RECORD NOS. 16-1351(L), 16-1362, 16-1373

In The
United States Court of Appeals
For The Fourth Circuit

JAMES DILLON,

Plaintiff – Appellee,

v.

GENERATIONS FEDERAL CREDIT UNION; BMO HARRIS BANK, N.A.; BAY CITIES BANK,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-1351 Caption: James Dillon v. BMO Harris Bank, N.A.

Pursuant to FRAP 26.1 and Local Rule 26.1,

James Dillon
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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 all generations of parent corporations:

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:

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:

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:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/Darren T. Kaplan Date: April 5, 2016

Counsel for: Appellee James Dillon

CERTIFICATE OF SERVICE

****

I certify that on April 5, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/Darren T. Kaplan (signature) April 5, 2016 (date)

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STATEMENT OF ISSUES

In this consolidated appeal, appellant Bay Cities Bank ("Bay Cities") challenges (1) the proof a proponent of a purported agreement to arbitrate is required to present in order to support its initial burden to put forward admissible evidence of a written agreement to arbitrate and (2) whether Bay Cities's attempts to authenticate the purported arbitration agreements were sufficient to support their admission into evidence under FED. R. EVID. 901.

Appellants BMO Harris Bank, N.A. ("BMO"), and Generations Community Federal Credit Union ("Generations") challenge (1) how the arbitral agreements they sought to enforce in the district court materially differed (if at all) from the arbitration agreement this Court held "invalid and unenforceable" in *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016) ("*Hayes*") notwithstanding that the choice of law provisions in the arbitration agreement BMO invoked were substantively identical to the choice of law provisions this Court held "underhandedly convert a choice of law clause into a choice of no law clause," 811 F.3d at 675, and the arbitration agreement Generations invoked ***was the identical arbitration agreement*** held "invalid and unenforceable" in *Hayes*; and (2) whether "*Hayes* is wrongly decided" – an implicit acknowledgment this appeal is baseless under current Fourth Circuit Law.

STATEMENT OF THE CASE

A. The Lawsuit.

Payday loans are illegal in North Carolina, the District of Columbia, and at least 12 other states. JA39-40, ¶ 4. Certain payday lenders (many based purportedly on Indian reservations) make use of the Internet to circumvent these prohibitions and offer payday loans to consumers residing in these states. JA40, ¶ 5. Payday lenders' ability to defy state law rests on the cooperation of financial institutions that knowingly "originate" illicit payday loan debits of borrowers' accounts on the electronic payments network known as the "ACH Network." JA40, ¶ 6. These banks, known as Originating Depository Financial Institutions ("ODFIs") are the enablers for the illicit payday lenders and use the legitimate electronic payments network to collect payments on the unlawful payday loans from borrowers' bank accounts. *Id*. On October 8, 2013, James Dillon ("Dillon") filed a class action complaint against four financial institutions that debited his bank account on behalf of illegal payday lenders—BMO, Four Oaks Bank & Trust, Generations, and Bay Cities (collectively "Defendants")—for violations of the Racketeer Influenced and Corrupt Organizations Act's ("RICO") proscription barring the collection of unlawful debts (18 U.S.C. § 1962(c)), along with North Carolina statutory and common law claims.

The Complaint alleges that BMO debited Dillon's bank account on behalf of Great Plains Lending, LLC ("Great Plains"), and a purported tribal entity that made Dillon several online loans with interest rates exceeding 400%. JA66-67, ¶¶ 81-84. Similarly, Bay Cities debited Dillon's bank account on behalf of two online lenders, MNE Services, Inc. d/b/a USFastCash ("MNE" or "USFastCash") (another purported tribal lender) and VIN Capital, LLC ("VIN Capital"). JA67-69, ¶¶ 85-92. Both lenders provided loans to Dillon with interest rates exceeding 500%. Generations debited Dillon's account on behalf of Western Sky Financial, LLC ("Western Sky"), an online lender with which this court is already familiar (*see, e.g.*, *Hayes*, 811 F.3d at 668; *Moses v. CashCall, Inc.*, 781 F.3d 63, 88 (4th Cir. 2015)) that provided Dillon with a $2,525 loan requiring interest payments in the amount of $11,332.12. JA70, ¶¶ 97-101. ODFIs are required to comply with the extensive rules and regulations governing the ACH Network, which mandate that ODFIs know the identities of the entities for which they originate transactions and to assure themselves that such transactions do not violate state or federal law. JA41, ¶ 9; JA54-59, ¶¶ 43-58.

B. Defendants File Motions to Compel Arbitration as Non-Signatories to the Unsigned, Click-Through Online Payday Loan Agreements.

In addition to motions to dismiss by all Defendants (which the district court denied with respect to the RICO, North Carolina Unfair and Deceptive Trade Practices Act, and unjust enrichment claims as to all defendants and with respect to

a North Carolina Consumer Finance Act claim as to Bay Cities (DE 108)), three of the four Defendants ("Appellants" here) sought to compel arbitration as non-signatories to purported online, click-through payday loan agreements with Great Plains, USFastCash, VIN Capital, and Western Sky that contained arbitral provisions. Dillon opposed the motions to compel on a variety of grounds, including making an evidentiary objection that the agreements were inadmissible because Defendants presented them to the court without any authenticating evidence. The district court agreed and denied the motions to compel arbitration. *See Dillon v. BMO Harris Bank, N.A.*, No. 1:13-CV-897, 2014 WL 911950, at *2 (M.D.N.C. Mar. 10, 2014) ("No moving defendant has presented any evidence to support the contention that the documents presented are in fact the loan agreements referenced in the complaint. Statements in briefs are not evidence and are obviously insufficient to establish the authenticity of a contract.").

On April 8, 2014, BMO filed a "renewed" motion to compel arbitration, this time including a declaration from John Shotton, an officer of Great Plains and member of the Otoe-Missouria Tribe of Indians purporting to authenticate the Great Plains loan agreement. Generations filed a similar motion one week later including the affidavit of Tawny Lawrence, a purported custodian of records and agent of Western Sky. JA123-125. On June 10, 2014, Bay Cities filed a similar "renewed" motion, this time attaching the declarations of Christopher D. Muir on behalf of

USFastCash and Richard Knowles on behalf of VIN Capital. JA132-168. Dillon opposed these motions on the ground that they were motions for reconsideration under FED. R. CIV. P. 54(b) because the declarations could have been submitted with the original motions. On July 7, 2014, the district court denied the "renewed" motions finding that "defendants have not satisfied the Court that reconsideration is appropriate under FED. R. CIV. P. 54(b)." *Dillon v. BMO Harris Bank, N.A.*, No. 1:13-CV-897, 2014 WL 3107295, at *2 (M.D.N.C. July 7, 2014). Defendants appealed.

C. The Appeal in *Dillon* I.

On appeal, this Court reversed and remanded for the district court to determine whether Dillon's claims were referable to arbitration under 9 U.S.C. § 3. *See Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707, 716 (4th Cir. 2015).[1]

D. Arbitration-Related Discovery.

Upon remand, the litigants jointly proposed to conduct arbitration-related discovery in conjunction with renewed briefing. The district court entered a modified scheduling order instructing the Defendants to file renewed motions to

[1] Appellants devote a portion of their statement of the case to an irrelevant "sanctions" motion Generations has filed in the district court premised on the suspect notion 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. That motion is *sub judice* below and the grant or denial of the motion will have no effect on this appeal.

compel arbitration and the parties to submit any additional evidence as part of their new filings. JA170, ¶ 3. On July 15, 2015, the Defendants submitted new renewed motions to compel arbitration. BMO submitted a second declaration from John Shotton as an officer of Great Plains and member of the Otoe-Missouria Tribe of Indians. Generations submitted a declaration of Jean Kohles, an employee of Western Sky-affiliate CashCall, Inc. ("CashCall") JA194-208. Bay Cities did not submit any new evidence instead relying solely on the previously-submitted declarations of Christopher D. Muir and Richard Knowles. *See* JA209-211.

In light of recent decisions finding versions of the arbitral provisions in the Western Sky loan agreement unconscionable and unenforceable,[2] Dillon voluntarily dropped his evidentiary challenge to the Western Sky arbitration agreement and challenged the agreement solely on substantive grounds. *See* JA229-263. Dillon continued to challenge the Great Plains and USFastCash agreements on both evidentiary and substantive grounds, and the VIN Capital agreement on evidentiary grounds only. *See* JA349-744.

1) The Western Sky and CashCall Subpoenas

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[2] These decisions included *Parnell v. CashCall, Inc.*, No. 4:14-cv-00024-HLM (N.D. Ga. May 12, 2014); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 778 (7th Cir. 2014), *cert. denied sub nom. W. Sky Fin. v. Jackson*, 135 S. Ct. 1894 (2015); *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015); *Parm v. National Bank of California*, No. 4:14-CV-00320 (N.D. Ga. May 20, 2015).

On August 14, 2015, Dillon subpoenaed non-parties Western Sky and CashCall seeking testimony via deposition and production of documents. JA261, ¶ 7; JA292-339. Western Sky intentionally evaded service of the subpoena (JA262, ¶ 8; JA344-348) and CashCall fought discovery at every turn (JA262, ¶ 10). When a motion to hold CashCall in contempt of subpoena became necessary, the earliest available hearing date in the Central District of California was after the due date for Dillon's opposition. *Id*.

2) The Great Plains Subpoenas

On August 14, 2015, Dillon subpoenaed non-party Great Plains seeking deposition testimony and production of documents. JA613, ¶ 5. On September 17, 2015, Great Plains filed an action in the Western District of Oklahoma seeking to quash the Great Plains subpoena premised on the tribal sovereign immunity of the Otoe-Missouria Tribe of Indians. Dillon ultimately withdrew the subpoena because challenging the motion to quash would have involved months of acrimonious discovery followed by lengthy appeals and could not have been completed in compliance with the discovery and briefing schedule set by the district court. JA614-15, ¶¶ 22, 23. BMO later issued its own subpoena and attempted to compel the appearance of its own witness, Mr. Shotton, to the evidentiary hearing on the motions to compel arbitration. Again, Mr. Shotton refused to appear and the Otoe-Missouria Tribe of Indians moved to quash the subpoena in the Northern District of

Oklahoma. After expedited briefing, the Northern District of Oklahoma granted the Tribe's motion to quash finding that "the Tribe has not waived sovereign immunity with respect to the loan agreements at issue in Shotton's declaration. *Dillon v. BMO Harris Bank, N.A.*, No. 16-MC-5-CVE-TLW, 2016 WL 447502, at *7 (N.D. Okla. Feb. 4, 2016).

