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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INTRODUCTION

Plaintiff James Dillon effectively agrees that Bay Cities's motion to compel arbitration should have been granted if it submitted arbitration agreements that were authenticated in accordance with Federal Rule of Evidence 901. Thus, Dillon does not attempt to defend the district court's rationale for denying the motion, which was not based on a finding under Rule 901, but instead on the legally erroneous premise that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, requires the movant to do more than produce an executed arbitration agreement that satisfies Rule 901. And Dillon's suggestion that Bay Cities's proffer did not satisfy Rule 901 runs counter to binding precedent.

Dillon's attempt to defend the denial of BMO Harris's and Generations's arbitration motions fares no better. Dillon concedes the orders below would be erroneous in the international-arbitration setting, where a contention that a foreign choice-of-law clause is a "prospective waiver" of federal statutory rights is not ripe until there is proof that the plaintiff cannot vindicate those rights in arbitration, and Dillon has no such proof. But the Supreme Court precedent extending the prospective-waiver doctrine to domestic arbitrations confirms that the same burden of proof still applies here. The district court therefore erred as a matter of law in denying BMO Harris's and Generations's arbitration motions.

The court further erred in denying Generations's motion because it invoked an arbitration clause that delegates questions of arbitrability to the arbitrator. By hearing Dillon's prospective-waiver challenge, the district court usurped the role of the arbitrator to decide the issue.

The orders below should be vacated and remanded for the district court to consider Dillon's remaining, unaddressed objections to enforcement of his arbitration agreements. JA1022-49.

ARGUMENT

I. The District Court Erred As A Matter Of Law By Denying Bay Cities's Motion To Compel Arbitration For Failing To Meet A Heightened—And Inapplicable—Burden Of Proof.

Dillon's brief ("Appellee's Br.") confirms that much of Bay Cities's argument on appeal is undisputed. Dillon concedes that if a movant seeking to compel arbitration meets its initial burden of producing evidence of an arbitration agreement, the burden shifts to the opponent to make an "unequivocal denial that the agreement has been made," supported by evidence, in order to raise a triable issue. Appellee's Br. 18 (citing *Drews Distrib., Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 352 n.3 (4th Cir. 2001)). It is also undisputed that Dillon has not offered the "unequivocal denial" required at the second step—meaning he could prevail only if Bay Cities never met its burden under the first step. *Id.*

Dillon's chief argument is that Bay Cities failed to meet that burden because the copies of his executed loan agreements submitted by Bay Cities, which contain arbitration provisions, were not authenticated in compliance with Rule 901. *Id.* at 18-19. Dillon thus tacitly agrees that authenticated loan documents would serve as sufficient evidence that he agreed to arbitrate so as to trigger a duty on his part to unequivocally deny that he so agreed (and to produce supporting evidence).

There are two problems with this argument. First, it is not what the district court held. The district court stated in court that the agreements were likely admissible under a Rule 901 analysis. The district court instead denied Bay Cities's arbitration motion on the premise that Bay Cities was required to do more than produce an admissible loan agreement, which was legal error. Second, Dillon's legal analysis of Rule 901 is incorrect—the standard is not as demanding as Dillon suggests, and was amply satisfied by Bay Cities here.

A. The District Court Required Bay Cities To Show More Than Admissibility To Satisfy Its Initial Burden.

The district court's error can be summarized as follows: in addition to requiring Bay Cities to submit arbitration agreements that are admissible under Rule 901, the district court held that Section 4 of the FAA required Bay Cities to go further and "satisfy" the court with evidence it deemed "credible" that Dillon had agreed to arbitrate—even though Dillon admitted to executing online loan

agreements with USFastCash and Vin Capital and did not assert that the copies of his agreements that Bay Cities had proffered were inauthentic. JA1033, 1040-41.

But the FAA does not impose that heightened burden. Joint Opening Br. of Defendants-Appellants ("Opening Br.") 27-32. Section 4's provision that the district court should be "satisfied" that the making of the agreement is not "in issue" has nothing to do with an analysis of whether the moving party has produced admissible evidence that an arbitration agreement exists. Instead, the "satisfied" provision addresses the third step of the analysis under *Drews* and similar cases, which takes place only after each party has met its initial burden and the making of the agreement has been placed "in issue." *See* Opening Br. 25-29; *Drews*, 245 F.3d at 352 n.3; 9 U.S.C. § 4.[1]

Rather than defend the district court's imposition of a heightened standard, Dillon portrays the decision below as a discretionary ruling that Bay Cities's

