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

GEORGE HENGLE, SHERRY BLACKBURN, WILLIE ROSE, ELWOOD BUMBRAY, TIFFANI MYERS, STEVEN PIKE, SUE COLLINS, LAWRENCE MWETHUKU, *on behalf of themselves and all individuals similarly situated,*	)	
	)	Civil Action No. 3:19-cv-250-REP
Plaintiffs,	)	
v.	)	
SCOTT ASNER; JOSHUA LANDY; SHERRY TREPPA, CHAIRPERSON OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; TRACEY TREPPA, VICE-CHAIRPERSON OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; KATHLEEN TREPPA, TREASURER OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; IRIS PICTON, SECRETARY OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; SAM ICAY, MEMBER-AT-LARGE OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in his official capacity*; AIMEE JACKSON-PENN, MEMBER-AT-LARGE OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; AMBER JACKSON, MEMBER-AT-LARGE OF THE HABEMATOLEL POMO OF UPPER LAKEMAN EXECUTIVE COUNCIL, *in her official capacity*;	)	
Defendants.	)	

REPLY IN SUPPORT OF
DEFENDANTS SCOTT ASNER AND JOSHUA LANDY'S
RENEWED MOTION TO COMPEL ARBITRATION

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INTRODUCTION

Plaintiffs, now unhappy with the contractual terms to which each agreed, strain to rewrite the Consumer Loan and Arbitration Agreements ("Agreement") to their benefit, confuse the issues, and misdirect the Court.[1] As in their original and amended complaints, Plaintiffs argue guilt by fabricated association—because other cases about tribal lending involved unenforceable arbitration provisions, the arbitration provision in this Agreement must be unenforceable too. Plaintiffs punctuate their arguments with baseless accusations about bad faith and improper purpose on the part of Asner and Landy. The only parties acting in bad faith are Plaintiffs—all in an effort to evade their valid and binding agreements to arbitrate the claims they improperly filed in this Court as a class action. This Court should reject their efforts and compel arbitration.

The proper analysis here is narrow and straightforward: It begins and ends with the question of *who* decides whether these disputes belong in arbitration. Plaintiffs clearly and unmistakably agreed to have an arbitrator—rather than a court—decide any threshold disputes about the validity or scope of the arbitration provision, including the disputes now raised in their opposition brief. Plaintiffs now attempt to evade that delegation clause, but fail to meet the demanding standard required to show that the Agreement, simply by entrusting threshold disputes to an arbitrator rather than a court, is unfair to the point of unenforceable. This Court need not, and should not, go further; the Agreement, the Federal Arbitration Act ("FAA"), and binding precedent leave no role for this Court other than to compel arbitration.

Even if this Court decides arbitrability itself, it will find that the claims against Asner and Landy belong in arbitration. Plaintiffs do not dispute that the arbitration provision covers all such

[1] "Plaintiffs" means all Plaintiffs in this action other than Plaintiff Mwethuku, who opted out of arbitration yet whose claims cannot proceed in this Court for different reasons. *See infra* at 20.

claims or that Asner and Landy have standing to enforce the provision as "related third parties" to the Agreement; thus, Plaintiffs can evade arbitration only if they show that the arbitration provision is invalid and unenforceable. Each of Plaintiffs' four arguments on that score are without merit.

First, the arbitration provision does not prospectively waive Plaintiffs' substantive legal rights against Asner and Landy. There are stark differences between the arbitration provision here and its counterparts in *Hayes* and *Dillon*, yet Plaintiffs fail to address them. *Second*, Plaintiffs object to standard choice-of-law language in which there is no infirmity. But even if there were, it is severable from the rest of the arbitration provision, as made clear by federal arbitration law and the arbitration provision itself. *Third*, Plaintiffs' convoluted theory about the interplay between the Agreement and the "Tribal Code" is refuted by the plain language of those documents and contradicted within Plaintiffs' own brief. These documents do not operate to conceal, alter, or eliminate the arbitration procedures that are clearly stated in the Agreement for disputes with third parties like Asner and Landy. *Fourth*, Plaintiffs not only misstate the legal standard governing unconscionability, but also fail to demonstrate procedural and substantive flaws in the arbitration provision that shock the conscience, as required by the correct legal standard.

ARGUMENT

I. The Delegation Clause Must Be Enforced.

Binding precedent supplies the answer to the question of "*who* decides" arbitrability. *Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 101 (4th Cir. 2012). The parties to an arbitration agreement can decide whether the arbitrator or the court will resolve "'gateway' questions of 'arbitrability,'" such as challenges to the validity of the arbitration agreement itself. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). If the parties delegate gateway questions to the arbitrator, the Court must "respect the parties' decision as embodied in the contract." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019).

A. The Delegation Clause Clearly And Unmistakably Assigns Questions About The Validity Of The Arbitration Provision To The Arbitrator.

Plaintiffs clearly and unmistakably delegated threshold disputes regarding the "validity and scope of this Arbitration Provision" to the arbitrator. Ex. 1 to Mem. Supp. Defs.' Renewed Mot. to Compel Arbitration ("Mot."), at 5, ECF No. 58-1 ("Ex. 1"); *see id.* at 5, ¶ 1(a). Plaintiffs do not dispute that fact, Opp'n at 24-27, nor could they credibly do so. The Agreement contains language at least as explicit as language deemed to be "clear and unmistakable" evidence of delegation under Fourth Circuit precedent. *See* Mot. at 11-12 (collecting cases). In addition to the Agreement's language assigning disputes about "scope and validity" to the arbitrator, Ex. 1 at 5, the Arbitration Provision also invokes arbitral rules requiring delegation, *id*. at 6, ¶ 4; *see Gillam v. Branch Banking & Tr. Co. of Va.*, No. 3:17-CV-722, 2018 WL 3744019, at *4 (E.D. Va. Aug. 7, 2018).