3) The Christopher Muir and MNE Services, Inc. Subpoenas

On August 14, 2015, Dillon subpoenaed non-parties Christopher Muir and MNE Services. Following weeks of negotiations with counsel for Mr. Muir, Dillon agreed to schedule Muir's deposition for September 16, 2015 and narrow the deposition topics to only those directly relevant to Mr. Muir's declaration presented to the court by Bay Cities. JA356, ¶ 17. On September 10, 2015, the Miami Tribe of Oklahoma ("Miami Tribe") filed a motion in the Western District of Missouri in order to quash the subpoena of Muir as an "improper attempt to compel disclosure about the internal matters and business of the Miami tribe and its enterprises." *Miami Tribe of Oklahoma v. James Dillon, et al.*, No. 4:15-mc-09024-NKL, Dkt. 1 (W.D. Mo.). JA356, ¶ 18; JA592-95.

On September 18, 2015, MNE itself filed a separate action in the U.S. District Court for the Northern District of Oklahoma seeking to quash the MNE subpoena premised on tribal sovereign immunity. JA357, ¶ 22; JA606-08. Dillon again withdrew both subpoenas because the issues could not have been resolved in

compliance with the discovery and briefing schedule set forth by the district court. JA356, ¶¶ 20, 22.

4) The Richard Knowles Subpoena

On August 14, 2015, Dillon subpoenaed Richard Knowles ("Knowles") who was employed by BillingTree Payment Solutions, a third-party service provider to VIN Capital. Correspondence between Bay Cities and Mr. Knowles produced as part of arbitration-related discovery established that Bay Cities knew Mr. Knowles did not have personal knowledge of VIN Capital's loan application process, but requested that he submit a declaration anyway because representatives from VIN Capital were unwilling to do so. JA351-54, ¶¶ 9-12.

Knowles ultimately agreed to execute the declaration Bay Cities filed with its "renewed" motion to compel arbitration in June 2014 (and relied on in its most recent July 2015 filing). During Mr. Knowles' subsequent deposition, Mr. Knowles' admitted that he did not have personal knowledge of VIN Capital's record keeping practices or Dillon's purported loan agreement. JA552-88.

5) The Deposition of James Dillon

On September 30, 2015, the Defendants took the deposition of Dillon. *See* JA745-784. Dillon's testimony made clear that he had no memory of what, if any, agreement provisions were presented to him as part of any of his online loan applications. With respect to the VIN Capital loan, Dillon testified:

> A. All I remember was the amount that I got for the loan and the -- what I had to pay back, and I really can't tell you the exact amount. That's all I remember from that.
>
> ***
>
> A. Yeah, that's correct. I don't remember an arbitration provision.
>
> Q. And what provisions do you remember?
>
> A. I don't know -- remember any of them.

JA750 (14:9-12); JA751 (18:1-4).

Dillon further testified that he never physically signed any documents and was not in possession of a purported VIN Capital loan agreement. *See* JA750 (17:7-16). Dillon offered similar testimony regarding the USFastCash loans and Great Plains loans:

> Q. But you're not in possession of a copy of the loan agreement that you entered into with USFastCash on or about December 6, 2012. Is that right?
>
> A. That's correct.
>
> Q. Do you know any of the terms of that loan agreement?
>
> A. I don't remember them.

JA755 (35:21-25; 36:1-3).

> Q. Do you recall whether that is the same language that you clicked through when you originally took out [the Great Plains] loan in December of 2012?
>
> A. I don't remember if it was. I didn't read it.
>
> Q. So when you testified earlier, when Mr. Ranlett asked you is it fair to say this is your loan agreement with Great Plains from December of

> 2012, is that correct, that this is your loan agreement that you can say definitively?
>
> A. No, it's not correct. I don't know if it is or not.
>
> Q. What you do know is that you entered in your personal information and that you checked those two boxes on the last page?
>
> A. Yeah, that's all I know about it.

JA764 (72:24-25; 73:1-14).

Dillon's testimony did not establish that he was presented with an arbitration agreement at the time he took out the VIN Capital, USFastCash and Great Plains' loans because (a) he did not remember the loan language or recall reading any terms presented other than the basic loan terms; (b) he never printed off or was provided copies of the purported loan documents; and (c) he did not physically sign any documents.

E. Order Scheduling Evidentiary Hearing.

On January 11, 2016, the district court entered an order scheduling an evidentiary hearing and also weighing the evidence presented to date with Defendants' renewed motions and Dillon's opposition briefing. *See* JA806-810. With respect to the Western Sky agreement presented by Generations, the district court held that there was undisputed evidence of an arbitration agreement but that "[l]egal issues remain as to the enforceability of that arbitration provision." JA806. With respect to the VIN Capital agreement, the district court found that: "Richard Knowles, the witness who by affidavit purported to authenticate the VIN Capital

loan agreement, (Doc. 123-2 at ¶ 5), turned out, at deposition, to have little to no personal knowledge about the source or creation of the purported agreement. (*See* Doc. 174-11 at 19)." JA807.

Regarding the USFastCash and Great Plains agreements, the district court found: "The two witnesses whose testimony purportedly authenticated the other agreements were not deposed. Christopher Muir, the witness purporting to authenticate the USFastCash loan agreement, provided a vague and unhelpful declaration…." (Doc. 123-1 at ¶¶ 1-2; see Doc. 123-1 at ¶¶ 3, 5, 11). "John Shotton, who by declaration purported to authenticate the loan agreement with Great Plains Lending, and Mr. Muir both stated in their declarations that they would testify if called as witnesses. (Doc. 104 at ¶ 1; Doc. 123-1 at ¶ 1). Yet both later asserted tribal immunity, either individually or through their employers, and resisted Dillon's efforts to depose them. (Doc. 174 at ¶¶ 15, 17-22; Doc. 177 at ¶¶ 15-23). The refusal to give testimony raises questions as to whether Mr. Muir's and Mr. Shotton's declarations are truthful and whether they have personal knowledge to support their declarations. Overall, the evidence as to the authenticity of these three purported agreements is of questionable admissibility and even more questionable credibility." JA807.

Regarding Dillon's deposition testimony, the district court held: "The plaintiff Dillon consistently testified that, while he recognized certain information in the

proffered loan agreements as the same information he submitted when applying online for the loans, he did not remember reading or seeing reference to any arbitration provisions during the online loan application or acceptance process. (*See* Doc. 182-1 at 14-21, 33-34; Doc. 184-1 at 3-12, 15-20). The parts of his testimony on which the defendants rely to authenticate the written loan agreements are subject to extensive qualifications and are not particularly persuasive." JA808.

The district court concluded that because it "questions whether these affidavits are admissible and, if they are, whether they are credible and deserving of any weight, the Court concludes that an expeditious and summary evidentiary hearing is needed to determine the content of the loan agreements Dillon entered into with Great Plains Lending, USFastCash, and VIN Capital, and specifically whether those loan agreements contained written arbitration provisions." JA809. The district court specifically warned that "[a] failure by the defendant with the burden of proof to call a witness with personal knowledge about how a lender's electronic contract execution process worked for each particular loan agreement at issue and how the proffered document was created and maintained will likely result in a finding that the purported loan document is inadmissible, at least until and unless the plaintiff relies on that document." JA810.

F. The Evidentiary Hearing.

On January 27, 2016, the district court held an evidentiary hearing. No

Defendant was able to call a witness with personal knowledge about how a lender's electronic contract execution process worked for each particular loan agreement. Defendants instead called Dillon to the stand and took turns questioning him about the various loan agreements. Dillon's testimony at the hearing was consistent with his earlier deposition testimony establishing that he had no recollection of any loan provisions that may have been present at the time he clicked through the various loan applications. *See* JA829-53.

G. Additional Exhibits in Opposition to Bay Cities' Motion to Compel.

Following the evidentiary hearing, Plaintiff presented additional new exhibits in opposition to Bay Cities' motion to compel arbitration. The first was a February 9, 2016 unsealed criminal indictment of Timothy Muir ("T. Muir") and Scott Tucker ("Tucker") from the Southern District of New York, charging, among other things, several counts under RICO for conspiring to collect and collecting on unlawful debts in violation of 18 U.S.C. § 1962 (c) and (d). JA972.

Plaintiff also submitted a Non-Prosecution Agreement between AMG and MNE/USFastCash and the U.S. Attorney for the Southern District of New York that required the companies to forfeit $48 million in criminal proceeds from the payday lending enterprise. As part of the agreement, AMG and MNE admitted, inter alia, *that the companies filed false factual declarations in various courts in order to facilitate the payday loan scheme.* JA973.

H. Supplemental Briefing Regarding *Hayes*.

On February 2, 2016, the U.S. Court of Appeals for the Fourth Circuit issued its opinion in *Hayes*. JA32. In response to an order from the district court, all parties fully briefed the effect of *Hayes* on the enforceability of the arbitration agreements at issue before the district court.

I. Orders Denying Generations's and BMO's Renewed Motions to Compel.

On March 4, 2016, the district court issued two orders separately denying the renewed motions to compel arbitration of Generations and BMO. *See* JA1022-1026. With respect to Generations, the district court noted that Generations was attempting to enforce the identical Western Sky agreement found unenforceable in *Hayes*:

> The proffered Western Sky loan agreement here is identical in all relevant particulars to the Western Sky loan agreement in *Hayes*. (Doc. 106-1 at 4-9); 811 F.3d at 668-70. The agreement here applies the law of the Cheyenne River Sioux Tribe as its sole governing law, (Doc. 106-1 at 4, 6); sends all disputes to arbitration, (*id*. at 7); instructs the arbitrator to apply only tribal law, (*id*. at 8); and, most importantly, denies the applicability of all federal and state law to the agreement. (*Id*. at 6). Because these provisions are the same as in the loan agreement in *Hayes*, 811 F.3d at 668-70, the arbitration agreement here is unenforceable.

JA1023.

