IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

LULA WILLIAMS, GLORIA TURNAGE, GEORGE HENGLE, DOWIN COFFY, and FELIX GILLISON, JR., *on behalf of themselves and all individuals similarly situated*,

Civil Case No. 3:17-cv-00461-REP

Plaintiffs,

v.

BIG PICTURE LOANS, LLC, *et al.*,

Defendants.

DEFENDANTS BIG PICTURE LOANS, LLC, ASCENSION TECHNOLOGIES, LLC, JAMES WILLIAMS, JR., GERTRUDE MCGESHICK, SUSAN MCGESHICK, AND GIIWEGIIZHIGOOKWAY MARTIN'S
REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Specially-Appearing Defendants Big Picture Loans, LLC, Ascension Technologies, LLC, James Williams, Jr., Gertrude McGeshick, Susan McGeshick, and Giiwegiizhigookway Martin, (the "Tribal Defendants"), by counsel, submit this reply in support of their Motion to Dismiss under Fed. R. Civ. P. 12(b)(6).

INTRODUCTION

This lawsuit is from a playbook of sensational arguments that have been recycled against several defendants in other cases.[1] However, the claims against Defendants here are unique and cannot be shoehorned to fit into their preexisting arguments. By failing to recognize the unique circumstances presented by Indian tribes and their economic arms and instrumentalities, Plaintiffs reliance on preformed legal positions and unsupported accusations is insufficient.

[1] *See, e.g.*, *Gibbs v. Rees*, No. 3:17-cv-386, ECF No. 1 (E.D. Va. May 19, 2017); *Inscho v. Johnson*, No. 1:17-cv-674, ECF No. 1 (E.D. Va. June 15, 2017); *Wiley v. Jardine*, No. 3:17-cv-11, ECF No. 1 at ¶ 2 (Jan. 5, 2017); *Hunter v. NHCash.com, LLC*, No. 3:17-cv-348, ECF No. 1 at ¶ 2 (E.D. Va. May 8, 2017).

To date, this litigation has focused on whether or not the Court has jurisdiction over this matter and the moving Tribal Defendants. As a result, this Motion to Dismiss ("Motion") is limited to the single argument that the tribal choice of law and forum selection provision is an agreement by Plaintiffs that "all disputes" will be governed by LVD law and applicable federal laws, and requires Plaintiffs to use the tribal dispute resolution procedures. (Dkt. 1-1, p. 4 (quoted in full *infra* § I.B)). As presently limited by the Court, the Tribal Defendants reserve the right to raise additional bases for dismissal should, *arguendo*, there be a final determination that the Tribal Defendants are not immune from suit. *See generally* FED. R. CIV. P. 12.

Plaintiffs are flatly wrong to claim that "the provision's choice-of-law clause prospectively waives all of a consumer's federal statutory rights and remedies, while the chosen law mandates a sham dispute resolution procedure that ensures a consumer will never be able to make it into any court to raise any claims against Big Picture, Martorello, and others associated with the enterprise." (Opp. p. 2). Federal law is expressly adopted in the loan agreements. Moreover, Plaintiffs provide no facts to show the parties, facts, and law here are analogous in any way to the parties, facts, and law in *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 335 (4th Cir. 2017). Quite the contrary, as detailed below, Plaintiffs' loan agreements' Governing Law and Forum Selection provision is explicitly different than that in *Dillion* as it expressly incorporates applicable federal law both directly in the loan agreement and indirectly through operation of LVD law.

The clear language of Plaintiffs' Governing Law and Forum Selection provision makes it apparent that there is no prospective waiver of any federal law, provides that Plaintiffs have a fair forum to ensure their "day in court," and ensures that remedies are available in the event of wrongdoing. Plaintiffs cannot support their allegations that the loan agreements, or, more precisely here, the Governing Law and Forum Selection provision within the loan agreements, was

procured with fraud. Finally, Virginia public policy does nothing to support Plaintiffs claims that the choice-of-law provision in the loan agreements that they voluntarily entered into are invalid. Thus, they must be enforced and this case dismissed.

ARGUMENT

"While legal conclusions can provide the framework for a complaint, all claims must be supported by factual allegations." *Zaklit v. Glob. Linguist Sols., LLC*, No. 1:14CV314 JCC/JFA, 2014 WL 3109804, at *4 (E.D. Va. July 8, 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Plaintiffs cannot meet that basic requirement.