In these circumstances, there is "no place for the exercise of discretion by a district court." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). It is error for a court to decide disputes about "validity" that were clearly and unmistakably delegated to the arbitrator. *Henry Schein*, 139 S. Ct. at 531. This binding precedent requires the Court to enforce the delegation clause and the Agreement, compelling arbitration of "all disputes." Ex. 1 at 5, ¶ 3.

B. Plaintiffs Cannot Evade The Delegation Clause.

Plaintiffs strain to evade the delegation clause. But their arguments do not show that the delegation clause *itself* is invalid, and therefore do not provide this Court with any basis to usurp the role of the arbitrator to decide in the first instance whether these claims belong in arbitration.

Section 2 of the FAA "states that a 'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' *without mention* of the validity of the contract in which it is contained." *Rent-A-Center*, 561 U.S. at 70 (emphasis in original) (quoting 9 U.S.C. § 2). Accordingly, "a party's challenge to another provision of the contract, or to the contract as a

whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Id*. The challenge must instead "be directed specifically to the agreement to arbitrate before the court will intervene." *Id.* at 71. In *Rent-A-Center*, the Court extended this reasoning to delegation clauses. That is, a party must challenge the delegation clause itself and show it to be unenforceable. Challenges to the arbitration provision generally, or the underlying contract as a whole, do not suffice. *Id*. at 72; *see Artis v. Lyon Shipyard, Inc.*, No: 2:17cv595, 2018 WL 2013073, at *2 (E.D. Va. Apr. 26, 2018) ("[A] party cannot successfully attack a delegation clause by arguing that the substantive terms of the underlying arbitration contract are unconscionable."). Moreover, when parties use the same arguments to attack both the arbitration provision and the delegation clause, they face a "much more difficult" burden to prevail as to the delegation clause. *Rent-A-Center*, 561 U.S. at 74. Plaintiffs must overcome that "much more difficult" burden here because they challenge the delegation clause on the same grounds as the arbitration provision. *See* Opp'n at 24-27.

Plaintiffs argue that the delegation clause is unenforceable because the arbitration provision allegedly (1) prospectively waives the borrower's rights under state and federal law; (2) requires a hidden "Mandatory Dispute Resolution process" prior to arbitration; and (3) prevents the arbitrator from considering "whether the agreement is unenforceable under Virginia law." *Id*. at 25-26. But, as explained below, Plaintiffs have not met their burden to show that these arguments render the arbitration provision unenforceable. *See supra* at 7-17. They come nowhere near satisfying the "much more difficult" standard to show that these alleged defects make it improper for an arbitrator to decide the validity of the arbitration provision.[2]

[2] Plaintiffs rely on the Second Circuit's recent decision in *Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2d Cir. 2019), *petition for cert. filed*, 88 U.S.L.W. 3073 (U.S. Sept. 11, 2019) (No. 19-331). *See* Opp'n at 1-2, 26. But *Gingras* did not decide whether the delegation clause was unenforceable; after finding that the plaintiffs challenged the clause, the court proceeded directly to the validity

Plaintiffs also argue that the delegation clause is unenforceable because the entire Agreement allegedly is void under Virginia law. Opp'n at 26. Far from challenging the delegation clause, this argument attacks the Agreement as a whole. What is more, it would require the Court to decide the merits of this case—including whether Virginia law applies and, if so, whether any act has been done in the making or collection of loans that violates Virginia usury law—under the guise of deciding whether the delegation clause is valid. For this backward approach, Plaintiffs cite *Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk Assurance Co.*, which held that delegation clauses are invalid in *insurance* contracts governed by Virginia law. 867 F.3d 449, 456 (4th Cir. 2017).[3] This case does not involve an insurance contract, so does not implicate the particular reason *Minnieland* found the delegation clause invalid. Instead, this case is governed by *Rent-A-Center* and the "line of cases" before it holding that alleged infirmities in the underlying contract are no impediment to enforcing the delegation clause. 561 U.S. at 70-71.

In their last-ditch effort to evade the delegation clause, Plaintiffs advance two additional arguments both of which contravene established federal law and should be discarded by this Court.

First, Plaintiffs contend that the Court can decide the prospective waiver issue *notwithstanding* a valid and enforceable delegation clause. Opp'n at 27-28. That is so, Plaintiffs say, "because there is no uncertainty concerning the effect of the arbitration agreement's waiver

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of the arbitration provision as a whole. *Id*. at 126. That approach is contrary to the Fourth Circuit's interpretation of Supreme Court precedent as requiring the court to decide whether the delegation clause is unenforceable upon finding that the plaintiffs squarely challenged it. *Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449, 455 (4th Cir. 2017) ("if we conclude that [the party] specifically challenged the enforceability of the delegation provision, we then must decide whether the delegation provision is unenforceable 'upon such grounds as exist at law or in equity'"). *Gingras* conflicts with this Circuit's binding precedent.

