16-2019-cv(L), 16-2132-cv(CON), 16-2135-cv(CON), 16-2138-cv(CON), 16-2140-cv(CON)

United States Court of Appeals

for the

Second Circuit

JESSICA GINGRAS, on behalf of herself and others similarly situated,
ANGELA C. GIVEN, on behalf of herself and others similarly situated,

Plaintiffs-Appellees,

– v. –

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JOINT REPLY BRIEF FOR DEFENDANTS-APPELLANTS THINK FINANCE, INC., TC DECISION SCIENCES, LLC, TAILWIND MARKETING, LLC, TC LOAN SERVICE, LLC, TECHNOLOGY CROSSOVER VENTURES, KENNETH E. REES AND SEQUOIA CAPITAL OPERATIONS, LLC

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Plaintiffs rely on rhetoric and overbroad statements to support their underlying claims, but avoid the two core arbitration issues on appeal.[1]

First, the parties contractually agreed that any question concerning arbitrability should be decided by the arbitrator. The Arbitration Agreements[2] unambiguously delegate to the arbitrator "any Dispute," including the "validity, enforceability, or scope" of the Agreements. A-264.[3] Plaintiffs try to avoid this provision by pointing to a series of unrelated and, frankly, irrelevant, provisions in the Arbitration Agreements and by arguing, generally, that the Arbitration Agreements are unconscionable. In light of the clear Delegation Provision, it is for the arbitrator, not the District Court, to decide whether Plaintiffs' claims are arbitrable. On this ground alone, Defendants' motions to compel arbitration should have been granted.

Second, assuming, arguendo, the District Court did not err in deciding whether the Arbitration Agreements are enforceable, it should have granted

[1] This brief is submitted jointly by all Defendants-Appellants except the Tribal Defendants Joel Rosette, Ted Whitford and Tim McInerney. Unless otherwise indicated, references to "Defendants" do not include the Tribal Defendants.

[2] All capitalized terms have the meaning ascribed to them in Defendants' opening brief.

[3] In the opening brief, Defendants cited to the Arbitration Agreements within two of Plaintiffs' loan agreements. Defs.' Br. 5 n.2. Plaintiffs' brief primarily cites to one of Plaintiff Given's loan agreements when referring to language in the Arbitration Agreements. Pls.' Br. 80. Because the operative language in the Arbitration Agreements is virtually identical, Defendants conformed their citations to Plaintiff Given's loan agreement.

Defendants' motions to compel arbitration because the Arbitration Agreements are neither unconscionable nor unfair. To the contrary, the Arbitration Agreements contain all of the hallmarks of procedural and substantive fairness, including language in conspicuous, bold type that arbitration is to be conducted by a neutral arbitrator appointed by JAMS or AAA, with costs to be paid by Plain Green. Further, even if the Court were to find that any individual provision of the Arbitration Agreements was unconscionable, it could be severed and the Arbitration Agreements otherwise enforced.

I. THE QUESTION OF ARBITRABILITY SHOULD BE DECIDED BY AN ARBITRATOR.

Plaintiffs relegate the threshold legal issue on appeal—whether the arbitrator should decide arbitrability—to the end of their brief, and even then largely repeat their earlier arguments regarding the alleged unconscionability of the Arbitration Agreements as a whole. Plaintiffs' scattered and confusing arguments provide no basis for invaliding this Delegation Provision.

A. Plaintiffs' Loan Agreements Contain a Clear and Unmistakable Delegation Provision.

Defendants' opening brief highlighted the straight-forward language establishing that the parties contractually agreed that an arbitrator would decide the scope and enforceability of the Arbitration Agreements. Defs.' Br. 5, 18. Ignoring key decisions such as *Rent-A-Center*, Plaintiffs make a series of inapposite

arguments designed to distract from this unambiguous language in the Arbitration Agreements specifying that *any* dispute Plaintiffs have under their loan agreements must be resolved through arbitration, including, most significantly, disputes concerning the enforceability, validity and scope of the Agreements.[4]

Plaintiffs' loan agreements contain a clear agreement that "any Dispute" "will be resolved by Arbitration" and that a "Dispute" "includes . . . any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." A-264. This clause delegates to the arbitrator any disputes about arbitrability in a manner that is even clearer than the clause at issue in *Rent-A-Center*, where the Supreme Court ruled that it was for the arbitrator, not a federal court, to decide whether the dispute was arbitrable. *See Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 66 (2010) (agreement provided "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or

[4] "Dispute" is also broadly defined to include the claims that Plaintiffs assert. Plaintiffs contend that this case is not covered by the Arbitration Agreements because it was brought as a putative class action and the Arbitration Agreements contain a class action waiver. Class action waivers of this type, however, are valid and routinely upheld by courts. Defs.' Br. 25 (citing *Kemph v. Reddam*, No. 13-CV-6785, 2015 WL 1510797, at *6 (N.D. Ill. Mar. 27, 2015) (enforcing class action waiver in similar arbitration agreement); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (noting validity of class action waivers)). Because the Arbitration Agreements contain valid class action waivers, only individual actions can be brought.

formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable"); *see also PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199–2000 (2d Cir. 1996) (ruling that where an arbitration provision indicates an intent to arbitrate "any and all" claims, it reflects a "broad grant of power to the arbitrators" that evidences the parties' clear "inten[t] to arbitrate issues of arbitrability").

