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*,	)	
Plaintiffs,	)	Civil Action No. 3:19-250
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 LAKE EXECUTIVE COUNCIL, *in her official capacity*;	)	
Defendants.	)	

REPLY IN SUPPORT OF TRIBAL DEFENDANTS'
MOTION TO COMPEL ARBITRATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

With the exception of Mr. Mwethuku, Plaintiffs do not dispute that:

- They agreed to resolve any disputes arising out of their loan agreements through arbitration;
- The arbitration provisions were clearly identified in their loan agreements;
- The arbitration provisions encompass the specific claims at issue here; and
- The arbitration process set forth in their agreements is conducted by one of the two most prominent arbitration organizations, within 30 miles of Plaintiffs' homes if so desired, and with the Tribal businesses advancing the costs of the arbitration.[1]

Those facts make this an easy case for arbitration. Although Plaintiffs raise a host of reasons why they should be excused from their straightforward agreements to arbitrate—each of which are addressed below—they have not come close to satisfying the heavy burden necessary to invalidate their own agreements.

At its core, Plaintiffs' attack rests on two fundamental misconceptions. *First*, Plaintiffs repeatedly suggest that Tribal law somehow overrides their arbitration agreements and requires that borrowers litigate their disputes in a Tribal forum as a precondition to arbitration. Plaintiffs are wrong. Tribal law says no such thing. To the contrary, in language Plaintiffs gloss over, Tribal law reinforces that borrowers should follow the dispute resolution procedures set forth in their loan agreements—namely, arbitration. Confirming the point, a recent consumer dispute with Majestic Lake Financial that was arbitrated went directly to JAMS arbitration, with no prior detours to any Tribal forum. Affidavit of Sherry Treppa, ECF No. 44, ¶ 235 ("Treppa Aff."). In contracts signed every day throughout this country, parties agree to apply a certain state's substantive laws but

[1] Tribal Defendants use "Plaintiffs" to refer to all Plaintiffs other than Mr. Mwethuku, who opted out of his arbitration agreement. For reasons discussed *infra* V, his claims also cannot proceed before this Court.

resolve any claims through arbitration, without anyone claiming confusion about whether the dispute resolution procedures set forth in state law override those agreements. Nothing changes simply because Plaintiffs signed similar agreements with businesses owned by a sovereign Tribe.

Second, Plaintiffs contend that the loan agreements renounce all applicable federal law, like the loan agreements in the *Hayes* and *Dillon* cases decided by the Fourth Circuit. Wrong again. Like virtually all loan agreements, Plaintiffs' agreements include a choice of law provision, here specifying that Tribal law applies. And under well-established precedent, the Tribal businesses and Tribal Defendants are entitled to sovereign immunity, which shields them from many claims under federal law. But Plaintiffs' loan agreements do not categorically renounce federal law that otherwise would apply. To the contrary, the loan agreements and the underlying Tribal law that is incorporated into those agreements repeatedly acknowledge "applicable federal law."

At the end of the day, this case must be resolved based on the arbitration agreements Plaintiffs signed, not agreements from other cases. And the agreements Plaintiffs signed are no different than the countless other arbitration agreements that are enforced each day in light of the "strong federal policy in favor of enforcing arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985). Plaintiffs should be held to their agreements.

ARGUMENT

I. TRIBAL LAW DOES NOT OVERRIDE THE CLEAR REQUIREMENT TO ARBITRATE IN PLAINTIFFS' LOAN AGREEMENTS.

Plaintiffs' central argument against arbitration—which they repeat, in various flavors, throughout their brief—hinges on a misreading of Tribal law. Plaintiffs repeatedly contend that the clear agreement to arbitrate in their loan agreements is hollow because Plaintiffs must "compl[y] with both the initial complaint procedure and the administrative review process of the

Tribal Regulatory Commission" *before* even "request[ing] arbitration." Pls.' Opp. to Mot. to Compel Arbitration, ECF No. 96, 7 ("Opp."). Specifically, Plaintiffs argue that the contractual arbitration provisions are countermanded by Section 11 of the Habematolel Pomo of Upper Lake Tribal Consumer Financial Regulatory Ordinance ("Tribal Ordinance"), which they claim requires that all disputes first be adjudicated by the Tribal lending businesses and Tribal Regulatory Commission. *Id.* at 6–8, 19, 21.

Section 11 of the Tribal Ordinance says no such thing. Section 11 sets forth a baseline dispute resolution process in which consumers *may* pursue complaints against lenders and obtain review of the lenders' determination of their complaints before the Commission, with the Commission's decision ultimately reviewable by an independent AAA arbitrator.[2] Opp. Ex. 2, ECF No. 96-2, Tribal Ordinance §§ 11.2–11.3, 11.5. This dispute resolution process is available to someone who is not subject to an arbitration agreement—such as Mr. Mwethuku, who chose to opt out of arbitration and agreed to pursue any disputes in a Tribal forum. *See infra* V.