[1] Under this framework, if the proponent of arbitration meets its initial burden to show that a written arbitration agreement exists, the burden shifts to the opponent to provide an unequivocal denial that the agreement had been made, supported by evidence (the second step). *Drews*, 245 F.3d at 352 n.3. If the opponent meets that burden by showing the existence of an issue of fact, then the making of the agreement has been placed "in issue" (9 U.S.C. § 4), and the court must determine whether there is a genuine issue of fact requiring a trial (the third step). If the opponent does not meet that burden, however, the making of the agreement is not "in issue," and "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.*

evidence should be excluded under Rule 901.[2] Appellee's Br. 24-25. But that characterization is contradicted by the district court's order, which repeatedly formulated Bay Cities's burden as requiring more than admissibility under Rule 901. For example, the court stated that the "initial burden on a proponent of an arbitration agreement" is not only to present an agreement that is admissible under "Rule 901," but that "[a]dditionally, the FAA requires that the Court be 'satisfied' there is an agreement to arbitrate." JA1042; *see also, e.g.*, JA1031 (requiring "admissible evidence" that is "credible" "to support a finding of an agreement to arbitrate"); *id.* at 1032 (proponent must produce "*credible*, admissible evidence *which satisfies the Court* that there was an arbitration agreement") (emphasis added).

In fact, at the hearing, the district court stated to Bay Cities's counsel: "I actually think you have a pretty good argument that it's admissible. That's just sort of the next—then is it credible and so that's—because I think you're right about 901. It's a very low test. If this were a jury trial and you were going to put it in front of the jury, I would say okay, yeah, probably good enough. And then they'd have to decide." JA872:11-17.

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[2] Dillon also attacks a strawman argument that Bay Cities has *no* burden to show the existence of an arbitration agreement. Appellee's Br. 24, 34-35, 37. But Bay Cities has never made that argument, either below or on appeal.

The district court's discussion of why it was not "satisfied" with Bay Cities's evidence confirms that the court was deviating from Rule 901. The district court faulted Bay Cities for not adducing evidence to rule out any possibility that third parties had altered the electronic loan agreements—even though there was no evidence to suggest that possibility and Dillon did not deny that the proffered documents were genuine. JA1032-44, 1047. Although Dillon repeats the district court's observation that electronic documents present "special risks of fraud and error" (Appellee's Br. 17-18), nothing in Rule 901 or any authority cited by Dillon requires the proponent of a document to negate all conceivable hypotheticals in which the document might have been forged. Further, Dillon offers no arguments to respond to Bay Cities's demonstration that there is no legal basis to impose a higher standard for admissibility of electronic documents. Opening Br. 35-37. To the contrary, Rule 901 requires merely that the proponent of a document "produce evidence sufficient to support a finding that the item is what the proponent claims it is." FED. R. EVID. 901(a). As discussed next, Bay Cities met that burden.

B. Bay Cities Met Its Burden Of Production.

Dillon's argument that the agreements Bay Cities proffered could have been excluded under Rule 901 is based on a misreading of the Federal Rules of Evidence and rests on inapplicable authority.

1. Dillon's legal analysis of the applicable Rules of Evidence is wrong.

Dillon's contention that the order below could be sustained as an exercise of discretion to exclude evidence under Rule 901 is mistaken. Rule 901 requires the proponent to make a *prima facie* showing of authenticity, tasking the district court with serving "as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." *United States v. Cornell*, 780 F.3d 616, 629 (4th Cir. 2015) (internal quotation marks omitted). It is settled that that foundation may be established even through "circumstantial evidence that the documents in question are what they purport to be," and the proponent need not "establish a perfect chain of custody or documentary evidence to support their admissibility." *United States v. Vidacak*, 553 F.3d 344, 350 (4th Cir. 2009).

Moreover, Rule 104(a) specifies that the "court must decide any preliminary questions" about whether "evidence is admissible," and Rule 104(b) provides that when "the relevance of evidence depends upon whether a fact exists," the proponent must submit proof "sufficient to support a finding that the fact does exist." But in making this determination, "the trial court neither weighs credibility nor makes a finding that" the proponent "has proved the conditional fact by a preponderance of the evidence." *Huddleston v. United States*, 485 U.S. 681, 690 (1988). Instead, if the other party denies that fact or submits contrary evidence,

issues of credibility or the weight of the evidence are decided by the jury. *Id.* But because Dillon neither denied the authenticity of the agreements that Bay Cities submitted nor submitted any contrary evidence, the court's gatekeeper role is limited to determining whether a trier of fact who deems Bay Cities's evidence to be credible *could* find that the agreements have been authenticated.

