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.	)	

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

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Defendants Scott Asner ("Asner") and Joshua Landy ("Landy") respectfully submit this memorandum in support of their renewed motion to compel individual arbitration as to Plaintiffs' claims against them in this action.

INTRODUCTION

In their Amended Complaint, Plaintiffs fail to address the undisputed facts and controlling law that require them to arbitrate their claims against Asner and Landy. Those claims arise from "Consumer Loan and Arbitration Agreements" issued to Plaintiffs by four lending portfolio companies owned and operated by the Habematolel Pomo of Upper Lake, a federally recognized Indian Tribe (collectively, "Tribal Lending Companies"). As the name suggests, the Consumer Loan and Arbitration Agreements require arbitration to resolve any disputes arising from or related to the loans, including disputes with a broadly defined group of related third parties that encompasses Asner and Landy. The Agreements establish a fair and efficient arbitration framework, and they confirm that the borrower may pursue in arbitration any claims against related third parties that the borrower could pursue in a court of law. In short, if Plaintiffs have any claims at all against Asner and Landy, they have a remedy in a fair and efficient forum—arbitration.

Only one Plaintiff, Lawrence Mwethuku, opted out of mandatory arbitration. The remaining Plaintiffs entered into substantively the same agreements to arbitrate their claims on an individual basis. The agreements are valid and binding. Pursuant to the Federal Arbitration Act, those agreements must be enforced.[1] 9 U.S.C. § 2.

[1] While Asner and Landy do not seek to compel arbitration of Mwethuku's claims against them, those claims cannot proceed in this forum for other reasons. First, as Defendants Sherry Treppa, Tracey Treppa, Kathleen Treppa, Iris Picton, Sam Icay, Aimee Jackson-Penn, and Amber Jackson (collectively, "Tribal Officials") explain in their Motion to Compel Arbitration, Mwethuku's claims should be dismissed because he agreed to submit them to the tribal forum and has failed to exhaust his claims in that forum. Asner and Landy join these arguments. Second, even if

Like the original pleading, the Amended Complaint pretends the agreements to arbitrate do not exist. Just as Plaintiffs conspicuously failed to attach their Consumer Loan and Arbitration Agreements to their original Complaint, they do not include a single Agreement among the 17 exhibits appended to their Amended Complaint. In fact, Plaintiffs do not even acknowledge their express agreement to arbitrate their claims and to waive any right to participate in a class action. And while Plaintiffs have added to their Amended Complaint the bare assertion that "the lending agreements used for Plaintiffs contained unconscionable choice of law and forum-selection provisions that are void and unenforceable for public policy concerns," ECF No. 54 ("FAC") ¶ 211, Plaintiffs do not challenge the agreement to arbitrate, much less the delegation clause within the agreement that requires an arbitrator to resolve any disputes, including as to enforceability.

Binding precedent requires the Court to enforce the Consumer Loan and Arbitration Agreements and send the claims against Asner and Landy to individual arbitral proceedings. As set forth in the Tribal Officials' Motion, the Court's analysis begins and ends with a single question: who decides whether the claims against Asner and Landy are arbitrable. The "Arbitration Provision" in the Consumer Loan and Arbitration Agreement provides a clear and unmistakable answer: the arbitrator. The Arbitration Provision unequivocally delegates questions of validity and scope to the arbitrator, and it confirms the intent to delegate by invoking arbitral rules and procedures of the two most prominent national arbitration organizations in the country, which likewise entrust these threshold issues to the arbitrator. Thus, if Plaintiffs eventually challenge the validity or scope of their agreement to arbitrate, that challenge is for the arbitrator to

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Mwethuku is not required to submit his claims against Asner and Landy to the tribal forum, those claims should be dismissed with prejudice for the reasons set forth in Asner and Landy's separate Renewed Motion to Dismiss. For ease of reference, the remainder of this memorandum uses "Plaintiffs" to refer to all Plaintiffs in this action other than Mwethuku.

decide. This Court's role is simply to enforce the delegation clause and stay the action pending the outcome of arbitration. *See* 9 U.S.C. § 3. Even if this Court decides arbitrability for itself, notwithstanding the explicit agreement to send that question to the arbitrator, the result is the same: the Court should compel arbitration because Plaintiffs entered into a valid agreement to arbitrate, and their agreement covers the claims asserted here.

Nor is the result any different because Asner and Landy are not signatories to the Consumer Loan and Arbitration Agreements. In addition to joining and reinforcing arguments advanced by the Tribal Officials, this memorandum presents two additional reasons why this Court should compel individual arbitration of the claims against Asner and Landy.