[2] Plaintiffs' attack on the Commission's partiality is not just beside the point in light of their contractual agreements, but also unsupported by any facts. Plaintiffs offer no evidence that the Commission could not fairly resolve a dispute involving a consumer, other than the fact that the Commission is appointed by the Tribal Council. Opp. 7. Under that reasoning, no regulatory agency established by a state or federal executive would be impartial. And the uncontroverted facts confirm that Plaintiffs' insinuations are baseless. The Commission currently employs a former U.S. Attorney for the District of South Dakota, as well as the former acting deputy enforcement director for the federal Consumer Financial Protection Bureau. Treppa Aff. ¶ 71. The Tribal Ordinance also provides that the Commission "shall operate to protect Consumers *independently* of the Executive Council," Tribal Ordinance § 4.3 (emphasis added), and dictates that the Commission's employees, including the Commissioner, must be free from any relationship to the Tribal businesses, *id.* § 4.7 (prohibiting Commission employees from: (a) being indebted to the Tribal businesses; (b) being an officer, director, or employee of the Tribal businesses; (c) owning, directly or indirectly, any shares or obligations of any entity that provides goods or services to the Tribal businesses; and (d) receiving anything of value from the Tribal businesses or their employees other than distributions from the Tribal businesses made to all Tribe members).

But Section 11 does *not* suggest that this process overrides clear contractual agreements that all disputes should go directly to arbitration. The plain language of the Tribal Ordinance makes clear that its resolution process is one that a consumer *may*—not must—invoke: "A Consumer who is aggrieved by an action or inaction of a licensee *may* request the Licensee address the complaint." Tribal Ordinance § 11.2(a) (emphasis added). And the Tribal Ordinance further provides—in language Plaintiffs conspicuously ignore—that a consumer who has entered a loan agreement is required to follow the dispute resolution procedures *set forth in that agreement*, which here provides for arbitration. *Id.* ("Consumer's request must be made in accordance with the terms of the Consumer's loan agreement."). It is therefore unsurprising that the consumer who arbitrated his dispute with Majestic Lake Financial expressed no confusion about where to pursue his claims and went directly to JAMS arbitration—not to the Tribal Regulatory Commission. Treppa Aff. ¶ 235. Majestic Lake Financial did not object to his doing so, since his direct resort to arbitration was consistent with the arbitration agreement and the intent of the parties to arbitrate.

In short, Plaintiffs agreed to arbitrate their disputes without first exhausting their claims in a Tribal forum. Tribal law honors, rather than subverts, those agreements.

II. AN ARBITRATOR MUST DECIDE WHETHER PLAINTIFFS' CLAIMS SHOULD BE ARBITRATED.

Plaintiffs do not dispute that under their contracts, any questions about the validity of their arbitration agreements must be determined by an arbitrator. And the Supreme Court has made clear that there is no dispute over whether such delegation clauses should be enforced: "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

A. Plaintiffs Fail To Carry Their Burden Of Showing That The Delegation Clause Is Unconscionable.

To overcome the delegation clause, Plaintiffs must show that the clause is unenforceable because it is unconscionable. To meet this heavy burden, Plaintiffs must do more than simply challenge the validity or fairness of the underlying arbitration or loan agreement as a whole. Rather, Plaintiffs must challenge the delegation clause "specifically," and establish that the clause itself is unenforceable. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 73–75 (2010) (enforcing delegation provision and holding that "unless [the party] challenged the delegation provision specifically, we must treat it as valid under § 2 [of the Federal Arbitration Act ("FAA")], and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator"); *see also, e.g.*, *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 455 (4th Cir. 2017) (party must "lodge[] a challenge against the delegation provision in the [agreement], *in particular*") (emphasis added); *Artis v. Lyon Shipyard, Inc.*, No. 2:17-cv-595-MSD, 2018 WL 2013073, at *4 (E.D. Va. Apr. 26, 2018) ("[A] challenger must specifically dispute the enforceability of the *delegation provision itself*, because if . . . [it] is not itself proven to be invalid, the arbitrator retains 'exclusive authority to determine whether the arbitration agreement [is] unconscionable.'") (emphasis in original) (citation omitted). Where a party seeks to use a general challenge against the agreement as a whole to invalidate a delegation provision, the party bears the "much more difficult" burden of demonstrating that this general challenge "*as applied* to the delegation provision rendered *that provision* unconscionable." *Rent-A-Center*, 561 U.S. at 74 (emphases in original).

Plaintiffs do not even attempt to carry this burden. Plaintiffs say nothing about why the delegation provision itself so "shocks the conscience" that only someone under a "delusion" would agree to it, as they are required to do. *Fransmart, LLC v. Freshii Dev., LLC*, 768 F. Supp. 2d 851,

870–71 (E.D. Va. 2011) (citation omitted). Nor can they. Like delegation provisions contained in thousands of other contracts entered into every day, the delegation provision here does nothing more than provide that a neutral arbitrator at AAA or JAMS, rather than the district court, should evaluate any dispute over arbitrability. If such a delegation agreement were found to "shock[] the conscience," *id.* at 871 (citation omitted), then no delegation agreement could ever survive.