The district court issued a similar order regarding the Great Plains agreement attempting to be enforced by BMO. While not identical, it contained the same offending provisions that rendered the Western Sky agreement unenforceable in *Hayes*:

> For the reasons stated in *Hayes* … the motion will be denied. The contract BMO seeks to enforce, like the contract in *Hayes*, contains provisions that "convert a choice of law clause into a choice of no law clause" and that "flatly and categorically renounce the authority of the federal statutes to which [the defendant] is and must remain subject." *Hayes*, 811 F.3d at 675. It cannot be enforced.

JA1025.

The district court did not decide whether either agreement was unenforceable on other grounds raised by Dillon. *See id.*

J. Order Denying Bay Cities's Renewed Motion to Compel.

On March 23, 2016, the district court issued an order denying Bay Cities's renewed motion to compel arbitration finding that Bay Cities offered inadequate proof of agreements to arbitrate. JA1027-49. The district court found that "Bay Cities has provided no evidence from the lenders showing that the arbitration provisions in the documents were presented to Dillon. The other evidence, including the testimony of non-party witnesses, Dillon's testimony, and the proffered documents themselves, is insufficient to satisfy the Court that Dillon and the lenders mutually agreed to the arbitration provisions." JA0128.

With respect to the declaration of Christopher Muir, the district court held the testimony was not credible for three primary reasons: "First, AMG admits that the Miami Tribe of Oklahoma, which is the owner of USFastCash and the purported source of the document attached to the declaration, has a history of dishonesty in court proceedings … Second, Mr. Muir and AMG refused to participate in a

deposition where Dillon could ask questions about USFastCash's recordkeeping systems and about deficiencies in Mr. Muir's declaration, despite Mr. Muir's sworn statement that he would testify if called upon to do so." JA1034. The district court also found that the Muir declaration was silent on key points. JA1035-36.

Regarding the VIN Capital loan, the district court weighed the credibility of the declaration submitted by Richard Knowles:

> Mr. Knowles had no knowledge about VIN Capital's online loan procedures and document retention procedures, and his testimony does not provide any information as to whether the arbitration provision in the proffered document was presented to Dillon during the loan application process. Finally, Mr. Knowles testified that when he tried to get a copy of Dillon's agreement directly from VIN Capital, VIN Capital never responded to repeated phone calls and emails.
>
> … Mr. Knowles' testimony provides an insufficient basis for the Court to conclude that the document produced to BillingTree by CWB is an accurate copy of the loan agreement between Dillon and VIN Capital.

JA1045-46.

The district court concluded that "[d]ocuments created by entities of questionable credibility, produced second- or third-hand, and purportedly authenticated by witnesses who are unfamiliar with the lender's online record creation and retention practices are insufficient. Absent credible evidence that Dillon agreed to the arbitration provisions in the proffered documents, the motions to compel arbitration will be denied." JA0148.

Following these orders, Defendants filed timely notices of appeal.

SUMMARY OF ARGUMENT

I. Bay Cities.

Bay Cities failed to present competent evidence of an agreement to arbitrate between Dillon and either USFastCash or VIN Capital. Bay Cities was unable to satisfy even the forgiving evidentiary requirements of FED. R. EVID. 901 to authenticate the agreements it proffered. While the Federal Arbitration Act ("FAA") embodies a liberal policy in favor of arbitration, that policy does not apply "when there remains a question as to whether an agreement even exists between the parties in the first place." *Raymond James Fin. Servs., Inc. v. Cary*, 709 F.3d 382, 386 (4th Cir. 2013).

"The standard for deciding a motion to compel arbitration brought under . . . 9 U.S.C. § 4, is a standard similar to a motion for summary judgment." *Erichsen v. RBC Capital Markets, LLC*, 883 F. Supp. 2d 562, 566 (E.D.N.C. 2012). Only *after* the movant has made a prima facie showing of an agreement to arbitrate does the burden fall to the non-movant to present "an unequivocal denial that the agreement to arbitrate had been made . . . and some evidence should be produced to substantiate the denial." *Drews Distrib., Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 352 n.3 (4th Cir. 2001).

As in *Pearson v. United Debt Holdings*, 123 F. Supp. 3d 1070 (N.D. Ill. 2015), Bay Cities produced unsigned electronic documents that purported to be Dillon's

loan agreements, but failed to authenticate the documents. The *Pearson* court observed that "[t]he party seeking to compel arbitration must establish that an agreement to arbitrate exists," and that while "[t]he bar for authentication of an arbitration agreement is not high," a proponent must nonetheless satisfy Fed. R. Evid. 901(a) "'which requires evidence sufficient to support a finding that the matter in question is what its proponent claims.'" 123 F. Supp. 3d at 1073. The movant must "'show[ ] at least prima facie' that an arbitration agreement exists *Almacenes Fernandez, S. A. v. Golodetz*, 148 F.2d 625, 628 (2d Cir. 1945).

Bay Cities is also incorrect that the district court "appl[ied] a heightened standard for demonstrating the making of an arbitration agreement solely because the parties entered into the agreement over the Internet." The district court simply highlighted the deficiencies in Bay Cities' proffer due to its affiants' inability and refusal to testify on numerous material topics.

In the end, Bay Cities's declarations failed to authenticate the arbitration agreements it sought to admit into evidence and the remainder of Bay Cities's evidence was insufficient to satisfy even the minimal requirements of FED. R. EVID. 901.

II. BMO and Generations.

As in *Hayes*, the arbitration agreements BMO and Generations sought to enforce below "fail[] for the fundamental reason that [they] purport[] to renounce

wholesale the application of any federal law to the plaintiffs' federal claims." 811 F.3d at 673. The choice of law provisions in the arbitration agreement BMO invoked contain essentially identical language to the choice of law provisions this Court found "underhandedly convert a choice of law clause into a choice of no law clause." 811 F.3d at 675. As the district court held below, "[a]ll of these provisions match corresponding provisions in the Western Sky loan agreement in *Hayes* …." JA1025. The arbitration agreement Generations invoked is invalid as it is the *identical* arbitration agreement this Court held "invalid and unenforceable" in *Hayes*. *Id.*

BMO argues that the district court erred in holding that "the mere presence of a foreign choice of law clause does not automatically invalidate an arbitration agreement under the 'prospective waiver' doctrine," (Appellant's Joint Opening Brief ("JOB"), p. 58[3]) but the district court invalidated BMO's arbitration agreement because, just as in *Hayes*, "[i]nstead of selecting the law of a certain jurisdiction to govern the agreement … this arbitration agreement uses its 'choice of law' provision to waive all of a potential claimant's federal rights. *Hayes*, 811 F.3d at 675. BMO also incorrectly contends that the district court's determination that the choice of law provisions operated as an impermissible waiver of Dillon's federal rights was "premature" even though this Court made the identical determination at the identical

[3] References in the JOB are to the top ECF page number, not the bottom printed page number.

stage of the proceedings in *Hayes* (*see id.*), and there is no question that the choice of law provisions in the arbitration agreement "flatly and categorically renounce the authority of the federal statutes to which [BMO] is and must remain subject." *Id.*

BMO further insists that Dillon had some burden "to prove that he would be deprived of federal statutory rights in arbitration," (JOB, p. 62) but, the words "burden" and "proof" do not even appear in *Hayes*, and no part of the decision requires that plaintiff do anything more than raise his challenges to the enforceability of the arbitral provisions. Faced with controlling law in *Hayes*, BMO attempts to draw a distinction from the defendant in *Hayes* with an eleventh hour "disclaimer" of tribal law that avoids actually selecting U.S. law and which fails to address other language in the arbitration agreement *requiring* the arbitrator apply tribal law or risk vacatur of the arbitral award by the Otoe-Missouria Tribal Court. JA185. BMO's "disclaimer" is nothing more than an attempt to sever the offending choice of law provisions of the arbitration agreement – the very thing this Court refused to do in *Hayes*. *Hayes*, 811 F.3d at 675-76.

BMO suggests that the arbitration agreement would still "allow the arbitrator to set aside the tribal choice-of-law clause." (JOB, p. 65). But the language in the choice of law provisions is mandatory, not permissive and other choice of law language in the rest of the agreement can only be harmonized by determining that the law of the Otoe-Missouria Tribe is the only law that "will" be applied in

arbitration. Nor is Dillon required to show that he would fare better under law other than tribal law. The choice of Otoe-Missouria tribal law was never meant to serve as a bona fide choice of law in arbitration, it was intended to renounce the authority of federal law. "[A] party may not underhandedly convert a choice of law clause into a choice of no law clause—it may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject." *Hayes*, 811 F.3d at 675.

Generations hoes an even tougher row in seeking to convince this Court it may utilize the very same arbitration agreement held unenforceable in *Hayes*. Generations suggests that the holding in *Hayes* is confined to claims for statutory damages, but Dillon's civil RICO claim "is of course a statutory tort remedy…." *Brandenburg v. Seidel*, 859 F.2d 1179, 1189 (4th Cir. 1988), *overruled on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). Generations further attempts to distinguish RICO from other statutory claims because RICO claimants must demonstrate "actual harm." (JOB, p. 73). But all federal statutory violations require injury in fact in order for a plaintiff to have standing to sue. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1544 (2016), as revised (May 24, 2016).

Generations also posits that the district court erred in "disregarding" the delegation provision in the arbitration agreement, (JOB, p. 74) but Dillon properly challenged the delegation provision below by making a *specific challenge* to the

delegations provision's use of the common choice of tribal law provisions to determine arbitrability in accordance with Supreme Court precedent. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010).

Finally, all Appellants argue that "*Hayes* is wrongly decided" but their arguments continue to misstate this Court's ruling. In contrast to the other arbitral choice of law provisions this Court and the United States Supreme Court considered prior to *Hayes*, the arbitral provisions in *Hayes* and here "underhandedly convert a choice of law clause into a choice of no law clause" and that "flatly and categorically renounce the authority of the federal statutes to which [the defendants are] and must remain subject." *Hayes*, 811 F.3d at 675. Appellants' challenge is also procedurally improper in that they have not petitioned for their appeal be heard initially *en banc* under FED. R. APP. P. 35(c). "It is quite settled that a panel of this circuit cannot overrule a prior panel. Only the *en banc* court can do that." *Booth v. Maryland*, 327 F.3d 377, 383 (4th Cir. 2003).

STANDARD OF REVIEW

This Court reviews "a trial court's rulings on the admissibility of evidence for abuse of discretion, and … will only overturn an evidentiary ruling that is arbitrary and irrational." *United States v. Cole*, 631 F.3d 146, 153 (4th Cir. 2011).

