Nos. 16-1351(L), 16-1362, 16-1373

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES DILLON,
Plaintiff-Appellee,

v.

GENERATIONS FEDERAL CREDIT UNION,
Defendant-Appellant.

JAMES DILLON,
Plaintiff-Appellee,

v.

BMO HARRIS BANK, N.A.,
Defendant-Appellant.

JAMES DILLON,
Plaintiff-Appellee,

v.

BAY CITIES BANK
Defendant-Appellant.

Appeals from Orders of the United States District Court for the Middle District of North Carolina, No. 1:13-cv-00897-CCE (Eagles, J.)

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

No. 16-1362 Caption: Dillon v. Generations Federal Credit Union

Pursuant to FRAP 26.1 and Local Rule 26.1,

BMO Harris Bank, N.A. who is appellant makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐YES ☒NO

2. Does party/amicus have any parent corporations? ☒YES ☐NO

   If yes, identify all parent corporations, including grandparent and great-grandparent corporations: BMO Harris Bank, N.A. is wholly-owned by BMO Financial Corp., a Delaware holding company that is not publicly traded. BMO Financial Corp. is wholly-owned by the Bank of Montreal, Toronto, Canada.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☒NO

   If yes, identify all such owners: N/A

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
☐YES ☒NO

   If yes, identify entity and nature of interest: N/A

5. Is party a trade association? (amici curiae do not complete this question)
☐YES ☒NO

   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member: N/A

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☒NO

   If yes, identify any trustee and the members of any creditors' committee: N/A

Signature: /s/ Kevin Ranlett Date: May 31, 2016

Counsel for: BMO Harris Bank, N.A.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

No. 16-1351 Caption: Dillon v. Generations Federal Credit Union

Pursuant to FRAP 26.1 and Local Rule 26.1,

Generations Community Federal Credit Union who is appellant makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐YES ☒NO

2. Does party/amicus have any parent corporations? ☐YES ☒NO

   If yes, identify all parent corporations, including grandparent and great-grandparent corporations: N/A

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☒NO

   If yes, identify all such owners: N/A

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
☐YES ☒NO

   If yes, identify entity and nature of interest: N/A

5. Is party a trade association? (amici curiae do not complete this question)
☐YES ☒NO

   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member: N/A

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☒NO

   If yes, identify any trustee and the members of any creditors' committee: N/A

Signature: /s/ Leslie Sara Hyman Date: May 31, 2016

Counsel for: Generations Community Federal Credit Union

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

No. 16-1373 Caption: Dillon v. Generations Federal Credit Union

Pursuant to FRAP 26.1 and Local Rule 26.1,

Bay Cities Bank who is appellant makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐YES ☒NO

2. Does party/amicus have any parent corporations? ☒YES ☐NO

   If yes, identify all parent corporations, including grandparent and great-grandparent corporations: Home Bancshares, Inc.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☒YES ☐NO

   If yes, identify all such owners: Home Bancshares, Inc.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
☐YES ☒NO

   If yes, identify entity and nature of interest: N/A

5. Is party a trade association? (amici curiae do not complete this question)
☐YES ☒NO

   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member: N/A

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☒NO

   If yes, identify any trustee and the members of any creditors' committee: N/A

Signature: /s/ Michael P. Carey Date: May 31, 2016

Counsel for: Bay Cities Bank

Table of Contents

Page

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 3

STATEMENT OF THE CASE 4

A. Dillon's Counsel File A Wave Of Virtually Identical Putative Class Actions Across The Country, Including This Action 4

B. This Court Vacates The District Court's Denial Of Defendants' Motions To Enforce Dillon's Arbitration Agreements 6

C. Defendants Renew Their Motions To Enforce Dillon's Arbitration Agreements On Remand And Take Arbitration-Related Discovery 7

D. Dillon Admits That He Has Always Had The Western Sky Agreement Invoked By Generations 10

E. The District Court Holds An Evidentiary Hearing 11

F. The District Court Requests Supplementary Briefing on *Hayes* 13

G. The District Court Denies The Renewed Arbitration Motions 14

SUMMARY OF ARGUMENT 16

STANDARD OF REVIEW 22

ARGUMENT 23

I. THE DISTRICT COURT APPLIED THE WRONG STANDARD TO DETERMINE WHETHER BAY CITIES MET ITS PRIMA FACIE BURDEN TO SHOW THE EXISTENCE OF AN ARBITRATION AGREEMENT 24

A. This Court's Burden-Shifting Framework Required Dillon To Unequivocally Deny Entering Into His Loan Agreements 25

B. The District Court Committed Legal Error By Holding Bay Cities's Initial Burden To A Heightened Standard 27

1. The FAA does not require the movant to "satisfy" the factfinder at the prima facie stage 27

Table of Contents
(continued)

Page

2. The movant is not required to support its initial showing with "credible, admissible evidence."....32

3. The elevated burden is contrary to public policy....35

C. Bay Cities Met Its Initial Burden Of Showing That Dillon Had Agreed To Arbitrate....37

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE ARBITRATION PROVISIONS THAT BMO HARRIS AND GENERATIONS INVOKED ARE UNENFORCEABLE MERELY BECAUSE THE CONTRACTS INCLUDE FOREIGN CHOICE-OF-LAW CLAUSES....43

A. The District Court Disregarded Supreme Court And Fourth Circuit Precedent Mandating That Arbitration Agreements Be Enforced If The Effect Of A Choice-Of-Law Clause Is Uncertain....44

1. The mere presence of a foreign choice-of-law clause does not automatically invalidate an arbitration agreement under the "prospective waiver" doctrine....44

2. Dillon failed to meet his burden to prove that he would be deprived of federal statutory rights in arbitration....49

B. The District Court Erred in Failing to Grant Generations's Motion to Dismiss....57

1. *Hayes* does not apply to this case because *Hayes* can only apply to claims allowing for statutory damages....57

2. The district court erred in failing to refer to the arbitrator the question of arbitrability raised by Dillon as to the loan agreement invoked by Generations....60

C. *Hayes* Is Wrongly Decided....61

CONCLUSION....62

REQUEST FOR ORAL ARGUMENT....62

TABLE OF AUTHORITIES

Page(s)

Cases

Achey v. BMO Harris Bank, N.A.,
64 F. Supp. 3d 1170 (N.D. Ill. 2014).....4, 35, 39

Aggarao v. MOL Ship Mgmt. Co.,
675 F.3d 355 (2012).....*passim*

Allen v. Lloyd's of London,
94 F.3d 923 (4th Cir.1996) 59

Almacenes Fernandez, S.A. v. Golodetz,
148 F.2d 625 (2d Cir. 1945) 26, 29

Am. Express Co. v. Italian Colors Rest.,
133 S. Ct. 2304 (2013).....18, 32

Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG,
783 F.3d 1010 (5th Cir. 2015) 57

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011).....23

Baja, Inc. v. Automotive Testing and Dev. Serv., Inc.,
2014 WL 2719261 (D.S.C. June 16, 2014) 30

Barnes Group, Inc. v. C & C Prods., Inc.,
716 F.2d 1023 (4th Cir. 1983) 60

Bel-Ray Co. v. Chemrite (Pty) Ltd.,
181 F.3d 435 (3d Cir. 1999) 55

Blatt v. Shearson Lehman/Am. Express Inc.,
1985 WL 2029 (S.D.N.Y. 1985).....30

Blau v. AT&T Mobility,
2012 WL 10546 (N.D. Cal. Jan. 3, 2012).....26

Booth v. BMO Harris Bank, N.A.,
2014 WL 3952945 (E.D. Pa. Aug. 11, 2014) 4

TABLE OF AUTHORITIES
(continued)

Page(s)

Brisco v. Schreiber,
2010 WL 997379 (D.V.I. Mar. 16, 2010).....30

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006).....62

Chastain v. Robinson-Humphrey Co.,
957 F.2d 851 (11th Cir. 1992).....26

Chorley Enters., Inc. v. Dickey's Barbecue Rests., Inc.,
807 F.3d 553 (4th Cir. 2015).....25, 28

Chubb & Son v. C & C Complete Servs., LLC,
919 F. Supp. 2d 666 (D. Md. 2013).....49

Commercial Union Assur. Co. v. Milken,
17 F.3d 608 (2d Cir. 1994).....56

Cosey v. Prudential Ins. Co. of Am.,
735 F.3d 161 (4th Cir. 2013).....49

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985).....24

Dillon v. BMO Harris Bank, N.A.,
787 F.3d 707 (4th Cir. 2015).....*passim*

Dillon v. BMO Harris Bank, N.A.,
No. 16-mc-5-CVE-TLW (N.D. Okla. Feb. 4, 2016).....12

DIRECTV, Inc. v. Imburgia,
136 S. Ct. 463 (2015).....45

Drews Distrib., Inc. v. Silicon Gaming, Inc.,
245 F.3d 347 (4th Cir. 2001).....*passim*

Elder v. BMO Harris Bank, N.A.,
2014 WL 1429334 (D. Md. Apr. 11, 2014).....5, 29

TABLE OF AUTHORITIES
(continued)

Page(s)

Erichsen v. RBC Capital Mkts.,
883 F. Supp. 2d 562 (E.D.N.C. 2012) 31

Forrest v. Verizon Commc'ns, Inc.,
805 A.2d 1007 (D.C. 2002) 36

Fort Sumter Tours, Inc. v. Babbitt,
66 F.3d 1324 (4th Cir. 1995) 22

Galloway v. Santander Consumer USA, Inc.,
__ F.3d __, 2016 WL 1393121 (4th Cir. Apr. 8, 2016).....26, 28

Gavino v. Eurochem Italia,
61 F. App'x 119 (5th Cir. 2003).....26

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991).....23, 24

Gordon v. U.S. Bancorp,
No. 13-cv-3005 (D. Minn. Apr. 21, 2014).....5

Graham v. BMO Harris Bank, N.A.,
2014 WL 4090548 (D. Conn. July 16, 2014) 5, 29

Grynberg v. BP P.L.C.,
596 F. Supp. 2d 74 (D.D.C. 2009).....58

Guidotti v. Legal Helpers Debt Resolution, L.L.C.,
716 F.3d 764 (3d Cir. 2013) 29

Gunson v. BMO Harris Bank, N.A.,
43 F. Supp. 3d 1396 (S.D. Fla. 2014).....4

Hayes v. Delbert Services Corp.,
811 F.3d 666 (4th Cir. 2016) .....*passim*

Hillick v. BMO Harris Bank, N.A.,
No. 5:13-CV-1222 (N.D.N.Y. Dec. 16, 2013) 4

TABLE OF AUTHORITIES
(continued)

Page(s)

The Hoxie,
297 F. 189, 190 (4th Cir. 1924) 21, 54

Huddleston v. United States,
485 U.S. 681 (1988).....34

Kemph v. Reddam,
2015 WL 1510797 (N.D. Ill. Mar. 27, 2015) 57

Kuhn v. Ameriquest Mortg. Co.,
2004 WL 2782568 (D. Kan. Dec. 1, 2004) 35

Labajo v. First Int'l Bank & Trust,
2014 WL 4090527 (C.D. Cal. July 9, 2014).....5

Las Vegas Sands, LLC v. Nehme,
632 F.3d 526 (9th Cir. 2011) 38, 41

Law Co. v. Mohawk Constr. & Supply Co., Inc.,
577 F.3d 1164 (10th Cir. 2009) 38, 41

Lorraine v. Markel Am. Ins. Co.,
241 F.R.D. 534 (D. Md. 2007) 38, 42

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).....56

Maersk Line, Ltd. v. United States,
513 F.3d 418 (4th Cir. 2008) 53

In re McNallen,
62 F.3d 619 (4th Cir. 1995) 49

McQueeney v. Wilmington Trust Co.,
779 F.2d 916 (3d Cir. 1985) 38

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985).....*passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983).....18, 24, 32, 53

Moss v. BMO Harris Bank, N.A.,
24 F. Supp. 3d 281 (E.D.N.Y. 2014).....5

Moss v. BMO Harris Bank, N.A.,
No. 2:13-cv-5438-JFB-GRB (E.D.N.Y. July 16, 2015).....5

