UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CHAD MARTIN HELDT, CHRISTI W. JONES, SONJA CURTIS, and CHERYL A. MARTIN, individually and on behalf of all similarly situated individuals	*	
Plaintiffs,	*	Case No. 3:13-cv-3023-RAL
v.	*	Hon. Roberto A. Lange
PAYDAY FINANCIAL, LLC, d/b/a Lakota Cash and Big Sky Cash; WESTERN SKY FINANCIAL, LLC, d/b/a Western Sky Funding, Western Sky, and Westernsky.com; MARTIN A. ("Butch") WEBB; CASHCALL, INC; and WS FUNDING, LLC	*	
Defendants.	*	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO STAY DEFENDANTS' MOTION TO COMPEL ARBITRATION AND TAKE DISCOVERY ON ARBITRATION ISSUES[1]

Defendants Payday Financial, LLC, Western Sky Financial, LLC, Martin A. Webb, CashCall, Inc., and WS Funding, LLC (together, "Defendants") submit this Memorandum in Opposition to the Motion to Stay Defendants' Motion to Compel Arbitration and Take Discovery on Arbitration Issues ("Motion to Stay," Dkt. No. 29) filed by Plaintiffs Chad Martin Heldt, Christi W. Jones, Sonja Curtis, and Cheryl Martin (together, "Plaintiffs"), and respectfully

[1] Pursuant to District of South Dakota LR 29.1, the parties on September 27, 2013 filed a Joint Motion to extend the deadline for this memorandum to October 15, 2013 (Dkt. No. 35). As of the time of this filing, that Joint Motion remains pending before the Court. Out of an abundance of caution, this memorandum in opposition to Plaintiffs' motion is being filed. If the Court grants the pending Joint Motion, Defendants respectfully request the opportunity to file an amended memorandum with more fully developed arguments and citations to authority.

request that the Court enter an order denying Plaintiffs' Motion to Stay.

INTRODUCTION

Plaintiffs make two arguments for why their Motion to Stay should be granted: (1) the arbitral forum does not exist, and (2) the rules governing the purported forum do not exist. (Motion to Stay 3). Their motion should be denied for several independent reasons. First, because the loan agreements clearly indicate an agreement to arbitrate, Plaintiffs are not entitled to discovery on these issues. Their Motion to Stay is nothing more than an attempt to seek discovery on topics that are not relevant under the Federal Arbitration Act, which mandates that arbitration agreements, including delegation clauses, must be enforced.

Plaintiffs rely on district court orders in *Inetianbor* and *Jackson* that are inapposite. *Inetianbor*—which was heavily relied upon by *Jackson*—featured unique factual circumstances that have no bearing on the availability of an arbitrator for the present dispute. And Plaintiffs' claims about the availability of consumer rules on the Cheyenne River Reservation are irrelevant because Defendants have volunteered to conduct the arbitration pursuant to AAA and JAMS rules.

While Plaintiffs claim that allowing discovery on various and sundry issues will streamline this dispute, it is clear that Plaintiffs intend to seek wide-ranging and burdensome discovery on issues well outside the bounds of determining whether the arbitral forum and rules exist.

ARGUMENT

I. Plaintiffs Are Not Entitled to Discovery, and Their Motion is Merely an Attempt to Circumvent the FAA

Plaintiffs cite *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764 (3d Cir. 2013), for the proposition that a court may order discovery where the plaintiff has produced facts sufficient to "place the agreement to arbitrate in issue." *Id.* at 776. However, *Guidotti* focuses on the well-accepted rule that courts retain power to determine "whether there was a meeting of the minds on the agreement to arbitrate." *Id.* at 775. Here, Plaintiffs are purportedly seeking discovery on the existence of the arbitral forum and rules—not on whether there was a meeting of the minds as to the arbitration clause in the first place.