This Court reviews de novo a district court's order denying arbitration under the FAA. *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707, 714 (4th Cir. 2015).

However, when a decision compelling or denying arbitration is based on factual findings, this Court will defer to the district court's factual findings. *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 586 (4th Cir. 2012) ("We review a district court's decision as to default of arbitration de novo but defer to the district court's underlying factual findings").

ARGUMENT

I. The District Court Did Not Abuse its Discretion in Finding that Bay Cities Failed To Authenticate The USFastCash And VIN Capital Arbitration Agreements.

Appellants propose a standard whereby a party may compel arbitration without presenting any evidence that an agreement to arbitrate exists, and foist the burden on the responding party to show in the first instance that there is no such agreement. That is not the law. A party seeking to compel arbitration bears the initial burden to show by competent evidence that the parties agreed to arbitrate their dispute. Only after the moving party has made its showing does any evidentiary burden rest on the party resisting arbitration.

Here, the district court was well within its discretion to find that Bay Cities failed to meet its initial burden; that is, Bay Cities failed to present competent evidence of an agreement to arbitrate between Dillon and either USFastCash or VIN Capital. Bay Cities was unable to satisfy even the forgiving evidentiary requirements of FED. R. EVID. 901 to authenticate loan agreements it proffered. The

court acted within its discretion and logically and rationally in finding that no reasonable fact-finder could determine an agreement existed based on the record before it. Appellants' wide-ranging argument that the district court's decision represents an assault on all electronic contracts is a red herring, and should be rejected.

A. The District Court applied the Proper Standard in Requiring Bay Cities to Present Competent Evidence of an Agreement to Arbitrate.

Courts applying the FAA are beholden to "the rule that arbitration is strictly a matter of consent—and thus that courts must typically decide any questions concerning the formation or scope of an arbitration agreement before ordering parties to comply with it . . . ." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010). While the FAA embodies a liberal policy in favor of arbitration, that policy obtains only when "'a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand,' not when there remains a question as to whether an agreement even exists between the parties in the first place." *Raymond James*, 709 F.3d at 386 (quoting *Granite Rock Co.*, 561 U.S. at 301); *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) ("While federal policy broadly favors arbitration, the initial inquiry is whether the parties agreed to arbitrate their dispute."). Thus, "a litigant can compel arbitration . . . if he can demonstrate [*inter alia*] the existence of a dispute

between the parties [and] a written agreement that includes an arbitration provision which purports to cover the dispute . . . ." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500–01 (4th Cir. 2002); *Chorley Enters., Inc. v. Dickey's Barbecue Rests., Inc.*, 807 F.3d 553, 563 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 1656 (2016) (same).

A district court faced with a motion to compel must bear in mind that arbitration is a matter of contract, and implement at the outset a "limited review to ensure that a valid agreement to arbitrate exist[s] and that the specific disputes f[a]ll within the substantive scope of that agreement." *Choice Hotels Int'l, Inc. v. Patel*, 236 F. App'x 868, 870 (4th Cir. 2007); *see also Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 456 (4th Cir. 1997) (district court has authority to "review[ ] the making and performance of the arbitration agreement"). After that inquiry, if the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," and that the dispute before it is subject to arbitration, the court "shall" enter an order compelling arbitration. *See* 9 U.S.C. § 4.

This Court and numerous other courts have long held that "the standard for deciding a motion to compel arbitration brought under . . . 9 U.S.C. § 4, is a standard similar to a motion for summary judgment." *See Erichsen*, *supra*, 883 F. Supp. 2d at 566.[4] Thus, the party moving to compel arbitration:

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[4] *See also Bensadoun v. Jobe–Riat*, 316 F.3d 171, 175 (2nd Cir. 2003) ("In the context of motions to compel arbitration brought under the [FAA], the court

> … has the initial burden of demonstrating that there are no genuine issues of material fact that prevent the court from enforcing the arbitration agreement. *Once that has been accomplished*, the nonmoving party must come forward with a specific showing that a genuine issue of material fact exists for trial.

Flowers v. MasterCuts, No. 6:13-CV-20946, 2014 WL 2765618, at *3 (S.D.W. Va. May 2, 2014) (emphasis added), *report and recommendation adopted*, No. 6:13-CV-20946, 2014 WL 2765825 (S.D.W. Va. June 18, 2014).

Importantly, "the summary judgment standard is appropriate in cases where the district court is required to determine arbitrability, regardless of whether the relief sought is an order to *compel* arbitration or to *prevent* arbitration." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (emphasis added). A standard akin to summary judgment is thus appropriate here, where Bay Cities seeks to compel arbitration.

Contrary to Bay Cities's assertions, the courts are clear that the burden on a motion to compel arbitration does not shift to the non-moving party unless and until

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applies a standard similar to that applicable for a motion for summary judgment."); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735 (7th Cir. 2002) ("The FAA does not expressly identify the evidentiary standard a party seeking to avoid compelled arbitration must meet. But courts that have addressed the question have analogized the standard to that required of a party opposing summary judgment . . . ."); *cf. Chorley Enters.*, 807 F.3d at 564 (standard to demonstrate entitlement to jury trial under 9 U.S.C. § 4 "is akin to the burden on summary judgment"); *Galloway v. Santander Consumer USA, Inc.*, 819 F.3d 79, 85 n.3 (4th Cir. 2016) (same).

the moving party has met its initial burden. "If the party seeking arbitration has substantiated the entitlement *by a showing of evidentiary facts*, the party opposing may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried." *Oppenheimer & Co. v. Neidhardt*, 56 F.3d 352, 358 (2d Cir. 1995). Only *after* the movant has made a prima facie showing of an agreement to arbitrate does the burden fall to the non-movant to present "an unequivocal denial that the agreement to arbitrate had been made . . . and some evidence should be produced to substantiate the denial." *Drews*, *Distrib., Inc.*, *supra*, 245 F.3d at 352 n.3 (quoting *Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F.2d 4, 7 (2d Cir.1981)) (internal punctuation omitted).[5] Requiring the proponent of arbitration to make a competent initial showing of the parties' mutual assent comports with, and is indeed necessitated by, "the principle that a court may submit to arbitration only those disputes . . . the parties have agreed to submit." *Raymond*

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[5] Bay Cities relies heavily on *Drews*, even describing the footnote in *Drews* as creating a "burden shifting framework" (JOB, pp.42-43) but the footnote in *Drews* requiring "an unequivocal denial that the agreement [to arbitrate] had been made," *id.* at 352 n. 3, is premised on three Second Circuit cases considering the evidentiary burden to obtain a jury trial on defenses to arbitration *after* the proponent of arbitration shows "at least prima facie … the agreement to arbitrate." *Almacenes Fernandez, S. A., supra*, 148 F.2d at 628.

James Fin., 709 F.3d at 386 (quoting *UBS Fin. Svcs. v. Carilion Clinic*, 706 F.3d 319, 323–25 n. 2 (4th Cir. 2013)).[6]

B. The District Court Applied the Proper Standard to Bay Cities's Motion.

Against the legal backdrop above, the district court applied the appropriate standards in denying Bay Cities's motion. Other courts in closely analogous circumstances have found that unauthenticated, untrustworthy, self-serving productions by tribal payday lenders are insufficient to meet the movant's initial burden. Bay Cities's comparisons to FED. R. EVID. 104 are inapposite.

The recent *Pearson* case is illustrative. There, the plaintiff brought suit again collections company United Debt Holdings ("UDH") under the Fair Debt Collections Practices Act, based on UDH's conduct in attempting to collect a debt arising from an allegedly usurious loan "issued under the laws of the Chippewa Cree Tribe" to the plaintiff. *Pearson*, 123 F.Supp.3d at 1071. UDH produced a document that purported to be the plaintiff's loan agreement, but the plaintiff asserted that UDH had failed to authenticate the document or show that it was the loan agreement

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[6] Bay Cities's repeated implication that the district court's use of the word "satisfy" somehow misstates the burden on the proponent of an alleged agreement to arbitrate (JOB, pp. 45-46) is puzzling. The FAA explicitly provides: "[t]he 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. (emphasis added)

she signed. *Id.* at 1072. The court observed that "[t]he party seeking to compel arbitration must establish that an agreement to arbitrate exists," and that while "[t]he bar for authentication of an arbitration agreement is not high," a proponent must nonetheless satisfy FED. R. EVID. 901(a) "'which requires evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *Id.* at 1073 (quoting *Smith v. City of Chicago*, 242 F.3d 737, 741 (7th Cir. 2001)).

Analyzing the evidence before it, the district court found that the document was "not physically signed," that "[n]o witness affirme[d] that the documents were found in [the lender's] or UDH's business records, that they were presented to Pearson when he took out his loan, or that the document actually bears Pearson's electronic signature." *Id.* at 1074 (footnote omitted). With a dearth of evidence bearing indicia of reliability that the document was what it purported to be, the court found that UDH had not met its burden. Importantly, the court addressed UDH's argument that the plaintiff had failed to either unequivocally adopt or unequivocally deny the agreement:

> Nor has Pearson admitted through statements or conduct that the document attached to the motion to compel arbitration is the agreement into which he entered. Pearson agrees, of course, that he entered into *an* agreement with [the lender]; Pearson's theory of the case relies on the proposition that the terms of the agreement between Pearson and [the lender] were illegal. Contrary to UDH's characterizations, though, nowhere in either his affidavit or his brief does Pearson concede that he entered into *this* agreement. Even if UDH is correct that Pearson's affidavit does not specifically deny or provide evidence to dispute the document, it was not yet his burden to provide such information; the

> proponent of the document bears the initial burden of establishing the authenticity of the document.

Id. at 1074.