Muriithi v. Shuttle Express, Inc.,
712 F.3d 173 (4th Cir. 2013).....51

Nat'l Res. Def. Council, Inc. v. U.S. EPA,
16 F.3d 1395 (4th Cir. 1993).....23

Noohi v. Toll Bros., Inc.,
708 F.3d 599 (4th Cir. 2013).....22

PPG Indus., Inc. v. Pilkington PLC,
825 F. Supp. 1465 (D. Ariz. 1993).....51

PacifiCare Health Sys., Inc. v. Book,
538 U.S. 401 (2003).....*passim*

Parm v. BMO Harris Bank, N.A.,
No. 13-cv-3326 (N.D. Ga. Sept. 30, 2014).....4

In re Parmalat Secs. Litig.,
377 F. Supp. 2d 390 (S.D.N.Y. 2005).....55

Peabody Holding Co. v. United Mine Workers of Am.,
665 F.3d 96 (4th Cir. 2012).....23

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967).....62

Rent-A-Center, West, Inc. v. Jackson,
561 U.S. 63 (2010).....21, 22, 60

TABLE OF AUTHORITIES
(continued)

Page(s)

Riley v. BMO Harris Bank, N.A.,
61 F. Supp. 3d 92 (D.D.C. 2014).....5, 29, 36

Rivas v. Carnival Corp.,
2010 WL 2696676 (S.D. Fla. Mar. 30, 2010) 51

Roby v. Corp. of Lloyd's,
996 F.2d 1353 (2d Cir. 1993) 58

Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading, Ltd.,
2009 WL 406688 (N.C. Super. Ct. Feb. 18, 2009).....54

Suzlon Infrastructure, Ltd. v. Pulk,
2010 WL 3540951 (S.D. Tex. Sept. 10, 2010).....58, 59

Sydnor v. Conseco Fin. Serv. Corp.,
252 F.3d 302 (4th Cir. 2001) 22

U.S. v. Lubich,
72 M.J. 170 (C.A.A.F. 2013).....43

U.S. v. Pantic,
308 F. App'x 731 (4th Cir. 2009).....34, 42

Umbenhower v. Copart, Inc.,
2004 WL 2660649 (D. Kan. Nov. 19, 2004).....30

United States v. Cornell,
780 F.3d 616 (4th Cir. 2015) 33, 37

United States v. Evans,
728 F.3d 953 (9th Cir. 2013) 34

United States v. Westinghouse Elec. Corp.,
648 F.2d 642 (9th Cir. 1981) 55

Van Tassell v. United Marketing Group,
LLC, 795 F. Supp. 2d 770 (N.D. Ill. 2011) 36

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Vee Vinhnee,
336 B.R. 437 (B.A.P. 9th Cir. 2005) 42

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,
515 U.S. 528 (1995).....*passim*

Wachovia Bank, N.A. v. Schmidt,
546 U.S. 303 (2006).....1

Whiting-Turner Contracting Co. v. Liberty Mut. Ins. Co.,
912 F. Supp. 2d 321 (D. Md. 2012).....26

In re Wiand,
2011 WL 4532070 (June 8, 2011) 29

Williams v. CashCall, Inc.,
92 F. Supp. 3d 847, 854 (E.D. Wis. 2015) 57

Williams v. Silver Spring Volunteer Fire Dept.,
86 F. Supp. 3d 398, 407 (D. Md. 2015).....31

Yaroma v. Cashcall, Inc.,
2015 WL 5475258 (E.D. Ky. Sept. 16, 2015) 57

Yuzwa v. M/V Oosterdam,
2012 WL 6675171 (C.D. Cal. Dec. 12, 2012).....51

Statutes

9 U.S.C. § 2.....3

9 U.S.C. § 3.....3

9 U.S.C. § 4.....*passim*

9 U.S.C. § 16(a) 2

9 U.S.C. § 16(a)(1)(A) 2

15 U.S.C. § 1692.....44, 58

TABLE OF AUTHORITIES
(continued)

Page(s)

15 U.S.C. § 7001(a) 37

18 U.S.C. § 1961 1

28 U.S.C. § 1332(d) 1

28 U.S.C. § 1367(a) 1

47 U.S.C. § 227 ..... 44, 58

N.C. Stat. § 66-234 37

N.C. Stat. § 66-317 37

Other Authorities

Fed. R. App. P. 28(i) 60

Fed. R. Civ. P. 56 31

Fed. R. Evid. 104(a) 33

Fed. R. Evid. 104(b) 27, 33

Fed. R. Evid. 901 ..... *passim*

Fed. R. Evid. 901(1) 38

Fed. R. Evid. 901(b)(4) 37, 40

Fed. R. Evid. 902(11) 42

RESTATEMENT (SECOND) OF CONFLICTS OF LAWS (1971) 55

JURISDICTIONAL STATEMENT

These consolidated appeals, which arise from the same putative class action, are the second appeal from the district court's denial of motions to enforce plaintiff-appellee James Dillon's arbitration agreements. This Court vacated the district court's prior order in *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707 (4th Cir. 2015) ("*Dillon I*"). The district court denied the arbitration motions again on remand, prompting this appeal.

In the court below, Dillon asserted claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, and state statutes and common law. JA 38-39.[1] The district court thus had jurisdiction under 28 U.S.C. §§ 1331 and 1367(a). The district court also had jurisdiction under 28 U.S.C. § 1332(d): Dillon seeks greater than $5 million in alleged damages for the putative class, and at least one putative class member is a citizen of a state different from at least one defendant. JA 47.[2]

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[1] The term "JA" refers to the joint appendix. "DE" refers to the district court record. And "Dkt. No." refers to the appellate record.

[2] Specifically, Dillon alleges that he is a citizen of North Carolina. JA 41. By contrast, defendant-appellant BMO Harris Bank, N.A., is a citizen of Illinois because it is a national banking association headquartered in that state. JA 42; *see also Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 307 (2006). Two of the other defendant banks are also citizens of states other than North Carolina: Generations Federal Credit Union is a citizen of Texas and Bay Cities Bank is a citizen of Florida. JA 42. A fourth defendant, Four Oaks Bank & Trust, which is not a party to these appeals, is a citizen of North Carolina. *Id.*

This Court has jurisdiction over this appeal under Section 16(a)(1)(A) of the Federal Arbitration Act ("FAA"), which provides that "[a]n appeal may be taken from … an order … refusing" a motion to enforce an arbitration agreement. 9 U.S.C. § 16(a)(1)(A); *see also*, *e.g.*, *Dillon I*, 787 F.3d at 714 (FAA "§ 16(a) provides us with jurisdiction over [an] interlocutory appeal" when "the essence of the requested relief" in the denied motions "is that the issues presented [in the litigation] be decided exclusively by an arbitrator and not by a court") (internal quotation marks omitted). Defendants-appellants Generations Community Federal Credit Union ("Generations"), BMO Harris Bank, N.A. ("BMO Harris"), and Bay Cities Bank ("Bay Cities") (collectively, "Defendants") are appealing orders denying their motions to enforce Dillon's arbitration agreements. JA 914; 917; 919.

Defendants timely commenced their appeals. The district court denied Generations's and BMO Harris's arbitration motions on March 4, 2016 (JA 1022-26), and they timely filed their respective notices of appeal on March 29, 2016 (JA 1050) and March 31, 2016 (JA 1052). The district court denied Bay Cities's arbitration motion on March 23, 2016 (JA 1049), and Bay Cities timely filed its notice of appeal on April 4, 2016 (JA 1054). This Court consolidated the appeals. Dkt. Nos. 4-5.

STATEMENT OF ISSUES

The FAA specifies that a "written provision in any … contract … to settle by arbitration a controversy thereafter arising out of such contract … 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. Section 4 of the FAA provides that if the district court is "satisfied that the making of the agreement for arbitration … is not in issue, the court shall make an order" compelling arbitration. *Id.* § 4. "If the making of the arbitration agreement … be in issue, the court shall proceed summarily to the trial thereof." *Id.* The FAA then directs the court to stay the action "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under [the] agreement." *Id.* § 3.

These consolidated appeals present four issues.

Bay Cities: If the party resisting arbitration does not deny agreeing to arbitrate and presents no evidence suggesting that the proffered agreement containing an arbitration clause is not authentic, can the district court impose a heightened burden of proof on the proponent of arbitration to prove the existence of the arbitration agreement because the agreement was executed online?

BMO Harris: If both parties would be requesting that the arbitrator apply U.S. law, the arbitrator could invalidate the foreign choice-of-law clause in the agreement if it is unlawful, and the plaintiff failed to show that applying foreign

law would affect the outcome, can the district court refuse to enforce an arbitration provision merely because the contract contains a foreign choice-of-law clause?

Generations: If the arbitration agreement clearly and unmistakably delegates challenges to the enforceability of the agreement to the arbitrator, can a district court nonetheless decide in the first instance whether a foreign choice-of-law clause renders the arbitration agreement unenforceable? Generations also joins the issue presented by BMO Harris, namely, if the arbitrator could invalidate the foreign choice-of-law clause in the agreement if it is unlawful and the plaintiff failed to show that applying foreign law would affect the outcome, can the district court refuse to enforce an arbitration provision merely because the contract contains a foreign choice-of-law clause?

STATEMENT OF THE CASE

A. Dillon's Counsel File A Wave Of Virtually Identical Putative Class Actions Across The Country, Including This Action.

This appeal arises from the only one of a dozen copycat putative class actions filed by Dillon's counsel in which the district court refused to enforce the plaintiff's arbitration agreements. Nine federal district courts have concluded that these cases must proceed in arbitration.[3] And in the two other cases, Dillon's counsel voluntarily dismissed the action before the court could rule.[4]

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[3] *Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396 (S.D. Fla. 2014); *Achey v. BMO Harris Bank, N.A.*, 64 F. Supp. 3d 1170 (N.D. Ill. 2014); *Booth v.*

The complaint in this case was cut from the same pattern as the other cases. The plaintiff here, Dillon, alleges that he used the Internet to borrow money from lenders—most operated by Indian tribes—on terms that he says violate his home state's usury law. JA 66-70; 103-105. But Dillon's counsel chose not to sue the lenders who made the loans and collected the challenged interest and finance charges. Instead, Dillon's counsel has targeted banks that allegedly played a role in the sequence of funds transfers between Dillon's and his lenders' bank accounts using the Automated Clearing House ("ACH") network. JA 66-70. That network is used to process millions of debit and credit transactions each day. JA 53.

Like the plaintiffs in virtually all of the other cases, Dillon asserts claims under RICO and the law of his home state (North Carolina) on behalf of a putative class of residents of 13 states and the District of Columbia. JA 71-116. The

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BMO Harris Bank, N.A., 2014 WL 3952945 (E.D. Pa. Aug. 11, 2014); *Riley v. BMO Harris Bank, N.A.*, 61 F. Supp. 3d 92 (D.D.C. 2014); *Graham v. BMO Harris Bank, N.A.*, 2014 WL 4090548 (D. Conn. July 16, 2014); *Labajo v. First Int'l Bank & Trust*, 2014 WL 4090527 (C.D. Cal. July 9, 2014); *Moss v. BMO Harris Bank, N.A.*, 24 F. Supp. 3d 281 (E.D.N.Y. 2014); *Elder v. BMO Harris Bank, N.A.*, 2014 WL 1429334 (D. Md. Apr. 11, 2014); *Gordon v. U.S. Bancorp*, No. 13-cv-3005 (D. Minn. Apr. 21, 2014) (DE 109-1). In one case (*Moss*), the district court subsequently reinstated the action in court against two of the defendants after finding that the designated arbitration provider was unavailable. *Moss v. BMO Harris Bank, N.A.*, No. 2:13-cv-5438-JFB-GRB (E.D.N.Y. July 16, 2015) (DE 103), *appeal pending*, No. 15-2513 (2d Cir.).

[4] *See* Notice of Voluntary Dismissal, *Parm v. BMO Harris Bank, N.A.*, No. 13-cv-3326 (N.D. Ga. Sept. 30, 2014); Notice of Voluntary Dismissal, *Hillick v. BMO Harris Bank, N.A.*, No. 5:13-CV-1222 (N.D.N.Y. Dec. 16, 2013).

proposed class consists of borrowers whose bank accounts were debited via ACH transfer in connection with loans made by an undefined group of out-of-state payday lenders on terms that allegedly were unlawful under the law of the state of the borrower's residence. JA 71.