As the Supreme Court has recognized, "[a]rbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable." *Henry Schein*, 139 S. Ct. at 531. Plaintiffs are free to raise their arguments that the underlying arbitration agreement is unenforceable in that forum. If the arbitrator agrees, this lawsuit would then return to this Court.

Plaintiffs offer no response to this straightforward reasoning. They do not hide that most of their attacks on the delegation provision are simply repackaged attacks on the arbitration agreement as a whole, arguing that the "delegation clause is unenforceable for virtually the same reason as the underlying arbitration agreement." Opp. 24; *see also, e.g.*, *id.* (challenging delegation provision based on alleged prospective waiver of federal law). But attacks on the contract as a whole are by definition not specific challenges to the delegation provision. And as is evident from the discussion below, none of the challenges raised by Plaintiffs apply to the delegation provision, let alone render it unconscionable.

Plaintiffs are equally misguided in their suggestion that the choice of Tribal law provision means that the arbitrator could not apply federal law in assessing the enforceability of the arbitration agreements. *See* Opp. 24–25. "The Supreme Court has . . . squarely rejected the argument that a federal court should read a contract's general choice of law provision as . . . displacing federal arbitration 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)). As a

result, the Fourth Circuit considers it "[u]nquestionabl[e]" that "a contract's general choice of law provision does not displace federal arbitration law if the contract involves interstate commerce," as this one does. *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 697 n.7 (4th Cir. 2012). And the arbitration agreements at issue here eliminate any doubt on this score, repeatedly and expressly providing for the application of the *Federal* Arbitration Act (FAA). *See, e.g.*, Treppa. Aff. Ex. 93, ECF No. 45-43, at 7 ("Meyers Agreement") ("The arbitrator shall apply applicable substantive Tribal law consistent with the Federal Arbitration Act (FAA) . . . ."); *id.* ("Thus, any arbitration shall be governed by the FAA and subject to the laws of the Habematolel Pomo of Upper Lake.").[3]

Plaintiffs also err in arguing that the delegation clause is unenforceable because the entire agreement was void from its inception under Virginia usury laws. Opp. 25–26. As an initial matter, Virginia law does not govern the loan agreements. *See* Tribal Defendants' Mem. in Supp. of Mot. to Dismiss, ECF No. 65, I; Tribal Defendants' Reply in Support of Mot. to Dismiss I. And in any event, the Supreme Court has already rejected a similar argument. In *Buckeye Check Cashing, Inc. v. Cardegna*, the Court analyzed a consumer's attempt to avoid arbitration by alleging that the relevant contracts were rendered invalid by a usurious finance charge that violated state law. 546 U.S. 440, 444 (2006). Because the allegations of usury related to the underlying contractual arrangement between the parties and were not specific to the arbitration clause itself, the Court determined the usury allegations could not undermine the parties' agreement to arbitrate

[3] Although a court in this district recently declined to enforce a delegation clause on the basis that it did not permit the arbitrator to apply federal law in determining the arbitrability question, *Gibbs v. Stinson*, No. 3:18-cv-676-MHL, 2019 WL 4752792, at *11–18 (E.D.Va. Sept. 30, 2019) ("*Gibbs II*"), that reasoning does not apply here, where the arbitration agreements are clear that the arbitrator can consider federal law in resolving that question. Tribal Defendants submit further that *Gibbs II*'s delegation ruling is inconsistent with Supreme Court and Fourth Circuit precedent for the reasons set forth *infra* II.B.

their disputes. *Id.* at 445–46; *see also Sleeper Farms v. Agway, Inc.*, 506 F.3d 98, 103 (1st Cir. 2007) ("As a matter of federal law, the arbitration clause is unaffected even if the substance of the contract is otherwise void or voidable."). The same reasoning follows here. Plaintiffs are free to try to argue that Virginia law should apply and that the loan agreements violate Virginia's usury limitations. But there is no question that those arguments must first be raised in arbitration, rather than litigation.

B. The Court Must Address The Delegation Clause Before Evaluating The Prospective Waiver Argument.

Plaintiffs also contravene longstanding precedent in arguing that their prospective waiver argument "is ripe for determination by the Court," "[r]egardless of the delegation provision," because there supposedly is "no uncertainty" as to whether there is such a waiver. Opp. 26. Just this year, the Supreme Court reiterated its longstanding precedent that a court must enforce valid delegation clauses despite challenges to the enforceability of the underlying arbitration agreement. *See Henry Schein*, 139 S. Ct. at 529. In *Henry Schein*, the Court examined attempts by some federal courts to "short-circuit the process and decide the arbitrability question themselves"—"[e]ven when a contract delegates the arbitration question to an arbitrator"—because the argument in support of arbitration was "wholly groundless." *Id.* at 527–28. The Court rejected this approach based on the text of the FAA itself and a long line of precedent entrusting arbitrators to determine their own jurisdiction when contractually empowered to do so. *Id.* at 529–31. As the Court explained, such an approach

> confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability. *When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract*.

Id. at 531 (emphasis added); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–44 (1995) (agreeing that "the question 'who has primary power to decide arbitrability' turns upon what the parties agreed about" that question).