I. The Governing Law and Forum Selection provision is valid and enforceable.

"Since its seminal decision in *The Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1 (1972), the Supreme Court has consistently accorded choice of forum and choice of law provisions presumptive validity, rejecting the 'parochial concept' that 'notwithstanding solemn contracts . . . all disputes must be resolved under our laws and in our courts.'" *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) (parallel citations omitted); *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538-39 (1995); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 519 (1974). Valid forum selection or choice of law provisions should be "given controlling weight in all but the most exceptional cases." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).

Virginia law also provides that where "a contract specifies that the substantive law of another jurisdiction governs its interpretation or application, the parties' choice of substantive law should be applied." *Olawole v. ActioNet, Inc.*, 258 F. Supp. 3d 694, 705 (E.D. Va. 2017) (quoting *Settlement Funding, LLC v. Von Neumann–Lillie*, 274 Va. 76, 81 (2007)); *see also Hitachi Credit*

Am. Corp. v. Signet Bank, 166 F.3d 614, 624 (4th Cir. 1999) ("Virginia law looks favorably upon choice of law clauses in a contract, giving them full effect except in unusual circumstances."). The rationale most often used to support application of this rule is that it comports with traditional concepts of freedom of contract and recognizes the present nationwide and worldwide scope of business relations which generate potential multi-jurisdictional litigation. *The Bremen,* 407 U.S. at 11. Plaintiffs' attempt to invalidate the choice-of-law provision on the basis that it violates federal rights and because it is unreasonable and unfair. But these claims are without merit.

Any refusal to enforce forum selection clauses must "be overcome by a clear showing that they are 'unreasonable' under the circumstances." *Allen*, 94 F.3d at 928 (quoting *The Bremen,* 407 U.S. at 10). "Choice of forum and law provisions may be found unreasonable if (1) the complaining party 'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum; (2) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; (3) their formation was induced by fraud or overreaching; or (4) their enforcement would contravene a strong public policy of the forum state." *Id.* (citing *Carnival Cruise Lines,* 499 U.S. at 595). Under the criteria in *Allen*, the Plaintiffs' Governing Law and Forum Selection provision is reasonable and therefore enforceable.

A. The Governing Law and Forum Selection provision ensures due process and fairness.

The administrative process identified in Plaintiffs' loan agreements and codified in Section 9 of the Tribal Consumer Financial Services Regulatory Code ("Code")[2] guarantees Plaintiffs the same process and remedies found in virtually every state and federal administrative procedure. With the administrative process being parented by the LVD Tribal Court ("Tribal Court"), all consumers are guaranteed due process.

[2] Dkt. 23, Attach. #4.

The administrative process begins with an informal alternative dispute resolution procedure. LVD recognized that formal adjudication can at times get expensive and stressful for consumers, so in the first instance, the process requires that consumers bring their complaints to their lender to afford the parties an opportunity to resolve the matter without extensive adjudication. (*Compare, e.g.*, Code § 9.2 *with* Local Civil Rule 83.6(A) (encouraging parties to "achieve settlement") *and* Va. Code § 8.01-576.5 (allowing a court to refer a matter to an orientation session to "encourage the early resolution of disputes.")).

The next step – the formal dispute resolution procedure – closely mirrors most state and federal administrative processes. *See, e.g.*, Administrative Procedures Act, 5 USC § 554; Virginia Administrative Procedures Act, 40 VCA § 2.2-4000 *et seq*.; Michigan Administrative Procedures Act, MCL 24.271 *et seq*. Just as any sovereign exercising its police powers through regulation and regulatory agencies, LVD has done the same with its Code and its Tribal Financial Services Regulatory Authority ("TFSRA"). The TFSRA is empowered to resolve consumer disputes including, when necessary, conducting administrative hearings. (Code at §§ 9.3(b) and (c)).

Finally, in the same manner that judicial review is afforded for all state and federal administrative decisions before original court actions may proceed, consumers may appeal any TFSRA decision to the Tribal Court. The Tribal Court's review in an administrative appeal is limited in the same manner as most federal and state courts presiding over an administrative appeal. *See, e.g.*, FED. R. APP. P. 10(a); Va. Code § 2.2-4027; Mich Comp. Law 24.306. Section 9.4(g) of the Code ensures that any party understands that a Tribal Court decision exhausts tribal and administrative remedies to allow opportunity for an original action in a court of competent jurisdiction.