Plaintiffs largely ignore this unambiguous delegation provision and, instead, argue that several different provisions in the Arbitration Agreements are the delegation provision. They are not. *Compare* Pls.' Br. 80–81 (asserting that the class action waiver is the delegation provision) *with* Pls.' Br. 89 (asserting that provision requiring written findings by the arbitrator is the delegation provision) *with* Pls.' Br. 87 (asserting that the scope of a prevailing party's remedies is the delegation provision) *with* Pls.' Br. 91 (perhaps most confusingly, asserting that the delegation provision incorrectly states that Plain Green is the lender). None of these provisions address the arbitrator's express authority to resolve "any issues concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." A-264. That authority is provided in the Delegation Provision. Indeed, Plaintiffs conceded this point in their Complaint, where they acknowledge that the delegation provision "include[s] within the scope of the

arbitration agreement 'any issue concerning the validity, enforceability, or scope of this loan or the Agreement to Arbitrate.'" A-55 at ¶ 131.

While the Delegation Provision is more than enough to compel this result, even without it, the Arbitration Agreements plainly delegate arbitrability by virtue of their incorporation of the policies and procedures of the AAA and JAMS.[5] A-264. Courts routinely find this type of incorporation of AAA or JAMS rules into an arbitration agreement evidence an unambiguous intent to delegate arbitrability to an arbitrator. *See Contec Corp. v. Remote Sol. Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005); *Shaw Grp. Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 122 (2d Cir. 2003).

Plaintiffs cite to *NASDAQ OMX Grp., Inc. v. UBS Sec. LLC*, for the proposition that an arbitration agreement that merely incorporates the rules of an arbitration organization does not contain a clear delegation clause. 770 F.3d 1010 (2d Cir. 2014). In *NASDAQ*, the arbitration agreement was silent on whether an arbitrator or the court should decide arbitrability, but incorporated AAA's rules, which provide for arbitrability to be decided by the arbitrator. *Id.* at 1031. While

[5] The Agreements' reference to policies and procedures ensures that a wide range of procedural mechanisms and remedies are available to consumers. Although Plaintiffs focus on their perceived distinction between the AAA rules and AAA procedures, Plaintiffs fail to note that JAMS refers to its rules as the "JAMS Comprehensive Arbitration Rules and Procedures." *See* JAMS Comprehensive Arbitration Rules & Procedures, https://www.jamsadr.com/rules-comprehensive-arbitration/ (last visited Jan. 24, 2017).

the defendant argued that the incorporation of AAA's rules trumped a specific arbitration exclusion in the contract for certain disputes, the court held that the dispute was subject to the exclusion, making the incorporation of AAA's rules irrelevant. *Id.* at 1032. By contrast, the Arbitration Agreements here have a provision delegating arbitrability to an arbitrator and do not limit or carve out Plaintiffs' claims from the scope of that provision.

Plaintiffs also attempt to muddy these straight-forward contract interpretation issues with pejorative statements concerning corruption and the alleged purchase of Chippewa Cree law.[6] Not only are these assertions conclusory and unfounded, but they also do not go to the threshold arbitration issues on appeal. It is the Arbitration Agreements' Delegation Provision and federal law, not Chippewa Cree law, that determines whether arbitrability is delegated to the arbitrator. The application of Chippewa Cree law and any attendant choice-of-law question—including allegations about the validity of that law—are for the arbitrator to address *after* arbitrability has been determined. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53 (1995) (noting "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause

[6] These points are not only irrelevant, but also meritless. The plain language of the term sheet at issue states that the lending code should be "acceptable to all parties" and should ensure Plain Green will "comply with the federal consumer credit code including the Truth in Lending Act, the Equal Credit Opportunity Act, and the Electronic Funds Transfer Act." A-73. This is a far cry from "purchasing" Chippewa Cree law.

covers arbitration; neither provision intrudes upon the other"); *see also Kemph*, No. 13-CV-6785, 2015 WL 1510797, at *5 (holding that arbitrator is free to "accept the dispute, find the choice-of-law provision is unenforceable, and determine what default law should apply").

Because there is a clear and unmistakable provision in the Arbitration Agreements delegating to the arbitrator the authority to decide whether a particular dispute is arbitrable, Plaintiffs' dispute should be referred to arbitration.

B. Plaintiffs Do Not Directly Challenge the Delegation Provision.

As Defendants demonstrate in their opening brief, under *Rent-A-Center*, where there is a clear delegation provision, as there is here, the issue of arbitrability is for an arbitrator to decide unless there is a direct and specific challenge to the *delegation provision itself*. 561 U.S. at 71-73; *see* Defs.' Br. 20–21. Plaintiffs attempt to distract from this focused inquiry with inflammatory and prejudicial statements attacking the Arbitration Agreements as a whole, but they fail to directly attack the validity of the Delegation Provision.