The Fourth Circuit has not only recognized this principle, it has specifically applied it to a prospective waiver argument like the one Plaintiffs advance here. *See Aggarao v. MOL Ship Management Co.*, 675 F.3d 355 (4th Cir. 2012). The *Aggarao* plaintiff attempted to avoid arbitration by asserting that the choice of law provision contained in the parties' agreement—requiring the application of the law of the Philippines to the exclusion of otherwise applicable American law—constituted an improper prospective waiver of federal statutory claims. The Fourth Circuit rejected this argument as premature, explaining that such challenges are only ripe after an arbitrator has reached a decision. *Id.* at 373 (plaintiff was "not entitled to interpose his public policy defense, on the basis of the prospective waiver, doctrine until the second stage of the arbitration-related court proceedings—the award-enforcement stage").

The same principle articulated in *Henry Schein* and *Aggarao* applies here to foreclose Plaintiffs' attempted end-run around the delegation provision.[4] Plaintiffs' prospective waiver argument challenges the validity of the underlying arbitration agreements. Because the agreements contain a valid delegation clause, that challenge must be decided by the arbitrator.

[4] To the extent the Fourth Circuit's 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), are read as allowing a court to resolve any prospective waiver question *before* honoring the delegation agreement, such an approach would no longer be good law in light of the Supreme Court's express directives in *Henry Schein*. Moreover, to the extent *Hayes* and *Dillon* are read in this manner, they would directly conflict with *Aggarao*. As the earliest opinion from this Circuit, *Aggarao* would control. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) ("When published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting *en banc* or the Supreme Court.").

Plaintiffs' suggestion that the Court should bypass this precedent because any arbitration award under their agreements would not be enforceable by a federal court, Opp. 27, is incorrect. As Plaintiffs note, *id.*, the arbitration agreements provide that a consumer *may* choose to enforce an arbitration award before the applicable governing body of the Tribe. Meyers Agreement 7. But Plaintiffs cite no provision making that process the *exclusive* method for enforcement. To the contrary, the agreements repeatedly assert that they are governed by the FAA. *Id.* Under the FAA, federal courts retain jurisdiction to resolve issues with the enforcement of an arbitral award, including claims raised by "any party to the arbitration" that the arbitrator "exceeded' his or her "powers" by deciding an issue that was not arbitrable. 9 U.S.C. § 10(a); *see also Henry Schein*, 139 S. Ct. at 530 (the FAA "provides for back-end judicial review of an arbitrator's decision"). As a result, in the event that Plaintiffs were to prevail in arbitration and the Tribal Defendants somehow refused to comply with that award, Plaintiffs would be free to seek enforcement in federal court.

III. THE PROSPECTIVE WAIVER DOCTRINE DOES NOT EXCUSE PLAINTIFFS FROM THEIR ARBITRATION AGREEMENTS.

Even if this Court were to disregard the delegation provision and address the validity of the arbitration agreements, Plaintiffs' prospective waiver arguments provide no basis for excusing Plaintiffs from their agreements to arbitrate.

A. The Prospective Waiver Doctrine Does Not Apply Here.

Plaintiffs' prospective waiver argument is premised on their repeated insistence that this case is indistinguishable from *Hayes*, 811 F.3d 666, and *Dillon*, 856 F.3d 330, which invalidated arbitration agreements on prospective-waiver grounds. But simply saying something does not make it so.

The law is clear that the prospective waiver doctrine applies only where the litigant opposing arbitration can show that the arbitration and choice of law clauses work together to *unambiguously* eliminate the right to pursue a federal statutory remedy that would otherwise be available. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (resolution of party's prospective waiver argument would be "premature" because "it is not *established* what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result") (emphasis added); *Dillon*, 856 F.3d at 334 (prospective waiver doctrine cannot be applied where there is "*uncertainty* whether the foreign choice of law would preclude otherwise applicable federal substantive statutory remedies") (emphasis added).

Contrary to Plaintiffs' suggestion, Opp. 10–11, the mere fact that a contract includes a choice of law provision specifying that a particular jurisdiction's laws apply is insufficient, on its own, to invalidate an agreement to arbitrate. As the Supreme Court has explained, the FAA "allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions," and thus the parties are free to "choose . . . the law of Tibet [or] pre-revolutionary Russia." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). Consistent with this admonition, the Supreme Court and Fourth Circuit have repeatedly upheld the enforceability of arbitration agreements that contain foreign choice of law provisions. *See, e.g.*, *Vimar Seguros*, 515 U.S. at 540–41 (Japanese law); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 637 n.19 (1985) (Swiss law); *Aggarao*, 675 F.3d at 361, 380 (Philippine law).