Dillon contends that Rule 104 is inapposite because "the court here … determined [that the loan agreements] were *not authentic* under Rule 901." Appellee's Br. 35 (emphasis in original). But this is precisely where Rule 104(b) comes into play. A finding that the loan agreements were not authentic under Rule 901 is the exact type of factual finding that Rule 104(b) and *Huddleston* prohibit in making an admissibility determination, *viz.*, that Bay Cities failed to prove the conditional fact (the loan agreements' authenticity) by a preponderance of the evidence. Instead, the district court's role under both Rule 901 and Rule 104 was to determine whether Bay Cities had offered evidence sufficient to support a trier of fact in finding that the loan agreements were authentic. *See, e.g.*, *Huddleston*, 485 U.S. at 690; *United States v. Pantic*, 308 F. App'x 731, 733 (4th Cir. 2009) (Rule 901(a) requires the proponent merely to present "evidence sufficient to support a finding that the matter in question is what the proponent claims") (internal punctuation and citations omitted). Bay Cities met that burden.

2. Dillon relies upon inapposite authority.

None of the decisions that Dillon cites supports his view that the district court could have denied Bay Cities's arbitration motion under Rule 901. In attempting to argue that Bay Cities had to satisfy specific "requirements" other than a prima facie showing of authenticity to meet its initial burden, Dillon cites to cases that contain no such holdings. For example, contrary to Dillon's assertion, *Crawford v. Tribeca Lending Corp.*, 815 F.3d 121 (2d Cir. 2016), did not *require* testimony from several witnesses tending to demonstrate that the loan agreements at issue were authentic. Appellee's Br. 38. It merely found that the evidence submitted by the proponent of arbitration, which included testimony from several witnesses, was sufficient. *Crawford*, 815 F.3d at 126. Likewise, in *Oppenheimer & Co. v. Neidhardt*, 56 F.3d 352 (2d Cir. 1995), the Second Circuit did not *require* the proponent of arbitration to make "a showing of evidentiary facts" sufficient to demonstrate that there are no genuine issues for trial (Appellee's Br. 35), but rather articulated the burden imposed upon the party resisting arbitration if the proponent has made such a showing. *Oppenheimer*, 56 F.3d at 358-59.

Dillon also cites *Pearson v. United Debt Holdings, LLC*, 123 F. Supp. 3d 1070 (N.D. Ill. 2015), which denied a motion to compel arbitration for lack of an authenticated arbitration agreement. *Id.* at 1074. But there, the movant had failed to meet its prima facie burden because it submitted *no* evidence of authenticity—

there was no authenticating affidavit, no argument that the loan agreement at issue was self-authenticating, and no witness affirmation that the document actually bore Pearson's electronic signature. *Id.* at 1073-74. Accordingly, the court held that the proponent had "not carried its initial burden of providing threshold evidence that demonstrates that the document is what [the proponent] says it is." *Id.* at 1074.

Here, by contrast, Bay Cities provided ample evidence that the proffered documents are in fact Dillon's loan agreements. Bay Cities demonstrated the self-authenticating nature of the loan agreements due to the personal information appearing within them that Dillon admittedly supplied, and Dillon himself repeatedly affirmed that he electronically signed the agreements. Opening Br. 7-9, 12, 37-40. Bay Cities also provided authenticating declarations that further support this conclusion. *Id.* at 40-41.[3] Bay Cities met the *Pearson* court's test.

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[3] Dillon's reliance upon the district court's criticisms of those declarations (Appellee's Br. 32) is misplaced. As noted above, the district court improperly considered issues of weight and credibility, which is forbidden by Rule 104(b). Moreover, Dillon ignores the fact that those declarations were not the only evidence of authenticity—Dillon's own testimony regarding his clicking to accept the agreements, his inputting personal information into the agreements, and the self-authenticating nature of the documents provide powerful support for admissibility. Opening Br. 7-9, 12, 37-40. Indeed, Dillon's relative silence regarding his own testimony is telling here, particularly considering that he repeatedly admitted electronically signing loan agreements, which directly contrasts to the situation in *Pearson* and other cases relied upon by Dillon. *See, e.g.*, *Henggeler v. Brumbaugh & Quandahl, P.C., LLO*, 894 F. Supp. 2d 1180, 1187 (D. Neb. 2012).

In sum, the district court applied the wrong standard to deny Bay Cities's motion to compel arbitration by requiring Bay Cities to show more than the loan agreements' admissibility under Rule 901. And that error was not harmless, because Dillon's assertion that Bay Cities's evidence that he agreed to arbitrate could have been excluded under Rule 901 is mistaken.

II. The District Court Erred By Relieving Dillon Of His Burden Of Proof Under The Prospective-Waiver Doctrine To Resist Arbitrating His Claims Against BMO Harris And Generations.

Dillon contends that the district court properly denied BMO Harris's and Generations's arbitration motions under the prospective-waiver doctrine applied in *Hayes v. Delbert Services Corp.*, 811 F.3d 666 (4th Cir. 2016), because the invoked arbitration agreements contained foreign choice-of-law clauses. Appellee's Br. 40-41. But that doctrine applies only if the plaintiff proves that he or she will be deprived of federal statutory rights in arbitration—and Dillon made no attempt to do so.