Plaintiffs do not even meaningfully acknowledge the distinction between a specific challenge to the Delegation Provision and a general challenge to the Arbitration Agreements as a whole. For example, Plaintiffs' unconscionability and fraud arguments concerning alleged corruption issues surrounding Chippewa Cree law are, at best for Plaintiffs, attacks on the choice of law provision in the loan

agreements, not the validity of the Delegation Provision. *See* Pls.' Br. 87–94. Chippewa Cree law has no bearing on the application of the Delegation Provision here, which under federal law, *i.e.*, the FAA and case law applying it, is sufficiently clear to compel referral of this dispute to an arbitrator. Plaintiffs' notions concerning the validity of Chippewa Cree law will bear on their claims, if at all, only after arbitrability is determined.

Plaintiffs' other scattershot attacks—including on a Tribal Court review provision, Plaintiffs' alleged lack of remedies and who the true lender is—are likewise not directed at the validity of the Delegation Provision specifically. Pls.' Br. 86-87, 81. These types of inchoate allegations of putative unfairness are textbook examples of the types of general attacks on an arbitration agreement as a whole that the Supreme Court and this Court have rejected. *See Rent-A-Center*, 561 U.S. at 72; *Campaniello Imps., Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 668 (2d Cir. 1997) (holding general allegations that delegation provision "was a part of the overall scheme to defraud" are not specific challenges to delegation provision); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995) (enforcing arbitration agreement even though the objecting party argued that the foreign arbitral panel would not abide by controlling federal law); *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 (2003) (enforcing arbitration when

objecting party argued that the arbitration agreement might limit certain remedies because it did "not know how the arbitrator" would construe the agreement).[7]

Here, the Delegation Provision gives the arbitrator authority to decide the arbitrability of any dispute. Because Plaintiffs do not make a direct and specific challenge to the validity of this provision, but only challenge the validity of the Arbitration Agreements as a whole, the motions to compel should have been granted. Under the well-established framework provided by federal law, it is for the arbitrator to decide whether the dispute is subject to arbitration, not the courts. Defs.' Br. 18-20.

II. EVEN ASSUMING ARBITRABILITY WAS FOR THE DISTRICT COURT TO DECIDE, THE DISTRICT COURT SHOULD HAVE COMPELLED ARBITRATION.

Even if arbitrability were an issue for a court, and not an arbitrator to decide, the Court should compel arbitration. Federal law is clear that under the FAA the validity and enforceability of an agreement to arbitrate must be evaluated independently of the validity of the agreement as a whole. *Rent-A-Center*, 561 U.S. at 70-71; *Hayes v. Delbert Servs.*, 811 F.3d 666, 671 (4th Cir. 2016) ("Importantly, any grounds given for revocation must concern the validity of the

[7] Plaintiffs reliance on *Moseley v. Elec. & Missile Facilities, Inc.*, 374 U.S. 167 (1963), is misplaced because, there it was crucial to the Supreme Court's holding that enforcing the arbitration agreement at issue there would have nullified the Miller Act. Courts have also noted that *Moseley* has been limited by subsequent Supreme Court decisions. *See, e.g., Garten v. Kurth*, 265 F.3d 136, 143-44 (2d Cir. 2001).

arbitration agreement in particular, not simply the validity of the underlying contract as a whole."). The issue here is thus whether the Arbitration Agreements themselves are unconscionable, not whether the loan agreements as a whole are unconscionable. *See, e.g.*, *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 779 (7th Cir. 2014). Plaintiffs' assertion that Vermont law, and not Tribal Law, applies to determine whether the Arbitration Agreements are unconscionable is immaterial. Under either Chippewa Cree Tribal Law or Vermont law, the Arbitration Agreements should be enforced.[8]

A. The Arbitration Agreements Are Not Unconscionable Under Vermont Law.

In response to Defendants' explanation of why the Arbitration Agreements are fair and enforceable, Plaintiffs make broad and unsupported arguments attempting to invalidate the Arbitration Agreements under Vermont law. Defs.' Br. 34-37. Under Vermont law, however, the unconscionability inquiry focuses on whether the agreement to arbitrate itself leads to unfair and one-sided results, *i.e.*, whether the contemplated arbitration is procedurally and substantively fair. *See*

[8] Plaintiffs assert that whether Tribal Law applies—as expressly set forth in the loan agreements—has been waived on appeal. Defendants, however, argued the issue below and the District Court addressed it. It has therefore not been waived. *See Russell v. Bd. of Plumbing Examiners of the Cty. of Westchester*, 1 F. App'x 38, 41 (2d Cir. 2001) (holding issue that is "pressed or passed upon below" is preserved for review even if the court addresses it *sua sponte*) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995) (even point that petitioner "disavowed" was preserved).

generally Littlejohn v. TimberQuest Park at Magic, LLC, 116 F. Supp. 3d 422 (D. Vt. 2015).