[3] The court in *Minnieland* reached that conclusion by straightforwardly applying Section 38.2-312 of the Virginia Code, which requires Virginia courts to decide actions against insurers, and reflects "a state policy choice that insureds should have the option to seek enforcement of Virginia's insurance laws and regulations in court, rather than through arbitration." 867 F.3d at 457.

of all federal statutory rights." *Id*. at 27. This argument is directly contrary to *Henry Schein*, which held that the court cannot bypass a delegation clause simply because the court thinks the answer to the arbitrability question is obvious. 139 S. Ct. at 529. Even if the argument in favor of arbitration appears "wholly groundless" to the court, the court is not at liberty to "override the contract"; it must respect the agreement of the parties to delegate arbitrability to the arbitrator. *Id*.; *see also Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 371-73 (4th Cir. 2012) (rejecting argument that prospective waiver should be considered when deciding whether to enforce arbitration provision). The lower court decisions that Plaintiffs invoke all predate *Henry Schein*, which forecloses the reading of those decisions that Plaintiffs urge.[4]

Second, Plaintiffs contend that "a federal court will not have an opportunity to review the arbitration award," so judicial consideration of the prospective waiver issue is now or never. Opp'n at 28. Yet, the FAA clearly provides for judicial review of arbitration awards by "the United States court in and for the district wherein the award was made," and permits federal courts to "make an order vacating the award upon the application of any party to the arbitration." 9 U.S.C. § 10(a). Plaintiffs misread *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995),

[4] A recent decision in this district purports to cabin *Henry Schein* to challenges to the "arbitrability or non- arbitrability of issues within" an arbitration agreement. *Gibbs v. Stinson*, No. 3:18-cv-676, 2019 WL 4752792, at *12 (E.D. Va. Sept. 30, 2019). On its own terms, that reading of *Henry Schein* is wrong, as explained above. The *Gibbs* court conflates challenges to the specific agreement *to arbitrate* with challenges to the entire arbitration agreement, *as a whole*. Even before *Henry Schein*, the Supreme Court in *Rent-A-Center* made clear that challenges to the validity of the arbitration contract *as a whole*—such as unconscionability—must be delegated to the arbitrator if the delegation clause itself is valid. 561 U.S. at 71-72. And in *Aggarao* the Fourth Circuit held that prospective waiver challenges must be delegated to the arbitrator. 675 F.3d at 371-73. *Gibbs* neither references nor distinguishes these cases. Moreover, Plaintiffs here cannot show that the delegation clause itself is invalid. And, even accepting *Gibbs*' erroneous distinction, this Court must compel arbitration because the Agreement here does not effect a prospective waiver of Plaintiffs' federal law claims, and therefore is valid. *See infra* at 7-14.

to hold that an arbitration award would be insulated from judicial review. Not so. *Sky Reefer* merely observed that if judicial review were somehow foreclosed,[5] then the Court might address the prospective waiver issue up front rather than waiting per usual until the award-enforcement stage to do so. But in *Sky Reefer*—just as in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985), and in this case—judicial review is available after the arbitral award has issued. Thus, Plaintiffs cannot rely on the counterfactual contemplated in *Sky Reefer* to dodge the delegation clause. The delegation clause is valid, and it must be enforced.

II. The Arbitration Provision Is Valid And Enforceable.

Because Plaintiffs clearly and unmistakably assigned threshold arbitrability issues to the arbitrator, and because Plaintiffs' delegation clause is valid, the FAA and binding precedent require this Court to compel arbitration. The Court should go no further. If, contrary to binding precedent, the Court nonetheless reaches the question of whether Plaintiffs' claims against Asner and Landy belong in arbitration, this Court's inquiry is narrow. Plaintiffs do not dispute that the arbitration provision covers all of their claims against Asner and Landy or that Asner and Landy have standing to enforce the arbitration provision as "related third parties" to the Agreement. The sole question is whether the agreement to arbitrate is valid. *Chorley Enters., Inc. v. Dickey's Barbecue Rest., Inc.*, 807 F.3d 553, 563 (4th Cir. 2015). As a matter of federal law, agreements to arbitrate are presumptively "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Plaintiffs' four challenges to the validity of the arbitration agreement all fail.

A. The Arbitration Provision Does Not Prospectively Waive Plaintiffs' Claims Against Asner And Landy.

Plaintiffs attempt to argue guilt by fabricated association based on other cases involving

[5] For example, because the court delegated the dispute to a foreign court and dismissed rather than stayed the action, such that the court would lack jurisdiction under the FAA to review or confirm the resulting arbitral award.

tribal lending in which arbitration provisions have been invalidated for prospectively waiving federal statutory rights. Opp'n at 1-2, 8-12. But the task at hand is contract interpretation, and the arbitration provision here is meaningfully different from those in other cases. Plain and simple, the Agreement here does not renounce or prospectively waive federal law.

1. *Hayes* And *Dillon* Are Distinguishable.

The offending loan agreement language in *Hayes* and *Dillon* is nowhere to be found in Plaintiffs' Agreement. *Hayes* hinged on language declaring: "Neither this Agreement nor Lender is subject to the laws of any state of the United States of America," and "no United States state or federal law applies to this Agreement." *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 669-70 (4th Cir. 2016). *Dillon* had "identical language" and specifically required borrowers to "agree that no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation." *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 335-36 (4th Cir. 2017). Thus, when the Fourth Circuit found prospective waivers in *Hayes* and *Dillon*, the court was *not* relying upon a standard choice-of-law provision selecting tribal law. The court based its decisions on "terms throughout the underlying loan agreement" expressly disavowing the application of all state and federal law. *Id.* at 336 (citing *Hayes*, 811 F.3d at 670, 675). Put another way, the *Dillon* and *Hayes* agreements had clear contractual terms that demonstrated "an unambiguous attempt to apply tribal law *to the exclusion of federal and state law*." *Id.* (emphasis in original).