In *Hayes* and *Dillon*, the Fourth Circuit found an unambiguous renunciation of federal law not because the agreements contained a tribal choice of law provision, but because the court interpreted the arbitration agreements as expressly providing that the borrower must waive *any and all* federal rights. *See Hayes*, 811 F.3d at 670 (agreement providing that "no . . . federal law

applies to this agreement"); *Dillon*, 856 F.3d at 332 (agreement providing that "[n]o . . . federal law or regulation shall apply to this Agreement, its enforcement or interpretation").[5]

Plaintiffs do not cite or quote that language from *Hayes* or *Dillon*, presumably because there is no language to that effect in their arbitration agreements. Plaintiffs instead stress that the loan agreements specify that Tribal law—as opposed to another state's laws—shall apply to the agreement. Opp. at 12. But again, a mere declaration of which jurisdiction's laws apply does not amount to a renunciation of any available federal rights. Plaintiffs cannot identify, as they must under the prospective waiver doctrine, any provision in the loan agreement that states the borrower is completely foregoing all available federal rights.

Indeed, the loan agreements and Tribal law make clear, in various places, that there is no renunciation of any federal law that can be applied to the Tribe. For example, the arbitration agreements specify that the "transaction involve[es] both interstate commerce and Indian commerce under the United States Constitution *and other federal* and tribal laws." Meyers Agreement 7 (emphasis added). In addition, when defining the types of disputes subject to arbitration, the agreements include "all tribal, *federal* or state law claims, disputes or controversies" and "all claims based upon a violation of any tribal, state or *federal* constitution, statute or regulation." Meyers Agreement 6 (emphases added).

[5] The same is true for the out-of-circuit cases Plaintiffs cite. *See Gingras v. Think Fin., Inc*., 922 F.3d 112, 118, 127 n.4 (2d Cir. 2019) (relying on terms stating that the borrower "agree[s] that *no other state or federal law or regulation* shall apply to this Agreement, its enforcement or interpretation") (emphasis added in *Gingras*), *pet. for cert. docketed sub nom. Sequoia Capital Operations, LLC v. Gingras*, No. 19-331 (Sept. 11, 2019). Plaintiffs' reliance on *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), is misplaced for additional reasons. There the court determined that the arbitration agreements were unconscionable because the arbitral forum and rules simply did not exist, and a fair arbitration was not available because any arbitration would be conducted by an authorized representative of the Tribe. *Id.* at 778–79. Neither reason applies here.

Moreover, the Tribal Ordinance, which is expressly incorporated in the loan agreements, *see id.* at 8, repeatedly makes clear that the Tribe is *not* renouncing all federal law wholesale. For instance, the Tribal Ordinance mandates that the lending businesses "shall at all times comply with the provisions of this Ordinance, rules and regulations promulgated pursuant to this Ordinance, and all other applicable Tribal, *and federal laws as applicable*." Tribal Ordinance § 7.1 (emphasis added); *see also id.* § 1.1(i) (noting it is essential that the Tribal government regulate its lending services in a manner "commensurate with . . . *applicable federal law*") (emphasis added); *id.* § 1.1(j) (noting the Tribal government must ensure that lenders' data practices "meet all . . . *applicable federal laws*") (emphasis added); § 8.2(j) ("[a]ny federal law not applicable to Indian tribes . . . shall not apply"); § 9.2(d) ("all Consumer Data must be protected . . . in accordance with . . . *all applicable federal laws* related to such protection of Consumer Data") (emphasis added); § 9.5(a) (requiring the lending businesses to "adhere to *all applicable federal laws* pertaining to Personal information") (emphasis added). Plaintiffs suggest it is "a gross simplification to suggest that there is a set of federal laws that apply to tribes and a set that does not." Opp. 13. That is irrelevant. What matters, under the prospective waiver doctrine, is whether there is an effort to completely renounce *all applicable* federal law. Just this week, a court within this district recognized this principle when concluding that agreements preserving the application of "applicable federal law" do not operate as prospective waivers of federal rights because they do no "disavow federal law, wholesale." *Gibbs II*, 2019 WL 4752792, at *19, 23–24.[6] The arbitration

[6] At the same time, the court concluded that other agreements that did not preserve "applicable federal law" but rather contained language expressly disavowing any application of federal law—similar to the language in *Hayes* and *Dillon*—amounted to a prospective waiver of statutory rights. *Gibbs II*, 2019 WL 4752792, at *14–18. But the language in the loan agreements at issue here does not contain the express disavowals of federal law that the court deemed most troubling in *Gibbs II*. *See, e.g.*, *id.* at *17 (provisions included those stating that "no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation" and other

agreements deemed enforceable in *Gibbs II* encompassed claims "arising from. . . federal" laws and acknowledged "applicable federal law." *Id.* at *23. The loan agreements and Tribal law here do just that.[7]

Further, to the extent the loan agreements are deemed to renounce any federal rights, they do so based on the Tribe's sovereign immunity, which further distinguishes this case from *Hayes* and *Dillon*. Plaintiffs assert that the "identity of the person seeking to enforce the arbitration agreement" is a "distinction with no difference." Opp. 16. *Hayes* says otherwise. At the beginning of its assessment of the arbitration provision at issue there, the *Hayes* court went out of its way to stress that its analysis depended on the fact that the defendant was not making "any claim of tribal affiliation":

> We note at the onset that, while Western Sky was a tribal-owned entity, Delbert is not. *Accordingly, Delbert does not attempt to ground its renunciation of federal law in any claim of tribal affiliation. Both in its briefing and during oral argument, Delbert understandably did not contend that it was a tribal entity and therefore not subject to the authority of federal law on that basis*.
>
> Instead, Delbert seeks to avoid federal law through the prospective waiver of federal law provision found in the arbitration agreement.