B. This Court Vacates The District Court's Denial Of Defendants' Motions To Enforce Dillon's Arbitration Agreements.

Like many of the defendant banks in the copycat actions, BMO Harris, Generations, and Bay Cities moved to enforce the arbitration provisions in Dillon's loan agreements with the third-party lenders. DE 14, 35, 40. Defendants attached copies of Dillon's loan agreements to their motions, and invoked the rule that documents incorporated by reference in the complaint are deemed part of the pleadings. DE Nos. 14-1, 36-1, 41-1, 41-2. The district court nonetheless denied the initial motions for lack of declarations authenticating the proffered loan agreements. DE 100.

Defendants then obtained authenticating declarations from third-party witnesses and filed renewed motions. JA 124-168; DE Nos. 102, 106, 123. But the district court denied arbitration again, this time on the ground that Defendants' motions were improper requests for reconsideration. DE 128. This Court vacated that order, holding that "the district court should have resolved the Renewed Motions on the merits." *Dillon I*, 787 F.3d at 715-16.

C. Defendants Renew Their Motions To Enforce Dillon's Arbitration Agreements On Remand And Take Arbitration-Related Discovery.

On remand, Defendants renewed their motions to enforce Dillon's arbitration agreements. JA 172-511. BMO Harris submitted a declaration concerning Dillon's loan from Great Plains Lending, LLC ("Great Plains") (JA 174-86); Generations submitted declarations concerning Dillon's loan from Western Sky Financial, LLC ("Western Sky") (JA 124-31, 192-208); and Bay Cities submitted declarations concerning Dillon's loans from VIN Capital, LLC ("VIN Capital") (JA 158-68) and MNE Services, Inc., doing business as USFastCash ("USFastCash") (JA 133-56).

Bay Cities's motion noted that the USFastCash and VIN Capital loan documents closely matched Dillon's description of his applications and loans in the complaint. For example, Dillon alleges that his USFastCash loan was for $300 with a finance charge of $90, and that as part of the application process he authorized USFastCash in December 2012 to effect ACH transactions for obtaining and repaying the loan, and authorized his bank Wells Fargo to debit his checking account to repay the loan. JA 67-68. The loan documents that Bay Cities submitted contained terms matching those allegations. JA 146-56.

Nonetheless, Dillon renewed his argument that the loan agreements had not been authenticated, and the district court issued an order permitting discovery. DE

No. 158. During his deposition, Dillon was shown his loan agreements. JA 752-69. He testified that he recognized the VIN Capital and USFastCash documents as his agreements with those lenders. JA 752, 756. He further testified that he had obtained those loans online by filling out applications on the lenders' websites, and that he typed in all of the information reprinted on the loan documents—including his electronic signature, as well as his contact information and Social Security and bank account numbers. JA 752-57. He confirmed that the information in the loan documents was correct and matched the information that he had provided. *Id*.

The excerpts below, from his testimony regarding the VIN Capital loan, are illustrative:

> Q. And you typed that information into the computer when you took out the loan?
>
> A. Yeah, I did.
>
> Q. To go from one box to the other, do you remember what you hit?
>
> A. I just remember clicking boxes.
>
> …
>
> Q. You typed in your name when you filled out the application. Is that right?
>
> A. That's correct.

> Q. And then you clicked.
>
> A. And then I clicked.
>
> Q. And the to the right, it has a date, an X in parentheses, and it says 12, slash, 13, 2012. You see that?
>
> A. Yeah, I see it.
>
> Q. So you – you typed the date in?
>
> A. Yeah, I did.
>
> Q. And then you clicked.
>
> A. Yeah, I clicked on it.

JA 753. Rather than denying that the loan documents that Defendants had submitted were genuine, Dillon said merely that he could not recall whether the documents he had electronically accepted online contained arbitration provisions because he "d[id]n't remember reading" the written terms. JA 757.

Dillon served subpoenas on some of the third-party witnesses who authenticated his loan agreements (or their employers). JA 501-51, 700-22. But in addition to seeking information about the authenticity of those agreements, Dillon's subpoenas sought all documents regarding the lenders' "ownership structure," "distribution of revenue," "debt collection procedures," "consumer

complaints," the "drafting" and "legality and/or enforceability" of its "consumer loan agreements," and its dealings with various regulators. *E.g.*, JA 529-533.

Richard Knowles, the declarant as to the VIN Capital loan documents, was deposed. JA 553. But the Miami Tribe of Oklahoma and the Otoe-Missouria Tribe moved to quash the subpoenas with respect to the USFastCash and Great Plains loans on grounds of tribal sovereign immunity. JA 593-94, 737-38. Dillon did not oppose those motions to quash and instead voluntarily withdrew his subpoenas. JA 602, 740.

D. Dillon Admits That He Has Always Had The Western Sky Agreement Invoked By Generations.

Since his opposition to Defendants' initial motions to enforce Dillon's arbitration agreements, Dillon had objected to the authenticity of all of the proffered agreements. For example, at the March 6, 2014 hearing in the district court, his counsel stated that "[he] drafted the complaint without the loan agreement." DE No. 101 at 19:21. And Dillon's counsel told this Court in *Dillon I* that "[t]here was good cause for Dillon to challenge the authenticity of the payday loan agreements offered by Defendants," because some "payday lenders" use "bogus documents" to "misrepresent to banks" in the ACH network (such as Generations, Bay Cities, and BMO Harris) that consumers entered into loans and authorized "withdrawals from the consumer's bank accounts." *Dillon I*, No. 14-1728, ECF No. 36, at 37-38 (internal quotation marks omitted).

However, at his deposition, Dillon admitted for the first time that he had printed a copy of the Western Sky agreement at the time he entered into the loan agreement. JA 769. He had also faxed a copy to his attorneys shortly before they commenced the lawsuit. DE No. 239 at 1. The text of that agreement was identical to that of the document that Generations was invoking. *Id.* at 2.[5]

Although Dillon withdrew his objection to the authenticity of the Western Sky agreement that Generations sought to enforce, he continued to question the authenticity of the agreements invoked by BMO Harris and Bay Cities. *E.g.*, DE No. 173 at 12-19.

E. The District Court Holds An Evidentiary Hearing.

Following the completion of briefing on the renewed arbitration motions, the district court scheduled an evidentiary hearing "to determine the contents of the loan agreements Mr. Dillon entered into with Great Plains Lending, USFastCash, and VIN Capital"—the agreements that BMO Harris and Bay Cities were invoking—"and specifically whether those loan agreements contained written arbitration provisions." JA 809. The court acknowledged that Dillon had not denied accepting those agreements; he simply "did not remember" whether they

[5] Following a motion by Generations, the district court has since asked for briefing on whether Dillon and his counsel should be sanctioned for making "misleading oral arguments" to this Court and the district court, for challenging the authenticity of a loan agreement that Dillon had printed out at the time he entered the loan, and for failing to disclose that fact earlier. DE No. 173 at 3-4.

contained "arbitration provisions." JA 808. But the court indicated that a hearing was needed because the lenders' motions to quash Dillon's subpoenas—which Dillon did not oppose—raised concerns about the "credibility" of the declarations authenticating the agreements. JA 807. The court speculated that "an unscrupulous lender might add an arbitration clause if it is sued by the borrower, but might delete the arbitration clause if the lender files suit claiming a default." JA 808 n.1.

At the hearing, Dillon was the only witness who testified.[6] He again confirmed that he entered into loan agreements online by typing the requested information and his name into the computer and clicked buttons to indicate his acceptance. JA 830-51. He also confirmed that the information on the proffered loan documents was the information he had typed online. *E.g.*, 831-36. He reiterated that he did not read the terms of the agreements and so could not say whether they contained arbitration provisions. JA 835, 842, 852-53. And he confirmed that he could not deny that the proffered loan documents were true and correct copies of the agreements he accepted online. JA 830, 837-38, 851-52.

[6] BMO Harris had subpoenaed the tribal witness who had authenticated Dillon's loan agreement, but the tribe successfully moved to quash the subpoena on grounds of tribal sovereign immunity. *Dillon v. BMO Harris Bank, N.A.*, No. 16-mc-5-CVE-TLW (N.D. Okla. Feb. 4, 2016).

F. The District Court Requests Supplementary Briefing on *Hayes*.

Following the district court's hearing, this Court issued its decision in *Hayes v. Delbert Services Corp.*, 811 F.3d 666 (4th Cir. 2016). In *Hayes*, several consumers had sued Delbert Services, which was a debt collector for loans made by Western Sky. *Id.* at 669. Delbert Services had moved to dismiss, invoking the doctrine of tribal exhaustion and the tribal choice-of-law, forum-selection, and arbitration provision in the agreement. *Id.* at 669-70. After the district court enforced the arbitration provision, this Court reversed on the ground that the Western Sky arbitration provision contained an improper "prospective waiver" of the plaintiffs' federal statutory rights. *Id.* at 674-75 (internal quotation marks omitted).

The parties then filed supplemental briefs regarding the impact of *Hayes* on the motions to enforce Dillon's arbitration agreements. DE Nos. 205-10. Dillon contended the tribal choice-of-law clauses in several of the agreements, including the ones that Generations and BMO Harris invoked, rendered the agreements unenforceable under *Hayes*. *E.g.*, DE Nos. 206 at 1-3, 208 at 1-4.

Defendants distinguished *Hayes* on different grounds. For example, among other things, BMO Harris argued that unlike in *Hayes*, where the defendant was invoking tribal law, BMO Harris had agreed that Dillon could assert U.S.-law claims in arbitration. DE No. 210 at 1. And Generations contended that the

applicability of *Hayes* was a question for the arbitrator because, unlike the plaintiff in *Hayes*, Dillon had not adequately challenged the parties' agreement to arbitrate that dispute. DE No. 205 at 2.

G. The District Court Denies The Renewed Arbitration Motions.

The district court denied the arbitration motions in separate orders. The first two orders, issued on March 4, 2016, denied BMO Harris's and Generations's motions "[f]or the reasons stated in *Hayes v. Delbert Serv[ices] Corp.*, 811 F.3d 666 (4th Cir. 2016)." JA 1022-26. The court did not address the Defendants' arguments that *Hayes* was distinguishable.[7]

On March 23, 2016, the district court denied Bay Cities's motion to compel arbitration without reaching the *Hayes* issue because, in the court's view, Bay Cities had "offered inadequate proof of agreements to arbitrate[.]" JA 1048. The court asserted that "[c]lick-wrap contracts like the one[s] at issue here pose special risks of fraud and error." JA 1035. The court observed that where "one of the contracting parties has exclusive control of the electronic record, … that party is in a position to produce a document that meets its current preferences and needs" (JA

[7] The district court indicated that it was not reaching two of Dillon's other objections to BMO Harris's and Generations's motions: (1) whether the arbitration provisions were unconscionable; and (2) whether the defendants could invoke those provisions as non-signatories under the doctrines of equitable estoppel or third-party beneficiaries. JA 1023, 1026.

1035-36)—such as by adding "an arbitration provision" after the fact (JA 1036 n.5).

In light of these perceived risks, the district court held that the proponent of an arbitration agreement contained in an electronic document must comply with two requirements. First, the proponent must meet the authentication requirements of Federal Rule of Evidence 901. JA 1042. "Additionally," the court explained, the proponent must adduce "admissible, credible evidence" that makes the district court "'satisfied' there is an agreement to arbitrate" (*id.* (quoting 9 U.S.C. § 4))—even when the other party does not deny having agreed to arbitrate.

The district court then held that it was "not satisfied" by Bay Cities's evidence of the existence of the VIN Capital and USFastCash arbitration provisions. JA 1043, 1048. The district court stated that the authenticating declarations were not sufficiently "credible" because they did not explain in detail the witnesses' personal knowledge of the manner in which Dillon accepted the agreements. JA 1033-35, 1045. And the court explained that it also was not "satisfied" by Dillon's own testimony recognizing parts of the loan documents, because Dillon's failure to read the documents and Bay Cities's lack of evidence proving that the records were stored "without alteration" meant that it was possible

that arbitration provisions had been added to the documents afterward. JA 1042, 1047.[8]

SUMMARY OF ARGUMENT

The rulings below turned on a series of legal errors regarding the standards governing motions to enforce arbitration agreements.

