gonnella's was 138.99%. Defendant WS Funding, LLC now owns the debt owed by Gonnella.

Defendant Martin A. Webb ("Webb") owned and controlled Defendants Western Sky, along with Payday Financial, LLC; Great Sky Finance, LLC; Red Stone Financial, LLC; Management Systems, LLC; 24-7 Cash Direct, LLC; Red River Ventures, LLC; High Country Ventures, LLC; and Financial Solutions, LLC (collectively the "Webb Entities"). Webb ran the Webb Entities as a common enterprise, and each entity listed the same Timber Lake, South Dakota address as its principal place of business. Webb is a member of the Cheyenne River Sioux Tribe (the "Tribe"). He is not a

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Tribal Nation is the proper and exclusive venue for this action, we need not rule on Defendants' alternative grounds for dismissal.

[2] We accept as true the factual allegations in Plaintiffs' amended complaint. *Reger Dev., LLC v. Nat'l City Bank,* 592 F.3d 759, 763 (7th Cir. 2010).

Tribal official, and the Tribe maintains no role or relationship in the ownership or operation of the Webb Entities, which is noted on Payday Financial LLC's website.

The Webb Entities advertised via internet and television to Illinois consumers, offering loans between $300 and $2,525. They charged interest rates over 100% despite not holding a banking charter or a license from the Illinois Department of Financial and Professional Regulation, whose authorization is required for lenders to charge interest rates greater than 9%. To receive a loan from the Webb Entities, borrowers must agree to and sign a six-page contract ("the Loan Agreement") which delineates the rights of each of the parties with respect to the loan. The Loan Agreement provides that the parties resolve any dispute arising out of the loan transaction by arbitration on the Tribal Reservation applying Tribal law.[3]

Jackson and Gonnella filed a four-count class-action lawsuit against Webb, the Webb Entities, and WS Funding, LLC, in the Circuit Court of Cook County. *See Jackson v. Payday Financial, LLC,* Case No. 11-CH-35207 (Oct. 11, 2011). The suit was removed to this Court under the Class Action Fairness Act. 28 U.S.C. 1332(d). After removal, Plaintiffs amended their complaint to add Binkowski as a plaintiff and CashCall, another debt collector that purchased and owns debts from Webb and the Webb Entities, as a defendant. Counts I-III allege that Defendants violated Illinois'

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[3] Borrowers may litigate the dispute in person, by telephone, or by video conference.

civil and criminal usury statutes, 815 ILCS 205/4(1) and 720 ILCS 5/17-59, and the Illinois Consumer Fraud and Deceptive Business Practices Act, 815ILCS 505/2, by charging unlawfully high interest rates. Count IV prays for declaratory and injunctive relief from enforcement of the arbitration clause.

Webb, the Webb Entities, and CashCall (collectively "Defendants") move to dismiss this suit under Federal Rule of Civil Procedure 12(b)(3) for improper venue.

LEGAL STANDARD

A motion to dismiss based on the enforcement of an arbitration clause is treated as an objection to venue and is properly brought under Federal Rule of Civil Procedure 12(b)(3). *Faulkenberg v. CB Tax Franchise Sys., LP,* 637 F.3d 801, 807 (7th Cir. 2009); *see also Cont'l Cas. Co. v. Am. Nat'l Ins. Co.,* 417 F.3d 727, 733 (7th Cir. 2005) (holding that dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(3) where a forum selection clause requires that a dispute be arbitrated outside of the district in which the suit is brought). When a defendant challenges venue under Federal Rule of Civil Procedure 12(b)(3), it is the plaintiff's burden to establish that venue is proper. *Faur v. Sirius Int'l Ins. Corp.,* 391 F.Supp.2d 650, 657 (N.D. Ill. 2005). In considering a motion to dismiss under Rule 12(b)(3), the Court construes all facts and draws all reasonable inferences in favor of the plaintiffs. *Faulkenberg,* 637 F.3d at 806.

DISCUSSION

The Loan Agreement states that any dispute arising under the Loan Agreement "will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative...."

Under both Illinois and federal law, a forum selection clause is *prima facie* valid and enforceable unless (1) the clause's incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that the complaining party will for all practical purposes be deprived of its day in court; or (3) enforcing the clause would contravene a strong public policy of the forum in which the suit is brought, as declared by statute or judicial decision. *AAR Int'l, Inc. v. Nimelias Enters. S.A.,* 250 F.3d 510, 525 (7th Cir. 2001). Plaintiffs assert that the forum selection clause is not valid because: (1) it furthers an illegal contract; (2) Plaintiffs' financial straits left them susceptible to Defendants' overreaching; and (3) it is contrary to Illinois' strong public policy.

First, Plaintiffs claim that the forum selection clause is not enforceable because it is part of an illegal contract, and sustaining such a clause would further an illegal objective and thus would be contrary to Illinois public policy. The Seventh Circuit spoke directly on this issue in *Muzumdar v. Wellness Int'l Network, Ltd.,* 438 F.3d 759 (7th Cir. 2006), in which it considered whether a forum selection clause was "void and unenforceable as against public policy" where the

underlying contract set out an illegal pyramid scheme. *Id.* at 762. The Seventh Circuit held that the forum selection clause was enforceable because a contrary ruling would have required the court to decide the contract's legality before deciding whether it should consider the case at all—a scenario the court deemed "an absurdity." *Id.* Plaintiffs now seek to invalidate the forum selection clause with the same failed argument that the plaintiffs advanced in *Mazumdar.* But as the Seventh Circuit found, doing so would require us to rule on the substance of their complaint before reaching the threshold question of whether venue in this court is proper in the first instance. Therefore, the alleged illegality of the Loan Agreement has no bearing on the validity of the forum selection clause.