811 F.3d at 673 (emphasis added). The Fourth Circuit's statement is clear: To the extent a "renunciation" of federal law in an arbitration agreement merely reflects a recognition that the defendant has tribal status and is thus entitled to sovereign immunity, that does not amount to an improper prospective waiver because the borrower is not foregoing any federal right they could

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provisions "render[ing] federal law optional"). Rather, as set forth *supra* III.A, the agreements and Tribal law here provide for mandatory application of the FAA and make numerous references to applicable federal law.

[7] In addition, Tribal law expressly incorporates more than a dozen federal consumer protection statutes. *See* Tribal Ordinance § 7.2.

otherwise assert against that defendant.[8] Plaintiffs do not even acknowledge this language in *Hayes*, let alone offer any alternative explanation as to what it means.

In short, in contrast to the defendants in *Hayes* and *Dillon*, Tribal Defendants here make a "claim of tribal affiliation"—they are leaders of the Tribal government sued in their official capacities. *See* Tribal Defendants' Mem. in Supp. of Mot. to Dismiss, ECF No. 65, II. And Plaintiffs' loan agreements do not renounce any applicable federal law. In those circumstances, *Hayes* confirms that the arbitration agreement does not amount to an improper prospective waiver.

B. The Arbitration Agreements Are Severable From The Remainder Of The Loan Agreements.

In the event the Court determines that the choice of law provisions in the loan agreements improperly renounce federal law, the Court should still refer Plaintiffs' claims to arbitration because the arbitration provisions are severable from the remainder of the agreements. Plaintiffs do not dispute that their agreements include an express severability provision. *See, e.g.*, Meyers Agreement 7. Nor do they disagree that "[a]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Rent-A-Ctr.*, 561 U.S. at 70–71 (2010) (citation omitted).

Plaintiffs instead argue—again without any basis—that the severability analysis is the same here as in *Hayes* and *Dillon*, where the court concluded that that the renunciation of federal law

[8] Consistent with this principle, although Plaintiffs cite several district court opinions in the Fourth Circuit that rejected arbitration agreements on prospective waiver grounds, Opp. 15–16, none involved a defendant that had been found to have sovereign immunity as a tribal entity or official. *See, e.g.*, *Solomon v. American Web Loan*, 375 F. Supp. 3d 638, 672 (E.D. Va. 2019) (determining that the arbitration agreement was unenforceable only after concluding that the relevant defendants were not entitled to the tribe's sovereign immunity), *on appeal*, Nos. 19-1258, 19-1267 (4th Cir. 2019); *Gibbs v. Haynes Investments, LLC*, 368 F. Supp. 3d 901, 907 (E.D. Va. 2019) ("*Gibbs I*") (motion to compel arbitration raised by non-tribal entities or individuals), *on appeal*, No. 19-1434 (4th Cir. 2019).

there made up the "core" of those agreements. Opp. 28. In other words, in those cases, the court concluded that the "consent to application of federal law would *defeat the purpose of the arbitration agreement in its entirety*." *Id.* (emphasis added) (citing *Dillon*, 856 F.3d at 336–37).

Not so here. Plaintiffs ignore that these loan agreements are drafted differently from the agreements at issue in *Hayes* and *Dillon*. The language of Plaintiffs' loan agreements makes clear that the question of *which* law applies is distinct from the question of *who* resolves any dispute. The agreements specifically contemplate that a plaintiff might ultimately be permitted to pursue a federal claim and provide that, in such an event, that federal claim would still be subject to arbitration. *See supra* III.A; Tribal Defendants' Mem. in Support of Mot. to Compel Arbitration, ECF No. 63, IV.

Accordingly, plaintiffs cannot demonstrate that the application of federal law here "would defeat the purpose of the arbitration agreement in its entirety," *Dillon*, 856 F.3d at 336, because the agreements expressly provide for arbitration of any federal law claims that may persist. In these circumstances, the arbitration provisions are severable.

IV. PLAINTIFFS CANNOT MEET THE HEAVY BURDEN OF ESTABLISHING THAT THE ARBITRATION AGREEMENTS ARE UNCONSCIONABLE.

Plaintiffs acknowledge the heavy burden they bear in seeking to be excused from their agreement to arbitrate on the ground that it is unconscionable. *See* Tribal Defendants' Mot. to Compel Arbitration, ECF No. 63, at II. As they say, they must demonstrate that "the contract is 'so grossly inequitable that it 'shocks the conscience.'" Opp. 17 (citation omitted). Plaintiffs fall far short of meeting this burden.[9]

[9] Contrary to Plaintiffs' assertions, Opp. 18, they must establish both procedural *and* substantive unconscionability. Under Virginia law, "[u]nconscionability is concerned with the intrinsic fairness of the terms of the agreement in relation to all attendant circumstances," *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364, 2001 WL 112107, at *3 (Spotsylvania Cty. Cir. Ct. 2001), and therefore "has both a substantive and procedural element," *Artis v. Lyon Shipyard, Inc.*,