Not so here. Plaintiffs challenge three sections of the arbitration provision, Opp'n at 8-10, but none repudiates state or federal law. First, the statement that the "parties … will be governed by the laws of the Habematotel Promo of Upper Lake" is a standard choice-of-law provision. *Id.* at 9 (quoting Ex. 1 at 6, ¶ 4). It does not preclude the arbitrator from applying other law, nor does it resemble the express repudiations of state and federal law in *Hayes* and *Dillon*. In fact, while

Plaintiffs claim this phrasing is "[u]nlike a typical choice of law clause," it exactly matches the suggested provision for "Governing Law" on the American Arbitration Association website Plaintiffs themselves cite. *See* Opp'n at 9 & n.7. Just as a choice-of-law provision stating that the "parties will be governed by the laws of the Commonwealth of Virginia" does not constitute an improper prospective waiver, this language choosing tribal law does not either.

The same is true of the second provision Plaintiffs highlight, which states that the "arbitrator shall apply applicable substantive Tribal law consistent with the Federal Arbitration Act." Opp'n at 10 (quoting Ex. 1 at 6, ¶ 5). Again, this is standard language, not an illicit prospective waiver. Countless arbitration provisions direct arbitrators to apply the substantive law of a particular jurisdiction consistent with the FAA, and "[t]he Supreme Court has … squarely rejected the argument that a federal court should read a contract's general choice-of-law provision" to displace applicable federal law. *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 382 (4th Cir. 1998) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)). Notably, the arbitration provisions in *Hayes* and *Dillon* did not invoke the FAA like the provision here, and instead repeatedly disclaimed any application of federal law.

Finally, Plaintiffs misconstrue the provision addressing the choice of tribal law even if the arbitration proceeding takes place off the reservation to accommodate the borrower. *See* Opp'n at 9-10 (quoting Ex. 1 at 6, ¶ 4). In this context, the provision is not a repudiation of state or federal law, but rather confirmation that the choice of law remains the same regardless of where the arbitration occurs. Plaintiffs read this provision to mean that the arbitrator cannot apply other law, where warranted. But that reading simply is not plausible in the context of the arbitration provision or the Agreement, which repeatedly references and incorporates federal law and specifically recognizes that any state-law claims that are available must be brought in arbitration. *See* Mot. at

22-23. These references to state and federal law elsewhere would make no sense if Plaintiffs' interpretation were the correct one. This Court must select the interpretation that accounts for context and harmonizes surrounding provisions. *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 267 (4th Cir. 2011). The interpretation Plaintiffs urge does neither.

In sum, the Agreement here contains multiple provisions making clear that federal law applies and therefore *lacks* the key language found to have repudiated federal law in *Hayes* and *Dillon*. Mot. at 22-23. Plaintiffs have no real answer to Asner and Landy's arguments about the specific references to federal constitutional and statutory law in the Agreement. Plaintiffs do not address the language invoking "interstate commerce" and "other federal … laws," *see* Ex. 1 at 6, and instead deflect with non sequiturs about the Indian Commerce Clause, *see* Opp'n at 17. Similarly, Plaintiffs cannot explain away the long list of federal law protections incorporated into the Agreement, *see* Ex. 1 at 6, 7, 9, except to speculate that such provisions "may have been aimed at avoiding violations to prevent government enforcement of those laws," Opp'n at 18. Rank speculation aside, the Agreement repeatedly references and does not waive federal law, so *Hayes* and *Dillon* do not preclude arbitration.

2. Plaintiffs Disregard In-Circuit Precedent And Rely Upon Decisions From Other Circuits Involving Different Agreements And Circumstances.

Plaintiffs ignore *Jarry v. Allied Cash Advance Virginia, L.L.C.*, 175 F. Supp. 3d 622, 626 (W.D. Va. 2016), which Asner and Landy cited in their opening brief, and which distinguished *Hayes* and *Dillon*. *See* Mot. at 23. The agreement in *Jarry*, like the Agreement at issue here, made multiple references to federal and state law. 175 F. Supp. 3d at 626. The *Jarry* agreement also contained a "Governing Law" provision stating that it "shall be construed, applied, and governed by the laws of the Commonwealth of Virginia, except that the Arbitration Agreement . . . shall be governed by the Federal Arbitration Act ('FAA')." Ex. C to Compl., *Jarry v. Allied Cash Advance*

Virginia, L.L.C., No. 6:15-CV-00045 (W.D. Va. Dec. 4, 2015), ECF No. 1-3. The court determined that the *Jarry* agreement was "very different" from the agreement at issue in *Hayes* and did "not reject the wholesale application of federal and state law as it explicitly allows for such laws to be applied at arbitration." *Jarry*, 175 F. Supp. 3d at 626. The same is true in this case. *Jarry* also rejected the arguments Plaintiffs make here that defining the scope of the arbitration provision to include state and federal law claims is meaningless. *See* Opp'n at 18. If such claims could not exist under the Agreements, there would be no need to send them to arbitration. *Jarry*, 175 F. Supp. 3d at 626.