I. Section 4 of the FAA provides a mechanism for determining whether the making of an arbitration agreement is in issue such that the party opposing arbitration is entitled to a trial on the matter. Under this provision, the non-movant must unequivocally deny entering into an arbitration agreement and produce some evidence to substantiate that denial. *Drews Distrib., Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 352 n.3 (4th Cir. 2001).

Bay Cities moved to compel arbitration, tendering electronically signed documents appearing on their face to be the loan agreements forming the basis for Dillon's claims. Bay Cities also submitted deposition and hearing testimony from Dillon in which, among other things, he recognized the documents as his loan agreements and acknowledged that they correctly reflected personal identifying information that he had personally entered into a computer when filling out the loan documents, as well as third-party testimony that the proffered documents were

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[8] The district court indicated that it was not reaching Dillon's argument under *Hayes* or the same two arguments that the court reserved in its orders denying BMO Harris's and Generations's motions (*see* page 14, n.7, *supra*). JA 1048-49.

Dillon's agreements. Dillon did not deny entering into the proffered agreements. Under *Drews*, the making of the arbitration agreement is not in issue, and the district court must direct the parties to arbitrate their claims.

The district court nonetheless denied Bay Cities's motion, holding that Bay Cities had not "satisfied" the district court through "credible, admissible evidence" that an agreement to arbitrate exists. JA 1032. Because Dillon did not even purport to satisfy his burden under *Drews*, the only way in which the district court could have ruled in his favor was to find that Bay Cities did not meet its *initial* burden as movant. The district court defined that initial burden not as a prima facie burden, but rather as a burden to "satisfy" the district court—in effect, to persuade it as if it were the trier of fact. And, because the agreements were executed electronically, the district court required evidence to negate the possibility that the agreements had been tampered with after Dillon executed them, even though there was no allegation of such tampering and Dillon did not deny signing them in the form presented. The district court's ruling misapplied the FAA.

First, neither the text of Section 4 nor the authority interpreting it supports the district court's imposition of a heightened burden on Bay Cities. Under Section 4, a party opposing arbitration has not placed the existence of an agreement "in issue" and thus created a triable issue of fact unless that party makes an unequivocal denial supported by some evidence. The district court's approach

stands *Drews* on its head—it required Bay Cities to persuade the court that an agreement existed before Dillon was required to take a position on the matter. That approach also contravened the policies underlying to FAA to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" (*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)), and to refrain from imposing "preliminary litigating hurdles" on parties moving for arbitration (*Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013)).

Second, the district court incorrectly held that Bay Cities was required to establish the credibility of the evidence it submitted as part of its initial burden under the *Drews* framework. Many authorities hold that a party moving for arbitration bears only a slight prima facie burden of production. To the extent that its documentary evidence had to be authenticated—which is not at all clear—Federal Rules of Evidence 901 and 104 only required Bay Cities to establish prima facie authenticity. In determining whether a movant did so, a district court may not make judgments as to weight and credibility. The district court committed legal error by stepping outside the gatekeeper role set forth in Rules 901 and 104 and into the role of the trier of fact, and that error permeated the district court's evaluation of the evidence.

The court appears to have reasoned that a heightened burden on Bay Cities was appropriate here because Dillon entered into his agreements online. But neither federal nor North Carolina law supports imposing a heightened standard to the proof of electronic contracts—to the contrary, both jurisdictions have passed legislation designed to place such contracts on the same footing as offline paper contracts.

Viewed under the proper legal standards, Bay Cities made a prima facie showing that Dillon agreed in his loan documents to arbitrate the present dispute. Dillon has not met his burden to unequivocally deny this fact. Accordingly, this issue must be resolved in Bay Cities's favor.

II. The district court also erred as a matter of law in denying BMO Harris's and Generations's arbitration motions under the "prospective waiver" doctrine that this Court applied in *Hayes*. Under that doctrine, plaintiffs may avoid enforcement of their arbitration agreements by showing that, in arbitration, they would be deprived of the protections of "the federal statutes to which [the defendant] is and must remain subject." *Hayes*, 811 F.3d at 675.

BMO Harris: The district court improperly relieved Dillon of his burden of proof under the "prospective waiver" doctrine by simply assuming that Dillon would be unable to assert his U.S.-law claims against BMO Harris in arbitration. Dillon noted that the Great Plains agreement that BMO Harris invoked

contains a foreign choice-of-law clause selecting the law of the Otoe-Missouria Tribe. But the district court did not require Dillon to show that he actually would be deprived of any U.S.-law remedies. That was an error of law.

In fact, there is no meaningful risk that the tribal choice-of-law clause would prevent Dillon from asserting his U.S.-law claims for at least three reasons. First, BMO Harris has agreed that Dillon may arbitrate under U.S. law. Binding precedent—specifically, the Supreme Court case that created the "prospective waiver" doctrine applied in *Hayes*—establishes that such a waiver of a foreign choice-of-law clause moots any objection to enforcement of the arbitration agreement on the ground that it "displace[s] American law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

Second, even if BMO Harris were to argue that the tribal choice-of-law clause extinguishes Dillon's claims, the arbitrator would have the power to set aside that clause. Nothing in the Great Plains agreement unambiguously deprives the arbitrator of the same power that a court would have to decide that the tribal choice-of-law clause is unenforceable. And the *contra proferentem* rule requires that the agreement be read in the consumer's favor as permitting the arbitrator to hear U.S.-law claims. When (as here) it is uncertain whether an arbitrator would apply a choice-of-law clause or other contract term, the Supreme Court and this Court have reiterated that "the proper course is to compel arbitration." *PacifiCare*

Health Sys., Inc. v. Book, 538 U.S. 401, 407 (2003); *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539-40 (1995); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 371-73 & n.16 (2012).

Third, even if the arbitrator were bound to apply Otoe-Missouria law, Dillon failed to present any evidence that resolving his claims under Otoe-Missouria law would affect the outcome in any way. This Court has long held that a party who contends that foreign law is "unlike ours"—as Dillon does here—"must prove its existence." *The Hoxie*, 297 F. 189, 190 (4th Cir. 1924). Yet Dillon has never offered any evidence as to how Otoe-Missouria law differs from federal law. Nor has he shown how any such difference would matter.

Generations: In invalidating the Western Sky agreement that Generations had invoked, the district court made the same errors regarding the applicability of the prospective-waiver doctrine; Dillon failed to offer any evidence as to how the law of the Cheyenne River Sioux Tribe differs from federal law. The district court also erred in reaching the issue at all because Dillon had agreed to submit any such challenges to the enforceability of the arbitration agreement to the arbitrator to decide in the first instance. Such agreements to delegate questions of arbitrability to the arbitrator are fully enforceable. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

To be sure, a court can decide a challenge specifically to the enforceability of the delegation clause. *Rent-A-Center,* 561 U.S. at 77-78. But Dillon failed to make such a challenge here. He simply contended that the tribal choice-of-law clause rendered the arbitration agreement as a whole, including its delegation clause, unenforceable under *Hayes*. That is insufficient to avoid the delegation clause. Under *Rent-A-Center*, a challenge to "the *entire arbitration agreement*, including the delegation clause," is a "challenge to the validity of the [a]greement [to arbitrate] as a whole," which is reserved "for the arbitrator." *Id.* at 72-73. The district court thus erred as a matter of law in intruding upon the arbitrator's authority to decide Dillon's challenge under *Hayes* to the arbitration provision invoked by Generations.[9]

STANDARD OF REVIEW

This Court "review[s] a district court's denial of a motion to compel arbitration *de novo*." *Sydnor v. Conseco Fin. Serv. Corp.*, 252 F.3d 302, 304-05 (4th Cir. 2001); *accord Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 602 (4th Cir. 2013). This Court likewise reviews *de novo* the issue of which legal standard the FAA directs district courts to apply in deciding whether a party has met its prima facie burden that an arbitration agreement exists. *See Fort Sumter Tours, Inc. v. Babbitt*,

[9] In addition, although Defendants acknowledge that this panel is bound by *Hayes*, Defendants preserve for further appellate review the contention that *Hayes* was wrongly decided.

66 F.3d 1324, 1328 (4th Cir. 1995) ("This Court reviews *de novo* the district court's interpretation of a statute"); *Nat'l Res. Def. Council, Inc. v. U.S. EPA*, 16 F.3d 1395, 1400 (4th Cir. 1993) ("[T]his court will apply a *de novo* standard of review" to determine "whether the district court properly applied the correct legal standard[.]").

This Court reviews the application of the FAA's "prospective waiver" doctrine "*de novo*." *Hayes*, 811 F.3d at 671, 673. And the same "*de novo*" standard of review applies to "the district court's rulings" as to whether "the court is the proper forum in which to adjudicate arbitrability" and whether "the dispute is, in fact, arbitrable." *Peabody Holding Co. v. United Mine Workers of Am.*, 665 F.3d 96, 101 (4th Cir. 2012).

ARGUMENT

The district court's denial of Defendants' motions to enforce Dillon's arbitration agreements contravened the FAA. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements" and give force to the "'liberal federal policy favoring arbitration agreements.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (quoting *Moses H. Cone*, 460 U.S. at 24). The Supreme Court has emphasized that its "cases place it beyond dispute that the FAA was designed to promote arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345-46 (2011). To that end, the FAA mandates that

courts "rigorously enforce" arbitration agreements (*Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)), "resolve[]" "any doubts concerning the scope of arbitrable issues … in favor of arbitration," and "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" (*Moses H. Cone*, 500 U.S. at 22, 24-25).

The district court disregarded each of these statutory mandates. It imposed a heightened burden on Bay Cities to prove that the loan agreements that Dillon conceded accepting electronically contained arbitration provisions. In concluding that the agreement that BMO Harris invoked improperly waived Dillon's federal statutory rights, the court below drew every inference against arbitration. The court repeated that error in addressing the arbitration provision that Generations had invoked, and further ignored key language in the arbitration agreement—delegating certain issues to the arbitrator—altogether.

I. THE DISTRICT COURT APPLIED THE WRONG STANDARD TO DETERMINE WHETHER BAY CITIES MET ITS PRIMA FACIE BURDEN TO SHOW THE EXISTENCE OF AN ARBITRATION AGREEMENT.

The district court denied Bay Cities' motion to compel arbitration on the ground that Bay Cities failed to produce "credible, admissible evidence which satisfies the Court that there was an arbitration agreement." JA 1032. That ruling rests on a fundamental misunderstanding of the parties' respective burdens and an unwarranted skepticism toward electronic contracts generally that is unsupported

by precedent and contrary to federal and North Carolina public policy. Instead of applying existing law, the district court engaged in a form of judicial legislation, by deeming electronic contracts less reliable than hand-signed contracts without any evidence in the record to support those conclusions. In doing so, the district court committed legal error by applying a standard contrary to FAA provisions regarding the judicial determination of whether a contract to arbitrate has been made, the Fourth Circuit decisions applying those FAA provisions, and federal and North Carolina statutes regarding electronic contracts.

A. This Court's Burden-Shifting Framework Required Dillon To Unequivocally Deny Entering Into His Loan Agreements.

Both the district court and Dillon acknowledge that to determine whether a written agreement containing arbitration provisions exists, courts in this Circuit employ the burden-shifting framework described in *Drews*:

> The [FAA] provides for a right to a jury trial when 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue.' However, '[a] party resisting arbitration cannot obtain a jury trial merely by demanding one; rather, he bears the burden of showing that he is entitled to a jury trial under § 4 of the [Act].' 'To establish a genuine issue entitling a party to a jury trial, 'an unequivocal denial that the agreement [to arbitrate] had been made [is] needed, and some evidence should [be] produced to substantiate the denial.'

245 F.3d at 352 n.3 (quoting 9 U.S.C. § 4 and *Doctor's Assoc. v. Stuart*, 85 F.3d 975, 983 (2d Cir. 1996)) (internal citations omitted); *see also Chorley Enters., Inc.*

v. Dickey's Barbecue Rests., Inc., 807 F.3d 553 (4th Cir. 2015); *Galloway v. Santander Consumer USA, Inc.*, __ F.3d __, 2016 WL 1393121, at *7-9 (4th Cir. Apr. 8, 2016). It is only after the opponent of arbitration meets this burden that a triable issue arises. *Drews*, 245 F.3d at 352 n.3.