Plaintiffs attack the Governing Law and Forum Selection provision by arguing that the Tribal Court lacks jurisdiction. The argument has no merit. Plaintiffs cite the LVD Constitution, which bestows the Tribal Court with jurisdiction over any matter or controversy arising under Tribal law. The Code was enacted by LVD under its constitutional authority to enact laws that control activity within LVD's jurisdiction. (*See* LVD Constitution Art I § 2). The Code explains that any consumer financial service offered by any tribally owned licensee is within the jurisdiction of LVD. (*See* Code, §§ 1.1(c), (e), (g); 2.4; 5.1(c); 7.2(a), (g); 8.1). Plaintiffs' loans were issued under the Code by a licensee that is a wholly-owned arm of LVD, and so this matter clearly arises under LVD law. In fact, nothing anywhere supports Plaintiffs' contention that LVD, through the TFSRA and Tribal Court, does not have jurisdiction.

Plaintiffs also argue that the Governing Law and Forum Selection provision is unfair and will deprive them of their day in court because, *arguendo*, the TFSRA "[w]ill not grant the consumer an opportunity to be heard if the only allegation contained in the consumer complaint is an allegation that the consumer finance service provider is illegal in a jurisdiction outside the jurisdiction of the Tribe." (Opp. p. 20 (quoting TFSRA Regulation 1.1(B)(4)(c)).

Plaintiffs overstate the import of TFSRA Regulation 1.1(B)(4)(c) and its role in the dispute resolution process. First, TFSRA Regulation 1.1(B)(4)(c) specifically states that "[t]he [TFSRA] will adhere to the dispute resolution procedures set out under section 9.3 of the Code," which allows any relief appropriate. Next, Plaintiff fail to recognize that TFSRA Regulation 1.1(B)(4(c) has been superseded by subsequent amendments to the Code. TFSRA Regulation 1.1 was adopted in 2013, while the Code and the dispute resolution process was last amended in 2015. When two laws conflict, the more recently enacted law controls. *W.S. Forbes & Co. v. Southern Cotton Oil Co.*, 130 Va. 245, 108 S.E. 15, 25 (1921) (citing *Gaines' Adm'r v. Marye*, 94 Va. 225, 227 (Va.

1897)). *See also Inter-Contl. Promotions, Inc. v. MacDonald*, 367 F.2d 293, 301 (5th Cir. 1966) ("[T]he conflicting provision which is last in time or last in order of arrangement prevails."). Thus, TFSRA Regulation 1.1 does not deprive consumers of their day in court.

B. The Governing Law and Forum Selection provision incorporates applicable federal law to ensure fairness and that consumers have adequate available remedies.

Plaintiffs are protected by applicable federal law. The Governing Law and Forum Selection provision makes absolutely clear that the loan agreements are governed by "applicable federal law." (Compl. ¶ 70; Dkt. 1-1 p 4). But in their Opposition, Plaintiffs argue that the inclusion of this language in the Governing Law and Forum Selection provision is negated by other language in the loan agreements. (Opp. pp. 6–7). In particular, the loan agreement includes certain acknowledgements:

> You acknowledge and agree that this Agreement is subject solely and exclusively to the Tribal law and jurisdiction of the Lac Vieux Desert Band of Lake Superior Chippewa Indians.
>
> You acknowledge and agree that the Tribal Dispute Resolution Procedure is the sole and exclusive forum for resolving disputes and/or claims arising from or relating to this Agreement.

Dkt. 1-1 p. 6.

Plaintiffs assert the above provisions result in an "unambiguous" exclusion of federal law, despite the clear reference to "applicable federal law" within the Governing Law and Forum Selection Provision., which controls over any other general provision cited by Plaintiffs. *See, e.g.*, *Girgis v. Salient Solutions, Inc.*, 2012 U.S. Dist. LEXIS 94764, at *1 (E.D. Va. Jul. 9, 2012); *Macke Laundry Serv. Ltd. P'ship v. Alleco Inc.*, 743 F.Supp. 382, 386 (D. Md. 1989) (noting the "settled rule of contract construction that a specific provision will control over a general provision where such provisions are arguably in conflict").

Furthermore, the provisions of the agreement must be read together and do not require extensive interpretation. The "important acknowledgements" section that references Tribal law refers to the Code, which ***does include*** applicable federal law. In the Code, federal consumer protection laws are incorporated in §§ 1.1(f), 6.1, and 6.2. Of these sections, Code § 6.2 requires that a licensee "shall conduct business in a manner consistent with principles of federal consumer protection law," and lists several federal laws. For a tribal licensee, this section requires compliance with federal consumer protection laws.

Plaintiffs misconstrue Code § 6.2 in an attempt to show that compliance with applicable federal law is "voluntary." Under the code, a licensee must "conduct business in a manner consistent with principles of federal consumer protection law." Failure to do so subjects the licensee to enforcement action. (*See, e.g.*, Code § 5.4(a)(5).)