1. The arbitration agreements are procedurally fair.

Issues of procedural fairness encompass the form of the contract, the existence of bargaining power disparities and contract formation. *Littlejohn*, 116 F. Supp. 3d at 430; *Glassford v. BrickKicker*, 35 A.3d 1044, 1048 (Vt. 2011). Plaintiffs contend that the loan agreements, and the Arbitration Agreements contained therein, are procedurally unfair because they are hard to find on the Plain Green website. Pls.' Br. 66. These arguments notwithstanding, there is no dispute that the loan agreements were available to Plaintiffs when they each signed their four separate loan contracts, which Plaintiffs acknowledged they read and understood. A-265-266.

Plaintiffs also contend that the Arbitration Agreements are "difficult to read," though the provisions they cite in support of this notion are straightforward. Pls.' Br. 67. For example, Plaintiffs contend it is "inconsistent" for a dispute under the loan agreements to be arbitrated because the Arbitration Agreements also provide that the arbitrator has no authority to conduct class-wide proceedings and that any dispute concerning the validity of the class action waiver must be determined by a Tribal Court. Plaintiffs' claim that this provision is confusing is self-serving. The parties have simply agreed that the arbitrator has no authority to

conduct a class-wide proceeding—a non-issue in light of the class action waivers Plaintiffs also agreed to. This is a common provision in arbitration agreements, the validity of which has been affirmed by *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351-53 (2011).

Similarly, Plaintiffs argue, without support, that borrowers are not "likely to understand" the doctrine of tribal immunity, but tribal immunity is an issue in this case regardless of whether it is adjudicated by an arbitrator or a federal court. Plaintiffs also contend that it is "impossible" to determine what Tribal Law is, which is rebutted by Plaintiffs themselves identifying the pertinent provisions to this Court. *See* A-315–A343.

Finally, Plaintiffs assert, again without support, that the Arbitration Agreements are unconscionable because the small dollar amounts involved discourage an individual to pursue a claim. Courts have repeatedly rejected this argument. *See AT&T Mobility LLC*, 563 U.S. at 351-53; *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1212-13 (11th Cir. 2011); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298 (2d Cir. 2013) (holding a "class-action waiver [in an arbitration agreement] is not rendered invalid by virtue of the fact that [a] claim is not economically worth pursuing individually"). This argument is especially unpersuasive here because the Arbitration Agreements provide for Plain Green to

pay all costs associated with the arbitration and to pay a borrower's attorneys' fees if the borrower prevails in arbitration.

2. The arbitration agreements are substantively fair.

Defendants' opening brief also demonstrates that the Arbitration Agreements are substantively fair under Vermont law because, among other things, they provide for a neutral arbitrator from AAA or JAMS, do not impose any upfront costs on claimants, and provide for the arbitration to be conducted at a location convenient for the claimant. Defs.' Br. 34-37; A-264.

Plaintiffs do not address this issue directly. Rather, they attempt to distract from it by contending that the Tribal Court lacks personal jurisdiction. Pls.' Br. 63-66. This ignores that Plaintiffs expressly consented in their loan agreements to holding certain proceedings before the Tribal Court. Such choice-of-venue provisions are routinely enforced without a separate inquiry on whether there is personal jurisdiction over the parties who execute such an agreement. *See F.T.C. v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 941 (D.S.D. 2013). Indeed, the very case on which Plaintiffs rely for this meritless argument makes clear that jurisdiction of a tribal court extends to "activities of nonmembers who enter *consensual relationships with the tribe or its members, through commercial dealing, contracts,* leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981) (emphasis added).

Section 10-3-602 of the Tribal Code provides that mandatory arbitration clauses in loan agreements will not be enforced if they are "oppressive, unconscionable, unfair, or in substantial derogation of a Consumer's rights," and that an agreement to arbitrate that "complies with the applicable standards of the American Arbitration Association" is presumptively valid. A-324. Unlike other arbitration clauses that have been ruled substantively unconscionable, the Tribal Code section addressing the enforceability of the arbitration agreements here does not *ex ante* create harsh or unfair results. Instead, it expressly allows the *arbitrator* to decide if the underlying arbitration agreement is unenforceable.

Plaintiffs also assert that the allowance in the Arbitration Agreements for review by the Tribal Court leads to a predetermined result against Plaintiffs depriving them of relief. Pls.' Br. 62. This is not only wholly unsupported—and, frankly, offensive—but also overlooks that pursuant to the FAA, any decision by a Tribal Court on optional review is subject to review by a federal court. 9 U.S.C. §§ 9, 10; *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993). There is nothing unconscionable or unfair about review by a Tribal Court, especially when any review by that Court will be subjected to review by a federal court. *See, e.g.*, *Vimar*, 515 U.S. at 540-41.

The sole Vermont case relied upon by Plaintiffs in support of their unconscionability argument, *Glassford v. BrickKicker*, supports Defendants'

position. There, the contract limited a home inspection company's liability to an amount less than the arbitration costs, making any remedy "illusory." 35 A.3d at 1048-49. There are no such limits here, and the Arbitration Agreements provide that Plain Green will pay the costs of the arbitration.