Exactly the same circumstances obtain here, and the same analysis applies. Dillon took out online loans with USFastCash and VIN Capital and, as he testified in his deposition, had no recollection what if any loan provisions were presented as part of his applications beyond the basic loan terns. Dillon did not admit, and Bay Cities has not presented competent evidence to show, that the agreements Bay Cities produced are what Dillon clicked through at the time he took out the loans.[7]

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[7] Each of the cases Appellants cite to rebut *Pearson's* reasoning is distinguishable at best. In *Brisco v. Schreiber*, 2010 WL 997379, at *2 (D.V.I. Mar. 16, 2010), the defendant submitted the agreement made between itself at the plaintiff, and court found that "the evidence in this matter is sufficient to find that the document submitted by Defendant constitute the insurance policy between the parties" pursuant to Fed. R. Evid. 901. In *Umbenhower v. Copart, Inc.*, 2004 WL 2660649, at *2–6 (D. Kan. Nov. 19, 2004), a custodian with personal knowledge of the defendant's record-keeping practices did authenticate the document via affidavit. In *Blatt v. Shearson Lehman/Am. Express Inc.*, 1985 WL 2029, at *1 (S.D.N.Y. 1985), the defendant submitted a "Customer Agreement" signed by both plaintiffs, from its own records. In *Baja, Inc. v. Automotive Testing and Dev. Serv., Inc.*, 2014 WL 2719261, at *5 (D.S.C. June 16, 2014), the court did not address document authentication at all, but rather rejected the plaintiff's arguments that the terms of the invoices at issue failed due to other alleged contract formation problems. Critically, in each of these cases the submitted documents were held in the defendant's own custody at all times, and all affiants had personal knowledge of the defendants' document retention policies. Here, as in *Pearson*, the purported contracts were provided by neither Bay Cities *nor* the lenders, and the affiants did not and could not attest to personal knowledge of the lenders' document retention policies or any other business practices. The Court was within its discretion to find these documents did not satisfy FED. R. EVID. 901.

Moreover, as the district court determined in weighing the evidence, the declarations presented by Bay Cities were insufficient to authenticate the purported agreements. For example, the district court found that Muir's declaration was "vague and unhelpful" because among other things: "He was not employed by USFastCash, but rather by a 'shared service provider,' AMG Services; he was vague about the nature of his work and how it related to USFastCash; he did not explain how or why he became familiar with USFastCash's loan procedures; and he did not even state his job title." JA807. Furthermore, Mr. Muir refused to be deposed "despite Mr. Muir's sworn statement that he would testify if called upon to do so" (JA0134), Mr. Muir also refused to attend the evidentiary hearing held for the specific purpose of presenting witness testimony, and AMG, Mr. Muir's employer, admits it "has a history of dishonesty in court proceedings." JA1032-33.

Additionally, the district court recognized that Mr. Muir's declaration is silent on key points "relevant to authentication" including "how the electronic document purporting to memorialize the loan agreement was created" whether the document presented to the district court "was presented to Mr. Dillon in the same format" and how "USFastCash maintained its electronic records or ensured that loan agreements were preserved without alteration or change." JA1035. In fact, "Mr. Muir does not purport to work for USFastCash and does not explain how he became familiar with its online loan practices" and "does not identify his position with AMG and says

nothing about how his work related to USFastCash's online lending procedures." *Id*. He does not even "affirm he worked for AMG at any relevant time." *Id*. Taken together, and considering Mr. Dillon's lack of opportunity to cross-examine Mr. Muir on his facially dubious declaration, the district court was well within its discretion to determine the evidence was insufficient to authenticate the purported USFastCash agreement.

The Knowles declaration fares no better. First, the evidence established that Bay Cities knew Mr. Knowles (as an employee of a twice removed, third-party service provider to VIN Capital) did not have personal knowledge of VIN Capital's loan application process, but requested that he submit a declaration anyway after representatives from VIN Capital proved unwilling to cooperate. JA351-54, ¶¶ 9-12. Indeed, correspondence between the parties showed that on April 29, 2014, Bay Cities Executive Vice President and Chief Risk Officer Patrick J. Murrin ("Murrin") wrote an email to Knowles requesting that Knowles do his part to track down representatives from VIN Capital in an effort to get the case to arbitration. JA352-53, ¶¶ 10, 11. After it became clear that VIN Capital did not intend to respond, on April 29, 2014, Murrin asked Knowles if *Knowles* would be willing to execute the declaration originally drafted for VIN. JA 353, ¶ 11.

When deposed on these issues, the district court found persuasive that "Mr. Knowles admitted he lacked personal knowledge of VIN Capital's online loan

application process and document retention practices"; "testified he was unfamiliar with CWB's document retention practices"[8]; and "had no knowledge about VIN Capital's online loan procedures and document retention procedures." JA1045. Additionally, the court recognized that Mr. Knowles' "testimony [did] not provide any information as to whether the arbitration provision in the proffered document was presented to Mr. Dillon during the loan application process" or "provide any information as to how VIN Capital created, maintained, and retrieved the electronic documents at issue." JA1045. "Moreover, the loan agreement did not come from VIN Capital, but from yet another entity, CWB, about whose document retention practices Mr. Knowles also had no information"; and "Mr. Knowles testified that he did not know whether the purported loan agreement was authentic, how CWB obtained the document, or whether the document had been altered." *Id*. In light of the evidence presented, the district court again properly concluded that the evidence was insufficient to authenticate the purported VIN Capital loan agreement.

Bay Cities confusingly argues that the existence of an arbitration agreement is not "in issue" for the purposes of 9 U.S.C. § 4, and thus the party seeking arbitration has no burden whatsoever, until the party resisting arbitration "dispute[s]

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[8] Mr. Knowles testified by declaration and in a deposition that BillingTree obtained the proffered document in the regular course of business from CWB, VIN Capital's shared service provider, at the request of Bay Cities for proof of authorization for Mr. Dillon's loan. JA1044.

the existence of the agreement by an unequivocal denial supported by evidence." (JOB, p. 28). At the same time, however, Bay Cities acknowledges that the movant must "'show[ ] at least prima facie' that an arbitration agreement exists." *Id.* at 29 (quoting *Almacenes Fernandez*, 148 F.2d at 628). As the courts have clarified in the years since *Almacenes*, that prima facie burden requires "a showing of evidentiary facts," *Oppenheimer*, 56 F.3d at 358, sufficient to "demonstrate[e] that there are no genuine issues of material fact" as to the arbitration agreement's existence. *Flowers*, 2014 WL 2765618, at *3. The district court applied the appropriate standard and acted within its discretion in finding that Bay Cities had failed to make its prime facie showing.

Lastly, Bay Cities's arguments regarding FED. R. EVID. 104 are beside the point. It is undisputed that when a court makes a relevance determination under Rule 104(b) based on the existence of an extrinsic fact, "the trial court neither weighs credibility" nor determines whether the proponent of the evidence "has proved the conditional fact." *Huddleston v. United States*, 485 U.S. 681, 690 (1988). But the court here did not determine that the purported loan agreements were inadmissible because they were *irrelevant* under Rule 104(b)—it determined they were *not authentic* under Rule 901; *i.e.* that Bay Cities failed to show that a reasonable jury could properly find they were what they purported to be. The district court did not

discuss relevance at all, and the Supreme Court in *Huddleston* did not discuss document authentication or Rule 901. The comparison is inapposite.

C. Bay Cities's Policy Arguments Are Red Herrings.

Bay Cities is wrong that that the district court's ruling augurs an open season on all electronic contracts. Nowhere did the district court "apply a heightened standard for demonstrating the making of an arbitration agreement solely because the parties entered into the agreement over the Internet." (JOB, p. 36). While the district court discussed particular problems that can arise when a party seeks to authenticate electronic documents, it did not rest its conclusions on the electronic nature of the documents Bay Cities proffered. Instead, the court simply highlighted the deficiencies in Bay Cities's attempt at authentication due in part to its declarants' inability to testify on numerous material topics including "how the electronic document purporting to memorialize the [USFastCash] loan agreement was created," "how USFastCash maintained its electronic records or ensured that loan agreements were preserved without alteration or change," or "how [the USFastCash affiant] became familiar with its online loan practices." The court further found that the affiants "lacked personal knowledge of VIN Capital's online loan application process and document retention practices," and were "unfamiliar with CWB's document retention practices."

In light of these numerous material deficiencies, the court simply found that Bay Cities had failed to proffer competent evidence to authenticate the electronic agreements it proffered. The court's decision did not involve a heightened burden based on the agreements' electronic nature, but rather found on the facts before it that Bay Cities had failed to adduce evidence sufficient to show that the agreements are what they purport to be. The district court's opinion does not implicate broader contract law policy in any way.

II. Bay Cities Failed to Meet Its Burden of Showing That Dillon Had Agreed To Arbitrate.

After arguing that it has no initial burden under the FAA to prove an agreement to arbitrate unless there is "an unequivocal denial that the agreement [to arbitrate] had been made," Bay Cities finally articulates the actual standard when it argues it "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." (JOB, p. 51). Bay Cities's recitation of the evidence it produced in the district court, however only demonstrates how deficient was its showing that the electronic records it produced were the arbitral agreements.

FED. R. EVID. 901(a) requires that an item of evidence be "authenticated" through introduction of evidence sufficient to warrant a finding that the item is what the proponent says it is. Here, Bay Cities sought to introduce into evidence copies

of electronic records that lacked signatures by any party. And while Bay Cities is correct that a document can be authenticated by circumstantial evidence, promissory notes generally require significantly more. *See*, *e.g.*, *Crawford v. Tribeca Lending Corp.*, 815 F.3d 121, 126 (2d Cir. 2016) (requiring testimony from several witnesses tending to demonstrate that the loan agreements were what defendants claimed they were). Unsigned agreements have been rejected by district courts under Rule 901 even when accompanied by affidavits of custodians of records far more complete than those offered by Bay Cities. *See*, *e.g.*, *Henggeler v. Brumbaugh & Quandahl, P.C., LLO,* 894 F. Supp. 2d 1180, 1187 (D. Neb. 2012) (refusing to consider unsigned arbitration agreement after finding authenticating affidavit of custodian of records wanting).

That Bay Cities proffered agreements bearing a "close similarity to material allegations in Dillon's complaint" (JOB, p. 52) or that Dillon "supplied uniquely personal identifying information during the application process that is correctly reflected in the documents," (JOB, p. 53) is irrelevant—Dillon concedes he clicked through loan applications with USFastCash and VIN Capital, he does not concede however that he entered into the agreements presented by Bay Cities. *See*, *Pearson*, 123 F. Supp. 3d at 1074 ("Pearson agrees, of course, that he entered into an agreement with Plain Green; Pearson's theory of the case relies on the proposition that the terms of the agreement between Pearson and Plain Green were illegal.

Contrary to UDH's characterizations, though, nowhere in either his affidavit or his brief does Pearson concede that he entered into this agreement.")