A. Dillon Has The Burden To Prove He Would Be Denied Federal Statutory Rights In Arbitration.

Dillon concedes (Appellee's Br. 44-45) that, under *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995), and *Aggarao v. MOL Ship Management Co.*, 675 F.3d 355, 373 (4th Cir. 2012), plaintiffs cannot avoid enforcement of an arbitration agreement based on "mere speculation" that an arbitrator might "apply [foreign] law" to deprive them of federal statutory rights.

Vimar, 515 U.S. at 541; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637-38 (1985). Dillon acknowledges that these holdings—if applicable—would bar his prospective-waiver challenge. Appellee's Br. 44-45. But he asserts that they govern challenges only to international arbitration agreements subject to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Agreements. *Id.*[4]

Dillon is mistaken. The prospective-waiver doctrine applied in domestic, non-Convention arbitrations was adopted in its entirety from Convention cases. Indeed, the *Hayes* Court made clear that the prospective-waiver doctrine comes from *Mitsubishi*, a Convention case. *See Hayes*, 811 F.3d at 674-75 (citing a decision quoting *Mitsubishi* for the proposition that the doctrine "'prevent[s] [a] "prospective waiver of a party's *right to pursue* statutory remedies"'") (first alteration added). The same is true of the non-Convention cases that *Hayes* cites as applying or discussing the doctrine.[5] There is no reason to suppose that *Hayes* or

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[4] The Convention is codified in Chapter 2 of the FAA, 9 U.S.C. §§ 201-08, which authorizes district courts to compel arbitration outside the United States (*id.* § 206), which normally would be forbidden under Chapter 1, which governs domestic cases (*id.* § 4; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 327-28 (7th Cir. 1995)). Otherwise, the nonconflicting provisions of Chapter 1 apply to proceedings to enforce arbitration agreements subject to the Convention. 9 U.S.C. § 208.

[5] *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (citing *Mitsubishi*); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (same); *Kristian v. Comcast Corp.*, 446 F.3d 25, 47 (1st Cir. 2006) (same).

any other non-Convention case adopted the prospective-waiver doctrine but jettisoned its burden of proof.

To the contrary, even in non-Convention cases, the Supreme Court has reiterated that plaintiffs invoking the prospective-waiver doctrine must prove that they actually would be deprived of statutory rights in arbitration. For example, in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), a non-Convention case, the plaintiff argued that the "'risk' that she will be required to bear prohibitive arbitration costs" caused the arbitration agreement to function as an improper waiver of "her statutory rights[.]" *Id.* at 90. The Court rejected the argument because the plaintiff had failed to "meet [her] burden" of "showing the likelihood of incurring such costs." *Id.* at 92.

Similarly, in *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003), another non-Convention case, the Supreme Court denied a prospective-waiver challenge to a contractual limitation on remedies for lack of proof about "how the arbitrator will construe the remedial limitations." *Id.* at 407. Critically, the Court explained that "[o]ur decision in *Vimar Seguros Reaseguros, S.A. v. M/V Sky Reefer*"—***a Convention case***—"supplies the analytic framework for assessing the ripeness of this dispute" and confirms that "'mere speculation'" about what the arbitrator might do is not "an adequate basis upon which to declare the relevant arbitration agreement unenforceable." *Id.* at 404-05 (quoting *Vimar*, 515 U.S. at

541). *Randolph* and *PacifiCare* confirm that Dillon's assumption that *Vimar* is irrelevant in non-Convention cases is mistaken.[6]

Moreover, lower courts—including this one—agree that plaintiffs bear a burden of proof under the prospective-waiver doctrine in non-Convention cases. For example, in *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274 (4th Cir. 2007), a non-Convention case, this Court held that "[t]he party seeking to avoid arbitration bears the burden of establishing that he cannot effectively vindicate his statutory rights under the terms of an arbitration agreement." *Id*. at 283. This "burden," the Court explained, "is a substantial one and cannot be satisfied by … speculation about difficulties that *might* arise in arbitration." *Id*. at 286-87.[7]

Dillon asserts that *Hayes* did not require proof that the tribal choice-of-law clause would deprive the plaintiffs of statutory rights. Appellee's Br. 47. But the

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[6] Dillon notes that *PacifiCare* did not involve a choice-of-law clause. Appellee's Br. 46. But that is a distinction without a difference: the "party seeking to avoid arbitration bears the burden" of establishing that the prospective-waiver doctrine is met (*Randolph*, 531 U.S. at 92), regardless of whether the challenge is to a limitation on remedies (*PacifiCare*), the allocation of arbitration costs (*Randolph*), or a choice-of-law clause (as here).