No limits to remedies. Plaintiffs also attack the dispute resolution process, claiming that the Tribal Court and TFSRA are unable to grant appropriate remedies. However, the TFSRA is free to impose any relief it deems appropriate.[3] (Code § 9.3(f)). And if the TFSRA's relief is inadequate—*e.g.*, it is not consistent with the principles of federal consumer protection law, or does not consider applicable federal law as required in the loan agreement—the Tribal Court may remand the matter to the TFSRA with instructions to grant appropriate relief. (Code § 9.4(f)). While the Tribal Court defers to the TFSRA in the same manner as federal courts defer to government agencies, the Tribal Court may ensure proper relief is granted. *See Taubman Realty Group Ltd. Partnership v. Mineta*, 198 F. Supp. 2d 744, 764 (E.D. Va 2002) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

[3] Plaintiffs cite TFSRA Regulation 1.1(B)(4)(c) to argue that the TFSRA is limited in the relief it can grant. Plaintiffs fail to recognize that such regulation has been superseded by subsequent amendments., as argued in *supra* § I(A).

Immunity precluding any remedy would be unfair. It is peculiar that Plaintiffs argue that tribal sovereign immunity should prevent them from recourse. Plaintiffs argue that if Big Picture and Ascension were true arms of LVD, they would simply assert tribal sovereign immunity against any consumer claims, including in the instant matter. (Opp. p. 17). While it is true that without the Code, as arms of LVD, Big Picture and Ascension could simply assert sovereign immunity, such an extreme one-sided business approach would not be successful.[4] "When tribes back up sovereignty with stable, fair, effective, and reliable governing institutions, they create an environment that is favorable to sustained economic development." MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 866 (2014). Indeed, all sovereigns, at times, consent to suit. LVD's decision to subordinate licensees to administrative action and recourse is not unique. In fact, according to the Governing Law and Forum Selection provision the Plaintiffs agreed to, the Tribal Court may be the only court with jurisdiction over the claim as licensees, including Big Picture and Ascension, expressly subordinate themselves to the jurisdiction of the Tribe.

The prospective waiver doctrine is inapplicable. Plaintiffs argue that *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), stands for the premise that "where 'choice-of-forum and choice-of-law clauses' operate 'in tandem as a prospective waiver of a party's right to pursue statutory remedies,' they are unenforceable." (Opp. p. 5 (quoting *Mitsubishi*, 473 U.S. at 637 n. 19)). *Mitsubishi* does not support Plaintiffs' position here.

In *dicta* in a footnote in *Mitsubishi*, the Supreme Court opined that there is no reason for a court to presume that (international) arbitration will be inadequate and that arbitration provisions should be enforced without speculation on possible outcomes. But, the Supreme Court continued, if the arbitration outcome was contrary to United States public policy, there would be recourse in

See STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 308-09 (4th ed. 2012) (discussing circumstances under which Indian tribes provide for waivers of sovereign immunity).

federal court. *Mitsubishi*, 473 U.S. at 637 n.19 (1985); *see also Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 334 (4th Cir. 2017) ("A foreign choice of law provision, of itself, will not trigger application of the prospective waiver doctrine.").

Here, according to *Mitsubishi*, the Court must enforce the Governing Law and Forum Selection provision. Plaintiffs' mere speculation that they would be deprived of federal remedies, despite the plain language of the loan agreements and the Code stating otherwise, is not a prospective waiver sufficient to render the provision unenforceable. And, if the administrative procedure is somehow infirm, Plaintiffs have recourse to the Tribal Court, as is further discussed in the pending Motion to Dismiss for Failure to Exhaust Tribal Remedies and Under the Doctrine of *Forum Non Conveniens*.

Hayes and Dillon are inapplicable. Rather than rely on the language of their own loan agreements, Plaintiffs make every effort to shoehorn this matter into the decisions in *Hayes v. Delbert Services Corp.*, 811 F.3d 666 (4th Cir. 2016), and *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017). Both cases are readily distinguishable.