Further, as the district court found, deposition testimony wherein Dillon "recognized" the loan agreements in the broad sense that they were loan agreements did nothing to authenticate the agreements'' specific provisions:

> While Dillon agreed the personal information in the proffered document accurately reflected the information he provided during the loan application process, (Doc. 180-1 at 8-10, 24:6-33:2), he did not remember any reference to an arbitration provision as he "clicked through" the loan application. (Id. at 10, 31:19-32:2). Given his lack of knowledge about the arbitration provision, it is difficult to understand how Dillon could competently identify the document as his loan agreement.

JA1046.

There was also nothing erroneous about the district court's treatment of the Muir and Knowles declarations. That the "witnesses testified to their familiarity with payday loan agreements" (JOB, p. 55) *in general* does nothing to authenticate these particular loan agreements. That the declarants obtained the electronic records from the databases of "servicers" of the payday lenders proves nothing when both declarants were unable to testify as to the chain of custody that led the electronic records to be located where they were found. "The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence. *See* FED. R. EVID. 901; McCormick, Handbook on the Law of Evidence s 213 (2d ed. E. Cleary ed. 1972)." *United States v. Howard-Arias*, 679

F.2d 363, 366 (4th Cir. 1982).[9]

Bay Cities failed to authenticate the documents it sought to place into evidence and the district court's evidentiary rulings in this regard where not "arbitrary or irrational." *Cole*, *supra*, 631 F.3d at 153.

III. The District Court Properly Held That The Arbitration Provisions BMO And Generations Invoked Were Unenforceable Under *Hayes*.

In denying BMO and Generations's motions to compel arbitration, the district court properly applied *Hayes* which held the very same arbitration provisions Generations sought to invoke below, as well as functionally identical arbitration provisions BMO sought to invoke, "invalid and unenforceable." In arguing that the district court misapplied *Hayes*, Appellants summon from thin air so-called "burdens" on the party resisting arbitration that were not even hinted at in *Hayes* and which would be completely inconsistent with this Court's finding that "one of the animating purposes of the arbitration agreement was to ensure that Western Sky and its allies could engage in lending and collection practices free from the strictures of any federal law." 811 F.3d at 676. Here, Generations is inarguably one of Western

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[9] Bay Cities completely ignores the fact that Muir's employer prevented his being deposed on his authenticating declaration. JA357, ¶ 22; JA606-08. Courts routinely strike, or refuse to consider, declarations where an opposing party is not allowed the opportunity to depose the declarant. *See Soto v. Castlerock Farming & Transp., Inc.*, No. 1:09-CV-00701-AWI, 2013 WL 6844377, at *13 (E.D. Cal. Dec. 23, 2013).

Sky's "allies" and BMO is in an identical alliance with Great Plains with an identical animating purpose.[10] When arbitration agreements are used by payday lenders and their allies in an obvious scheme to avoid state and federal law, there is no "burden" for Dillon to discharge apart from bringing the "offending" arbitral provisions to the attention of the court. As in *Hayes,* Appellants cannot avoid what is the intended result of these arbitration agreements: "rather than use arbitration as a just and efficient means of dispute resolution, [Appellants] seek[] to deploy it to avoid state and federal law and to game the entire system." *Id*.

A. There Is Nothing "Uncertain" About the Effect of the Choice of law Clause in the Arbitration Agreement BMO Sought to Invoke.

In a futile effort to escape the authority of *Hayes*, BMO offers the straw man argument that "the mere presence of a foreign choice of law clause does not automatically invalidate an arbitration agreement under the 'prospective waiver' doctrine." (JOB, p. 58). There is no dispute that "[i]n principle," the parties to an arbitration agreement "might choose … the law of Tibet" or "the law of pre-revolutionary Russia[.]" *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). However, while "parties are free within bounds to use a choice of law clause in an

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[10] Bay Cities is also "allied" with at least one illegal payday lender, USFastCash. *See* indictment against Tucker and T. Muir (JA976-1016) for operating an unlawful payday lending scheme with USFastCash as one the "Tucker Payday Lenders." JA977.

arbitration agreement to select which local law will govern the arbitration … a party may not underhandedly convert a choice of law clause into a choice of no law clause." *Hayes*, 811 F.3d at 675. An arbitration agreement's choice of law clause will not be enforced when it amounts to an outright prohibition on the assertion of federal rights:

> As the plaintiffs point out, the arbitration agreement here almost surreptitiously waives a potential claimant's federal rights through the guise of a choice of law clause. In the section entitled "Applicable Law and Judicial Review" the arbitration agreement provides that it "IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE CHEYENNE RIVER SIOUX TRIBE. The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement." … Another section of the arbitration agreement confirms that, no matter where the arbitration occurs, the arbitrator will not apply "any law other than the law of the Cheyenne River Sioux Tribe of Indians to this Agreement." … Instead of selecting the law of a certain jurisdiction to govern the agreement, as is normally done with a choice of law clause, this arbitration agreement uses its "choice of law" provision to waive all of a potential claimant's federal rights.

Id. at 675.

The choice of law clauses in the Great Plains arbitration agreement are even more emphatic:

> **Applicable Law and Judicial Review**. "THIS AGREEMENT TO ARBITRATE IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE OTOE-MISSOURIA TRIBE OF INDIANS. The arbitrator will apply the laws

> of the Otoe-Missouria Tribe of Indians and the terms of this Agreement, including the Agreement to Arbitrate . . . The arbitration award will be supported by substantial evidence and must be consistent with this Agreement and applicable law or may be set aside by the tribal court upon judicial review."
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> **GOVERNING LAW**. "This Agreement and the Agreement to Arbitrate are governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Otoe-Missouria Tribe of Indians. We do not have a presence in Oklahoma or any other state of the United States of America. Neither this Agreement nor the Lender is subject to the laws of any state of the United States."

JA185.

These provisions inarguably require the arbitrator to apply "the laws of the Otoe-Missouria Tribe of Indians and the terms of this Agreement." Just as in *Hayes*, the payday lender is "using its 'choice of law' provision to waive all of a potential claimant's federal rights." *Id.* As the district court held:

> The contract BMO seeks to enforce, like the contract in *Hayes*, contains provisions that "convert a choice of law clause into a choice of no law clause" and that "flatly and categorically renounce the authority of the federal statutes to which [the defendant] is and must remain subject." *Hayes*, 811 F.3d at 675. It cannot be enforced.

JA1025.

The decision below was not premised on a supposed "categorical rule barring enforcement of an arbitration provision in any contract that also includes a foreign choice of law clause," (JOB, p. 62) rather, the district court denied BMO's motion to compel because, as in *Hayes*, it was "unambiguous[]" that the [Great Plains]

agreement "proceeds to take [the plaintiff's] very claims away." 811F.3d at 668, 673-74.

Citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), BMO argues that the "prospective waiver doctrine this Court embraced in *Hayes* is "triggered if—and only if—the plaintiff has definitively shown that he or she will be precluded from vindicating federal statutory rights." (JOB, p. 59). But *Vimar* doesn't hold for that proposition at all. In fact, *Vimar* says nothing about requiring any "definitive showing" by the party resisting arbitration. Indeed, as BMO itself concedes in citing *Vimar* to argue that the district court "prematurely" considered a challenge to arbitration based on the possibility a foreign arbitrator would not apply federal law, (JOB, p. 59-60) *Vimar deferred consideration* of the prospective waiver of statutory claims "at this interlocutory stage." *Id.* at 540.

BMO ignores however, that, unlike *Hayes*, *Vimar* concerned a commercial arbitration agreement in an international contract and thus, was animated by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S.C. § 201 *et seq*. *Id.* at 538. To implement the Convention, Chapter 2 of the FAA provides two causes of action in federal court for a party seeking to enforce arbitration agreements covered by the Convention: (1) an action to compel arbitration in accord with the terms of the agreement, 9 U.S.C. § 206, and (2) at a later stage, an action to confirm an arbitral award made pursuant to

an arbitration agreement, 9 U.S.C. § 207. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1262-63 (11th Cir. 2011). As explained by this Court in reading *Lindo*:

> The Convention prescribes that the null-and-void defense be interposed at the first stage of the arbitration-related court proceedings, the "arbitration-enforcement stage"—i.e., when a district court is "considering an action or motion to 'refer the parties to arbitration.'" *Lindo*, 652 F.3d at 1263 (quoting Convention, art. II(3)). The public policy defense, on the other hand, may only be asserted at the second stage of the arbitration-related court proceedings, the "award-enforcement stage"—i.e., after an arbitration award has been made and the court is "considering whether to recognize and enforce an arbitral award." *Id.* (citing Convention, art. V).

Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 372 (4th Cir. 2012).

It is the Convention that requires questions of effective vindication be deferred to the arbitral award stage where the public policy defense is available. Thus, both *Vimar* and *Aggarao* are inapplicable here because the Great Plains loan agreement is not subject to the Convention and the Otoe-Missouria Tribe is not a Convention signatory.[11]

While the agreement in *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) as cited by BMO was not subject to the Convention, the case still provides no authority for overturning the decision below because *PacifiCare* did not concern

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[11] BMO's citation to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) is likewise misplaced for the same reason. "We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award." *Id.* at 637.

an arbitral choice of law provision. *PacifiCare* decides the question of whether plaintiffs can be compelled to arbitrate claims arising under RICO, "notwithstanding the fact that the parties' arbitration agreements may be construed to limit the arbitrator's authority to award damages under that statute." *Id.* at 402. The *PacifiCare* court engaged in a lengthy analysis to ascertain whether RICO's treble-damages provision constituted damages which were punitive (and thus impermissibly precluded by the subject arbitration agreements) or "remedial," ultimately concluding that:

> In light of our case law's treatment of statutory treble damages, and given the uncertainty surrounding the parties' intent with respect to the contractual term "punitive," the application of the disputed language to respondents' RICO claims is, to say the least, in doubt. And *Vimar* instructs that we should not, on the basis of "mere speculation" that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved ….

Id. at 406-07 (citation omitted).

Apart from acknowledging that RICO's statutory treble damages is precisely the type of federal statutory right meriting close examination to ensure it is not prospectively waived, *PacifiCare* provides little utility here. In contrast to the arbitration agreements in *PacifiCare*, Great Plains (and its related third parties) leave no doubt that *no federal statutes are permitted to apply in arbitration*. This unambiguous and categorical waiver of the authority of federal statutes is likely why

this Court never considered *PacifiCare* or *Aggarao* and mentioned *Vimar* only in passing in deciding *Hayes* ("the [U.S. Supreme] Court has upheld arbitration agreements that … impose other procedural requirements on potential claimants." *Hayes* at 674 (citing, *Vimar* at 541)).