[7] *Accord, e.g.*, *Escobar-Noble v. Luxury Hotels Int'l of Puerto Rico, Inc.*, 680 F.3d 118, 124 (1st Cir. 2012); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298 (2d Cir. 2013); *Black Box Corp. v. Markham*, 127 F. App'x 22, 24 n.3 (3d Cir. 2005); *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 763-65 (5th Cir. 1999); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 314 (6th Cir. 2000); *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 722-23 (9th Cir. 1999); *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1028 (11th Cir. 2003).

Hayes Court did not need to discuss the burden of proof; it was met for at least three reasons. First, the defendant was arguing that the clause extinguished the plaintiffs' U.S.-law claims. 811 F.3d at 670. Second, there was no dispute about whether the tribal choice-of-law clause would govern. *See id.* at 673-74. And third, the *Hayes* Court had concluded that selecting the law of the Cheyenne River Sioux Tribe with respect to claims under the Telephone Consumer Protection Act ("TCPA") and Fair Debt Collection Practices Act ("FDCPA") was effectively a "choice of no law clause." *Id.* at 675.

By contrast, none of those factors is present here. BMO Harris is not invoking tribal law. Whether the arbitrator would apply tribal law to the claims against BMO Harris is hotly contested. And Dillon has never shown that tribal law would deprive him of a remedy against BMO Harris or Generations comparable to the remedies he seeks under RICO.

Dillon's position that *Hayes* allows U.S. plaintiffs to evade enforcement of any arbitration agreement with a foreign choice-of-law clause would unsettle numerous commercial contracts involving foreign subject matters. Under Dillon's view, even contracts selecting foreign law comparable to or more pro-plaintiff than

U.S. law (such as the laws of some Middle Eastern nations with respect to usury) would be unenforceable. That is not the law.[8]

In sum, Dillon's theory that his only burden under the prospective-waiver doctrine is to point to a foreign choice-of-law clause is mistaken as a matter of law, and the ruling below relieving him of his actual burden was legal error.

B. Dillon Failed To Meet His Burden To Prove That The Mere Existence of A Tribal Choice-Of-Law Clause Prevents Him From Effectively Vindicating His U.S.-Law Claims Against BMO Harris.

The district court's error in overlooking Dillon's burden of proof was not harmless. There is every reason to believe that Dillon could vindicate his U.S.-law claims against BMO Harris in arbitration: BMO Harris had agreed to apply U.S. law in arbitration, the arbitrator could invalidate the choice-of-law clause, and Dillon failed to show how U.S. and Otoe-Missouria law differ. Opening Br. 54-56. Dillon's responses to these points are meritless.

1. BMO Harris has agreed that the arbitrator may apply U.S. law, mooting the need to consider the tribal choice-of-law clause.

Dillon first asserts that BMO Harris's commitment to request that the arbitrator apply U.S. rather than tribal law came too late in the litigation. Appellee's Br. 48-49. But BMO Harris has ***never*** contended that the tribal choice-

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[8] To the extent that *Hayes* relieves plaintiffs of the burden of proof imposed by *Mitsubishi*, *Vimar*, and *Aggarao*, defendants respectfully preserve the contention that it was wrongly decided.

of-law clause bars Dillon's claims. To the contrary, BMO Harris's first substantive response to the complaint—its motion to dismiss—made clear that its position is that Dillon's claims fail under U.S. law. DE No. 39 at 9-25.

Even if BMO Harris had waited to agree to U.S. law until Dillon objected, binding precedent confirms that BMO Harris's agreement is timely. In *Mitsubishi*, the Supreme Court credited a waiver of foreign law even though it was not made until ***oral argument in the Supreme Court***. 473 U.S. at 637 ("At oral argument, however, counsel for Mitsubishi conceded that American law applied to the antitrust claims.").

Dillon next contends—erroneously—that BMO Harris cannot agree to apply U.S. law because the *Hayes* Court refused to sever the tribal choice-of-law clause in that case under the contract-law principles governing the severance of unenforceable contract terms. Appellee's Br. 50 (citing *Hayes*, 811 F.3d at 675-76). But BMO Harris is not invoking that contract-law doctrine. Instead, BMO Harris is relying on the conflict-of-law principle that when (as here) "'the parties agree'" during the litigation as to what "'law governs their claims,'" "courts typically need not inquire into the validity of a choice of law provision." *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)). Indeed, Dillon concedes that parties are "free to consent to

the application of the forum law," despite a choice-of-law clause. Appellee's Br. 49; *see also Cosey v. Prudential Ins. Co.*, 735 F.3d 161, 169 n.7 (4th Cir. 2013). Thus, the choice-of-law clause would not apply in the first place—and so questions about its enforceability and severability, which were addressed in *Hayes*, never arise.

Finally, Dillon complains—irrelevantly—that Great Plains has not agreed to apply U.S. law. Appellee's Br. 50. But Dillon has not sued Great Plains. Nor would it be a party to the arbitration. Further, contrary to Dillon's assumption (*id.*), Great Plains cannot challenge an award resolving his claims against BMO Harris under tribal law, either in tribal (or any other) court. Instead, because this action would remain pending (albeit stayed during arbitration), the court below would retain exclusive jurisdiction to confirm or vacate the award. 9 U.S.C. §§ 9-10.