Ignoring *Jarry*, Plaintiffs point to decisions from other circuits applying *Hayes* and *Dillon*. *See* Opp'n at 15. This nonbinding precedent is inapposite for the same reasons *Hayes* and *Dillon* do not apply here: these cases interpret contracts with terms repudiating non-tribal law.[6]

[6] *See Gingras*, 922 F.3d at 118, 126-27 (relying upon terms stating that agreement is "subject solely to the exclusive laws and jurisdiction of the Chippewa Cree Tribe of the Rocky Boy Indian Reservation" such that "no other state or federal law or regulation shall apply" (quotation marks omitted)); *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955, 970 (N.D. Cal. 2019) (same for terms stating that lender "may choose to voluntarily use certain federal laws as guidelines," but "such voluntary use does not represent acquiescence of the [tribe] to any federal law"); *Titus v. ZestFinance, Inc.*, No. 18-CV-5373, 2018 WL 5084844, at *1 (W.D. Wash. Oct. 18, 2018) (same for terms stating, "you agree that the laws of the Tribe will apply to the Loan Agreement, and understand that United States state law does not apply to the Loan Agreement in any way"); *MacDonald v. CashCall, Inc.*, No. 16-CV-2781, 2017 WL 1536427, at *2 (D.N.J. Apr. 28, 2017) (same for terms stating that agreement "shall be subject to and construed in accordance only with the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law applies to this Agreement"); *Parnell v. CashCall, Inc.*, 181 F. Supp. 3d 1025, 1030 (N.D. Ga.) (same for terms stating that agreement "is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe," and that "no United States state or federal law applies"); *Ryan v. Delbert Servs. Corp.*, No. 5:15-CV-05044, 2016 WL 4702352, at *1 (E.D. Pa. Sept. 8, 2016) (same for terms stating that agreement is governed "solely [by] the exclusive laws . . . of the Cheyenne River Sioux Tribe," and that "no other state or federal law or regulation shall apply to [the agreement], its enforcement or interpretation"); *see also Gibbs v. Haynes Investments, LLC*, 368 F. Supp. 3d 901, 911 (E.D. Va. 2019) (same for agreements that "expressly disavow the application of any state law" and include terms stating that the lender "may choose to voluntarily use certain federal laws as guidelines for the provision of services," but "[s]uch

Indeed, another court in this district recently upheld an arbitration provision in a tribal lending agreement and compelled arbitration where that provision did not "disavow federal law, wholesale." *Gibbs v. Stinson*, 2019 WL 4752792, No. 3:18-cv-676, at *19 (E.D. Va. Sept. 30, 2019). The relevant agreement there (issued by Mobiloans) declared that it encompassed any "[d]ispute" involving "any cla[i]m arising from … [a] Tribal, *federal* or state constitution, statute, ordinance[,] regulation, or common law." *Id.* at *23 (emphasis and omission in original). The same is true of Plaintiffs' Agreement in this case, which defines disputes to include "all tribal, federal or state law claims" and "all claims based upon a violation of any tribal, state or federal constitution, statute or regulation." Ex. 1 at 5. The relevant contract in *Gibbs* also repeatedly emphasized that "applicable federal law" would apply. 2019 WL 4752792, at *23. The Agreement here likewise references a number of specific federal statutes and regulations and "applicable … federal law." Ex. 1 at 6 (referring to specific statutes and regulations "and/or any other provision of applicable federal or tribal law or regulation"). And the Agreement here was made pursuant to "both interstate commerce and Indian commerce under the United States Constitution *and other federal* and tribal laws." *Id.* (emphasis added). As in *Gibbs*, the Agreement's explicit references to federal law "meaningfully differentiates" the Agreement "from the loan contracts considered in *Hayes* and *Dillon*." 2019 WL 4752792, at *23.[7]

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voluntary use does not represent acquiescence of the [Tribe] to any federal law"); *Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 668 (E.D. Va. 2019) (same for terms stating that lender's "inclusion of any disclosures does not mean that [it] consents to the application of federal law to any Loan or to this Agreement").

[7] *Gibbs* also distinguished the Mobiloans' agreement from other agreements in that case (issued by Plain Green and Great Plains) which, in the court's view, did repudiate entirely any application of federal law. *See* 2019 WL 4752792, at *14-*18. But those other agreements included provisions expressly disavowing federal law (such as provisions invoking the FAA only "for guidance"), expressly disclaiming application of particular federal statutes (like the Truth in Lending Act), and requiring plaintiffs to explicitly agree that no "state or federal law or regulation shall apply" to the

Plaintiffs also obscure important differences in the remaining decisions they cite. For example, in *Rideout v. CashCall, Inc.*, the court invalidated an arbitration provision where it required arbitration before an "authorized representative" of the Cheyenne River Sioux Tribe, yet there was "no evidence that such an arbitral forum exists." No. 2:16-CV-02817, 2018 WL 1220565, at *6 (D. Nev. Mar. 8, 2018). The same is true of *Smith v. Western Sky Financial, LLC*, which involved the same tribe. 168 F. Supp. 3d 778, 785 (E.D. Pa. 2016) ("Three circuit courts have concluded that a [Cheyenne River Sioux Tribe] arbitration mechanism simply did not exist."). In fact, the fifteen cases that Plaintiffs cite involve only four distinct Indian tribes (none of them the Habematotel Pomo of Upper Lake). Thus, several of these cases involve identical loan agreements or agreements that were slightly modified in response to adverse court decisions yet with no evidence that the tribe cured fundamental problems like the lack of a real arbitral forum.[8] As in *Jarry*, "the cases cited by the Plaintiff[s] are illustrative of potential problems not found in this arbitration agreement." 175 F. Supp. 3d at 625.