This burden-shifting framework has been widely adopted in the federal courts. *See, e.g., Almacenes Fernandez, S.A. v. Golodetz*, 148 F.2d 625, 628 (2d Cir. 1945); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992); *Gavino v. Eurochem Italia*, 61 F. App'x 119, 119 (5th Cir. 2003); *Blau v. AT&T Mobility*, 2012 WL 10546, at *3 (N.D. Cal. Jan. 3, 2012); *Whiting-Turner Contracting Co. v. Liberty Mut. Ins. Co.*, 912 F. Supp. 2d 321, 332 (D. Md. 2012).

In its order, the district court acknowledged the non-movant's burden to make an unequivocal denial supported by evidence, citing *Drews* for this proposition. JA 1032. Yet here, Dillon has not made a denial of any sort, much less an unequivocal denial, and has conceded that he cannot deny that his agreements contained arbitration provisions. Instead, his counsel relied solely on the argument that Bay Cities did not meet an initial burden to show that there was an agreement to arbitrate.

Thus, the district court's order can only be affirmed if this Court sustains the district court's ruling that Bay Cities failed to meet its *initial* burden to put forward a written agreement containing an arbitration provision. As shown below in part B,

in setting forth the nature of Bay Cities's initial burden, the district court committed legal error. And as shown below in part C, it is clear from the record that Bay Cities met its initial burden under the correct standard.

B. The District Court Committed Legal Error By Holding Bay Cities's Initial Burden To A Heightened Standard.

The district court held that Dillon's duty in opposing the motion to compel arbitration to make an unequivocal denial never arose because the "burden on the opponent only arises … after the proponent produces credible, admissible evidence which satisfies the Court that there was an arbitration agreement." JA 1032. This misstates the law in two respects. First, the district court's statement that the movant must "satisfy" the district court that there was an arbitration agreement as part of its initial prima facie showing is based on a misreading of the FAA. Second, by importing credibility determinations into ruling whether a movant had met its initial burden, the district court contravened well-settled authority under Federal Rules of Evidence 104 and 901 that a court should not make credibility determinations when ruling on admissibility.

1. The FAA does not require the movant to "satisfy" the factfinder at the prima facie stage.

The district court cited the text of Section 4 of the FAA for the proposition that Bay Cities was required to "satisfy" the district court that there was an agreement to arbitrate notwithstanding Dillon's failure to unequivocally deny this

fact. This finds no support in the text of Section 4 or in case law interpreting the FAA, and would stand *Drews* on its head.

Section 4 of the FAA sets forth the role of the court where a party moves to enforce an arbitration agreement. It states: "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement[.]" 9 U.S.C. § 4.

This clause sets forth what a trial court must do upon being satisfied that the making of the arbitration agreement "is not in issue"—that is, the court must compel arbitration. The subsequent sentence ("If the making of the arbitration agreement … be in issue, the court shall proceed summarily to the trial thereof") sets forth what happens if the existence of the agreement is put "in issue." The burden-shifting framework of *Drews* makes clear that in order to place the existence of the agreement "in issue," the party resisting arbitration must dispute the existence of the agreement by an unequivocal denial supported by evidence. Only then is a trial warranted. *See Drews*, *supra*; *Chorley*, *supra*; *Galloway*, *supra*.

Nothing in Section 4 or the decisions interpreting it authorizes a trial court to short circuit this burden-shifting procedure by stepping into a factfinder's role *as part of the process to determine whether an issue of fact exists*. The burden-

shifting framework is the means by which a court makes this ultimate determination. Thus, the "satisfied" component cannot be part of the movant's initial burden, which is the first step in a process of determining whether there is even a triable issue regarding whether an agreement was reached.

The movant's initial burden is slight. As the Second Circuit put it in a decision that this Court relied upon in *Drews*, the movant must merely "show[] at least prima facie" that an arbitration agreement exists. *Almacenes Fernandez*, 148 F.2d at 628; *see also In re Wiand*, 2011 WL 4532070, at *4 (June 8, 2011), *report and recommendation adopted*, 2011 WL 4530203 (M.D. Fla. Sept. 29, 2011) (describing movant's burden as "minimal burden of production").

The minimal nature of the required initial showing is apparent from the many decisions granting motions to compel arbitration where the movant attached the arbitration agreement to the motion papers, without an authenticating declaration or affidavit. *See, e.g., Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 771 (3d Cir. 2013). In fact, this happened in several of the copycat actions brought by Dillon's counsel.[10] Other decisions indicate that the

[10] *See, e.g., Graham*, 2014 WL 4090548, at *1 (finding loan agreements to be "integral to the complaint and proper for consideration on this motion"); *Riley*, 61 F. Supp. 3d at 95-96 (noting that the loan agreements were referenced in the complaint and that the plaintiff cited to them throughout her opposition to the defendants' motions); *Elder*, 2014 WL 1429334, at *1 (stating that the plaintiff "must rely on the terms of the written agreement in which the arbitration clause is

initial prima facie burden is met when the movant tenders a document purporting to be an agreement to which the non-movant is a party, which contains an arbitration provision covering the dispute, notwithstanding any potential questions about admissibility or credibility.[11]

This Court was not called upon in *Dillon I* to decide what constitutes a satisfactory initial showing, but it did observe that it was not "unreasonabl[e]" for Bay Cities to believe that the complaint itself, combined with the tendered loan agreements, provided sufficient support for a claim that Dillon entered into arbitration agreements. 787 F.3d at 715. As the above cited cases show, it is far from clear that as part of its initial burden, the movant must produce admissible evidence that satisfies Rule 901 (although, as shown below, Bay Cities plainly did

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contained because it is that agreement that contains the allegedly usurious interest provision upon which this law suit is based").

[11] *See Brisco v. Schreiber*, 2010 WL 997379, at *2 (D.V.I. Mar. 16, 2010) (holding that production of an unauthenticated copy of insurance policy containing arbitration provisions was sufficient to meet movant's initial burden); *Umbenhower v. Copart, Inc.*, 2004 WL 2660649, at *6 (D. Kan. Nov. 19, 2004) (holding that movant was not required to produce authenticated copy of arbitration agreement in order to make initial showing in support of its motion to compel arbitration); *Blatt v. Shearson Lehman/Am. Express Inc.*, 1985 WL 2029, at *1 (S.D.N.Y. 1985) (movant made prima facie showing by submitting copy of signed customer agreement containing arbitration terms); *Baja, Inc. v. Automotive Testing and Dev. Serv., Inc.*, 2014 WL 2719261, at *5 (D.S.C. June 16, 2014) (movant met initial burden by showing that pro forma invoices contained arbitration language and were signed by representative of non-movant).

produce admissible evidence that satisfies Rule 901).[12] Rather, it appears sufficient that the movant point out the existence of a potential arbitration defense with enough clarity and support to place the trial court and opposing party on notice as to the basis for the motion.

But the district court went far beyond this requirement to demand not only admissible evidence but also to require Bay Cities to "satisfy" the district court that Dillon had agreed to arbitrate. And to do so, it required Bay Cities to produce evidence to negate the possibility that the proffered documents had been somehow tampered with after they were executed by Dillon, even in the absence of any allegation by Dillon that this had occurred.

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[12] In support of the proposition that Bay Cities was required to produce "admissible evidence," the district court cited a prior district court decision, *Erichsen v. RBC Capital Mkts.*, 883 F. Supp. 2d 562, 568 (E.D.N.C. 2012) (JA 1032 n.3), which compared motions to compel arbitration to motions for summary judgment. (The district court neither in footnote 3 nor elsewhere cited authority for its reference to "credible" evidence.) While this Court and others have found the summary judgment analogy useful in some respects, the district court's requirement of admissible evidence does not logically follow from the premise that the two types of motions are similar in certain ways. Even a party moving for summary judgment would not be required to meet the evidentiary standards imposed by the district court. Under amended Federal Rule of Civil Procedure 56, "facts in support of or opposition to a motion for summary judgment need not be in admissible form; the new requirement is that the party identifies facts that could be put in admissible form." *Williams v. Silver Spring Volunteer Fire Dept.*, 86 F. Supp. 3d 398, 407 (D. Md. 2015) (explaining 2010 amendment to Rule 56) (emphasis in original). The 2010 amendment to the rule eliminated the previous practice which required the parties to authenticate certain documents by way of affidavit conforming to the rule. *See id.*

The district court's requirement that it be "satisfied" that an arbitration agreement exists is not only unsupported by the language and structure of the FAA, but it also undermines the FAA's policy objective of "mov[ing] the parties to an arbitrable dispute out of court and into arbitration ***as quickly and easily as possible***." *Moses H. Cone*, 460 U.S. at 22 (emphasis added). The Supreme Court has made clear that the FAA forbids district courts from imposing "preliminary litigating hurdle[s]" on parties moving to compel arbitration, as they are antithetical to this policy goal. *Am. Express*, 133 S. Ct. at 2312. Such litigating hurdles demonstrate the sort of judicial hostility to arbitration that the FAA was specifically designed to eliminate. This Court and others have adopted a burden-shifting framework with these goals in mind. Undoing that framework to impose a heightened burden on the movant would contravene those goals as well as the text and structure of the FAA.

2. The movant is not required to support its initial showing with "credible, admissible evidence."

The district court also erred in holding that Bay Cities was required to establish the credibility of the evidence it relied on as part of its initial prima facie showing. Even assuming that Bay Cities was required to produce admissible evidence as part of its initial burden, it had no further obligation to persuade the district court that the evidence should be afforded any particular weight or even

deemed to be credible, as weight and credibility are left to the ultimate factfinder to determine.

Under Federal Rule of Evidence 901, a party need only make a prima facie showing of authenticity. As this Court explained in *United States v. Cornell*, 780 F.3d 616 (4th Cir. 2015):

> The burden to authenticate under Rule 901 is not high—only a prima facie showing is required, and a district court's role is to serve as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.

780 F.3d at 629 (internal quotation marks omitted).

Rule 104 confirms that the district court overstepped its gatekeeping function by usurping the trier-of-fact's role of weighing credibility. Under Rule 104(a), the "court must decide any preliminary questions" about whether "evidence is admissible." When "the relevance of evidence depends on whether a fact exists"—such as the relevance of the proffered USFastCash and VIN Capital loan documents turning on their authenticity—the propounder must show proof "sufficient to support a finding that the fact does exist." Fed. R. Evid. 104(b). But in making this preliminary determination, "***the trial court neither weighs credibility nor makes a finding*** that" the proponent "***has proved the conditional fact***"—here, that the documents are authentic—"***by a preponderance of the***

evidence." *Huddleston v. United States*, 485 U.S. 681, 690 (1988) (emphasis added).

The district court therefore cannot exclude a document simply because it is skeptical that the document is authentic or that the authenticating testimony is credible. It follows, therefore, that the movant's burden is simply to show that a reasonable factfinder *could* find the document to be authentic. *See U.S. v. Pantic*, 308 F. App'x 731, 733 (4th Cir. 2009) ("To satisfy the burden of authentication under [Rule] 901(a), a proponent need only present 'evidence sufficient to support a finding that the matter in question is what the proponent claims.' The district court plays a gate-keeping role in assessing whether the proponent has established a suitable foundation[.]") (citations omitted).

A trial court commits legal error when it steps outside of its gatekeeper role to make determinations about weight and credibility, as the district court did here by determining that Bay Cities's authenticating testimony was not credible or persuasive. *See, e.g.*, *United States v. Evans*, 728 F.3d 953, 962 (9th Cir. 2013) (citing *Huddleston v. U.S.*, 485 U.S. at 690). "The court may not exclude relevant evidence—or, in this case, assign it no probative value—on the ground that it does not find the evidence to be credible." *Id*. at 963.

Here, rather than asking whether a trier of fact *could* find that the documents were authentic based on the proof submitted, the district court essentially required

Bay Cities to *persuade the district court itself* of that fact. That fundamental legal error was repeated throughout the district court's consideration of the evidence. As shown in Part I.C below, under the applicable standards, Bay Cities readily met its evidentiary burden.

3. The elevated burden is contrary to public policy.

The effect of the district court's approach was to elevate Bay Cities's prima facie burden of production to include offering evidence that electronic documents were not altered, either by design or mistake, all without any evidence or even allegations that they were altered. This represents a marked departure from existing case law under the FAA.