First, the Arbitration Provision in each Agreement applies with equal force to disputes with third parties such as Asner and Landy. The Arbitration Provision is not narrowly drafted to limit its scope to disputes between the borrower and the lender; to the contrary, the plain language of the Arbitration Provision—which applies to "any disputes" and specifically covers disputes with a broad class of "related third parties"—brings the claims against Asner and Landy squarely within its scope. Plaintiffs cannot credibly dispute this fact; their entire lawsuit is premised on the alleged affiliation between Asner, Landy, and the Tribal Lending Companies. In fact, the Amended Complaint doubles down on unsupported allegations about Asner and Landy's supposed close ties to the Tribal Lending Companies, leaving Plaintiffs no room to credibly argue here that Asner and Landy are not "related third parties." In addition to this expansive language in the Arbitration Provision, it is settled law in the Fourth Circuit that equitable principles entitle third parties like Asner and Landy to enforce agreements to arbitrate even when they are not signatories.

Second, Plaintiffs may try, but will fail, to shoulder their heavy burden to demonstrate unconscionability. The Arbitration Provision, and the delegation clause within it, are valid and

binding. The Arbitration Provision in this case differs meaningfully from the agreements to arbitrate in *Hayes v. Delbert Services Corporation* and *Dillon v. BMO Harris Bank,* where the Fourth Circuit declined to compel arbitration. On paper and in practice, the arbitration framework established by the Arbitration Provision here is fair and efficient. Most importantly, it does not attempt to alter or abridge the borrower's substantive rights. Any claims that Plaintiffs could pursue against Asner or Landy in litigation can be heard in the arbitral forum, using the same procedures applied to tens of thousands of arbitrations every year. Accordingly, the Arbitration Provision is enforceable, and this Court should compel arbitration.

BACKGROUND

Asner and Landy adopt by reference and incorporate the factual background provided by the Tribal Officials in their Motion to Compel Arbitration, as well as the evidence relied upon therein, including the Consumer Loan and Arbitration Agreements. *See Meridian Imaging Sols., Inc. v. OMNI Bus. Sols., LLC*, 250 F. Supp. 3d 13, 16 n.5 (E.D. Va. 2017) ("In analyzing [a] motion to compel arbitration pursuant to the FAA, it is appropriate—indeed necessary—to consider materials outside the pleadings."). As the Tribal Officials explain, each Plaintiff entered into at least one Consumer Loan and Arbitration Agreement, and five Plaintiffs executed the Agreement multiple times because they took out multiple loans with Tribal Lending Companies. Because the terms of the Agreements are substantively the same, this memorandum cites to the September 2016 Agreement of Plaintiff Tiffani Myers as a representative example. *See* Ex. 1 (page numbers added for ease of reference).

The discussion below highlights key terms of the Consumer Loan and Arbitration Agreements pertinent to the additional arguments advanced in this memorandum, and provides an overview of the claims against Asner and Landy that can only proceed in individual arbitration.

A. Plaintiffs Agreed To Arbitrate All Disputes With The Lender And Third Parties, And To Waive Participation In Any Class Proceeding.

Plaintiffs each entered into at least one Consumer Loan and Arbitration Agreement with a Tribal Lending Company. FAC ¶¶ 2, 11-18. In addition to the title of the document identifying it as a "**CONSUMER LOAN AND ARBITRATION AGREEMENT**," the respective Agreements contain a detailed further provision titled "**RESOLVING DISPUTES; WAIVER OF JURY TRIAL AND ARBITRATION PROVISION**" that is substantively the same in each Agreement. Ex. 1 at 1, 5 ("Arbitration Provision") (emphasis in original). The Arbitration Provision spans multiple pages of each Agreement and includes bold-type section headings and language in all capital letters. *Id*. at 5-6.

The Arbitration Provision begins with a straightforward explanation of the arbitration process, noting in particular that "binding arbitration is a process in which persons with a dispute waive their rights to file a lawsuit in a court and waive their rights to have a jury trial." *Id*. at 6. Following the explanation of the arbitration process are explicit acknowledgements associated with a borrower's agreement to arbitrate, including:

> 2. You acknowledge and agree that by entering into this Arbitration Provision:
>
> (a) YOU ARE GIVING UP YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES;
>
> (b) YOU ARE GIVING UP YOUR RIGHT TO HAVE A COURT RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; and
>
> (c) YOU ARE GIVING UP YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.
>
> 3. All disputes including any Representative Claims against Us and/or related third parties shall be resolved by binding arbitration only on an individual basis with You. THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU

> TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION.