Indeed, *Guidotti* makes clear that "when it is apparent, based on the face of a complaint, and documents relied upon in the complaint, that certain of a party's claims are subject to an enforceable arbitration clause, a motion to compel arbitration should be considered under a Rule 12(b)(6) standard *without discovery's delay*." *Id.* at 776 (quotations omitted; emphasis added). This alone is sufficient grounds to deny Plaintiffs' request for discovery. As discussed more fully in Defendants' briefs in support of their Motion to Compel Arbitration, there is no dispute of fact here on whether there is a valid agreement to arbitrate or whether this dispute falls within the scope of that agreement. ("Motion to Compel," Dkt. No. 23 at 11-12; "Reply in Support," Dkt. No. 33 at 5).

More importantly, Plaintiffs should not be permitted to seek discovery on topics that are irrelevant under the Federal Arbitration Act ("FAA"). As Defendants have previously made clear, the parties here agreed to arbitrate their disputes, including any issues concerning the validity, enforceability, or scope of the arbitration agreement (the delegation clause). (Motion to

Compel 8-10, 11-13; Reply in Support 6-7, 9-13). The FAA is clear that arbitration clauses must be enforced, *see Kubista v. Value Forward Network, LLC*, Civ. No. 12-4066, 2012 WL 2974675, at *2 (D.S.D. July 20, 2012), as must delegation clauses, *see Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010). As such, Plaintiffs are not permitted to challenge the validity of the arbitration clauses in this Court, yet they now seek burdensome discovery on this very issue. This Court should deny the Plaintiffs' continued attempts to circumvent the FAA's requirements. To the extent Plaintiffs seek discovery on the question of arbitrability, they must seek it through the arbitration process. (Motion to Compel 11-13; Reply in Support 9-13).

II. Availability of the Arbitral Forum: *Inetianbor* and *Jackson* Are Inapposite

This Court should not rely on the unique circumstances in *Inetianbor* to conclude that the parties should undertake burdensome and time-consuming discovery to determine whether the arbitral forum is unavailable. In *Inetianbor*—which was heavily relied upon by *Jackson*—the selected arbitrator (Mr. Chasing Hawk) refused to move forward with the arbitration after his relationship with Western Sky was brought into question. *Inetianbor v. CashCall, Inc.*, No. 0:13-cv-60066, slip op. at 4 (S.D. Fla. Aug. 19, 2013). There was evidence that Mr. Chasing Hawk's daughter was employed by Western Sky and that an employee of a Western Sky subsidiary had engaged in an *ex parte* communication with Mr. Chasing Hawk prior to the arbitration. *Id.* Additionally, the court in *Inetianbor* chided the defendants for failing to specifically allege that the alternative arbitrators they identified were "authorized representatives of the Tribe." *Id.* at 9. Combining these two factors, the Court concluded that the arbitral forum was not available. *Id.*

As Defendants have already argued, the conclusion in *Inetianbor* was limited to the unique facts of that case: a potentially biased arbitrator who refused to participate and had an

improper *ex parte* communication, plus the defendants had failed to specifically allege that the alternative arbitrators were "authorized representatives of the Tribe." (Motion to Compel 23-24; Reply in Support 7-8).

Jackson is similarly inapposite because its conclusion was based primarily on the circumstances of Mr. Chasing Hawk from the *Inetianbor* case. *See Jackson v. Payday Fin., LLC*, No. 11-cv-9288, slip op. at 2-4 (N.D. Ill. Aug. 28, 2013). *Jackson* never analyzed whether another arbitrator was available.[2]

Plaintiffs in the present dispute seem to contend that they are entitled to burdensome discovery because *one arbitrator in a different case* was unwilling to move forward. This Court should not make the same mistake that *Jackson* made: the sudden unavailability of one potentially biased arbitrator has no impact on the availability of other authorized arbitrators.