B. The Arbitration Agreements Are Not Unconscionable Under Tribal Law.

The Arbitration Agreements are also enforceable under Tribal Law. The District Court erred in concluding that Tribal Law is "entirely silent on questions of arbitrability of disputes." SPA-29. Section 10-3-602 of the Chippewa Cree Code provides clear guidance to arbitrators and the Tribal Court on the standard to determine enforceability of an agreement to arbitrate. This Code section expressly provides that an unconscionable agreement to arbitrate is not enforceable; and that an agreement to arbitrate that complies with AAA standards is presumptively enforceable.

Although Plaintiffs contend that the Arbitration Agreements do not comport with AAA standards, they fail to directly address the applicable standard. Pls.' Br. 71–72. Principle 11 of the AAA's Consumer Due Process Protocol Statement or Principles specifically governs consumer relationships with agreements to arbitrate. American Arbitration Association, Consumer Due Process Protocol Statement of Principles, https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014 (last visited Jan. 26, 2017). In accordance with this Principle, the loan

agreements provide clear and conspicuous notice of the agreement to arbitrate by outlining it in square boxes, heralded by headings that are bold, centered and underlined. A-264. The relevant subsections provide that the arbitration is binding and mandatory unless the consumer opts out and differentiates arbitration from court proceedings. *Id.* The Arbitration Agreements describe what arbitration is, how it works, how arbitration must be initiated, cost information, and where to obtain more information—all as set forth in Principle 11 of the AAA Due Process Protocol.

Further, despite Plaintiffs' assertions to the contrary (Pls.' Br. 60–61) the Chippewa Cree Lending Code provides substantive remedies in addition to the right of rescission. Section 10-6-201 provides consumers with the right to recover actual damages, as well as injunctive and equitable relief, for any violation of the Chippewa Cree Lending Code. A-338. These remedies are available either in Tribal Court or arbitration and are indistinguishable from those sought by Plaintiffs under the state and federal statutes at issue in this matter. Section 10-6-201(a)-(b); A-338. Accordingly, enforcement of the choice of law provision will not frustrate Plaintiffs' ability to recover.

Finally, Plaintiffs also speculate that they will face improprieties in their individual arbitrations before JAMS or AAA. Pls.' Br. at 93-94. Even if any such impropriety were to occur in their chosen arbitral forum, consideration and remedy

of that issue are reserved for a district court after the completion of the arbitration. *See Vimar*, 515 U.S. at 540-41 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)). Plaintiffs offer no rebuttal to this black letter principle, only their unsupported arguments, speculation and conjecture on an assumed preordained result in arbitration. Pls.' Br. 92–94. Plaintiffs should not be allowed to short-circuit the choice of forum and choice of law provisions in their agreements by speculating on how their claims might be resolved. The Court should reject Plaintiffs' arguments and respect the parties' contractual election to pursue arbitration in a specific forum and under a particular set of laws.[9]

C. Plaintiffs' Allegations of Frustration and Fraud Are Unfounded.

In a particularly offensive assertion, Plaintiffs contend that the intent of the Arbitration Agreements is frustrated by "ongoing corruption in the Tribe and instability in the Tribal Judiciary." Pls. Br. 73. Even assuming that these allegations were true, which they are not, they have no bearing on the arbitration. Once again, Plaintiffs conflate the merits of their dispute with the far more focused

[9] Plaintiffs make a fundamental error in addressing arbitrability: they continuously insert the merits of the dispute into the issue of whether the Arbitration Agreements are unconscionable. For example, Plaintiffs take issue with the fact that the Arbitration Agreements are governed by Tribal Law. A-265. They argue that Tribal Law does not provide adequate consumer protection in the consumer lending context and spew invectives that Defendants "purchased" Tribal Law to "favor loan sharking operations." Pls.' Br. 58–59. Not only is this unsubstantiated, it patently goes to the merits of Plaintiffs' dispute and does not bear on whether the dispute is arbitrable.

inquiry of whether the Arbitration Agreements should be enforced. Plaintiffs' litany of unsupported allegations concerning alleged "corruption" within Plain Green and the Tribe have no bearing on whether the Arbitration Agreements themselves should be invalidated on the ground that they were procured by fraud or frustrated.

III. EVEN ASSUMING PARTS OF THE ARBITRATION AGREEMENTS ARE UNENFORCEABLE, THOSE PROVISIONS SHOULD BE SEVERED AND THE AGREEMENTS ENFORCED.

Even if some part of the Arbitration Agreements was deemed unenforceable, that part should be severed and the remainder of the agreement to arbitrate enforced. Plaintiffs' assertion that a "boilerplate" severance clause cannot salvage an otherwise unconscionable agreement misses the point. Pls.' Br. 78-79. Federal law provides that an agreement to arbitrate should be enforced, without the "offending" provisions, so long as any unenforceable provisions of the agreement do not go to its "essence." *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1364 (N.D. Ill. 1990); *Herrera v. Katz Commc'ns, Inc.*, 532 F. Supp. 2d 644, 647 (S.D.N.Y. 2008) (finding that when faced with an unenforceable provision in an arbitration agreement "the proper remedy would be to sever the invalid provision of the arbitration clause and compel arbitration of the underlying dispute, rather than to invalidate the entire arbitration clause"). Plaintiffs voluntarily executed loan agreements that require them to arbitrate any

and all disputes. Under federal law, if, for example, the Court were to hold that the provision allowing for permissive review of any arbitral award by the Tribal Court invalid, the Arbitration Agreements should still be enforced without that provision.