Id. at 5, ¶ 2. In addition, directly above the signature block of the Agreement, the following text appears in bold type: "**You acknowledge, represent and warrant that: (a) You have read, understand, and agree to all of the terms and conditions of this Agreement, including the Arbitration Agreement, and specifically the waivers of any rights to a jury trial and any rights to participate in class proceedings contained herein** . . . ." *Id.* at 7 (emphasis in original).

As to its scope, the Arbitration Provision gives the words "dispute" and "disputes" their "broadest possible meaning." *Id*. at 5, ¶ 1. The words are defined to encompass, among other things, "all tribal, federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to this Agreement"; "all common law claims"; and "all claims based upon a violation of any tribal, state or federal constitution, statute or regulation." *Id.* at 5, ¶ 1(b), (d), (e). "Dispute" and "disputes" also includes "all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision, the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision." *Id.* at 5, ¶ 1(a). Thus, the Arbitration Provision empowers the arbitrator, rather than a court, to decide any disputes about the "validity and scope" of the agreement to arbitrate, and any challenge to set it aside.

Included within the scope of the Arbitration Provision are claims involving third parties (such as Asner and Landy). In defining "dispute" and "disputes," the Arbitration Provision expressly includes "all claims asserted by You individually against Us and/or any of Our employees, agents, directors, officers, shareholders, governors, managers, members, parent company or *affiliated entities* (hereinafter collectively referred to as 'related third parties')." *Id.* at 5, ¶ 1(g) (emphasis added). The Arbitration Provision goes on to reference "third parties"

multiple times; for example, it covers "all claims asserted by You as a private attorney general, as a representative and member of a class of persons, or in any other representative capacity, against Us *and/or related third parties*," as well as "all claims arising from or relating directly or indirectly to the disclosure by Us *or related third parties* of any non-public personal information about You." *Id.* at 5, ¶ 1(i), (j) (emphasis added). The Arbitration Provision also requires the borrower to waive certain rights vis-à-vis third parties, including "to have a court resolve any dispute alleged against us *or related third parties*," or "to serve as a representative, . . . and/or to participate as a member of a class or claimants, in any lawsuit filed against us *and/or related third parties*." *Id*. at 5-6, ¶ 2(b), (c) (emphases added) (capitalization omitted). In describing the process for initiating arbitration, the Arbitration Provision likewise refers to "related third parties," who "may send the other party written notice . . . of their intent to arbitrate." *Id.* at 5, ¶ 4.

The Arbitration Provision also establishes the procedures and law to govern any arbitration. "Any party to a dispute, including related third parties," can commence the arbitration by sending written notice to the other party. *Id*. Regardless of which party initiates arbitration, the borrower has the right to decide which of the two leading national arbitration organizations will administer the proceeding: the American Arbitration Association ("AAA") or JAMS. *Id.* The arbitration is then governed by the publicly available "rules and procedures used by the applicable arbitration organization applicable to consumer disputes." *Id*. at 6, ¶ 4. The borrower also has the right to request that the arbitration take place within 30 miles of his or her residence, *id*., and the borrower's expenses related to arbitration—"including the filing, administrative, hearing and arbitrator's fees"—are advanced by the lender, *id.* at 6, ¶ 5.

B. Plaintiffs Violated Their Agreement To Arbitrate On An Individual Basis By Bringing Covered Claims In A Putative Class Action Lawsuit.

In clear contravention of the Arbitration Provision, Plaintiffs brought their claims collectively as a putative class action in federal district court. In their original Complaint, Plaintiffs sued four lending portfolio companies and a call center operations company, all owned and operated by the Habematolel Pomo of Upper Lake. Plaintiffs alleged that the companies—Golden Valley Lending, Inc., Silver Cloud Financial, Inc., Mountain Summit Financial, Inc., Majestic Lake Financial, Inc., and Upper Lake Processing Services, Inc.—were subject to, yet failed to comply with, Virginia law governing loan licensing and interest rates. ECF No. 1 ("Compl.") ¶¶ 152-162. On that basis, Plaintiffs asserted claims on behalf of themselves and putative classes of Virginia borrowers for alleged violations of state and federal law. *Id*. ¶¶ 5-6. Plaintiffs asserted these claims not only against the various companies, but also against Asner and Landy as individual named defendants. While Plaintiffs did not allege that Asner or Landy issued the loans in question, they offered vague allegations about partial and indirect ownership of certain companies that purportedly played some role in the lending operations at some time in the past. *Id*. ¶ 3; *see also id.* ¶¶ 63-69.