Next, Plaintiffs argue that the forum selection clause is void because it was procured by duress. Plaintiffs claim that the Webb Defendants preyed on Plaintiffs' financial desperation by dangling needed funds in front of them and then conditioning disbursement on Plaintiffs' assent to the clause.

The allegations in the complaint do not permit for a reasonable inference that the Webb Defendants procured Plaintiffs' assent to the Loan Agreement under duress. Plaintiffs obtained their respective loans after presumably reading through and signing the Loan Agreement. The Loan Agreement explicitly and conspicuously identified the parties' choice of forum. A party to a contract has an obligation to read its provisions, is presumed to know its terms, and consents to be bound by them. *Bonny v. Soc. 'y of Lloyd's,* 3 F.3d 156, 160 n. 10 (7th Cir. 1993). There is no allegation that

the Webb Entities applied any pressure to Plaintiffs to sign the Loan Agreement, or used any deadlines to procure Plaintiffs' consent to the Loan Agreement. Plaintiffs' difficult financial circumstances alone do not warrant invalidating the forum selection clause. *See CIT Group/Credit Fin., Inc. v. Lott,* Case No. 93 C 0548, 1993 U.S. Dist. LEXIS 6669, at *5-6, 1993 WL 157617 (N.D.Ill. May 12, 1993) *(citing Cont'l Ill. Nat'l Bank & Trust Co. v. Stanley,* 606 F.Supp. 558, 562 (1985)) ("Duress does not exist merely where consent to an agreement is secured because of ... the pressure of financial circumstances ...."). Thus, Plaintiffs' argument fails.

Finally, Plaintiffs assert that Illinois' strong public policy in favor of enforcing its usury and consumer protection laws precludes enforcement of the forum selection provision. Illinois' public policy is set out in its Constitution, statutes, and longstanding case law. *In re Estate of Feinberg,* 235 Ill.2d 256, 335 Ill.Dec. 863, 919 N.E.2d 888, 894 (Ill. 2009). Plaintiffs argue that their right to sue under Illinois' usury and consumer protection statutes cannot be waived by contract. Furthermore, Plaintiffs argue, it would be against Illinois public policy to deny its residents the benefit of its consumer protection laws. However, Plaintiffs cite to no sources establishing Illinois' purported public policy of having its usury laws exclusively enforced in Illinois courts. To the contrary, Illinois and Seventh Circuit case law indicate that a party may prospectively waive by contract her statutory right to litigate in her preferred forum, even if the likelihood of success in a contractually selected forum is less

favorable. *See Bonny,* 3 F.3d at 162 (holding that a contract clause choosing England as the forum was enforceable despite the fact that enforcement allowed the defendant to avoid liability under American and Illinois securities laws); *Omron Healthcare v. Maclaren Exports,* 28 F.3d 600, 604 (7th Cir. 1994) (ruling that a forum selection clause choosing the High Court of Justice in England is enforceable, even if that tribunal may be biased against the plaintiff); *Walker v. Carnival Cruise Lines, Inc.,* 383 Ill.App.3d 129, 321 Ill.Dec. 422, 889 N.E.2d 687, 696 (Ill. App. Ct. 1st Dist. 2008) (contract clause accompanying a cruise line ticket choosing Miami, Florida as the forum to resolve future disputes was enforceable despite the possible deterrent effect on "plaintiff's ability to pursue her case."); *see also Potomac Leasing Co. v. Chuck's Pub, Inc.,* 156 Ill.App.3d 755, 109 Ill.Dec. 90, 509 N.E.2d 751, 759 (Ill. App. Ct. 2d Dist. 1987) (holding that a choice-of-law provision selecting Michigan law was valid even though Michigan law deprived plaintiff of a remedy). Plaintiffs therefore fail to demonstrate that Illinois' public policy warrants invalidating their freely contracted choice to litigate their dispute in the Tribal forum.

Because Plaintiffs have not identified any basis for invalidating the forum selection clause, Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(3) is granted.

CONCLUSION

For the reasons stated above, we grant Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(3).

/s/
Charles P. Kocoras
United States District Judge

Dated: July 9, 2012

Appendix D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 19, 2014

Before

KENNETH F. RIPPLE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

SARAH EVANS BARKER, *District Judge*

No. 12-2617

DEBORAH JACKSON, ET AL., *Plaintiffs-Appellants*,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	No. 1:11-cv-09288
PAYDAY FINANCIAL, LLC, ET AL., *Defendants-Appellees*.	Charles P. Kocoras, *Judge*.

O R D E R

Upon consideration of Defendants-Appellees' petition for panel rehearing or, alternatively, for rehearing en banc, filed on September 5, 2014, no judge

in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition.

IT IS ORDERED that the petition for rehearing or, alternatively, for rehearing en banc, is hereby **DENIED**.