At a minimum, Plaintiffs have not met the demanding standard that would require this Court to act now. Plaintiffs further concede that a court must defer determination of the waiver doctrine until the award-enforcement stage if there is any "uncertainty as to whether the foreign choice of law provision would preclude otherwise applicable federal substantive statutory

agreements. *Id.* at *15-17. The Agreement here, by contrast, requires that Tribal law be applied "consistent with" and that any arbitration be "governed by" the FAA, refers directly to the Truth in Lending Act and other "applicable … federal law," and, as described above, refers to federal law multiple times. Ex. 1 at 5-6. And to the extent the court in *Gibbs* relied on general choice-of-law provisions that invoke Tribal law as further evidence of a prospective waiver, its analysis in that respect directly conflicts with circuit precedent. *See supra* at 8-9.

[8] *Eisen v. Venulum Ltd.* did not involve tribal lending at all, but there the court invalidated an arbitration provision that appeared to renounce federal securities law after the defendants refused to acknowledge that such laws could be applied by an arbitrator. 244 F. Supp. 3d 324, 345 (W.D.N.Y. 2017). Asner and Landy, by contrast, have acknowledged federal law applies.

remedies." Opp'n at 27 (citing *Dillon*, 856 F.3d at 334). While Asner and Landy submit that the Plaintiffs are clearly *wrong* about prospective waiver, Plaintiffs bear the burden to show a prospective waiver, such that this Court must compel arbitration unless it can find that Plaintiffs are indisputably *right*. Plaintiffs cannot meet that burden in light of the key distinctions from *Hayes* and *Dillon* that are present here and that served as the basis for the *Jarry* and *Gibbs* courts' decision to compel arbitration.

B. The Governing Law Provision Is Severable.

To the extent Plaintiffs challenge the one-paragraph "Governing Law" provision of the Agreement, that provision is easily severed from the separate two-page arbitration provision, based on the express severability provision as well as federal arbitration law. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) ("as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract"); *Rent-A-Center*, 561 U.S. at 70 ("a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate").[9]

Because this case is readily distinguishable from *Hayes* and *Dillon*, Plaintiffs' reliance on the severability analysis in those decisions is misplaced, *see* Opp'n at 28-29. The Agreement here does not repudiate federal law at all, much less make that repudiation "one of the animating purposes of the arbitration agreement." *Dillon*, 856 F.3d at 335 (quoting *Hayes*, 811 F.3d at 676). The Fourth Circuit declined to sever in *Hayes* because the key aim of the arbitration agreement—which declared that "no United States state or federal law applies to this Agreement"—"was to ensure that Western Sky and its allies could engage in lending and collection practices free from

[9] The solution for any offending language within the arbitration provision itself is likewise to excise that language, not to invalidate the provision as a whole. Ex. 1 at 6, ¶ 8 ("If any of this Arbitration Provision is held invalid, the remainder shall remain in effect.").

the strictures of any federal law." 811 F.3d at 669-70, 676. Similarly, in *Dillon*, the court spotted "terms throughout the underlying loan agreement" that were "purposefully drafted" to skirt federal law, such as terms stating that "no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation." 856 F.3d at 336. The severability holdings in *Hayes* and *Dillon* were predicated on these terms, which simply do not appear in this Agreement and therefore cannot constitute its "essence."[10] Thus, even if this Court finds some infirmity in the arbitration provision, this Court should sever the offending language and enforce the rest.

C. The "Tribal Code" Is Inapplicable And Irrelevant As To Asner And Landy.

In a transparent attempt to muddy the waters, Plaintiffs invoke the Habematotel Tribal Consumer Financial Services Regulatory Ordinance ("Ordinance") to make the remarkable claim that they are deprived of all rights. Plaintiffs even go so far as to conveniently dub the Ordinance the "Tribal Code" in an attempt to extend the Ordinance beyond its actual import. *See* Opp'n at 4-8, 12-15, 19-24. Plaintiffs devote page after page of their brief to this convoluted theory about the interplay between the Ordinance and the Agreement to argue that the Agreement is allegedly unconscionable as a result. But the Ordinance does not have the far-reaching effect that Plaintiffs attempt to give it.

As to Asner and Landy, Plaintiffs' theory rests on the (unfounded) assumption that Asner and Landy are "Licensees" as the Ordinance defines that term, and as a result, that various provisions of the Ordinance including its "Consumer Dispute Resolution Process" apply to the claims at issue here. This assumption undergirds both of the central arguments for which Plaintiffs

[10] Any concerns regarding the intent behind the arbitration provision that informed the severability analysis in *Hayes* and *Dillon* are also not present here as to Asner and Landy. Plaintiffs make unsubstantiated claims about bad faith on the part of Asner and Landy, Opp'n at 28-29, yet present no allegations in their Complaint, let alone evidence in support of their opposition brief, that Asner and Landy had any part in drafting the Agreement to which they are third parties.

attempt to invoke the Ordinance—*i.e.*, the alleged prospective waiver of federal rights, *see* Opp'n at 3-5, 12-15, and the purported unconscionability of the Agreement, *see id.* at 5-8, 19-24.