Courts have held, even in cases involving electronic contracts of the sort at issue here, that the movant is not required to anticipate objections to authenticity of the contract to arbitrate. *See Achey*, 64 F. Supp. 2d at 1175 ("The party offering the evidence is not required to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be."); *Kuhn v. Ameriquest Mortg. Co.*, 2004 WL 2782568, at *2 (D. Kan. Dec. 1, 2004) (party moving to compel arbitration "need not negate the other party's claim"). Indeed, in several of the copycat cases, as noted above, courts treated defendants as having met their prima facie burden based solely on the overlap between the allegations in the complaints regarding the alleged loan agreements and the agreements proffered

by the defendants on motions to compel arbitration, even without any additional supporting evidence, such as the Dillon testimony introduced by Bay Cities. *See* page 29 n.10, *supra*, *citing Graham*, *Riley*, *and Elder*.

Yet Bay Cities was essentially required to prove that Dillon's loan applications and agreements were not somehow altered—by two separate lenders not alleged to be related to each other—to include arbitration provisions after Dillon electronically executed the agreements. JA 1035-38. Much of the district court's order addresses issues never raised by the parties, such as the potential for fraud in "clickwrap" agreements entered into over the Internet. JA 1035-36. Had Dillon unequivocally denied entering into his arbitration agreements and produced some evidence tending to support a claim that the proffered documents were altered, inquiry into these questions might arguably have been appropriate. But that is not what happened in this case; Dillon has consistently declined to make the required unequivocal denial, perhaps recognizing that he will have to rely on his loan agreements to make his claims as this litigation progresses.

There is no basis in law or policy to apply a heightened standard for demonstrating the making of an arbitration agreement solely because the parties entered into the agreement over the Internet. *See*, *e.g.*, *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1011 (D.C. 2002) ("A contract is no less a contract simply because it is entered into via a computer."); *Van Tassell v. United*

Marketing Group, LLC, 795 F. Supp. 2d 770, 789 (N.D. Ill. 2011) ("The making of contracts over the Internet 'has not fundamentally changed the principles of contract.'") (citation omitted). Both federal and North Carolina statutory law explicitly provide that a contract shall not be denied legal effect or enforceability solely because it is in electronic form or because an electronic record or signature was used in its formation. *See* 15 U.S.C. § 7001(a); N.C. STAT. § 66-317. Moreover, N.C. Stat. § 66-234 provides that a contract may be formed by electronic processes, which validates click-through transactions, such as Dillon's agreements here. JA 753-57, 830, 835-36, 842.

C. Bay Cities Met Its Initial Burden Of Showing That Dillon Had Agreed To Arbitrate.

Under the correct legal principles governing its initial burden, Bay Cities has shown more than enough to meet its initial burden to demonstrate the existence of an arbitration agreement and therefore place the burden on *Dillon to* make an unequivocal denial supported by some quantum of evidence so as to create a triable issue.

Whether or not it was required to do so, Bay Cities produced admissible evidence. Under Rule 901(b)(4), a document can be authenticated by circumstantial evidence, such as unique characteristics or contents that lend support to a finding of authenticity. *See Cornell*, 780 F.3d at 630 (holding that a letter was properly authenticated by, among other things, contents tending to

identify its author and recipient); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007) (citing and explaining advisory committee notes to Rule 901(b)(4)); *see also McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 930 (3d Cir. 1985) (holding that circumstantial evidence such as a document's appearance and contents and reference to personal information "easily shoulder the slight burden of proof that authentication requires"); *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 533-34 (9th Cir. 2011) (holding that trial court abused its discretion by failing to properly consider circumstantial evidence of a document's authenticity); *Law Co. v. Mohawk Constr. & Supply Co., Inc.*, 577 F.3d 1164, 1170-71 (10th Cir. 2009) (same).

Under Rule 901(1), a document can also be authenticated through "testimony that a matter is what it is claimed to be." *Lorraine*, 241 F.R.D. at 544. The rule "contemplates a broad spectrum" of potential witnesses, and its requirement that the witness testify from personal knowledge "is liberally construed." *Id*. at 544-45 (citing advisory committee notes to Rule 901(1)).

Bay Cities's evidence satisfied both of these provisions. Bay Cities tendered agreements bearing a close similarity to material allegations in Dillon's complaint. The details concerning the material payment terms (such as amounts and dates) match the allegations in the complaint. Indeed, Dillon would need to prove the existence of these loan agreements, and their payment terms, in order to prevail on

any of his claims, because all of his claims are premised on the allegation that his loans were usurious under North Carolina law.[13]

Further, Bay Cities has produced admissible evidence from both sides of the alleged loan transaction showing that Dillon agreed to arbitrate in the applications and loan documents he executed, including: (1) Dillon's admission that he personally executed loan documents by electronically signing them, (2) Dillon's recognition of the documents at his deposition, (3) Dillon's admission that he supplied uniquely personal identifying information during the application process that is correctly reflected in the documents, and (4) testimony from individuals familiar with the policies and records of the two lenders. *See* pages 7-9, 11, *supra*.

This satisfies Rule 901's requirements for authentication both based on circumstantial evidence and based on testimony that the document is what it is claimed to be. The uniquely personal, identifying information supplied by Dillon included his home and work telephone numbers, Social Security number and bank account number. The existence of this information on electronic forms—forms that he testified he opened up online, typed information into online, and clicked to

[13] Without providing any plausible explanation, Dillon has contended that he can prove his claims without using the loan agreements. The district court stated that "[i]t remains to be seen if this is possible[.]" JA 1044 n.18. Other courts have noted the implausibility of Dillon's counsel's position. *See Achey*, 64 F. Supp. 2d at 1175 ("[I]t is difficult to imagine how Achey could proceed without the Loan Documents, since they are the sole basis for her claim that the 2012 and 2013 Loans were usurious.").

accept—itself supports the conclusion that the documents are what they purport to be (Dillon's loan documents), thus satisfying Rule 901(b)(4).

And Dillon's deposition testimony that he recognized the proffered documents as his loan agreements is itself testimony that the documents are what they purport to be. For example, asked, "[D]o you recognize [the document] as your USFastCash loan application and agreement?" he replied, "Yeah, I recognize it." JA 756. And later, when asked whether the document "is your USFastCash loan agreement. Correct?" he replied, "That's correct." JA 781. These types of responses are regularly relied on by courts to authenticate documents.

The manner in which the district court's order discussed Bay Cities's evidence confirms that Bay Cities was being required at the initial stage to persuade the trier of fact that Dillon had agreed to arbitrate. The district court acknowledged Dillon's testimony purporting to recognize his agreements, but found that it was "outweighed" by other testimony where he stated that he did not read the terms of his loan documents and therefore could not say whether they contained arbitration provisions. JA 1040-41. In other words, testimony from Dillon that was as far from an unequivocal denial as testimony can get was cited by the district court as a reason to deny Bay Cities's motion.

The district court's treatment of the Muir and Knowles declarations was also tainted by its erroneous application of evidentiary rules. Throughout the

proceedings, the district court treated them as if they were somehow required evidence—*i.e.*, that Bay Cities could not authenticate the documents without testimony sufficient to establish them as business records of the lenders. This is incorrect—nothing in Rule 901 requires the proponent of documentary evidence to obtain an affidavit from a particular witness. *See Law*, 577 F.3d at 1170-71 (holding that district court committed error of law by requiring authenticating affidavit); *Las Vegas Sands*, 632 F.3d at 533 (same).

Both Muir and Knowles, who do not claim to have been involved in the execution of Dillon's loan agreements, nonetheless testified to facts tending to support a finding of authenticity. Both witnesses testified to their familiarity with payday loan agreements, based on Muir's employment with a service provider to USFastCash and Knowles's employment with a third-party payment provider whose customers included VIN Capital. Dillon does not dispute that their employment caused them to be familiar with payday loan agreements such that they could identify one. Both declarants testified to where the records were found, a fact bearing on authenticity. *See, e.g.*, *Pantic*, 308 F. App'x at 734.[14]

[14] In addition, Knowles testified regarding some of the recordkeeping procedures imposed upon members of the ACH payments industry, including the requirement that lenders keep records of customer's authorizations of debits (*i.e.*, loan agreements), as well as the process by which third-party senders such as Billing Tree obtain copies of authorizations for banks like Bay Cities acting as Originating Depository Financial Institutions. JA 557, 561-62, 564-72; *see also* JA 159. While a proponent of evidence need not prove the chain of custody to

The district court's reasons for discounting the testimony have nothing to do with these facts. Instead, it appears that the district court was holding their testimony to the standards set forth in Rule 902(11), which governs the authentication of documents *as business records*. This is evidenced by the district court's reliance on a bankruptcy panel decision, *In re Vee Vinhnee*, 336 B.R. 437 (B.A.P. 9th Cir. 2005), which endorses a detailed protocol for the authentication of electronic business records under Rule 902(11). But satisfaction of Rule 902(11) is not necessary unless it is essential to prove that the document is a business record in order to overcome a hearsay objection. It is thus inapplicable here, where Bay Cities need only prove the existence of the agreements, a legally operative fact that is not subject to the hearsay rule. *See Lorraine*, 241 F.R.D. at 566 (holding that documents introduced for purpose of proving the making of an agreement to arbitrate were not hearsay). *In re Vee Vinhnee's* rationale is properly limited to situations in which it is necessary to satisfy the business records exception to hearsay. *See U.S. v. Lubich*, 72 M.J. 170, 173 n.6 (C.A.A.F. 2013).

For the proposition that the documents are what they purport to be, Muir's and Knowles's testimony supports Bay Cities's other evidence, which in any event, as shown above, is by itself sufficient to authenticate the documents and meet Bay

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establish authenticity (*see Pantic*, 308 F. App'x at 733), this testimony also supports a finding of authenticity.

Cities's initial burden. With that, the burden shifted to Dillon to offer an unequivocal denial, supported by evidence, that he entered into the arbitration agreements. Since he has not done so, the district court erred in not directing the parties to arbitration under Section 4 of the FAA.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE ARBITRATION PROVISIONS THAT BMO HARRIS AND GENERATIONS INVOKED ARE UNENFORCEABLE MERELY BECAUSE THE CONTRACTS INCLUDE FOREIGN CHOICE-OF-LAW CLAUSES.

Despite the ubiquity of foreign choice-of-law clauses, the district court refused to enforce two of Dillon's arbitration agreements solely because the agreements each selected non-U.S. "governing law"—"the law of the Otoe-Missouria tribe" for the Great Plains agreement that BMO Harris invoked (JA 1025), and "the law of the Cheyenne River Sioux tribe" for the Western Sky agreement that Generations invoked (JA 1023). The district court concluded that the provisions "cannot be enforced" under this Court's decision in *Hayes*. JA 1022, 1025. That was error for two reasons. First, the district court relieved Dillon of his burden to show that he actually would be deprived of any federal statutory rights in arbitration. Second, by deciding Dillon's challenge to the Western Sky arbitration provision, which delegates questions of arbitrability to the arbitrator, the district court usurped the role of the arbitrator to decide the issue.

A. The District Court Disregarded Supreme Court And Fourth Circuit Precedent Mandating That Arbitration Agreements Be Enforced If The Effect Of A Choice-Of-Law Clause Is Uncertain.

1. The mere presence of a foreign choice-of-law clause does not automatically invalidate an arbitration agreement under the "prospective waiver" doctrine.

The district court's refusal to enforce the Great Plains arbitration provision that BMO Harris invoked stems from a misreading of this Court's recent decision in *Hayes* and a misunderstanding of the "prospective waiver" doctrine that *Hayes* applies.

In *Hayes*, borrowers asserted claims under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p, and Telephone Consumer Protection Act, 47 U.S.C. § 227, against a debt collector seeking repayment of Western Sky loans. *Hayes*, 811 F.3d at 669. The debt collector invoked provisions in the loan agreement that required disputes be resolved either in arbitration or tribal court under the law of the Cheyenne River Sioux tribe. *Id.* at 669-70.