In response to the original Complaint, Asner and Landy moved to compel arbitration and to dismiss for failure to state a claim. *See* ECF Nos. 37, 39. In the first motion to compel arbitration, Asner and Landy explained that Plaintiffs had failed to acknowledge their valid and binding agreements to arbitrate in the Complaint, and had conspicuously omitted those agreements from the numerous exhibits attached to the pleading. *See* ECF No. 38. Since Plaintiffs simply ignored their agreements to arbitrate, they did not furnish the Court with any basis to invalidate those agreements or the delegation clause within each of them referring any and all disputes—including disputes over scope or enforceability—to an arbitrator. *Id*. In their prior motion to

dismiss, Asner and Landy argued that the allegations were insufficient to support any of the claims asserted against them for failing to comply with Virginia usury laws, unjustly enriching themselves, or violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. *See* ECF No. 40. Critically, Plaintiffs did not allege that Asner or Landy owned, controlled, managed, operated, or worked for the Tribal Lending Companies, or that any of the Plaintiffs actually borrowed from or made payments to the companies that Asner and Landy allegedly owned and/or managed partially and indirectly. *Id*. at 3-4.

Plaintiffs responded by filing an Amended Complaint. In their Amended Complaint, Plaintiffs have dropped their claims against the Tribal Lending Companies and the call center operations company and shifted their focus to Asner and Landy as well as various individual officers of the Tribe. *See generally* FAC ¶¶ 131-236. In a transparent effort to dodge arbitration and dismissal, Plaintiffs have fabricated entirely new allegations. For example, Plaintiffs now claim that "the lending agreements used for Plaintiffs contained unconscionable choice of law and forum-selection provisions that are void and unenforceable for public policy concerns." *Id*. ¶ 211. In addition, Plaintiffs now contend—without a shred of support, and directly contrary to record evidence referenced in the Amended Complaint—that "[u]pon information and belief, Landy and Asner continue to participate in the affairs of the illegal lending enterprise, now as high-paid executives of the Tribal Lending Entities, as opposed to owners of the businesses that previously ran the companies." *Id*. ¶ 3. But, as relevant to this renewed motion to compel arbitration, Plaintiffs still do not acknowledge their agreements to arbitrate, provide those agreements to the Court, or furnish any reason why this Court should not compel arbitration of the claims against Asner and Landy, as the law commands.

ARGUMENT

A motion to compel arbitration presents two sequential questions. *Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 101 (4th Cir. 2012). First, the court must "determine *who* decides whether a particular dispute is arbitrable: the arbitrator or the court." *Id*. Second, if "the court is the proper forum in which to adjudicate arbitrability," then the court must "decide *whether* the dispute is, in fact, arbitrable." *Id*.

The Court's analysis in this case begins and ends with the first question. Plaintiffs clearly and unmistakably delegated arbitrability to the arbitrator as part of the loan agreement, and that agreement must be enforced.

Though the Court need not reach the second question, even if the Court decides for itself whether the claims against Asner and Landy are arbitrable, it will find that they are. Plaintiffs entered into a valid and binding agreement to arbitrate any disputes as part of the loan agreement, and the claims at issue here fall well within the scope of that agreement. Plaintiffs bear the burden to show that their agreement to arbitrate is unconscionable, and Plaintiffs cannot meet this heavy burden.

Accordingly, the Court should honor the agreements and compel individual arbitration.

I. Any Threshold Question Of Arbitrability Must Be Decided By The Arbitrator.

Plaintiffs agreed to delegate to the arbitrator any disputes about the validity or scope of the Arbitration Provision. As a result, any disputes that Plaintiffs raise about arbitrability belong in arbitration, and this Court should refer them to that forum for decision while these proceedings are stayed.

An agreement with respect to arbitrability must be enforced like any other. As the Supreme Court held this past term, the "[Federal Arbitration] Act allows parties to agree by contract that an

arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019). This decision echoes the Supreme Court's repeated prior holdings that delegation clauses are valid and enforceable under the FAA. *See, e.g.*, *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement . . . , and the FAA operates on this additional arbitration agreement just as it does on any other."); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[T]he question who has the primary power to decide arbitrability turns upon what the parties agreed about that matter." (emphasis and internal quotation marks omitted)). Courts must therefore "respect the parties' decision as embodied in the contract" when that decision "delegates the arbitrability question to an arbitrator," provided the delegation is "clear and unmistakable." *Schein*, 139 S. Ct. at 528, 530; *see also Carson v. Giant Food, Inc.*, 175 F.3d 325, 329-30 (4th Cir. 1999).