This assumption is unfounded. The "Consumer Dispute Resolution Process" applies only to disputes against "Licensees." Ordinance § 11. "Licensees" are defined as "a Consumer Financial Services Licensee, a Tribal Entity, or Consumer Data Licensee." *Id*. § 2.20. Those terms mean, respectively, "an Eligible Lender that is Licensed by the Commission to provide Consumer Financial Services," *id*. § 2.14; "any Person wholly owned and controlled by the Tribe," *id*. § 2.37; and "a Tribal Entity that is Licensed to engage in Processing within Tribal jurisdiction," *id*. § 2.12. None of these terms apply to Asner and Landy, whose alleged involvement stemmed (in Plaintiffs' own words) only from purported "ownership interest and participation in the enterprise." FAC ¶ 125, ECF No. 54. In fact, based on Plaintiffs' own allegations in the Amended Complaint, Asner and Landy not only fail to qualify as "Licensees," but are exempt from *all* provisions of the Ordinance, *except* the provision requiring them to conduct business consistent with a long list of federal consumer protection laws. Ordinance §§ 6.1, 7.2.

Plaintiffs cannot now credibly argue that the Ordinance deprives them of any rights as to Asner and Landy—or interferes with their right to arbitrate in any way. In fact, the Ordinance does the opposite of what Plaintiffs claim in at least two significant respects: first, it applies rather than renounces federal law, and second, it confirms that Plaintiffs' dispute resolution rights are intact because consumers need not bring disputes against Asner and Landy through the "Consumer Dispute Resolution Process" to which Asner and Landy are not "Licensees." Plaintiffs' assertion that the Ordinance's dispute resolution process "is the only available avenue for consumers to seek relief for their claims for any 'disputes' covered by their arbitration agreements," Opp'n at 7, is clearly incorrect, as disputes against Asner and Landy are covered by the arbitration provision, *see*

supra at 7.[11] Indeed, Plaintiffs appear to realize this and attempt to reverse course, later conceding that the "Mandatory Dispute Resolution process" does not apply to third parties like Asner and Landy. Opp'n at 22 & n.12. Plaintiffs' concession is correct—the Ordinance's dispute resolution process that Plaintiffs depict as undisclosed, convoluted, and inconsistent with the arbitration provision does not apply to Asner and Landy. Dissatisfied with the natural and obvious harmonization of these documents that in fact leaves Plaintiffs' rights intact (contrary to their remarkable claim), Plaintiffs then claim that the *lack* of this process renders the arbitration provision substantively unconscionable. *Id*. This argument defies logic. If the Ordinance, or at least its dispute resolution process, does not apply to Asner and Landy, it cannot then "work together [with the arbitration provision] to waive any such claims." *Id*.

Even setting aside the fact that the Ordinance does not apply to Asner and Landy here, Plaintiffs misunderstand the fundamental interaction between the Agreement and the Ordinance as applied to Plaintiffs' claims. The Tribal Officials explain the correct interaction in their reply brief, and Asner and Landy join the arguments set forth therein. For all these reasons, this Court should reject Plaintiffs' meritless arguments about the Ordinance, which amount to nothing more than a distraction from the actual terms of the arbitration provision and an attempt to invent circumstances that might allow them to argue the provision is unconscionable. Those terms affirm the application of federal law and establish a fair and efficient process for arbitrating claims against related third parties like Asner and Landy.

D. The Arbitration Provision Is Not Unconscionable.

"Unconscionability is a narrow doctrine whereby the challenged contract must be one which no reasonable person would enter into, and the inequality must be so gross as to shock the

[11] This fact does not relieve Plaintiff Mwethuku from his obligation to submit his claims to the tribal forum. *See infra* at 20.

conscience." *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) (internal quotation marks omitted). Plaintiffs fail to acknowledge their heavy burden to prove that the arbitration provision is unconscionable, much less meet it.

Plaintiffs start from the premise that Virginia law requires only procedural or substantive unconscionability but not both. Opp'n at 18. That premise is wrong.[12] "Unconscionability has both a substantive and procedural element." *Lee v. Fairfax Cty. Sch. Bd.*, 621 F. App'x 761, 762-63 (4th Cir. 2015). Thus, courts applying Virginia law have rejected unconscionability challenges where one type of unconscionability is proven, but not the other. *See, e.g.*, *Green v. Kline Chevrolet Sales Corp.*, No. 2:19-CV-127, 2019 WL 3728266, at *8 (E.D. Va. Aug. 7, 2019). Indeed, the very cases Plaintiffs rely upon recognize that a party asserting unconscionability must demonstrate both types by clear and convincing proof. *See, e.g.*, *McIntosh v. Flint Hill Sch.*, 100 Va. Cir. 32 (2018); *Sanders v. Certified Car Ctr., Inc.*, 93 Va. Cir. 404 (2016); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (2001). Plaintiffs fail to do so.

Plaintiffs try to show procedural unconscionability by labeling the Agreement a "contract of adhesion," Opp'n at 19, but fail to identify any decision refusing to enforce an arbitration provision on that basis. Some courts have held that form contracts "may suggest that a degree of procedural unconscionability exists," *Sanders*, 93 Va. Cir. at 406, but that is nowhere near the clear proof of unconscionability necessary to invalidate an arbitration provision. *Id.* ("[C]ontracts of adhesion are not *per se* unconscionable."); *see also Torres v. SOH Distrib. Co.*, No. 3:10-CV-

[12] Plaintiffs rely upon a single unpublished district court decision. *See* Opp'n at 18-19 (quoting *March v. Tysinger Motor Co.*, No. Civ. A. 3:07-cv-508, 2007 WL 4358339, at *4 (E.D. Va. Dec. 12, 2007)). *March* does not cite any authority for its assertion (in a footnote) that Virginia law has not "adopted the position of some courts that an agreement must be procedurally and substantially flawed to be unconscionable." 2007 WL 4358339, at *4 n.5. In fact, Virginia has adopted exactly that position.