In both *Hayes* and *Dillon*, *non-tribal entities* attempted to enforce arbitration provisions in loan agreements. *Hayes*, 811 F. 3d at 669–70; *Dillon*, 856 F.3d at 332–33. Both *Hayes* and *Dillon* found that the loan agreements' choice-of-law provisions expressly disclaimed the application of all federal law to the arbitration proceeding rendering the arbitration agreements invalid and unenforceable. In *Hayes*, as Plaintiffs point out, the arbitration provision in the loan agreement "renounce[d] wholesale the application of any federal law to the plaintiffs' federal claims." *Hayes*, 811 F.3d at 673. Similarly, in *Dillon*, the choice of law provision "functions as a prospective waiver of federal statutory rights and, therefore, is unenforceable as a matter of law." *Dillon*, 856 F.3d at 336. Because of the explicit language in the *Hayes* and *Dillon* agreements, the Fourth

Circuit held in both cases that the choice of law provisions prospectively disclaimed applicable federal law and found neither enforceable.

The loan agreements at issue differ from those in *Hayes* and *Dillon*. Indeed, the Governing Law and Forum Selection provision in Plaintiffs' loan agreement does not disclaim federal law but *explicitly incorporates it*.

C. The Governing Law and Forum Selection provision was not procured by fraud or overreaching.

Plaintiffs attempt to avoid the Governing Law and Forum Selection provision in their loan agreement with conclusory allegations that the "governing law clause . . . was procured through fraud and misrepresentations . . . ." (Compl. ¶ 73). However, "[w]hile all factual allegations in the Complaint must be presumed true at this stage in the proceedings, the fraud allegations must nevertheless meet the heightened pleading requirements set forth in Rule 9(b) of the Federal Rules of Civil Procedure." *Chien v. Virginia*, No. 1:17-CV-677, 2017 WL 3758716, at *3 (E.D. Va. Aug. 28, 2017) (citing *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989)).

Generally, Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). However, when alleging that a dispute resolution provision within an agreement was procured by fraud, "Virginia law requires that allegations of fraud and overreaching be directed specifically at the inclusion of a dispute resolution provision . . . ." *Zaklit*, 2014 WL 3109804, at *4. "In other words, to avoid the operation of a choice-of-law provision on the basis of overreaching or fraud, as is the case here, the party resisting the clause must establish by clear and convincing evidence that the clause itself, as opposed to the contract as a whole, was the product of impropriety." *Id.* at *7.

Here, Plaintiffs have failed to supply clear and convincing evidence that the Governing Law and Forum Selection provision was procured by fraud. Instead, Plaintiffs' whole lawsuit

alleges a deceitful lending operation that was a "rent-a-tribe" scheme designed to "create the illusion that it enjoys tribal sovereign immunity." (Compl. ¶¶ 2, 3; *see also id.* at ¶¶ 13, 30, 47).

Plaintiffs' claims of misrepresentation underlie the entire Complaint, but Plaintiffs do not identify any particular instance where there was alleged fraud related to the Governing Law and Forum Selection provision itself." *See, e.g., In re First Union Corp. Sec. Litig.*, 128 F. Supp. 2d 871, 884 (W.D.N.C. 2001) ("Rule 9(b) requires that plaintiffs plead all of the elements of fraud with particularity. Particularity of pleading is required with regard to the time, place, speaker, and contents, as well as the manner in which statements are false and the specific acts raising an inference of fraud- the 'who, what, where, why and when.'") (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999)). This was the exact situation in *Zaklit*, where the plaintiffs attempted to invalidate the choice of law provision but only made allegations about "the entire contract rather than to the choice-of-law clause in particular." *Zaklit*, No. 1:14CV314 JCC/JFA, 2014 WL 3109804, at *8. Thus, the *Zaklit* court ruled that plaintiffs "failed to make the requisite showing to invalidate the choice-of-law provision" because the plaintiffs did not allege that they were misled concerning the legal effect of the choice-of law provision. *Id.*

Also like in *Zaklit*, "Plaintiffs have presented no evidence to support their claim that the choice-of-law provision is invalid," to overcome their "heavy burden of proof." *Id.* (citing *Anchor Seafood, Inc. v. CMA–CGB (Caribbean), Inc.*, No. 05–23097–CIV, 2005 WL 4674292, at *3 (S.D. Fla. May 4, 2005)). "While the amount of evidence needed to satisfy this burden may be debatable, one thing is certain, it takes more than conclusory allegations in the pleadings, none of which are directed specifically at the choice-of-law provision, as is the case here. *Zaklit*, No. 1:14CV314 JCC/JFA, 2014 WL 3109804, at *8. Plaintiffs rely solely on conclusory allegations to support the

claim that the Governing Law and Forum Selection provision are invalid, therefore they have fallen far short of their burden to invalidate the provision.