The *Hayes* panel began by acknowledging the "overarching principle of the FAA—that arbitration is a matter of contract"—and that courts therefore "must rigorously enforce arbitration agreements according to their terms." *Id.* at 674 (internal quotation marks omitted). The panel emphasized that the Supreme Court "has affirmed that the FAA gives parties the freedom to structure arbitration in the way they choose." *Id.* Indeed, the Supreme Court recently reiterated that the

"Federal Arbitration Act allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions," and observed that "[i]n principle," the parties "might choose … the law of Tibet" or "the law of pre-revolutionary Russia[.]" *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). The contractual selection of "which local law will govern the arbitration … often bring[s] a welcome measure of predictability and thus efficiency to the dispute resolution process." *Hayes*, 811 F.3d at 675

The *Hayes* panel explained, however, that the Supreme Court "has repeatedly cautioned that this freedom does not extend to a 'substantive waiver of federally protected civil rights' in an arbitration agreement." *Id.* at 674 (quoting *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009)). The panel thus concluded that parties may not include in an arbitration agreement a "'prospective waiver of a party's *right to pursue* statutory remedies.'" *Id.* at 674-75 (quoting *Am. Express*, 133 S. Ct. at 2310) (quoting in turn *Mitsubishi Motors*, 473 U.S. at 637 n.19).

This "prospective waiver" doctrine is triggered if—and only if—the plaintiff has definitively shown that he or she will be precluded from vindicating federal statutory rights. For example, in *Vimar*, the plaintiff resisted enforcement of its arbitration agreement because the contract included a Japanese choice-of-law clause (515 U.S. at 531), and thus there was "no guarantee [that] foreign arbitrators will apply" U.S. law (*id.* at 539). The Supreme Court rejected the argument as

"premature," explaining that at the motion-to-compel-arbitration stage, "it is not established what law the arbitrators will apply to [the plaintiff's] claims or that [the plaintiff] will receive diminished protection as a result." *Id.* at 540. The Court observed that "[t]he arbitrators may conclude that" U.S. law "applies of its own force or that Japanese law does not apply," and emphasized that the argument could be revisited "'at the award-enforcement stage'" after the arbitrators resolve the claims. *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 638). In the meantime, the Court emphasized, "mere speculation" that the arbitrators "might apply Japanese law" was not valid grounds to deny enforcement of the arbitration agreement. *Id.* at 541

Similarly, in *PacificCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003), the plaintiffs resisted arbitration of their RICO claims on the ground that remedial limitations in the arbitration agreement appeared to bar the recovery of treble damages and thus constituted an impermissible "prospective waiver" of their statutory rights under RICO. *Id.* at 406-07. The Court rejected that argument, too, as premature, because the Court did not "know how the arbitrator [would] construe" the remedial limitations, which the Court described as "ambiguous." *Id.* at 406. "As in *Vimar*," the Court explained, "the proper course is to compel arbitration" for the arbitrator to construe the remedial limitations … in the first instance." *Id.* at 407.

This Court reached the same conclusion with respect to a foreign choice-of-law clause in *Aggarao*. There, the plaintiff resisted arbitration on the ground that, under the contract's Philippine choice-of-law clause "the arbitrator would apply the law of the Philippines to the exclusion of otherwise applicable American law, thereby denying his right to pursue his federal statutory claims." 675 F.3d at 371. This Court nonetheless directed that arbitration proceed. *Id.* at 373. This Court explained that the plaintiff's challenge under the "prospective waiver doctrine" must wait until "the award-enforcement stage" when "[i]t is possible that" either the "arbitrator will apply United States law" despite the foreign choice-of-law clause or the plaintiff might "vindicate the substance of those claims under Philippine law and obtain an adequate remedy." *Id.* at 373 & n.16.

In *Hayes*, however, the panel concluded that the plaintiffs' defense under the "prospective waiver" doctrine was ripe at the motion-to-compel-arbitration stage. 811 F.3d at 675. In the panel's view, it was apparent from the defendant's invocation of tribal law and the unambiguous language of the agreement that the lender had taken the "plainly forbidden step" of using a "choice of no law clause" to deprive the plaintiff of the protections of "the federal statutes to which [the defendant] is and must remain subject." *Id.* Thus, there was no need to defer consideration of the plaintiff's objections until an arbitration award was rendered, as (in the panel's view) the result was foreordained.

The district court here misunderstood *Hayes* as a categorical rule barring enforcement of an arbitration provision in any contract that also includes a foreign choice-of-law clause. JA 1025. But the district court overlooked the cornerstone of the *Hayes* decision—the panel's conclusion that it was "unambiguous[]" that the Western Sky agreement "proceeds to take [the plaintiffs'] very claims away." 811 F.3d at 668, 673-74. Thus, the plaintiffs in *Hayes* had already established that they would be deprived of the protections of the applicable U.S. law in arbitration.

By contrast, in this case, Dillon has never even purported to show that he actually would be deprived of federal rights or remedies in arbitration under the Great Plains agreement, as *Vimar*, *PacifiCare*, *Aggarao*, and *Hayes* require. By excusing Dillon from that burden of proof under the prospective-waiver doctrine—which he could never meet—the district court erred as a matter of law.

2. Dillon failed to meet his burden to prove that he would be deprived of federal statutory rights in arbitration.

a. BMO Harris has conceded that U.S. law applies to Dillon's claims in arbitration.

The first reason that Dillon could never satisfy his burden of proof under the "prospective waiver" doctrine is that BMO Harris has agreed that it, too, will be asking the arbitrator to apply U.S. law. Unlike the defendant in *Hayes*, who invoked a tribal choice-of-law clause as extinguishing the plaintiffs' claims, BMO

Harris informed the district court that it "has not invoked and will not ask the arbitrator to apply tribal law." DE No. 210 at 1.[15]

BMO Harris's concession that Dillon may assert claims under U.S. law in arbitration is binding. *See, e.g.*, *In re McNallen*, 62 F.3d 619, 625 (4th Cir. 1995). Indeed, "courts typically need not inquire into the validity of choice of law provisions" where, as here, "'the parties agree'" as to what "'law governs their claims.'" *Chubb & Son v. C & C Complete Servs., LLC*, 919 F. Supp. 2d 666, 675 (D. Md. 2013) (quoting *Vanderhoof-Forschner v. McSweegan*, 2000 WL 627644, at *2 n.3 (4th Cir. May 16, 2000)); *see also, e.g.*, *Cosey v. Prudential Ins. Co. of Am.*, 735 F.3d 161, 169 n.7 (4th Cir. 2013) (applying North Carolina law despite Missouri choice-of-law clause because "the parties in this case asked the district court" to apply "North Carolina law"). And BMO Harris's agreement to the application of U.S. law eliminates any risk that Dillon would be deprived of the "right to pursue statutory remedies" under U.S. law. *Hayes*, 811 F.3d at 674 (internal quotation marks and emphasis omitted).

In refusing to compel arbitration despite the parties' agreement that the arbitrator should apply U.S. law to Dillon's claims, the district court erred as a matter of law. In fact, the Supreme Court decision that "first articulated" the

[15] In fact, in BMO Harris's motion to dismiss, which it filed in the alternative if its request for arbitration were denied, BMO Harris argued that Dillon's claims failed on their ***own*** merits, not because the tribal choice-of-law clause bars them. DE No. 39 at 9-25.

"prospective waiver doctrine"—"*Mitsubishi Motors*" (*Aggarao*, 675 F.3d at 371)—establishes that a plaintiff cannot evade arbitration under the prospective-waiver doctrine when, as here, the defendant concedes that the arbitrator may apply U.S. law.

In *Mitsubishi Motors*, Mitsubishi sought arbitration of a claim against it under the Sherman Act. 473 U.S. at 619-20. The plaintiff objected—as Dillon does here—that the contract's Swiss choice-of-law clause provided for the exclusive application of foreign law, which the plaintiff contended would improperly "displace American law." *Id.* at 637 n.19. The Supreme Court rejected the argument and directed that the dispute be arbitrated because "Mitsubishi [had] conceded that American law applied to the antitrust claims" in arbitration, despite the foreign choice-of-law clause. *Id.* The Court added that once the arbitration has concluded in an award, "the national courts of the United States will have the opportunity at the award-enforcement stage" to confirm that "the tribunal took cognizance of the antitrust claims and actually decided them." *Id.* at 638.

Mitsubishi thus confirms that the district court erred in excusing Dillon from complying with his Great Plains arbitration agreement under the "prospective waiver" doctrine. Because BMO Harris has conceded that the arbitrator can decide his claims under U.S. law, Dillon's federal remedies have not been "prospectively

waiv[ed]."[16] In other words, BMO Harris's concession "moots the issue and foreclose[es] the possibility that" Dillon would be forced to "endure" the purportedly unlawful application of tribal law "in the arbitration process." *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 183 n.10 (4th Cir. 2013) (internal quotation marks omitted).

b. Unlike in Hayes, the arbitrator here could set aside the tribal choice-of-law clause.

Even if BMO Harris were invoking tribal law, unlike in *Hayes*, the arbitrator here could set aside the tribal choice-of-law clause in the Great Plains agreement. Despite similarities between the "Governing Law" clauses in the Western Sky agreement addressed in *Hayes* and the one in Dillon's Great Plains agreement, the Great Plains agreement ***omits*** the following language barring the arbitrator from invalidating the choice of tribal law: "You also expressly agree that this Agreement shall be subject to and construed in accordance ***only with*** the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law

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[16] District courts across the country have reached the same conclusion and compelled arbitration despite foreign choice-of-law clauses because the defendant conceded that the arbitrator may apply U.S. law. *See, e.g., Yuzwa v. M/V Oosterdam*, 2012 WL 6675171, at *4-*5 (C.D. Cal. Dec. 12, 2012) (compelling arbitration over objection to contractual choice of "the laws of the British Virgin Islands" because the defendant agreed to arbitrate "under U.S. law"); *Rivas v. Carnival Corp.*, 2010 WL 2696676, at *2 (S.D. Fla. Mar. 30, 2010) (compelling arbitration because defendant stipulated to application of U.S. law), *aff'd*, 448 F. App'x 981 (11th Cir. 2011); *PPG Indus., Inc. v. Pilkington PLC*, 825 F. Supp. 1465, 1482 (D. Ariz. 1993) (same).

applies to this Agreement." *Hayes*, 811 F.3d at 670 (emphasis added). By contrast, the Great Plains clause says merely that the agreement is "governed by … the laws of the Otoe-Missouria Tribe of Indians" and that "[n]either this Agreement nor the Lender is subject to the laws of any state of the United States." JA 185. The omission of the word "only" leaves open the possibility that the arbitrator may set aside the selection of tribal law if it is unlawful.

The same is true of the other tribal-law references in the Great Plains agreement. For example, it states that "this loan is governed by the laws of the Otoe-Missouria Tribe of Indians and is not subject to the provisions or protections of the laws of [the consumer's] home state or any other state." JA 186. But that summary of the default effect of a choice-of-law clause does not bar an arbitrator from deciding whether to enforce that choice of law. Another clause states that if the consumer elects to arbitrate near his or her "residence," this "accommodation for you shall not be construed in any way … to allow for the application of any law other than" tribal law. JA 185. But this clause arguably means merely that arbitrators cannot automatically apply U.S. law simply because of the U.S. forum.

Thus, at a minimum, the Great Plains agreement is ambiguous as to whether the arbitrator could set aside the tribal choice-of-law clause. That uncertainty should be resolved in favor of the enforceability of the arbitration provision for two reasons. First, as a matter of law, "ambiguities" in a form contract should be

"construe[d]" in consumers' favor. *Maersk Line, Ltd. v. United States*, 513 F.3d 418, 423 (4th Cir. 2008). Here, that rule requires interpreting the Great Plains agreement as permitting the arbitrator to apply U.S. law if applying tribal law would be unlawful. Second, in light of the strong federal policy favoring arbitration, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25.

To the extent that it is at all uncertain whether the arbitrator will apply tribal law—and here there is every reason to believe that the arbitrator will not do so—that uncertainty bars Dillon's "prospective waiver" defense to the enforcement of his arbitration agreement. As the Supreme Court has reiterated, when there is doubt as to whether an arbitrator will interpret the contract to allow the vindication of the plaintiff's federal claims, "the proper course is to compel arbitration." *PacifiCare*, 538 U.S. at 407; *see also Vimar*, 515 U.S. at 541 ("mere speculation that the foreign arbitrators might apply Japanese law which … might reduce respondents' legal obligations" was not sufficient to void arbitration agreement); *accord Aggarao*, 675 F.3d at 373 & n.16 (compelling arbitration because "[i]t is possible that" either the "arbitrator[] will apply United States law" despite the

foreign choice-of-law clause or the plaintiff might "vindicate the substance of those claims under Philippine law and obtain an adequate remedy").

c. Even if tribal law were applicable, Dillon has failed to show that he would fare better under U.S. law.