Applying that precedent, the Fourth Circuit has explained that delegation is "clear and unmistakable" when the arbitration agreement "contain[s] language specifically and plainly reflecting the parties' intent to delegate disputes regarding arbitrability to an arbitrator." *Novic v. Credit One Bank, Nat'l Ass'n*, 757 F. App'x 263, 266 (4th Cir. 2019). Language meets this standard where it states "that 'all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration,' or words to that clear effect." *Carson*, 175 F.3d at 330-31. For example, an arbitration agreement stating that the arbitrator shall hear disputes regarding "validity" or "scope" evinces the requisite intent. *Gillam v. Branch Banking & Tr. Co. of Va.*, No. 3:17-CV-722, 2018 WL 3744019, at *4 (E.D. Va. Aug. 7, 2018); *see also, e.g.*, *Artis v. Lyon Shipyard, Inc.*, No. 2:17-CV-595, 2018 WL 2013073, at *1, *4 (E.D. Va. Apr. 26, 2018) (enforcing delegation provision stating that "[t]he arbitrator has exclusive authority to resolve any

dispute relating to the applicability or enforceability of this Agreement, or the validity of any Claim").

The Arbitration Provision to which Plaintiffs agreed meets this standard. In two separate places, the Arbitration Provision states that disputes regarding "validity" and "scope" are subject to arbitration. Plaintiffs agreed in the first paragraph of the Arbitration Provision to "arbitrat[e] all disputes, *including the scope and validity of this Arbitration Provision*." Ex. 1 at 5 (emphasis added). Then, in the paragraph defining the words "dispute" and "disputes," Plaintiffs again agreed that those words encompass "all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision, *the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision*." *Id.* at 5, ¶ 1(a) (emphasis added). "This precise language stands in direct contrast to the broad wording of general arbitration provisions that [the Fourth Circuit has] rejected as not satisfying the 'clear and unmistakable' standard." *Novic*, 757 F. App'x at 266. Indeed, the Arbitration Provision manifests the intent to delegate threshold issues in multiple places with language at least as clear as the language in the provisions that were upheld in *Novic*, *Gillam*, and *Artis*.

Eliminating any doubt, the Arbitration Provision also invokes arbitral rules that require the arbitrator to resolve threshold arbitrability disputes. The Arbitration Provision allows the borrower to choose between two leading arbitration organizations, AAA and JAMS, to administer the arbitration. Ex. 1 at 6, ¶ 4. The rules of the selected organization then govern the arbitration proceeding. *Id*. Both AAA and JAMS have rules delegating threshold arbitrability disputes to the arbitrator. *See* Ex. 2, Rule R-14(a), AAA Consumer Arbitration Rules ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or

counterclaim."); Ex. 3, Rule 11(b), JAMS Comprehensive Arbitration Rules ("Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator."). Multiple courts in this district have found that invoking such rules provides an independently sufficient basis to require arbitration of threshold issues. *See, e.g.*, *Brenco Enters., Inc. v. Bitesquad.com, LLC*, 297 F. Supp. 3d 608, 611 (E.D. Va. 2018); *Innospec Ltd. v. Ethyl Corp.*, No. 3:14-CV-158, 2014 WL 5460413, at *4 (E.D. Va. Oct. 27, 2014) (collecting cases).

There can be no doubt that the specific language in the Arbitration Provision here, together with the invocation of arbitral rules requiring delegation, is enough to meet the "clear and unmistakable" standard. Just as in *Gillam*, "[t]he clear language sending issues of validity, scope, and interpretation of the contract to an arbitrator, combined with the reference to the JAMS rules, presents clear and unmistakable evidence that the parties agreed to arbitrate threshold issues." 2018 WL 3744019, at *4.

This Court must respect the delegation clause and refer any disputes to arbitration. Where, as here, the plaintiffs have "clearly and unmistakably" agreed that the arbitrator should decide the validity and scope of an arbitration provision, the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Indeed, courts in this district have recognized that their task "begins and ends" with the question of who decides arbitrability, because where the agreement delegates arbitrability to the arbitrator, "the Court need not decide whether the parties' dispute falls within their arbitration provision." *Innospec Ltd.*, 2014 WL 5460413, at

*4. Thus, any question as to whether the Arbitration Provision is valid or encompasses the claims against Asner and Landy is committed to the arbitrator. No further analysis is required or appropriate for this Court to compel arbitration.

II. Plaintiffs' Claims Against Asner and Landy Are Subject To Individual Arbitration.

Even if this Court decides arbitrability itself, notwithstanding the clear and unmistakable delegation of that question to the arbitrator, the Court should reach the same conclusion and order arbitration. *See* 9 U.S.C. § 4.

The Court's role in these circumstances is limited. Agreements to arbitrate are presumptively "valid, irrevocable, and enforceable," *id*. § 2, and courts must enforce them as long as "(i) the parties have entered into a valid agreement to arbitrate, and (ii) the dispute in question falls within the scope of the arbitration agreement." *Chorley Enters., Inc. v. Dickey's Barbecue Rest., Inc.*, 807 F.3d 553, 563 (4th Cir. 2015). Once the court finds a valid agreement to arbitrate, compelling arbitration is mandatory "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 582-83 (1960)). Any doubts or ambiguities are resolved in favor of arbitration as a matter of federal law: "the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989) (internal quotation marks omitted).