D. Enforcement of the Governing Law and Forum Selection Clause does not contravene Virginia public policy.

Virginia's public policy is to honor and enforce choice of law and forum selection provisions. The Supreme Court of Virginia has squarely held: "Where, however, the parties to the contract have themselves expressly declared that their contract shall be held and construed as made with reference to a certain jurisdiction, that shows by what law they intended the transaction to be governed." *Klein v. Verizon Communications, Inc.*, 674 F. App'x 304, 308 (4th Cir. 2017) (quoting *Union Cent. Life Ins. v. Pollard,* 94 Va. 146 (1896) and citing *Settlement Funding, LLC v. Von Neumann-Lillie*, 274 Va. 76 (2007)).

Plaintiffs' Complaint contains a lengthy diatribe against online lenders, which is "supported" by anecdotes describing Virginia's public policy against usury. (*See, e.g.*, Complaint ¶ 1–3, 21–23). However, Virginia honors forum selection and choice of law provisions, even when the selected law has different usury policies then Virginia, such as those present in the relevant loan agreements. *See generally Settlement Funding,* 274 Va. 76.

In *Settlement Funding,* the Supreme Court of Virginia held that "[i]f a contract specifies that the substantive law of another jurisdiction governs its interpretation or application, the parties' choice of substantive law should be applied" *without consideration of the fact that* "Utah has not established any limits on maximum rates of interest for consumer loans."[5] The choice-of-law clause was enforceable. *Id.* at 81.

[5] Thus, any attempt by Plaintiff to limit Settlement Funding to the consideration of the specific interest rate at issue in that case is without merit.

Plaintiffs' public policy arguments were presented to, and directly rejected by, the Supreme Court of Virginia in *Settlement Funding*, where the opening lines of the consumer's brief read:

> Although the Loan Agreement provides that Utah laws govern the contract, Virginia Courts do not blindly accept a contract provision requiring another state's laws to be applied. Instead, courts will only uphold the choice of law if there is a reasonable basis for the choice, and the law chosen is not contrary to the public policy of the Commonwealth of Virginia. In the case at bar, there was no reasonable basis proven at trial for choosing Utah law, and *Virginia public policy requires Virginia law to be applied*.

BRIEF FOR APPELLEE, *Settlement Funding v. Von Neumann-Lillie*, No. 061373, at *1 (Va. Jan. 5, 2007) (emphasis added, internal citations omitted). The same result must occur here.

Simply put, "not every situation where contractually chosen law diverges merely in degree from that of the state whose law would otherwise apply impinges upon the fundamental policy of that state." *Barnes Grp., Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1031 (4th Cir. 1983). As the Fourth Circuit has recognized, "[t]his is seen most clearly in regard to usury statutes, where the parties' choice of law has been held to validate interest rates that would be usurious and unenforceable in the jurisdiction whose law would prevail absent the contractual stipulation of controlling law." *Barnes Grp*., 716 F.2d at 1031 (collecting cases). Plaintiffs ignore that Fourth Circuit authority, and scores of other trial court decisions like it, based on their misperception of tribal sovereignty and the extension of tribal sovereign immunity.

Here, it is undisputed that the Plaintiffs voluntarily executed their loan agreements confirming they read, understood, and agreed to the choice of law provisions. Under *Settlement Funding*, Plaintiffs therefore cannot recover for alleged violations of Virginia usury laws because LVD law – not Virginia law – applies to Plaintiffs' loan agreements with Big Picture. And, like the laws of Utah, LVD law allows interest in excess of Virginia's rates. (Dkt. 23 p. 4). Thus, the true issue here is the recognition of LVD's ability to enact laws as a sovereign nation in the same manner as Utah, and the deference to those laws by Virginia and this Court. Virginia's strong

public policy honoring choice of law and forum selection provisions compels a straightforward– and dispositive– proposition that the loan agreements are not governed by Virginia law, but by the laws of LVD. *Zaklit*, 2014 WL 3109804, at *5.

The Supreme Court of Virginia's controlling holding in *Settlement Funding* is dispositive of the alleged "usury" here. Plaintiffs thus spend substantial space to muddy its clear import. (*See* Reply at pp. 10-14.) This Court, however, can go straight to the text of the decision, where the Supreme Court addressed the application of the law of a state (Utah) with no maximum rate of interest that could be charged by the lender, and held. "If a contract specifies that the substantive law of another jurisdiction governs its interpretation or application, the parties' choice of substantive law should be applied." *Settlement Funding*, 274 Va. at 79.