Finally, even in the highly unlikely scenario in which the arbitrator insists on applying tribal law over the parties' objections, Dillon still has failed to meet his burden of proof under the "prospective waiver" doctrine. The *Hayes* panel described the selection of Cheyenne River Sioux law as a "choice of ***no*** law clause." 811 F.3d at 675 (emphasis added). But Dillon has never shown that Otoe-Missouria law, which his Great Plains agreement selects, deprives him of the rights and remedies that he is seeking under U.S. law. That failure of proof is fatal to Dillon's defense to enforcement of his arbitration agreement.

Under both Fourth Circuit and North Carolina law, "[t]here is no presumption that the law of foreign countries is unlike ours. One who would rely upon the differences between them must prove its existence." *The Hoxie*, 297 F. 189, 190 (4th Cir. 1924); *accord Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading, Ltd.*, 2009 WL 406688, at *5 (N.C. Super. Ct. Feb. 18, 2009) (applying North Carolina law to contracts with French choice-of-law clauses because the parties "have not provided this Court with any authority or evidence

from which it might discern how French law would" resolve the dispute).[17] Dillon wholly failed to meet this burden; he presented no evidence at all regarding the content of Otoe-Missouria tribal law or how it differs from U.S. law.

Indeed, Dillon may prefer the law of the Otoe-Missouria tribe. U.S. law would deny him relief because he ***profited*** from the loan for which BMO Harris processed ACH debits. Dillon alleged in his original complaint that BMO Harris processed ACH transfers for a December 2012 loan. JA 66-67. But Dillon did not dispute during the January 27, 2016 evidentiary hearing that those allegations are mistaken (JA 888, 899) and has since moved for leave to file an amended complaint that withdraws those allegations (DE No. 218-1 at 14). Instead, BMO Harris was involved with transfers for another loan in August 2013. JA 176-78.

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[17] *Accord, e.g.*, *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 440-41 (3d Cir. 1999) (applying the law of the forum rather than South African law because the appellant failed to "provide[] any evidence to prove the substance of that law"); *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 647 n.1 (9th Cir. 1981) ("Absent a showing to the contrary, it is presumed that foreign law is the same as the law of the forum."); *In re Parmalat Secs. Litig.*, 377 F. Supp. 2d 390, 420-21 (S.D.N.Y. 2005) (plaintiff's suggestions that "Italian law perhaps take a more expansive view" of certain claims is "not entitled to any weight" because "[i]n the absence of proof to the contrary, foreign law therefore may be presumed to be the same as local law."); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 136 cmt. f (1971) ("The local law of the forum determines which party must initially provide information about the foreign law and which party has the ultimate burden of persuading the court as to the content of the foreign law. Frequently, the local law of the forum will provide that the party who claims that the foreign law is different from the local law of the forum has the burden of establishing the content of the foreign law.").

But Dillon paid back only $101.90 of that $200 loan, and the rest was forgiven. JA 177-78. Thus, he is almost $100 ahead. Under U.S. law, Dillon thus would lack standing or the requisite injury to state a claim. *See*, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (Article III standing requires "an 'injury in fact'"); *Commercial Union Assur. Co. v. Milken*, 17 F.3d 608, 612 (2d Cir. 1994) (rejecting RICO claim in which the plaintiffs profited from the challenged transaction because, "without provable damages, no viable RICO cause of action may be maintained").

In sum, the district court erred in refusing to enforce Dillon's Great Plains arbitration provision under the "prospective waiver" doctrine. Dillon failed to show that there was any meaningful risk—much less definitely establish—that he would be deprived of the right to pursue his federal statutory claims in arbitration. Accordingly, his claims against BMO Harris should be sent to arbitration.

B. The District Court Erred in Failing to Grant Generations's Motion to Dismiss.

1. *Hayes* does not apply to this case because *Hayes* can only apply to claims allowing for statutory damages.

The district court also improperly applied the "prospective waiver" doctrine to the arbitration provision in the Western Sky agreement invoked by Generations.[18]

"The Supreme Court has rejected the 'concept that all disputes must be resolved under our laws and in our courts,' even when remedies under foreign law do not comport with American standards of justice." *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1017 (5th Cir. 2015), *cert. denied*, No. 15-305, 2016 WL 100832 (Jan. 11, 2016) (quoting *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 517 n.11 (1974)). This is especially true as applied to RICO claims. As the Second Circuit has recognized:

> It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement…. We refuse to allow a party's solemn promise to be defeated by artful pleading.

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[18] In several other cases, district courts have enforced the arbitration provision in the Western Sky loan agreement at issue here. *Williams v. CashCall, Inc.*, 92 F. Supp. 3d 847, 854 (E.D. Wis. 2015), *judgment entered*, 2015 WL 4430367, at *5 (E.D. Wis. July 16, 2015), *appeal dism'd*, No. 15-2699 (7th Cir. May 16, 2016); *Yaroma v. Cashcall, Inc.*, 2015 WL 5475258, at *5-6 (E.D. Ky. Sept. 16, 2015), *appeal docketed*, No. 15-6159 (6th Cir. Oct. 20, 2015); *Kemph v. Reddam*, 2015 WL 1510797, at *5-6 (N.D. Ill. Mar. 27, 2015).

Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1360 (2d Cir. 1993). In *Roby*, the Second Circuit held that a choice of law provision naming English law did not defeat an arbitration clause even if that choice of law precluded recovery under a RICO claim. *Id.; see also Suzlon Infrastructure, Ltd. v. Pulk*, 2010 WL 3540951, at *10 (S.D. Tex. Sept. 10, 2010) ("To the extent Suzlon argues that its inability to pursue RICO claims in arbitration should allow it to pursue all claims it has asserted in this litigation because that inability makes the arbitration agreement unenforceable on public policy grounds, the argument is unpersuasive."); *Grynberg v. BP P.L.C.*, 596 F. Supp. 2d 74, 80 (D.D.C. 2009) ("Courts have routinely held that the wrongs RICO seeks to prevent can be vindicated in arbitrations applying foreign law.").

As explained below (in Part II.C, *infra*), *Hayes* conflicts with *Mitsubishi Motors*, *Vimar*, *PacifiCare*, this Court's prior decision in *Aggarao*, and a number of lower court rulings. This conflict can be reconciled when one considers the issue in *Hayes*: whether the plaintiff was required to arbitrate claims under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p, and the Telephone Consumer Protection Act, 47 U.S.C. § 227. *Hayes*, 811 F.3d at 669. In both statutes, Congress set out specific monetary penalties in the form of statutory damages as punishment for violations of the act that apply regardless of amount of actual injury. Understandably, such a remedy is unlikely to be present under foreign law.

The district court erred in applying *Hayes* to Dillon's claims because Dillon's RICO claim, which is his only federal claim, does depend on actual harm and thus does not trigger the same sort of deference to United States penalty setting. Dillon presented no evidence that he would not be able to vindicate his purported injuries in an arbitration under the law of the Cheyenne River Sioux tribe. Simply because the Cheyenne River Sioux tribe may not have a statute that mirrors RICO does not mean that his Dillon's rights cannot be enforced under that law. *See, e.g., Suzlon Infrasturcture, Ltd. v. Pulk*, 2010 WL 3540951 (S.D. Tex. Sept. 10, 2010) ("The record shows that while Suzlon may not pursue a RICO cause of action in arbitration, it may pursue claims and remedies arising from the facts it uses as the basis of the RICO claim.").[19]

Contrary to the district court's conclusion, this Court did not hold in *Hayes* that the prospective waiver doctrine invalidates all choice-of-law clauses, and thus arbitration clauses, in the face of any federal claim. At most, the Court held that claims under the Fair Debt Collection Practices Act and Telephone Consumer

[19] In the analogous situation where a plaintiff has agreed to arbitrate under foreign law in a foreign forum, and then attempts to avoid arbitration of a federal securities fraud claim, "every circuit that has addressed th[e] issue except the Ninth Circuit" concluded that the motion to compel arbitration should be granted. *Haynsworth*, 121 F.3d at 960; *see also Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir.1996) ("In summary, the policies of the United States securities laws do not override the parties' choice of forum and law for resolving disputes in this case.").

Protection Act were entitled to such protection, and the district court erred in applying *Hayes* to Dillon's RICO and North Carolina claims.

Pursuant to Federal Rule of Appellate Procedure 28(i), Generations adopts by reference Sections II(A)(1) and II(A)(2)(c) above. Dillon has never shown that Cheyenne River Sioux tribal law, which his Western Sky agreement selects, deprives him of the rights and remedies that he is seeking with his RICO claim.[20]

2. The district court erred in failing to refer to the arbitrator the question of arbitrability raised by Dillon as to the loan agreement invoked by Generations.

The district court also erred in disregarding the delegation provision in the Western Sky loan agreement. As this Court has recognized, "parties may give arbitrability questions to an arbitrator." *Hayes*, 811 F.3d at 671 n.1. The parties did so here. JA 129.

Courts do have the authority to decide a direct challenge specifically to the enforceability of the delegation clause. *Rent-A-Center*, 561 U.S. at 77-78. While the Court concluded that the plaintiff in *Hayes* had adequately challenged the delegation provision (*Hayes*, 811 F.3d at 671 n.1), Dillon did not do so, but instead challenged the arbitration agreement as a whole. Specifically, in his response to

[20] There should be no question that the choice-of-law provision may preclude Dillon's state-law claims. When it comes to state law, "parties' choice of law has been held to validate interest rates that would be usurious and unenforceable in the jurisdiction whose law would prevail absent the contractual stipulation of controlling law." *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1031 (4th Cir. 1983).

Generations's motion to dismiss, Dillon merely announced, in summary fashion, that he "specifically challenges the delegation provision" of the Arbitration Provisions. JA 236-37. Dillon made no argument specific to the delegation provision. Instead he argued that the entire arbitration agreement was invalid for a multitude of reasons, including that argument the district court adopted – that the "governing law" provision of the arbitration clause was a *per se* impermissible prospective waiver of statutory remedies. JA 241. In the absence of a direct challenge to the delegation clause, the district court erred in reaching Dillon's challenge to the legality of the arbitration clause because that challenge had been delegated to the arbitrator.

C. *Hayes* Is Wrongly Decided.

Defendants acknowledge that this panel is bound by *Hayes*. But Defendants respectfully submit that *Hayes* was wrongly decided. By permitting courts to refuse to enforce arbitration agreements that contain foreign choice-of-law clauses, without permitting the arbitrator to decide in the first instance whether that clause is enforceable or whether the claimant may recover under foreign law, *Hayes* contravenes the Supreme Court's decisions in *Mitsubishi Motors*, *Vimar*, and *PacifiCare* and this Court's prior decision in *Aggarao*.

In addition, by deciding the challenge to the choice-of-law clause in the contract, *Hayes* runs afoul of the rule that challenges to the validity of the

underlying contract as a whole—as opposed to the arbitration provision in particular—are reserved for the arbitrator. *See, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

Finally, the *Hayes* panel erroneously assumed that the Cheyenne River Sioux Tribe has no applicable law.

CONCLUSION

The district court's orders denying Defendants' renewed motions to enforce Dillon's arbitration agreements should be vacated and remanded so that arbitration may be compelled pursuant to those agreements.

REQUEST FOR ORAL ARGUMENT

Defendants respectfully request oral argument. This appeal raises important issues in this Circuit regarding both the evidentiary burdens applicable to motions to compel arbitration and the scope of the "prospective waiver" defense to arbitration agreements that include foreign choice-of-law clauses. Oral argument will enable the parties to address those issues adequately and respond to any questions or concerns that the Court may have.

Dated: May 31, 2016

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CERTIFICATE OF COMPLIANCE

On May 3, 2016, the Court entered an order granted an extension of the length limitation for this consolidated opening brief to 15,400 words. Order, Dkt. No. 32, at 1.

In accordance with that order and Federal Rules of Appellate Procedure 28(a)(10) and 32(a), I certify that this consolidated opening brief consists of 15,073 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I certify that on this 31st day of May, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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