III. The Existence of "Tribal Consumer Dispute Rules" is Irrelevant

Plaintiffs also challenge the existence of "Tribal Consumer Dispute Rules" that would apply to the arbitration. This is a red herring because Defendants have already volunteered to arbitrate this dispute using AAA and JAMS rules. (Motion to Compel 18 ("Defendants consent to severing the references and using the rules of the AAA and JAMS in their place.")). Indeed, this Court has previously allowed an arbitration provision to be severed and replaced with an alternative arbitration procedure. *See Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1167-68 (D.S.D. 2010) (language specifying arbitration be conducted "in accordance with the National Arbitration Forum Code of Procedure" could be replaced with alternative arbitration

[2] *Jackson* and Plaintiffs also cursorily rely on a New Hampshire Banking Department Cease and Desist Order. *See Jackson*, slip op. at 5; Motion to Stay 2. However, that Cease and Desist Order was not issued by an impartial tribunal—it was issued by the petitioner, the New Hampshire Banking Department. Even more telling, the Order says nothing about the availability of the arbitral forum or rules.

procedures).

No discovery is required to know that the rules for AAA or JAMS are available. This renders moot any technical arguments about the tribal arbitration forum that Plaintiffs may attempt to advance via their requests for discovery.

IV. Plaintiffs Seek Wide-Ranging and Irrelevant Discovery

Plaintiffs claim that they seek discovery for the purpose of determining "the existence of an arbitration forum, the availability of suitable arbitrators, and the existence of the rules." (Motion to Stay 3). Plaintiffs contend that allowing their requests would "avoid a prolonged process." (*Id.* at 1).

However, Plaintiffs' list of requested discovery topics directly undercuts both of these assertions. Rather than seeking to employ narrow discovery tools, Plaintiffs request permission to serve requests for documents, requests for admissions, and interrogatories on each and every Defendant. Worse yet, rather than focusing on the existence of the forum and the existence of consumer rules, Plaintiffs request burdensome discovery on irrelevant topics such as "the relationship between the Defendants" and " the procedural and substantive unconscionability of the proffered arbitration provision." (*Id.* at 4-5).

Courts have made clear that if discovery is permitted, it must be exceedingly narrow, or else the defendants would be losing their contractually secured right to arbitrate. *See Guidotti*, 716 F.3d at 774 (holding that the party opposing arbitration "must be given the opportunity to conduct *limited discovery on the narrow issue concerning the validity* of the arbitration agreement") (emphasis added; quotation omitted); *see also Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 511 (7th Cir. 2003) (same). Plaintiffs' motion is nothing more than a fishing expedition into broad areas that—as fully discussed in Defendants' previous briefs—have no

impact on the availability of the arbitral forum or consumer dispute rules. (Motion to Compel 11-13; Reply in Support 9-13). It is unclear why the Defendants' "relationship" with each other is relevant at all to whether arbitrators and rules are available on the Reservation, nor do Plaintiffs explain why they seek this information.

Plaintiffs also seek discovery on the "procedural and substantive unconscionability of the proffered arbitration provision" and whether Defendants waived arbitration "by pursuing non-tribal remedies against consumers." Plaintiffs never explain how these topics are in any way relevant to the existence of the arbitral forum or consumer rules, nor do they offer any supporting argument beyond mere recitation to *Jackson* and *Inetianbor*.

Plaintiffs' requests for discovery on unconscionability and waiver are nothing more than an attempt to further bog down this dispute and deprive Defendants' of their contractually guaranteed right to arbitrate.[3] (Motion to Compel 8-10, 11-13; Reply in Support 6-7, 9-13).

[3] Additionally, Plaintiffs never explain what information could possibly be in Defendants' possession that would bear on whether Plaintiffs' arbitration provisions are unconscionable. Any information on this (irrelevant) topic would be equally in Plaintiffs' possession. The same holds true for Plaintiffs' attempts to seek discovery on whether Defendants waived arbitration by pursuing "non-tribal remedies." Indeed, Plaintiffs never even say that Defendants pursued "non-tribal remedies" against *Plaintiffs*, but instead suggest that pursuing such remedies "against *consumers*" in general would somehow be relevant to the present parties' contractually agreed decision to arbitrate. (Motion to Stay 5, emphasis added).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' Motion to Stay.

DATED: September 30, 2013

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 30, 2013, I caused a copy of the foregoing Defendants' Motion to Dismiss Amended Complaint and Memorandum of Points and Authorities to be served via the Court's electronic filing system upon the following:

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