A. Plaintiffs Each Entered Into A Valid Agreement To Arbitrate That Covers All Their Claims In This Action.

There is no dispute that Plaintiffs each agreed to arbitration by executing at least one, and in some cases more than one, Consumer Loan and Arbitration Agreement. The Tribal Officials

explain in their Motion to Compel Arbitration how these agreements were formed with the Plaintiffs, and their arguments with respect to formation are fully adopted and incorporated herein.

The Arbitration Provision is broadly drafted in its scope and inarguably encompasses Plaintiffs' claims in this case. Under the Arbitration Provision, Plaintiffs agreed "to submit their disputes to a neutral third person ('an arbitrator') for decision." Ex. 1 at 5. As used in this provision, "disputes" takes on its "broadest possible meaning." *Id.* at 5, ¶ 1. It reaches "all tribal, federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to this Agreement"; "all common law claims"; and "all claims based upon a violation of any tribal, state or federal constitution, statute or regulation." *Id.* at 5, ¶ 1(b), (d), (e). Each claim in this action asserted against Asner and Landy falls within one or more of those expansive categories: Counts One and Two for civil RICO are federal law claims relating to the loan agreement, *see* FAC ¶¶ 131-154; Counts Three for violation of Virginia's usury laws asserts state law claims relating to the agreement's issuance and terms, *see id.* ¶¶ 155-164; and Count Four alleges unjust enrichment relating to the loan agreement under Virginia common law, *see id.* ¶¶ 165-174.[2] At a minimum, Plaintiffs cannot establish the requisite "positive assurance" that the Arbitration Provision is *not* "susceptible of an interpretation that covers" their claims against Asner and Landy. *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996) (quoting *United Steelworkers*, 363 U.S. at 582-83). Thus, their claims belong in arbitration.

B. Plaintiffs Agreed To Arbitrate Disputes Not Only With The Lender But Also With Third Parties Including Asner And Landy.

Importantly, the Arbitration Provision fully extends to disputes involving third parties. By its own terms, it covers "*all* disputes," including the disputes with Asner and Landy. Ex. 1 at 5;

[2] The remaining claims are asserted only against the Tribal Officials and do not implicate Asner or Landy. *See* FAC ¶¶ 175-236.

see Hunter v. NHcash.com, LLC, No. 3:17-CV-348, 2017 WL 4052386, at *6-7 (E.D. Va. Sept. 12, 2017) (holding that provision requiring arbitration of "[a]ny claim or dispute arising from or in any way related to the Agreement" encompasses claims against all defendants, not just lender who issued loan agreement). In fact, the Arbitration Provision expressly rejects any interpretation limiting its scope to disputes between only the lender and the borrower; it applies equally to claims brought against other individuals and entities, including "employees, agents, directors, officers, shareholders, governors, managers, members, parent company *or affiliated entities*." Ex. 1 at 5, ¶ 1(g) (emphasis added).

The entire basis for this action is the purported affiliation between Asner, Landy, and the Tribal Lending Companies. Plaintiffs allege that Asner and Landy are participants in an "enterprise" with the Tribal Lending Companies and the Tribal Officials, through which the various entities and individuals "market, initiate, and collect usurious loans." FAC ¶ 105. Indeed, Plaintiffs go so far as to claim in their Amended Complaint that Asner and Landy are "high-paid executives of the Tribal Lending Entities," *id*. ¶ 3, an allegation they added *after* the original motion to compel arbitration brought attention to the contractual language requiring arbitration of any disputes with such individuals, *see* ECF No. 38. Plaintiffs cannot contradict the allegations they specifically added to their Amended Complaint to argue in response to this motion that Asner and Landy are not even "affiliated" with the Tribal Lending Companies. Thus, the claims against Asner and Landy belong in arbitration.

Even setting aside this broad language in the Arbitration Provision, equitable principles entitle Asner and Landy to enforce the Arbitration Provision. "It is well-established . . . that a nonsignatory to an arbitration clause may, in certain situations, compel a signatory to the clause to arbitrate the signatory's claims against the nonsignatory despite the fact that the signatory and

nonsignatory lack an agreement to arbitrate." *Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 627 (4th Cir. 2006). Those circumstances include "when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory," and "when the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Hunter*, 2017 WL 4052386, at *5 (quoting *Brantley v. Rep. Mortg. Ins. Co.*, 424 F.3d 392, 395-96 (4th Cir. 2005)). In such circumstances, both of which are present here, signatories are barred by equitable estoppel from disavowing their agreement to arbitrate.