Plaintiffs do not dispute that the arbitration provisions were made clear in the agreements, or that each Plaintiff understood that he or she had agreed to arbitrate as part of the loan process. Instead, Plaintiffs contend that the arbitration agreements are "procedurally unconscionable because [they are] 'boilerplate' contract[s] of adhesion." Opp. 18–19. Even if that characterization were accurate, that alone is not sufficient to "shock the conscience" such that the parties' agreement to arbitrate should be invalidated. *See, e.g.*, *Torres v. SOH Distribution Co.*, No. 3:10-cv-179-JRS, 2010 WL 1959248, at *3 (E.D. Va. May 13, 2010) ("disparity in bargaining power" is insufficient to establish unconscionability). If Plaintiffs were right, virtually all contracts entered into by consumers on a daily basis—for cable TV, cell phone service, or credit cards, to name a few—would be unenforceable. The very cases cited by Plaintiffs make clear that they are wrong: "[C]ontracts of adhesion are not *per se* unconscionable; courts also must look to the substance of the agreement." *Sanders v. Certified Car Ctr., Inc.*, 93 Va. Cir. 404, 2016 WL 9076185, at *2 (Fairfax City Cir. Ct. 2016); *see also McIntosh v. Flint Hill Sch.*, 100 Va. Cir. 32, 2018 WL 9393020, at *7 (Fairfax City Cir. Ct. 2018) (same); *Philyaw*, 2001 WL 112107, at *2–3 (declining to enforce an arbitration clause only after determining the *substance* of the contract was unfair). Here, the "substance of the agreement[s]" set forth a fair and comprehensive arbitration process similar to the ones used by parties throughout the country every day.

Moreover, Virginia courts have recognized that loan agreements do not constitute true contracts of adhesion "[w]here one party can choose from multiple competing services and walk away from the agreement at any time" and thus does "not lack bargaining power." *Gillam v.*

No. 2:17-cv-595-MSD, 2018 WL 2013073, at *2 n.4 (E.D. Va. Apr. 26, 2018) (quoting *Lee v. Fairfax Cty. Sch. Bd.*, 621 F. App'x 761, 763 (4th Cir. 2015)). Courts applying Virginia law have thus refused to find unconscionability where only one element of unconscionability was established. *See, e.g.*, *Green v. Kline Chevrolet Sales Corp.*, No. 2:19-cv-127-MSD, 2019 WL 3728266, at *8 (E.D. Va. Aug. 7, 2019).

Branch Banking & Tr. Co. of Va., No. 3:17-cv-722-JAG, 2018 WL 3744019, at *4 n.4 (E.D. Va. Aug. 7, 2018); *see also Zaklit v. Golb Linguist Sols., LLC*, 53 F. Supp. 3d 835, 845–46 (E.D. Va. 2014) (employment agreement was not a contract of adhesion because the employee "ha[d] the freedom to consider employment elsewhere and [wa]s not bound to continue working for his current employer"). Here, each Plaintiff had the option to choose from multiple competing loan services and could have rejected the proposed agreement in favor of doing business with another lending entity. In fact, Plaintiffs sought out and obtained loans from other tribal lenders—as evidenced by the fact that they are plaintiffs in actions against other lenders as well. *See, e.g.*, *Gibbs II*, 2019 WL 4752792, at *3 (Plaintiffs Hengle and Blackburn); *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 265 (E.D. Va. 2018) (Plaintiff Hengle).

Plaintiffs' remaining arguments for unconscionability are mostly variations of arguments already addressed above—for example, their incorrect arguments that Tribal law overrides the plain terms of the arbitration agreements and thus forecloses arbitration, *see* Opp 19, 21–22, 24, *supra* I; that the agreements waive all of their federal and state rights, *see* Opp. 21, *supra* III; and that they would have to enforce any arbitral award in a Tribal forum, *see* Opp. 23–24, *supra* II.[10] Because those arguments all fail on the merits, they cannot provide any justification for concluding

[10] Plaintiffs' passing suggestion that the arbitration agreements confused consumers by referencing the Indian Commerce Clause, Opp. 20, is likewise meritless. It is unclear what confusion could be created by invocation of what is generally referred to as the Indian Commerce Clause, which is simply a subsection of the U.S. Constitution's Article I, Section 8 Commerce Clause that reads: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." But in any event, the contracts *do not mention it*—they simply assert that the loan agreement is made "pursuant to a transaction involving both interstate commerce and Indian commerce under the United States Constitution and other federal and tribal laws." Meyers Agreement 7. This factual statement (which rebuts the notion that the contracts renounce federal law) is materially similar to other disclosures made throughout the loan application process. *See* Tribal Defendants' Mem. in Support of Mot. to Compel Arbitration, ECF No. 63, at A–C. Notably, Plaintiffs themselves have alleged no confusion created by these loan terms.

that the loan agreements "shock the conscience" and that "no reasonable person would" agree to their terms. *Sydnor v. Conseco Fin. Serv. Corp.*, 252 F.3d 302, 305 (4th Cir. 2001).