2. Even if BMO Harris were invoking tribal law, the arbitrator could set aside the tribal choice-of-law clause if it is unlawful.

Dillon's insistence that the arbitrator could not disregard the agreement's tribal choice-of-law clause (Appellee's Br. 53-54) is equally meritless. Even if BMO Harris were invoking that clause—and it is not, mooting the issue—the arbitrator has the same power as a court to set aside the choice-of-law clause if it is unlawful. "[B]y agreeing to arbitrate" a dispute, "a party does not forgo the

substantive rights afforded" under governing law; "it only submits their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 628. That principle applies whether the right in question is a statutory right to sue (as in *Mitsubishi*) or the right under conflict-of-laws rules to challenge a choice-of-law clause. Unless Dillon believes that even a court would be bound to apply tribal law—and he does not—an arbitrator also would not be bound. An "arbitration agreement … only determines the choice of forum." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002).

Moreover, despite the repeated references in the Great Plains agreement to the arbitrator applying tribal law, which Dillon recounts (Appellee's Br. 53-54), the arbitrator may conclude that the choice-of-law clause is not binding if it is unlawful. The contract language that Dillon identifies, which states that Otoe-Missouria law "shall" apply or "governs" (JA311-13), is simply an emphatic way of describing the default effect of a choice-of-law clause. Nothing in the agreement, however, says that the arbitrator cannot apply normal conflict-of-laws principles.[9] Nor does Dillon deny that any ambiguity in the agreement about

[9] Indeed, choice-of-law clauses frequently state that a particular law "shall" apply or "governs," and that language is not treated as barring consideration of the clauses' enforceability. *See, e.g., Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1228-29 (6th Cir. 1995) (considering and rejecting as meritless a public-policy challenge to clause specifying that the parties' rights "shall be governed by" English law); *Carroll v. CMH Homes, Inc.*, 2013 WL 2431432, at *4 (E.D. Tenn. June 4, 2013)

whether the arbitrator may set aside the choice-of-law clause must be construed in the consumer's favor as permitting the application of U.S. law. *Maersk Line, Ltd. v. United States*, 513 F.3d 418, 423 (4th Cir. 2008). When there is any doubt as to whether an arbitrator will interpret the contract to allow the assertion of a federal right or remedy, "the proper course is to compel arbitration." *PacifiCare*, 538 U.S. at 407.

3. Dillon has not identified any difference between tribal and U.S. law, much less one that would affect the merits of his claims.

Finally, Dillon simply ignores his failure to make any showing that Otoe-Missouria law differs from U.S. law. Instead, he declares—without support—that a choice of Otoe-Missouria law is akin to a "choice of no law clause." Appellee's Br. 55. That is insufficient. Fourth Circuit law presumes that foreign law is the ***same*** as federal law, absent proof to the contrary. *The Hoxie*, 297 F. 189, 190 (4th Cir. 1924).

Moreover, even if Dillon's claims against BMO Harris were foreclosed under Otoe-Missouria law, he gives no reason to believe that he would fare better under U.S. law. Indeed, because he ***profited*** from the challenged loan—he paid back only $101.90 of the $200 loan, and the remainder was forgiven (JA177-78)—

(same for clause saying that contract "shall be interpreted" under Tennessee law); *Hart v. World Wrestling Entertainment*, 2012 WL 1233022, at *6-*7 (D. Conn. Apr. 10, 2012) (same for contract that "shall be governed by" Connecticut law).

he has no claim under U.S. law. *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) ("without provable damages, no viable RICO cause of action may be maintained").

In sum, Dillon's theory that the tribal choice-of-law clause will prevent him from arbitrating U.S.-law claims against BMO Harris rests on false assumptions about what an arbitrator might do. But that sort of rank "speculation" is insufficient to "justify the invalidation of an arbitration agreement." *Randolph*, 531 U.S. at 91.

III. The District Court Additionally Erred By Failing To Grant Generations's Motion To Dismiss Because *Hayes* Applies Only To Claims Allowing For Statutory Damages, Dillon Did Not Properly Challenge The Delegation Provision, And The Analysis Of What Law An Arbitrator Might Apply Is Premature.