Hunter is directly on point. There, the plaintiffs filed a putative class action complaining about "a joint enterprise involved in the origination and funding of short term loans," which allegedly included the lender who signed the loan agreements, its assignee, its parent corporation, and its individual owner/operator. *Id.* at *1. The plaintiffs sought to litigate the precise types of claims at issue here, notwithstanding the arbitration provisions in their loan agreements. *Id.* The court held that "all of the Defendants are equally entitled to move to compel arbitration in this case," not just "the lone signatory Defendant." *Id.* at *5. Here, as in *Hunter*, Plaintiffs assert "the same claims" against signatories and non-signatories alike, *id.* at *5, and "employ[] the same allegations as the bases for liability," *id.* (quoting *Aggaro v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 374 (4th Cir. 2012)). Furthermore, Plaintiffs "rely on the terms of the Agreements—specifically the interest rate provisions—in asserting their claims." *Id.* "Without the Agreements, Plaintiffs would have no claims." *Id.* This case therefore requires the same result as *Hunter*: arbitration.

C. Arbitration Must Proceed On An Individual Basis.

Finally, arbitration should be compelled on an individual basis to the exclusion of a class arbitration. The Arbitration Provision expressly requires that: "All disputes including any Representative Claims against Us and/or related third parties shall be resolved by binding arbitration *only on an individual basis* with You." Ex. 1 at 5, ¶ 3 (emphasis added). The Arbitration Provision further "explicitly waive[s] any right [the borrower] may have to participate in any class action," stating: "You are giving up your right to serve as a representative, as a private attorney general, or in any other representative capacity, and/or to participate as a member of a class of claimants, in any lawsuit filed against us and/or related third parties." *Id.* at 5, ¶ 2(c) (capitalization omitted). The Supreme Court has upheld precisely this type of waiver of an individual's right to participate in a class arbitration. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 237-39 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351-52 (2011). Even in circumstances where the arbitration agreement is *silent* on the issue of class arbitration, the Supreme Court has held that arbitration must proceed individually. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019). Here, the Arbitration Provision *expressly forbids* class arbitration. The class-action waiver within the Arbitration Provision must be given effect, and arbitration must proceed on an individual basis for each Plaintiff.

III. The Arbitration Provision Is Enforceable, And Plaintiffs Cannot Meet Their Heavy Burden To Show Otherwise.

Plaintiffs did not acknowledge their obligations under the Consumer Loan and Arbitration Agreements in their original Complaint, much less provide any basis for the Court to find that the Arbitration Provision therein is unconscionable. Plaintiffs now assert in their Amended Complaint that "choice of law and forum-selection provisions" in the Agreements are "unconscionable" and therefore "void and unenforceable for public policy concerns." FAC ¶ 211; *see also id.* ¶ 232

(alleging that loans "were void *ab initio*" for reasons including "violating Virginia's public policy and using unconscionable terms"). Plaintiffs do not provide any support for these bare assertions, even though they had not one but two motions to compel arbitration in hand when they attempted to address the deficiencies in their original pleading. In any event, the Agreements are fully enforceable.

Plaintiffs cannot meet their heavy burden to demonstrate unconscionability. "The party asserting unconscionability of a contract has the burden of proving that the contract is unconscionable by clear and convincing evidence." *Fransmart, LLC v. Freshii Dev., LLC*, 768 F. Supp. 2d 851, 871 (E.D. Va. 2011). That standard requires substantive contractual terms "so grossly inequitable" that they "shock the conscience." *Id.* (quoting *Mgmt. Enters., Inc. v. Thorncroft Co.*, 416 S.E.2d 229, 231 (Va. 1992)).

Plaintiffs will likely argue that the Arbitration Provision is unconscionable under 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). As discussed above, those arguments should be submitted to the arbitrator for decision. If this Court nevertheless reaches unconscionability itself, the Court will find that the arbitration provisions in *Hayes* and *Dillon* are different in critical respects from the Arbitration Provision in this case. For that reason, the Fourth Circuit's rationale for refusing to compel arbitration in those cases simply does not apply.