V. MR. MWETHUKU'S CLAIMS SHOULD BE DISMISSED BECAUSE HE FAILED TO SUBMIT THEM TO THE TRIBAL FORUM.

Plaintiffs do not dispute that (1) Mr. Mwethuku's agreement gave him the choice of opting out of arbitration and pursuing any claims in a Tribal forum; (2) Mr. Mwethuku exercised that choice by expressly opting out of the arbitration provision; and (3) Mr. Mwethuku has refused to pursue his remedies in the Tribal forum as called for by his agreement. These undisputed facts merit dismissal of Mr. Mwethuku's claims because he has failed to exhaust his tribal remedies. *See* Tribal Defendants' Mem. in Support of Mot. to Compel Arbitration, ECF No. 63, V.

Plaintiffs' contention that Mr. Mwethuku need not exhaust his tribal remedies because there is "no pending tribal litigation," Opp. 30, is a non-sequitur. The reason there is no pending tribal litigation is because Mr. Mwethuku has not met his contractual obligations. Mr. Mwethuku cannot agree to pursue a claim in a Tribal forum, refuse to honor that agreement, and then claim that there is no tribal remedy to exhaust because he never pursued his claim in a Tribal forum in the first place. For this reason, application of the tribal exhaustion doctrine "does not depend upon the existence of a pending action in the tribal forum." *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir. 1993). Instead, the dispositive point is that Mr. Mwethuku agreed to pursue any claims in a Tribal forum and has failed to do so.

Plaintiffs' summary assertion that a Tribal forum would not be fair is likewise insufficient to excuse Mr. Mwethuku from his agreement. The Tribal dispute resolution process, as clearly described in the Tribal Ordinance, provides a convenient and impartial forum for resolving his disputes. This procedure allows Mr. Mwethuku to request that the independent and experienced Commission—which employs a former U.S. Attorney for the District of South Dakota and the

former acting deputy enforcement director for the federal Consumer Financial Protection Bureau—investigate his claims. He can request a hearing before the Commission in which he would be entitled to be represented by counsel, present evidence, and call witnesses. Tribal Ordinance § 11. And he would have the right to appeal any decision to an independent AAA arbitrator of his choosing, *id.* § 11.5(a), with the lender required to pay the arbitrator's fees, *id.* § 11.5(a)(3). Unsubstantiated allegations of bias—which would not, in all events, apply to the AAA arbitrator—provide no basis for setting aside this carefully-crafted process.

Because Mr. Mwethuku agreed to litigate any disputes in a Tribal forum, his claims in this Court should be dismissed.[11]

CONCLUSION

For the reasons set forth herein, the Court should compel arbitration of Plaintiffs' claims and dismiss Mr. Mwethuku's claims for failure to submit them to the proper forum.

[11] As noted in Tribal Defendants' initial memorandum, if the Court determines Mr. Mwethuku's claims survive dismissal, it should stay his claims pending the outcome of arbitration of the other Plaintiffs' claims. *See Am. Heart Disease Prevention Found., Inc. v. Hughey*, 106 F.3d 389, 1997 WL 42714 at *6 (4th Cir. 1997) (unpublished).

DATED: October 4, 2019

Respectfully Submitted.

/s/ Matthew Skanchy
Matthew Skanchy (Bar No. 89575)
mskanchy@wilkinsonwalsh.com
Rakesh Kilaru (*pro hac vice*)
rkilaru@wilkinsonwalsh.com
James Rosenthal (*pro hac vice*)
jrosenthal@wilkinsonwalsh.com
Kosta Stojilkovic (*pro hac vice*)
kstojilkovic@wilkinsonwalsh.com
Beth Wilkinson (*pro hac vice*)
bwilkinson@wilkinsonwalsh.com
WILKINSON WALSH + ESKOVITZ LLP
2001 M Street NW, 10th Floor
Washington, D.C. 20036
Telephone: (202) 847-4000
Fax: (202) 847-4005

Counsel for Tribal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2019, I electronically filed the foregoing document with the Clerk of Court using the ECF system, which will send notification of such filing to all counsel of record.

DATED: October 4, 2019

Respectfully Submitted.

/s/ Matthew Skanchy
Matthew Skanchy (Bar No. 89575)
mskanchy@wilkinsonwalsh.com
Rakesh Kilaru (*pro hac vice*)
rkilaru@wilkinsonwalsh.com
James Rosenthal (*pro hac vice*)
jrosenthal@wilkinsonwalsh.com
Kosta Stojilkovic (*pro hac vice*)
kstojilkovic@wilkinsonwalsh.com
Beth Wilkinson (*pro hac vice*)
bwilkinson@wilkinsonwalsh.com
WILKINSON WALSH + ESKOVITZ LLP
2001 M Street NW, 10th Floor
Washington, D.C. 20036
Telephone: (202) 847-4000
Fax: (202) 847-4005

Counsel for Tribal Defendants