Dillon repeatedly misrepresents Generations's arguments. For example, he claims that Generations's appeal turns on whether the arbitration agreement it invokes "materially" differs from the ones at issue in *Hayes*. Appellee's Br. 1. This is incorrect. It is not the arbitration agreement that differs, it is the claims pled by Dillon and whether he sufficiently challenged the delegation provision. Dillon also mischaracterizes Generations's argument regarding the significance of Dillon's RICO claim to the Court' analysis as one "focused on the issue of

standing to assert federal claims" (*id.* at 57), when the issue is instead about the availability of remedies.[10]

Dillon's attempts to mislead this Court aside, the district court erred in applying *Hayes* to preclude arbitration at this stage of the proceedings. Pursuant to Federal Rule of Appellate Procedure 28(i), Generations adopts by reference Part II.A, II.B.2, and II.B.3 above. Because Dillon failed to meet his burden to prove that he would be deprived of federal statutory rights in arbitration, and because the arbitrator should decide in the first instance whether tribal or U.S. law applies to Dillon's claims, the trial court erred in denying Generations's motion.

A. Plaintiff's RICO Claim Is Not A "Statutory Damage" Claim That Cannot Be Waived.

Generations previously explained that the prospective-waiver doctrine does not apply at all to state-law claims and does not apply to federal claims, such as

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[10] Dillon also misrepresents the sanctions motion pending before the district court, which argues not that "an objection may not be lodged to the admission of unauthenticated documentary evidence unless the objecting party is absolutely certain the document is not authentic," Appellee's Br. 5 n.1, but instead explains that one may not object to the opposing party's failure to authenticate a document when one has received an identical copy of the document from his client and relied upon its terms in bringing suit. Relatedly, while Dillon claims that he "voluntarily dropped" his authentication challenge to the Western Sky loan agreement proffered by Generations based on "recent decisions" (Appellee's Br. 6 & n.2), three of the four decisions predate the March 2015 oral argument in this Court where Dillon's counsel did not withdraw his authenticity challenge to the Generations proffered agreement but instead told this Court that "[t]here was good cause for Dillon to challenge the authenticity of the payday loan agreements offered by Defendants." *Dillon I*, No. 14-1728, ECF No. 36, at 37-38 (internal quotation marks omitted).

RICO, for which a plaintiff may be fully compensated under foreign laws. *See* Opening Br. 45-48, 57-60. Dillon responds that the prospective-waiver doctrine applies because his RICO claim is a claim for "statutory damage." Appellee's Br. 55-57.

Dillon has missed Generations's point—which is that given Supreme Court precedent, *Hayes* must apply only to federal claims for statutory damages *for which there is no comparable remedy under foreign law*. The plaintiff in *Hayes* sought to avoid arbitration of claims under the FDCPA and TCPA. *Hayes*, 811 F.3d at 669. Each of these statutes authorizes the recovery of minimum statutory damages, regardless of the amount of actual injury. Specifically, the TCPA provides for a minimum of $500 per violation payable in a private right of action. 47 U.S.C. § 227. The FDCPA likewise provides that a debt collector violating its requirements is liable not only for "actual damages," but also for "additional damages" of up to "$1,000" in an individual action and up to "$500,000 or 1 per centum of the net worth of the debt collector" in a class action. 15 U.S.C. § 1692k(a)(2). Thus, these statutes create remedies that are not likely to be provided by foreign statutory or common law.

RICO, on the other hand, does not provide for fixed or minimum amounts for violations of the act, regardless of the amount of actual injury. Although RICO does provide for treble damages, these damages are, "remedial in nature," to

provide a remedy for economic injury suffered as a result of the violative conduct. *PacifiCare*, 538 U.S. at 406. Damages recoverable under RICO scale with the economic injury, and foreign law frequently authorizes recovery for those injuries. For this reason, "[c]ourts have routinely held that the wrongs RICO seeks to prevent can be vindicated in arbitrations applying foreign law." *Grynberg v. BP P.L.C.*, 596 F. Supp. 2d 74, 80 (D.D.C. 2009); *see also Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993) (compelling arbitration even if English choice-of-law clause precluded recovery under RICO claim); *Allen v. Lloyd's of London*, 94 F.3d 923, 930 (4th Cir. 1996) (same); *Suzlon Infrastructure, Ltd. v. Pulk*, 2010 WL 3540951, at *10 (S.D. Tex. Sept. 10, 2010) (rejecting argument that inability to pursue RICO claims in arbitration makes arbitration agreement unenforceable on public policy grounds).

Dillon recognizes that *Roby* stands for the proposition "that a RICO claim may be knowingly waived with a bona fide choice of foreign law clause in a contract," but then recites his oft-repeated quote from *Hayes* that the Western Sky loan agreement contains a "choice of no law clause" because it renounces the authority of federal statutes. Appellee's Br. 56. But Dillon has never shown that the Cheyenne River Sioux law selected by that agreement has no remedy comparable to RICO for the injuries he alleges. And as the cited authorities demonstrate, the choice of law in the Western Sky loan agreement is not a "choice

of no law" when it comes to RICO claims precisely because such claims *may* be waived by selecting foreign law. In order to avoid arbitration, Dillon must show that he cannot adequately enforce his rights under the laws that he agreed would govern his loan agreement. He has not done so.[11]

B. Dillon Has Not Properly Challenged The Delegation Provision.

Dillon further asserts that he properly challenged the delegation provision in the Western Sky arbitration agreement. Appellee's Br. 58-60. But he failed to specifically challenge any particular aspect of the delegation provision and rather challenged the entire Western Sky agreement as a whole. Accordingly, the enforceability of the arbitration provision is a question for the arbitrator.