It is not, as Plaintiffs contend, impossible to "disentangle" any of the individual provisions Plaintiffs challenge from the underlying Arbitration Agreements. The thrust of the Arbitration Agreements is that the parties will arbitrate any disputes arising under the loan agreements on an individual basis, and those disputes will be decided by an AAA or JAMS arbitrator. A-264. If the Court finds any section of the Arbitration Agreements invalid, this "essence" of the Agreement should still be enforced and the dispute should be sent to arbitration, not adjudicated in federal court.

IV. PLAINTIFFS' RELIANCE ON THE WESTERN SKY CASES IS MISPLACED.

Plaintiffs' reliance on a series of cases concerning Western Sky LLC, an online lender owned by a member of the Cheyenne River Sioux Tribe, is misplaced. *See* Pls.' Br. 55–58 (citing *Parm v. Nat'l Bank of Calif.*, 835 F.3d 1331 (11th Cir. 2016); *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1355 (11th Cir. 2014); *Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014); *Hayes v. Delbert Servs.*, 811 F.3d 666 (4th Cir. 2016); *Parnell v. Western Sky Fin., LLC, CashCall, et al.*, No. 16-11369, 2016 WL 6832933 (11th Cir. Nov. 21, 2016) (collectively, the "Western Sky cases")). As noted by Defendants and ignored by

Plaintiffs, the arbitration agreements and facts at issue in the Western Sky cases are significantly different from the Agreements in this case.

In *Inetianbor*, *Parm*, *Parnell*, and *Jackson*, the Seventh and Eleventh Circuits analyzed Western Sky's arbitration agreement, focusing on provisions that (1) mandated a "tribal elder" or designated "tribal representative" serve as arbitrator subject to the borrower's right to select AAA or JAMS to "administer the arbitration"; and (2) that tribal arbitration procedures apply to the arbitrations. Evaluating these provisions, and evidence that the plaintiff in *Inetianbor* attempted to avail himself of arbitration with the Cheyenne River Sioux Tribal Nation ("CRST") and was informed by CRST representatives that they did not conduct arbitrations or have arbitration rules, the courts found that the agreements called for an unavailable arbitral forum, rendering the agreements unconscionable. *See Inetianbor*, 768 F.3d at 1348-49; *Parm*, 835 F.3d at 1337; *Parnell*, 2016 WL 6832933, at *2; *Jackson*, 764 F.3d at 770-71.

Here, by contrast, the Arbitration Agreements provide for a legitimate arbitrator and arbitration forum. The Arbitration Agreements do not provide for a tribal representative to serve as arbitrator, but instead allow Plaintiffs to select a neutral from a qualified organization, including recognized national organizations like JAMS and AAA. A-264. The Arbitration Agreements further specify that the arbitration will be "conducted by," as opposed to "administered by," JAMS or

AAA and will apply the "policies and procedures" of the selected arbitration organization. A-264. These provisions ensure that an arbitral forum exists in which Plaintiffs' disputes can be heard and that fair policies and procedures will be applied. Further, unlike *Inetianbor*, *Parm*, *Parnell*, and *Jackson*, Plaintiffs did not attempt to avail themselves of the specified arbitral forum and find it was unavailable.

The Fourth Circuit's decision in *Hayes* is inapposite for similar reasons. Notably, the defendant there attempted to use a waiver of federal law in the Western Sky arbitration agreement to bar plaintiffs from pursuing federal claims under the Fair Debt Collection Practices Act and the Telephone Consumer Protection Act. The Arbitration Agreements here do not contain an express waiver of federal law and in fact provide for arbitration of all disputes, including "any claim based upon 'federal or state constitution, statute, ordinance, regulation, or common law….'" A-264. Defendants also do not assert that Plaintiffs are barred from pursuing federal claims, but seek to enforce the parties' agreement to arbitrate these claims. Finally, unlike the CRST, Chippewa Cree Tribal Law has been recognized as having substantive provisions by federal courts. *See Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396, 1400 n.2 (S.D. Fla. 2014) ("Under Chippewa Cree tribal law, the Court 'may apply laws and regulations of the United

States or the State of Montana.'") (quoting Law and Order Code of the Chippewa Cree Tribe § 1.9 (1987)).[10]

V. THE ARBITRATION AGREEMENTS APPLY TO THE CLAIMS AGAINST THE NON-TRIBAL DEFENDANTS.

A. Issues Regarding the Scope of the Arbitration Agreements Are "Gateway" Issues for the Arbitrator to Decide.

Plaintiffs also challenge the non-signatory Defendants' right to invoke the Arbitration Agreements. Pls.' Br. 96–103. As an initial matter, this is "an issue pertaining to the 'existence, *scope* or validity of the arbitration agreement,'" which the arbitrator—not the Court—should decide. *Contec Corp.*, 398 F.3d at 209 (emphasis added). Plaintiffs do not directly contest this principle, *see, e.g.*, Pls.' Br. 96–103, and so this Court should properly leave the issue for the arbitrator to rule on in the first instance.