Indeed, BMO's exploration of *Vimar*, *Aggarao* and *PacifiCare* is ultimately irrelevant. *Hayes* considered the very same challenge as Dillon raised below at precisely the same point in the proceedings on an essentially identical agreement to arbitrate,[12] so this Court clearly found the issues in *Hayes* distinguishable from *Vimar, Aggarao* and *PacifiCare*. There is simply no reason to defer the challenge to arbitration here where the Convention is not pertinent and the arbitral agreement, on its face, prospectively waives all federal rights. As in *Hayes*, the time to consider the prospective waiver doctrine is now.

B. BMO cannot invoke an Arbitration Contract and Simultaneously Seek to Rewrite the Arbitral Provisions it finds Inconvenient.

BMO suggests that Dillon has some burden "to prove that he would be deprived of federal statutory rights in arbitration," (JOB, p. 62) Yet, the words "burden" and "proof" do not even appear in *Hayes*, and no part of the decision requires the plaintiff to do anything—the *Hayes* decision is focused entirely on what

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[12] As it must, BMO concedes that "[i]n *Hayes* … 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." (JOB, p. 61).

Western Sky's arbitration provisions say and the fact that Western Sky's "ally" Delbert was attempting to use the arbitration provisions to escape liability under federal law:

> With one hand, the arbitration agreement offers an alternative dispute resolution procedure in which aggrieved persons may bring their claims, and with the other, it proceeds to take those very claims away. The just and efficient system of arbitration intended by Congress when it passed the FAA may not play host to this sort of farce.

Hayes, 811 F.3d 673-74.

Instead, BMO's "burden" argument introduces the novel concept that, having invoked an arbitration agreement to which it is not even a signatory, BMO is free to then rewrite the agreement as it sees fit. Thus, BMO now argues that Dillon cannot satisfy his purported "burden" to show a prospective waiver because BMO "has agreed that it, too, will be asking the arbitrator to apply U.S. law" (JOB, p. 62) — a purported "disclaimer" of Otoe-Missouria Tribal law that comes after three years of attempting to enforce the arbitration agreement as written, based on a single sentence offered in a supplemental brief submitted *after* this Court decided *Hayes*. BMO expressed this monumental change in position to the district court as follows: "BMO Harris has not invoked and will not ask the arbitrator to apply tribal law." (DE No. 210 at 2). Left unsaid by BMO in the district court was what law it would be asking the arbitrator to apply inasmuch as it "might choose … the law of Tibet" or "the law of pre-revolutionary Russia[.]" *DIRECTV, Inc.*, 136 S. Ct. at 468. Certainly, a

supposed "concession that Dillon may assert claims under U.S. law in arbitration" (JOB, p. 63) should include the words: "U.S." and "law" in it. [13]

Moreover, while parties are, generally, "free to consent to the application of the forum law," *Cosey v. Prudential Ins. Co. of Am.*, 735 F.3d 161, 169 (4th Cir. 2013), the arbitral choice of law provisions are not so easily glossed over here. Great Plains anticipated the undesirable possibility of its practices being reviewed under U.S. law and ensured that the Otoe-Missouria Tribal Court would have the last word:

> The arbitration award will be supported by substantial evidence and must be consistent with this Agreement and applicable law or may be set aside by the tribal court upon judicial review.

JA185.

There is no doubt what the "applicable law" in that sentence is: "[t]he arbitrator will apply the laws of the Otoe-Missouria Tribe of Indians" (*id.*) so an arbitrator who applies "U.S. law" will render an arbitration award that "may be set aside by the

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[13] BMO argues that because it unsuccessfully sought dismissal of the federal claims without invoking tribal law, this amounted to a "concession" that tribal law did not apply. (JOB, p. 63, fn. 15). Dillon disagrees that this amounted to a "concession" in part because BMO's motion to dismiss was submitted in the alternative to its motion to compel arbitration. In fact, BMO specifically requested "that the Court first resolve the threshold question raised by [it's other] motion—whether this case should be sent to arbitration—before considering this motion …." (Doc. 39, p. 8, fn. 1) Thus, BMO intended for the district court to rule on the motion to dismiss arbitration only if it first denied the arbitration motion—and there is no dispute BMO sought to compel arbitration under the Great Plains agreement requiring arbitration under the law of the Otoe-Missouria Tribe of Indians before the court ever reached the motion to dismiss.

tribal court upon judicial review." And even assuming BMO were to promise not to avail itself of the ability to set aside the resulting arbitration award in tribal court, there is no guarantee that Great Plains would refrain from doing so in an attempt to preserve its lucrative illegal payday loan enterprise.

Further, BMO's "concession" that U.S. law applies is simply a roundabout attempt to sever the offending choice of law provisions of the arbitration agreement. The very thing this Court refused to do in *Hayes*:

> Moreover, we do not believe the arbitration agreement's errant provisions are severable. It is a basic principle of contract law that an unenforceable provision cannot be severed when it goes the "essence" of the contract. 8 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 19:73 (4th ed.1993). Here, the offending provisions go to the core of the arbitration agreement. It is clear that one of the animating purposes of the arbitration agreement was to ensure that Western Sky and its allies could engage in lending and collection practices free from the strictures of any federal law.
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> Good authority counsels that severance should not be used when an agreement represents an "integrated scheme to contravene public policy." *Id*. (quoting E. Allan Farnsworth, Farnsworth on Contracts § 5.8, at 70 (1990)). We thus decline to sever the provisions here.

Id. at 675-76. *See*, *also*, *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1351 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1735, 191 L. Ed. 2d 701 (2015) (provision requiring arbitration be conducted by the "Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the

terms of this Agreement" found to be an "an integral aspect of the arbitration agreement.")

Here, not only do the errant choice of law provisions go to the "essence of the contract," the Great Plains "arbitration agreement is little more than an attempt to achieve through arbitration what Congress has expressly forbidden." Just as in *Hayes*, "good authority counsels that severance should not be used when an agreement represents an "integrated scheme to contravene public policy." *Id.* (citations omitted).[14]

C. The Arbitration Provision Unambiguously Requires the Arbitrator to Apply the Law of the Otoe-Missouria Tribe.

BMO selectively quotes from one of the two provisions of the arbitration agreement mandating tribal law and seizes on the lack of the word "only" as being indicative that an arbitrator would presumably be free to apply any law the arbitrator fancied. But the arbitration agreement is simply not amenable to any other interpretation:

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[14] BMO again cites *Mitsubishi Motors Corp.*, this time in support of its contention that BMO's "concession" that American law applies to Dillon's claims places it on equal footing with Mitsubishi after it "conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis." 473 U.S. at 637. But BMO ignores the many distinctions between Mitsubishi Motors's legitimate arbitration agreement with an automobile dealer enforceable under the Convention and the Great Plains arbitration agreement. Not least, that the Great Plains arbitration agreement represents an "integrated scheme to contravene public policy." *Hayes* at 676.

> THIS AGREEMENT TO ARBITRATE IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND ***SHALL*** BE GOVERNED BY THE LAW OF THE OTOE-MISSOURIA TRIBE OF INDIANS.

Id. (emphasis added)

"The word 'shall' is ordinarily 'the language of command.'" *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (quoting, *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)). *See also Inetianbor*, 768 F.3d at 1351 ("As the loan agreement says, the arbitration 'shall'—that is, 'is required to,' BLACK'S LAW DICTIONARY (9th ed. 2009)—be conducted by an authorized representative of the Tribe.") Apart from the fact that this language is identical to that in *Hayes*, there is no reasonable interpretation of this language other than the law of the Otoe-Missouria Tribe of Indians *is required* to govern.

The mandatory language continues:

> The arbitrator ***will*** apply the laws of the Otoe-Missouria Tribe of Indians and the terms of this Agreement, including the Agreement to Arbitrate . . . The arbitration award ***will*** be supported by substantial evidence and ***must*** be consistent with this Agreement and applicable law or may be set aside by the tribal court upon judicial review."

JA185 (emphasis added).

The words "will" and "must" are also mandatory language. *See*, *e.g.*, *Mendoza v. Blodgett*, 960 F.2d 1425, 1429 (9th Cir. 1992) ("the search for mandatory language necessarily focuses on words such as 'shall' and 'will,'"); *Summit Packaging Sys., Inc. v. Kenyon & Kenyon*, 273 F.3d 9, 12 (1st Cir. 2001)

("The parties' choice of the word 'will'-a word 'commonly having the mandatory sense of 'shall' or 'must,' BLACK'S LAW DICTIONARY 1102 (6th ed. 1991)-demonstrates their exclusive commitment to the two named forums."). *Cf. Taylor v. Jordan*, 922 F.2d 836 (4th Cir. 1991) ("A prison regulation creates a protected liberty interest where it imposes substantive limitations on official discretion … by using 'language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed").

What is more, under the "cardinal principle of contract construction[] that a document should be read to give effect to all its provisions and to render them consistent with each other," it is incumbent upon a court "to harmonize the choice of law provision with the arbitration provision …." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995). *See also CoreTel Virginia, LLC v. Verizon Virginia, LLC*, 752 F.3d 364, 370 (4th Cir. 2014) ("cardinal principle of contract construction ... that a document should be read to give effect to all its provisions") (citing *Mastrobuono*). Thus, the arbitral choice of law provisions must be read in harmony with the other choice of law provisions in the Great Plains agreement including:

> This Loan Agreement (the "Agreement") is subject ***solely*** to the exclusive laws and jurisdiction of the Otoe-Missouria Tribe of Indians, a federally recognized Indian Tribe …. By executing this Agreement, you hereby acknowledge and consent to be bound to the terms of this Agreement, consent to the sole subject matter and personal jurisdiction of the Otoe-Missouria Tribe of Indians Tribal Court, and further agree

> that ***no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation***.

JA180 (emphasis added).

The arbitral choice of law provision is unambiguous as to what law is to be applied by the arbitrator and even assuming *arguendo* that any ambiguity existed, the other contractual choice of law provision leaves no doubt that the command that "the arbitrator will apply the laws of the Otoe-Missouria Tribe of Indians" means exactly what it says.