Plaintiffs attempt to discredit *Settlement Funding* with an assertion that the Supreme Court of Virginia correctly enforced the choice of law clause "because the 'National Bank Act expressly preempts national banks,' like the lender in *Settlement Funding*, to 'charge on any loan interest at the rate allowed by the laws of the State . . . .'" (Opp. p. 25 (internal citations omitted)). The Supreme Court did not address any such issue, nor did the underlying briefing mention a "preemption" argument.[6] Also, in 2006, WebBank was "a Utah-chartered industrial loan corporation," not a bank. Moreover, as Congress has not enacted any federal usury law, case law interpreting the National Bank Act, 12 USC § 85, is directly analogous to instances of tribal sovereign lending laws, supporting the Tribal Defendants' position, not Plaintiffs'. The Supreme Court has held that Congress could have but chose not to impede the "exportation" of interest rates despite perceived impediments to states' enforcement of state usury laws. *Marquette Nat. Bank*

[6] *See* BRIEF FOR APPELLANT, *Settlement Funding v. Von Neumann-Lillie*, No. 061373 (December 11, 2006); BRIEF FOR APPELLEE, *Settlement Funding v. Von Neumann-Lillie*, No. 061373 (Va. Jan. 5, 2007); REPLY BRIEF FOR APPELLANT, *Settlement Funding v. Von Neumann-Lillie*, No. 061373 (Va. Jan. 19, 2006).

of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 317 (1978). Similarly, Congress could have, but chose not to, impede Indian tribes from acting in the same manner.

II. Virginia law does not apply to the loan agreements.

A. The loan agreements were formed on LVD's reservation.

Virginia adheres to the traditional First Restatement rule for contracts cases, namely that the laws of the place of contracting govern the validity of a contract, and the place of contracting is determined by the location of the last act necessary to complete the contract. *Rahmani v. Resorts Int'l Hotel, Inc.*, 20 F. Supp. 2d 932, 934 (E.D. Va. 1998), *aff'd*, 182 F.3d 909 (4th Cir. 1999); *Fuisz v. Selective Ins. Co.*, 61 F.3d 238, 241 (4th Cir. 1995). Additionally, other federal courts recognize the last act rule as well. In fact, at least one federal court has already determined that a borrower's contract with a tribal online lending company is formed on the tribe's reservation:

> But, in cases involving a contract formed on the reservation in which the parties agree to tribal jurisdiction, treating the nonmember's physical presence as determinative ignores the realities of our modern world that a defendant, through the internet or phone, can conduct business on the reservation and can affect the Tribe and tribal members without physically entering the reservation.

FTC v. Payday Fin., LLC, 935 F. Supp. 2d 926, 939 (D.S.D. 2013). The *Payday Financial* court concluded that "the contract between the Borrowers and Lending Companies appears to be formed on the Reservation in South Dakota." *Id.* at 938; *see also Rahmani*, 20 F. Supp. 2d at 934.

The Code § 2.4 expressly states that the contract is formed on the Reservation where Plaintiffs' applications were received, background information was reviewed, applications were either approved or denied, and loans originated. The loan agreements ensure that Plaintiffs understand that the loan agreement is formed on Indian land and controlled by LVD law. (Dkt. 1-1 p. 2). Thus, Virginia law does not control.

B. A "firm offer of credit" does not change where the loan agreements were formed.

Plaintiffs are mistaken to argue that "Defendants made an offer to Plaintiffs, which was accepted." (Opp. p. 27–28.) One Plaintiff allegedly received a "firm offer of credit" in the mail. By calling it an offer in attempt to rely on common law contract formation principles, Plaintiffs mischaracterize "firm offer of credit" as it is used under the Fair Credit Reporting Act ("FCRA"). Under the FCRA, "[t]he term 'firm offer of credit or insurance' means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer . . . ." 15 U.S.C. § 1681a(l). The offer may be further conditioned on: (1) a determination by the lender of the consumer's ability "to meet specific criteria bearing on credit worthiness"; (2) verification by the lender "that the consumer continues to meet the specific criteria used to select the consumer for the offer"; and (3) furnishing of any require collateral by the consumer. *Id.*

Thus, under the FCRA, a firm offer of credit is not the final step in creating a contract between the consumer and the lender—instead, the firm offer of credit only includes a guarantee that the consumer will not be denied credit if he meets the criteria spelled out in the offer. *See, e.g., Sullivan v. Greenwood Credit Union*, 520 F.3d 70, 76 (1st Cir. 2008) (citing *Kennedy v. Chase Mountain Bank USA, NA*, 369 F.3d 833, 841 (5th Cir. 2004)). To be a true firm offer a credit, then, the mailing must provide some "value" to the consumer, but is not a true "offer" as defined under state law. *See Sullivan*, 520 F.3d at 77.