B. The Arbitration Agreements Are Enforceable by Defendants.

Plaintiffs' primary opposition to arbitration with the Defendants is that the Arbitration Agreements' "dispute" definition does not encompass this particular type of dispute and these particular Defendants. Pls.' Br. 96–97. This is wrong and based on a selective and misleading quote from the Agreements.

[10] Plaintiffs also rely on *Ryan v. Delbert Servs. Corp.*, No. 5:15-cv-05044, 2016 WL 4702352 (E.D. Pa. Sept. 8, 2016). *Ryan*, another Western Sky case, relies heavily on *Hayes*, and is distinguishable on the same grounds.

Plaintiffs act as if the portion of the Arbitration Agreements they quote—which in one section refers to "Dispute" as "any controversy or claim between [the borrower] and Lender, its marketing agent, collection agent, any subsequent holder of th[e] Note, or any of their respective agents, affiliates, assigns, employees, officers, managers, members or shareholders" (A-264)—is all that the Agreements state regarding who is contractually entitled to demand arbitration. Pls.' Br. 97. That is incorrect. The Agreements contain two other provisions that broadly define "disputes" and with whom those "disputes" must be arbitrated. Defs.' Br. 48.

In fact, the definition of "Dispute" in the Arbitration Agreements covers Plaintiffs' claims against the non-signatory Defendants. The Agreements expressly state that "the term Dispute ***is to be given its broadest possible meaning***." A-264 (emphasis added). Further, the Arbitration Agreements provide that "any dispute you have with Lender ***or anyone else*** under this Agreement will be resolved by binding arbitration," absent an "opt-out," *e.g.*, A-264 (emphasis added), and that the effect of the Arbitration Agreements was that Plaintiffs would be forgoing their rights to have "any dispute alleged against [Plain Green] ***or related third parties***" determined by a judge or a jury. *E.g.*, A-264-265 (emphasis added and capitalization omitted). Plaintiffs contractually agreed that if they were to sue anyone associated with Plain Green over the loan agreements, that person could compel arbitration. That is exactly what Defendants are doing here.

To avoid this obvious conclusion, Plaintiffs suggest this Court should adopt a broad (and unsupported) legal principle that only entities expressly named in an arbitration agreement can compel arbitration. Pls.' Br. 97, 102–03. The law in this Circuit, however, could not be clearer that "the FAA requires the enforcement of an arbitration agreement not just in favor of parties to the agreement, but also in favor of third party beneficiaries." *Spear, Leeds & Kellogg v. Cent. Life Assur. Co.*, 85 F.3d 21, 26 (2d Cir. 1996). That principle is not "open for further debate; third party beneficiary theory is the law," and under that law, "***a beneficiary need not be identified prior to seeking enforcement of its rights under a contract***." *Id.* at 27 (emphasis added).[11]

C. Defendants Are Entitled to Enforce the Arbitration Agreements Based on Equitable Estoppel.

While the language in the Arbitration Agreements is sufficiently plain, Defendants are also entitled to invoke the Arbitration Agreements under estoppel principles. Defs.' Br. 51–53. Plaintiffs tacitly concede that the issues presented by their claims are sufficiently "intertwined" with their loan agreements such that estoppel would normally apply. Defs.' Br. 51–53. Yet, Plaintiffs make two arguments against estoppel: (1) that an alleged "fraudulent" relationship among Plain Green and Defendants bars estoppel, and (2) that a "formal corporate

[11] Plaintiffs' only rejoinder to this principle is to cite a case that in no way overrules *Spear* on this issue. Pls.' Br. 102–03 (citing *Ross v. Am. Exp. Co.*, 547 F.3d 137, 143 n.3 (2d Cir. 2008)).

relationship" is required for estoppel to apply. Pls.' Br. 97–102. Both are inapposite and unpersuasive.

As to the first argument, Plaintiffs misread two of this Court's decisions. Pls.' Br. 97–98 (citing *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354 (2d Cir. 2008) and *Ross v. Am. Exp. Co.*, 547 F.3d 137 (2d Cir. 2008)). Plaintiffs apparently believe that Defendants are not entitled to compel arbitration because they have alleged that Defendants' relationship with Plain Green was "fraudulent" and that, wherever there is such a fraud allegation, it operates to bar a third party from enforcing an arbitration agreement through estoppel. But there is no support in the cited cases (or elsewhere) for this position. To the contrary, both *Sokol* and *Ross* involved entities trying to compel arbitration even though they had no affiliation with *either* party to the underlying contract and even though they were both alleged to have fraudulently induced a *breach* of that contract.[12]

Here, the Complaint repeatedly alleges that Defendants are central to the day-to-day functioning of Plain Green's consumer-loan business, from which Plaintiffs' loan agreements arose, and Defendants are alleged to have played those

[12] *See Sokol*, 542 F.3d at 362 (party seeking to compel arbitration had no relation to either party to the arbitration agreement except for the fact that it "wrongfully induc[ed] [the counterparty] to breach his contract with [the plaintiff]"); *Ross*, 547 F.3d at 146 (rejecting attempt by a bank to invoke an arbitration agreement between a *different* bank and its customer).

roles at all times relevant to Plaintiffs' individual loans. Defs.' Br. 51–54.[13] In addition, there is no allegation that any Defendant induced either Plaintiffs or Plain Green to breach the loan agreements. Plaintiffs cannot invoke these inapposite cases to create a novel bar to the application of estoppel.