D. Dillon Is Not Required to Demonstrate That He Would "Fare Better" under U.S. Law.

BMO insists that "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." (JOB, p. 68). But BMO misstates the holding in *Hayes*: "[i]nstead of selecting the law of a certain jurisdiction to govern the agreement, as is normally done with a choice of law clause, this arbitration agreement uses its "choice of law" provision to waive all of a potential claimant's federal rights." 811 F.3d at 675. The choice of law provisions here, like the "offending" provisions in *Hayes*, are thus *completely unlike* the choice of law clauses in the other authorities BMO cites.

The *Hayes* court easily discerned that the choice of Cheyenne River Sioux tribal law in the arbitration agreement—like the choice of Otoe-Missouria tribal law here—was never meant to serve as a legitimate choice of law in arbitration, it was

intended to renounce the authority of federal law. "[A] party may not underhandedly convert a choice of law clause into a choice of no law clause—it may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject." *Id*. As in *Hayes*, "[b]ecause the arbitration agreement in this case takes this plainly forbidden step …it [is] invalid and unenforceable." *Id.*

Like the plaintiff in *Hayes*, Dillon has no burden to demonstrate anything because these provisions, coupled with other provisions in the agreement, which provide word-for-word that "*no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation*" (JA180) "takes this plainly forbidden step" and "flatly and categorically renounce the authority of the federal statutes to which [Great Plains and BMO] is and must remain subject." *Id*. That ends the inquiry and the arbitration agreement BMO has invoked is invalid and unenforceable.[15]

E. Plaintiff's RICO Claim is a "Statutory Damage" Claim.

Generations, which is invoking the identical arbitration agreement this Court held unenforceable in *Hayes*, suggests that the holding in *Hayes* is confined to claims

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[15] BMO concludes with a seemingly extraneous "standing" discussion arising from some confusion about which Great Plains loans BMO debited in repayment of, which is a merits-based argument completely unrelated to arbitration and prospective waiver of federal law. In any event, Dillon filed a motion for leave to file an amended complaint addressing this minor issue on June 14, 2016 (Doc. 248).

for statutory damages, which Generations asserts would exclude Dillon's RICO claims. A civil RICO claim is however a "statutory claim." Indeed, "[c]ivil RICO is of course a statutory tort remedy—simply one with particularly drastic remedies." *Brandenburg*, *supra*, 859 F.2d at 1189. "RICO is a strictly statutory remedy to enforce statutory rights." *Malley-Duff & Associates, Inc. v. Crown Life Ins. Co.*, 792 F.2d 341, 352 (3d Cir. 1986), *aff'd sub nom. Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987). Thus, even assuming *Hayes* were concerned only with prospective waivers of federal statutory rights, Plaintiff's RICO claims fall within the ambit of the holding in *Hayes*.[16]

Generations cites to *Roby v. Corp. of Lloyd's* ,996 F.2d 1353, 1366 (2d Cir. 1993) for the non-controversial proposition that a RICO claim may be knowingly waived with a bona fide choice of foreign law clause in a contract—but that is an epic leap from the choice of law clause in the Western Sky arbitration agreement which "underhandedly convert[s] a choice of law clause into a choice of no law clause … flatly and categorically renounce[ing] the authority of the federal statutes to which it is and must remain subject." 811 F.3d at 675.

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[16] As noted *supra*, the Supreme Court has indicated that RICO claims for "statutory treble damages" are among the group of claims that should not to be waived in arbitration. *PacifiCare Health Sys. Inc.*, 538 U.S. at 406.

Generations further posits that ["t]he 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." (JOB, p. 73). While Generations's point is far from clear, it is apparently focused on the issue of standing to assert federal claims.[17] However, the U.S. Supreme Court made clear just last term that a federal statutory violation still requires injury in fact for standing to sue. *See Spokeo*, 136 S. Ct. at 1544 (violation of Fair Credit Reporting Act insufficient for standing to sue without injury in fact). Thus, all federal statutory claims require "actual harm" as Generations seems to be using the term.

That Dillon's federal claims arise under RICO rather than the Fair Debt Collection Practices Act, and the Telephone Consumer Protection Act are irrelevant to this Court's holding in *Hayes* that a party "may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject." 811 F.3d at 675.

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[17] *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 590 (1992) ("To survive petitioner's motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed.").

F. Dillon Properly Challenged the Delegation Provision Below.

The Western Sky arbitration agreement contains an express delegation provision. JA129. "The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center, W., Inc.*, *supra*, 561 U.S. at 68. In *Rent-A-Center*, the Supreme Court held that "unless [plaintiff] challenged the delegation provision specifically, we must treat it as valid under § 2 (of the Federal Arbitration Act), and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.* at 72. But beyond requiring a "specific challenge" to the delegation provision, *Rent-A-Center* does not impose any different standard on delegation provision challenges as compared to challenges to any other contract:

> An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under § 2 "save upon such grounds as exist at law or in equity for the revocation of any contract . . ."

Id. at 70 (quoting 9 U.S.C. § 2).

Thus, so long as specifically challenged, where the delegation provision relies upon the common arbitral provisions, it may be invalidated where those common provisions are shown to be unenforceable. *See id.* at 74 ("It may be that had Jackson challenged 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.").

As required by *Rent-A-Center*, the opposition memorandum of law provided "Plaintiff hereby specifically challenges the delegation provision of the Arbitration Agreement" JA236 and went on to explain that, "the Arbitration Agreement is unconscionable and unenforceable and, because those same unconscionable provisions apply to the delegation provision, the delegation provision is also unconscionable and unenforceable." JA237. Generations argues that "Dillon made no argument specific to the delegation provision." (JOB, p. 76). However, as Dillon specifically argued below, "because those same unconscionable [common arbitral] provisions apply to the delegation provision, the delegation provision is also unconscionable and unenforceable." JA237. *Rent-A-Center* requires no more and there is no case law suggesting anything further is necessary for a proper delegation challenge. Certainly Dillon's 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*, which this Court determined "challenged the validity of that delegation with sufficient force and specificity to occasion our review." 811 F.3d at 671.

In any event, where the law the arbitrator would be forced to apply in determining a challenge to arbitration under the delegation clause is determined under the same choice of law provision this Court determined was only being used

to "waive all of a potential claimant's federal rights," 811 F.3d at 675, there is little doubt that the delegation provision is fatally flawed and a court may properly consider the enforceability of an arbitration agreement notwithstanding language delegating questions of arbitrability to the arbitrator.[18]

G. *Hayes* was Properly Decided.

Appellants close by arguing that *Hayes* was wrongly decided but their arguments misstate this Court's ruling. As explained *supra*, *Hayes* is completely consistent with *Mitsubishi Motors*, *Vimar*, and *Aggarao* because the arbitral agreement was not subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[19] Further, in contrast to Appellant's other authorities, the choice of law provision in the Western Sky arbitration agreement in *Hayes*, "[i]nstead of selecting the law of a certain jurisdiction to govern the agreement, as is normally done with a choice of law clause, this arbitration

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[18] It is worth noting that Generations was the only defendant below that argued that Dillon's challenge to the delegation clause was insufficient. (*See* Docs. 181 and 183).

[19] As discussed *supra*, *PacifiCare* does not concern an arbitral choice of law provision—rather, the issue in *PacifiCare* was whether a RICO claim may be prospectively waived by an arbitral waiver of punitive damages—a question the U.S. Supreme Court deferred until arbitration. Here, in contrast, there is no question that both the Western Sky and Great Plains arbitral choice of law provisions "flatly and categorically renounce the authority of the federal statutes to which [they are] and must remain subject." *Hayes* at 675.

agreement uses its "choice of law" provision to waive all of a potential claimant's federal rights." *Id.* at 675.

Appellants are also incorrect that *Hayes* purportedly decided the validity of the choice of law clause in the contract rather than the arbitration provision's choice of law clause. (JOB, p. 62). *Hayes* is based on the arbitration agreement's specific choice of law provision but it is also incumbent upon a court "to harmonize the choice of law provision with the arbitration provision …." *Mastrobuono*, 514 U.S. at 63-64.

Nothing in *Hayes* suggests that the Cheyenne River Sioux Tribe has no applicable law—rather, *Hayes* correctly found the arbitration agreement's choice of Cheyenne River Sioux Tribal law impermissibly "flatly and categorically renounce[ed] the authority of the federal statutes to which it is and must remain subject." 811 F.3d at 675. As in *Hayes*, "rather than use arbitration as a just and efficient means of dispute resolution," Appellants seek "to deploy it to avoid state and federal law and to game the entire system." *Id.* at 676.

Finally, Appellants' challenge to *Hayes* is procedurally improper in that Appellants have not petitioned for their appeal be heard initially *en banc* under FED. R. APP. P. 35(c). "It is quite settled that a panel of this circuit cannot overrule a prior panel. Only the *en banc* court can do that." *Booth*, 327 F.3d at (citing *Bell v. Jarvis*, 236 F.3d 149, 159 (4th Cir. 2000) (en banc)). An appellant must petition for

an initial *en banc* hearing in order for this Court to overrule past precedent. *See*, *e.g.*, *United States v. Waddell*, 412 F. App'x 577, 578 (4th Cir. 2011). Appellants' failure to seek an initial *en banc* hearing on their argument that this Court should overrule its own precedent dooms this portion of the appeal before the panel.[20]

The decisions of the district court denying the motions to compel arbitration should be affirmed.

CONCLUSION

The district court's orders denying Appellants' renewed motions to enforce the arbitration agreements should be affirmed.

Dated: July 19, 2016

Respectfully submitted,

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[20] *See* March 1, 2016 Order entered in *Hayes* denying petition for rehearing *en banc*. Appeal 15-1170 Docket #72.

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CERTIFICATE OF COMPLIANCE

On June 28, 2016, the Court entered an order granted an extension of the length limitation for this response brief to 15,400 words. Order, Dkt. No. 41, at 1.

In accordance with that order and Federal Rules of Appellate Procedure 28(a)(10) and 32(a), I certify that this Response Brief consists of 15,391 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 2013 in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July 2016, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all parties or their counsel of record through the CM/ECF system.

I further certify that on this 19th day of July 2016, I caused the required copies of the Brief of Appellee to be hand filed with the Clerk of the Court.

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