179, 2010 WL 1959248, at *3 (E.D. Va. May 13, 2010) (finding "disparity in bargaining power" insufficient to show unconscionability). If it were otherwise, then countless form contracts consumers enter into every day would be unenforceable. That cannot be right. The only other arguments Plaintiffs offer are repeats of their misguided arguments debunked above about the Ordinance and prospective waiver. Opp'n at 19-21; *see supra* at 7-17.[13]

Plaintiffs fare no better on substantive unconscionability. They must show "inequality" in the substance of the contract "so gross as to shock the conscience," *Mgmt. Enters., Inc. v. Thorncroft Co.*, 416 S.E.2d 229, 231 (Va. 1992), but their litany of complaints does not rise near to that level. At its core, Plaintiffs' argument is that any agreement involving a loan with a high interest rate must be one that "shocks the conscience." That is not a demonstrated basis for unconscionability, as established by the many states that do not impose interest rate caps on specific kinds of lending. Plaintiffs attempt to side-step this reality by proclaiming that the arbitration provision "was designed to prevent consumers from being able to pursue any claim against the lender's [*sic*] and its co-conspirators," and thus "was drafted with [a] bad faith purpose in mind." Opp'n at 21. This Court should not credit these conclusory and unsupported allegations—and certainly not as to Asner and Landy, who are not even alleged to have had any part in drafting the Agreement. Notably, Plaintiffs do not identify a single legal authority for the myriad arguments they offer in an effort to fabricate a basis for substantive unconscionability, notwithstanding the burden they bear to establish it. *See id.* at 21-24. Even if this Court considers these undeveloped arguments, they fail on the merits. The Agreement does not effectuate a prospective waiver, and it does not require mandatory dispute resolution prior to arbitration of

[13] *Jackson v. Payday Financial, LLC* adds nothing here because it addressed a record where the arbitral forum and arbitral rules did not exist. 764 F.3d 765, 778 (7th Cir. 2014).

claims against Asner and Landy. *See supra* 7-17. Repackaging those arguments as grounds for substantive unconscionability does not deliver a different result.[14]

III. Plaintiff Mwethuku's Claims Cannot Proceed In Court.

Although Plaintiff Mwethuku opted out of arbitration, he agreed to submit any disputes—including disputes with Asner and Landy—to the tribal forum. *See* Mot. at 1 n.1, 25. Asner and Landy join the arguments advanced by the Tribal Officials in their opening and reply briefs, which demonstrate that Mwethuku's agreement must be enforced.

Moreover, even if Plaintiff Mwethuku's claims do not belong in the tribal forum (which they do), they cannot proceed here. *First*, as Asner and Landy explain in their separate motion to dismiss, Plaintiff Mwethuku failed to adequately plead his claims despite two attempts to do so. Accordingly, his claims cannot proceed and must be dismissed. *Second*, Plaintiff Mwethuku's claims cannot proceed in litigation while the other Plaintiffs simultaneously pursue their claims in arbitration. Thus, even if this Court were to deny both of Asner and Landy's motions, the proper course is to stay litigation of Plaintiff Mwethuku's claims pending the outcome of the arbitration.[15]

CONCLUSION

For the foregoing reasons, Defendants Scott Asner and Joshua Landy respectfully request that the Court grant their motion to compel arbitration.

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[14] Asner and Landy have identified multiple terms within the arbitration provision that cut against a finding of unconscionability. Mot. at 5-7; *cf. Philyaw*, 54 Va. Cir. at 367 (choice of location and arbitral authority as well as division of costs cuts against unconscionability). That said, Asner and Landy bear no burden in this regard, and because Plaintiffs have not shouldered the burden they bear, this Court should reject their contention that the arbitration provision is unenforceable.

[15] While Plaintiffs insist there is "no legitimate reason" for this stay, they do not provide any support, and they fail to acknowledge or address the case law granting stays in precisely these circumstances due to "considerations of judicial economy and avoidance of confusion and possible inconsistent results." *Am. Home Assur. Co. v. Vecco Concrete Constr. Co. of Va.*, 629 F.2d 961, 964 (4th Cir. 1980); *see also e.g., S. Coal Corp. v. IEG PTY, Ltd.*, No. 2:14-CV-617, 2016 WL 8735622, at *4 (E.D. Va. Feb. 26, 2016). This case demands the same result.

Respectfully submitted,

Dated: October 4, 2019

/s/ Jan A. Larson

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CERTIFICATE OF SERVICE

I certify that on October 4, 2019, I have electronically filed the REPLY IN SUPPORT OF DEFENDANTS SCOTT ASNER AND JOSHUA LANDY'S RENEWED MOTION TO COMPEL ARBITRATION with the Clerk of Court using the ECF system which will send notification of such filing to the following:

George Hengle
Sherry Blackburn
Willie Rose
Elwood Bumbray
Tiffani Myers
Steven Pike
Sue Collins
Lawrence Mwethuku
Sherry Treppa
Tracey Treppa
Kathleen Treppa
Iris Picton
Sam Icay
Aimee Jackson-Penn
Amber Jackson

Dated this October 4, 2019.

/s/ Jan A. Larson
Jan A. Larson (Bar No. 76959)