Plaintiffs also incorrectly suggest that a "formal corporate relationship" is necessary for estoppel to apply. Pls.' Br. 101 (citing *Ross*, 547 F.3d at 144). The sole case they cite, *Ross*, however, acknowledges that this Court has "extended estoppel beyond situations involving affiliated corporate entities." 547 F.3d at 145 (citing *Choctaw Generation Ltd. P'Ship v. Am. Home Assur. Co.*, 271 F.3d 403, 406 (2d Cir. 2001)). *Ross* is not an outlier on this issue, either, as the Court made plain in *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 118 (2d Cir. 2010) (noting that non-signatory seeking to compel arbitration "was a client of [plaintiff's counterparty]," without mentioning any corporate affiliation or relationship).[14]

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[13] Further, unlike in *Ross*, Defendants here are plainly alleged to have had some "role in [the] formation or performance" of Plaintiffs' loan agreements, 547 F.3d at 146, either by virtue of acting as a loan servicer or by virtue of funding the loans themselves. A-49 at ¶ 109; A-59 at ¶¶ 154-55.

[14] Plaintiffs quibble (Pls.' Br. 101–02) with the level of detail contained in Mr. Hargrove's sworn declaration in support of the Think Finance Defendants' motion to compel arbitration, but Plaintiffs' allegations do not dispute Mr. Hargrove's averments that Think Finance provides various services to Plain Green, including "website maintenance, direct mail and electronic mail, as well as … loan origination, loan management, credit underwriting, verification, and fraud detection services." A-97 at ¶ 2. Plaintiffs' contention that Mr. Hargrove cannot testify about the companies' relationship at the time Plaintiffs' loans were made is also meritless: Mr. Hargrove is Think Finance's COO and has access to Think

Indeed, taken as true, Plaintiffs' own allegations establish that estoppel applies. Plaintiffs repeatedly allege that Defendants are closely related to Plain Green, and critical to its consumer-loan business, including the funding and day-to-day servicing of Plaintiffs' loan agreements. A-43–44 at ¶ 80 (Defendants Rees and Think Finance "provided everything that [Plain Green's consumer-loan] enterprise needed to operate") (internal quotation marks omitted); A-59 at ¶¶ 154–55 (alleging that Defendants Sequoia and TCV "provide money" used to fund the "lending process").

D. Certain Defendants Are Entitled To Compel Arbitration As Agents of Plain Green.

Finally, the Think Finance Defendants and Rees are entitled to compel arbitration based on an agency relationship with Plain Green. Pls.' Br. 98–102; Defs.' Br. 50–51.[15] On this point, Plaintiffs offer a tortured argument that these particular Defendants were not "agents" of Plain Green because they actually "dominated and controlled" Plain Green. Pls.' Br. 98. As this Court has noted in another context, however, this type of argument is "a distinction without a legal difference." *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993).

Finance's business records. A-97 at ¶ 3; *see also Tex. A&M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 402 (5th Cir. 2003) (allowing affidavit based in part on knowledge derived from company's business records).

[15] This agency argument does not apply to Sequoia Capital Operations, LLC and Technology Crossover Ventures. *See* Defs.' Br. 50 n.13.

In *Roby*, the plaintiffs similarly sought to avoid being forced to arbitrate with non-parties and challenged their status as agents of parties to the agreement. *Id.* More specifically, the *Roby* plaintiffs argued that "the [non-parties] have not been sued for acts carried out on behalf of the [parties to the agreement]," but that they had "[i]nstead … been sued as 'controlling persons' under the securities laws." *Id.* Rejecting that contention, this Court explained:

> Whether [non-signatories] are disclosed agents or controlling persons, their liability arises out of the same misconduct charged against the [parties to the agreement]. If the scope of the [parties'] agreements includes the [parties'] misconduct, it necessarily includes the [non-parties'] derivative misconduct.

Id. So too here. What matters is whether the alleged conduct by the Think Finance Defendants and Rees on behalf of Plain Green was within the scope of their relationship with Plain Green. Plaintiffs have never denied that it was, and still do not. On this additional ground, the Think Finance Defendants and Rees are entitled to invoke the Arbitration Agreements.

CONCLUSION

The District Court's order should be reversed and Defendants' motion to compel arbitration granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this Reply Brief complies with the type-volume limitation of Local Rule 32.1(a)(4)(B) because the Brief contains 6,710 words, excluding the parts of the Reply Brief exempted by Fed. R. App. P. 32(f).

I further certify that this Reply Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Reply Brief has been has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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