Federal courts have distinguished an FCRA firm offer of credit from a common law offer to contract. Under the FCRA, a "firm offer of credit" is a term of art, and despite the word "offer" appearing in the name, the term is not meant to be understood under state law definitions of "offer" or notions of contract law. *See, e.g., Cole v. US Capital*, 389 F.3d 719, 726-27 (7th Cir. 2009)

(explaining firm offers of credit under the FCRA). While the firm offer of credit must be more than a "guise for solicitation," "[d]efining a firm offer of credit as merely any offer that will be honored elevates form over substance, 'exalt[s] artifice above reality and ... deprive[s] the statutory provision in question of all serious purpose.'" *Cole,* 389 F.2d at 727.

Plaintiffs misconstruction and misuse of a "firm offer of credit" does not migrate the last act of the transaction from LVD's reservation to Virginia. Thus, LVD law rightfully governs.

C. The Governing Law and Form Selection provision applies to both contract, tort, and statutory claims.

"'Virginia law favors contractual choice of law clauses' and they are generally found to 'encompass contract-related tort claims.'" *Zaklit*, 2014 WL 3109804, at *9 (quoting *Cyberlock Consulting, Inc. v. Info. Experts, Inc.,* 876 F. Supp. 2d 672, 678 (E.D. Va. 2012)).

Under Virginia's choice of law rules, tort claims are governed by the law of the place of the wrong. *Rahmani*, 20 F. Supp. 2d at 937 ; *McMillan v. McMillan,* 219 Va. 1127, 1128 (1979); *Quillen v. International Playtex, Inc.,* 789 F.2d 1041, 1044 (4th Cir.1986). The place of the wrong is the place where the injury was suffered, not where the tortious act took place. *Rahmani*, 20 F. Supp. 2d at 937 (citing *Johnson v. Oroweat Foods Co.,* 785 F.2d 503, 511 (4th Cir.1986)); 4A MICHIE'S JURISPRUDENCE, CONFLICT OF LAWS § 36.

Regardless, Virginia acknowledges that choice of law provision can encompass all claims related to a contract, including tort and statutory claims. "'Where a choice-of-law clause in the contract is sufficiently broad to encompass contract-related tort claims,' Virginia courts will 'honor[ ] the intent of the parties to choose the applicable law' and apply the provision to related, non-contract claims." *Zaklit,* 2014 WL 3109804, at *9 (quoting *Hitachi Credit Am. Corp. v. Signet Bank,* 166 F.3d 614, 628 (4th Cir.1999)). "The rationale underlying this rule is straightforward; allowing parties to negotiate the rules that govern their relationship creates certainty and avoids

applying the laws of multiple jurisdictions to a controversy having its origin in a single, contract-based relationship." *Zaklit*, 2014 WL 3109804, at *9 (citing *Pyott–Boone*, 918 F. Supp. 2d at 544).

Also, the Supreme Court has recognized that alternative dispute resolution mechanisms are capable, and in some instances, intended, to adjudicate statutory rights. In *Mitsubishi*, the Supreme Court considered whether arbitration (under the Arbitration Act) could be employed to adjudicate the parties' statutory rights under the Sherman Antitrust Act. The Court found "'[t]he preeminent concern of Congress in passing the [Arbitration] Act was to enforce private agreements into which parties had entered,' a concern which 'requires that we rigorously enforce agreements to arbitrate.'" *Mitsubishi*, 473 U.S. at 625–26 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). While the Supreme Court's focus was on the Arbitration Act, its reasoning applies generally here:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.

Mitsubishi, 473 U.S. at 628 (internal citations omitted). The Supreme Court also acknowledged that contractual provisions requiring alternative dispute resolution, in *Mitsubishi* specifically arbitration, should be enforced even when enforcement took to the matter outside the jurisdiction of federal courts:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost

> indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction....
> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.... [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."

Mitsubishi, 473 U.S. at 631 (quoting *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 516–17 (1974)). Therefore, whether Plaintiffs' claims are rooted in contract, tort, or statutory law, the Governing Law and Forum Selection provision requires that LVD Law apply to the claims. Virginia law has no application. And, because Virginia law does not apply, Plaintiffs' claims – all of which hinge on the application of Virginia's statutory interest rate cap – must all be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court: (1) grant their Motion to Dismiss, thereby dismissing the claims with prejudice; and (2) grant them such other and further relief as may be warranted.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will then send a notification of such filing (NEF) to the following:

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