Dillon claims that all that is required to "specifically challenge" a delegation provision, as required by *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010), is for the plaintiff to recite that he or she "specifically challenges the delegation provision." Appellee's Br. 58-59. Dillon attempts to bolster this argument by quoting *Rent-A-Center*'s statement that "[i]t *may be* that had Jackson challenged

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[11] Dillon asserts that *PacifiCare* "indicated that RICO claims for 'statutory treble damages' are among the group of claims that should not be waived in arbitration." Appellee's Br. 55 n.16. He is mistaken. The *PacifiCare* Court expressly declined to reach the question of whether a waiver of punitive or exemplary damages renders RICO claims non-arbitrable. 538 U.S. at 406-07. That Court simply held that even if an arbitration agreement "may be construed to limit the arbitrator's authority to award damages under that statute," the "proper course is to compel arbitration" for the arbitrator to make that determination in the first instance. *Id.* at 402.

the delegation provision by arguing that these common procedures as applied to the delegation provision rendered that provision unconscionable, the challenge should have been considered by the court." *Id.* at 58-59 (quoting *Rent-A-Center*, 561 U.S. at 74).

As this quotation makes clear, the Supreme Court has not finally determined whether an argument that "common procedures as applied to the delegation provision rendered that provision unconscionable" should be considered by the court in the first instance when there is a delegation clause. However, even if this were sufficient, Dillon did not argue that "common procedures as applied to the delegation provision rendered that provision unconscionable." Dillon's only attempt to challenge the delegation provision was his unadorned statement that he "specifically challenge[d] the delegation provision." Although he also argued that the Western Sky arbitration agreement itself is unconscionable and unenforceable and that therefore the delegation provision is unconscionable and unenforceable, this is no different than simply challenging the arbitration agreement as a whole, as he has not set the delegation provision's alleged unconscionability apart from that of the entire agreement.

Dillon's attempts to compare his challenge to the Western Sky delegation provision to that of the plaintiffs in *Hayes* likewise fail. Dillon states without support that his "challenge to the delegation provision was at least equal to if not

more ample than the challenge mounted in the Eastern District of Virginia in *Hayes*." Appellee's Br. 59. The specific challenge in *Hayes* was not set forth in the opinion. Given that it was described as a challenge "with sufficient force and specificity to occasion" the Court's review (811 F.3d at 671 n.1), one must assume that it was something more than a recitation that the plaintiffs "specifically challenged" the delegation provision.

C. The Court Erred By Prematurely Reaching the Question of What Law An Arbitrator Would Apply In The Arbitration Of Dillon's Claims.

This Court held in *Aggarao* that the prospective-waiver doctrine is to be applied only after an arbitration has been conducted. Synthesizing the Supreme Court decisions on point, the *Aggarao* Court explained that "a prospective waiver would contravene public policy only when there is no subsequent opportunity for review in federal court." 675 F.3d at 371 (internal quotation marks omitted). Because Dillon, like Aggarao, will have a subsequent opportunity for review at the award-enforcement stage, he is "not entitled to interpose his public policy defense[] on the basis of the prospective waiver[] doctrine until the second stage of the arbitration-related court proceeding—the award-enforcement stage." *Id.* at 373.

Aggarao is never discussed, much less distinguished, in *Hayes*. A hallmark of Fourth Circuit jurisprudence has been the Court's long history of deference to

and respect for *stare decisis*. By allowing the prospective-waiver doctrine to be applied pre-arbitration, *Hayes* failed to afford *Aggarao* its expected respect.

Dillon has failed to demonstrate that an arbitrator would fail to apply U.S. law rather than the law of the Cheyenne River Sioux Tribe or that the law of the Cheyenne River Sioux Tribe would fail to remedy the wrongs he alleges. At this point in time, Dillon's argument that he will be precluded from vindicating a RICO violation is pure speculation. Under *Aggarao*, *Mitsubishi*, and *Vimar*, his agreement to arbitrate can be invalidated on the basis of prospective waiver only after the arbitration is conducted. The district court erred by failing to follow *Aggarao* and failing to allow the arbitrator to in the first instance determine what law would apply to Dillon's claims.

CONCLUSION

The orders below should be vacated and remanded for further proceedings so that arbitration can ultimately be compelled.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with that order and Federal Rules of Appellate Procedure 28 and 32(a), I certify that this consolidated opening brief consists of 6,857 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 16th day of August, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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