In *Hayes*, the plaintiffs argued that the arbitration agreement "set[] up a hollow arbitral mechanism." 811 F.3d at 672. The plaintiffs drew on repeated prior holdings construing the same agreement and holding that the mechanism it described was "illusory." *Id.* at 670, 672 (collecting cases). Specifically, the agreement provided that arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute

rules," yet multiple courts found "that the Tribe has no authorized representatives who conduct arbitrations, and that the Tribe does not even possess a method through which it might select and appoint such a person." *Id.* at 672. As one court explained, "the arbitral forum and associated procedural rules set forth in [the plaintiff's] loan agreement are not available." *Id.* (quoting *Williams v. CashCall, Inc.*, 92 F. Supp. 3d 847, 851-52 (E.D. Wis. 2015)). Furthermore, the "consumer dispute rules" referenced in the agreement simply did not exist. *Id.* In short, the plaintiffs in *Hayes* presented evidence that the process, neutral arbitrator, and governing rules described in the arbitration provision were illusory.

Compounding these problems, the *Hayes* arbitration agreement "purport[ed] to renounce wholesale the application of any federal law to the plaintiffs' federal claims." *Id.* at 673. The contracts did so "almost surreptitiously . . . through the guise of a choice of law clause." *Id.* at 675. The "Governing Law" provision stated:

> Neither this Agreement nor Lender is subject to the laws of any state of the United States of America. By executing this Agreement, you hereby expressly agree that this Agreement is executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation. You also expressly agree that this 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.

Id. at 669-70. The provisions at issue in *Dillon* contained "identical" language that was "not distinguishable in substance from the related provisions in the Western Sky Agreement that [the Fourth Circuit] held unenforceable in *Hayes*." *Dillon*, 856 F.3d at 335.

As a threshold matter, with respect to Asner and Landy, *Hayes* and *Dillon* simply do not apply. Unlike the defendants in those cases, Asner and Landy do not seek "to avoid federal law." *Hayes*, 811 F.3d 673. In *Hayes*, the defendants sought to use an arbitration agreement to "flatly and categorically renounce the authority of the federal statutes to which it is and must remain

subject." *Id*. at 675. But Asner and Landy do not dispute that they are subject to applicable federal law. In other words, they acknowledge that whatever the scope of the sovereign immunity preserved in the Agreements, the Agreements do not extend such protections to them in their individual capacity in an arbitration. The Arbitration Provision makes this much clear, stating that immunity applies to claims asserted "against the Tribe and Us," not against the separately defined "related third parties." *Compare* Ex. 1 at 5 ("Preservation of Sovereign Immunity"), *with id.* at 5, ¶ 1(g). Accordingly, the concerns that animated *Hayes* and *Dillon* are simply not present here, and neither the sovereign immunity nor the choice-of-law provision "functions as a prospective waiver of federal statutory rights" against Asner and Landy. *Dillon*, 856 F.3d at 336.

Moreover, the Consumer Loan and Arbitration Agreement here differs in critical ways from that in *Hayes* and *Dillon*. First, the Agreement establishes a real dispute resolution process that is accessible and fair. It provides that the arbitration will be administered by one of the two leading arbitration organizations, AAA or JAMS, which the borrower is entitled to choose between. Ex. 1 at 5-6, ¶ 4. The selected organization's "rules and procedures"—which are publicly available—then govern the arbitration proceedings, which are conducted "consistent with the Federal Arbitration Act."[3] *Id*. at 6, ¶ 5. Moreover, upon the borrower's request, the arbitration must take place within 30 miles of his or her residence, *id*. at 6, ¶ 4, and the lender must advance

[3] While a provision regarding AAA and JAMS involvement was "lately added" to the agreement in *Hayes*, that provision conflicted with other terms noted above about arbitrator selection and procedures. The Fourth Circuit therefore questioned whether the "lately added" provision addressed any of the problems the plaintiffs identified: "It is not immediately clear, for instance, whether an AAA- or JAMS-appointed arbitrator would still need to be an authorized representative of the Tribe, or when and how the Tribe's law or the various convoluted provisions in the agreement would override the AAA or JAMS default rules." 811 F.3d at 673. Here, by contrast, the Agreement does not contain conflicting provisions or attempt to override the fair and efficient procedures established by AAA and JAMS, which are applied in tens of thousands of arbitrations every year.

the borrower's "filing, administrative, hearing and arbitrator's fees," "[r]egardless of who demands arbitration," *id*. at 6, ¶ 5. As the Tribal Officials explain in their memorandum, this mechanism exists and it works. Indeed, on a prior occasion when a consumer brought arbitrable claims against a Tribal Lending Company, a JAMS arbitrator presided over the arbitration proceeding—and, after allowing briefing on the subject, rejected the borrower's argument that the Agreement was unconscionable based on the choice of law provision.

Second, the "Governing Law" provision here stands in stark contrast to the provision above from *Hayes* that supported a finding of unconscionability. It states in relevant part:

> This Agreement is made and accepted in the sovereign territory of the Habematolel Pomo of Upper Lake, and shall be governed by applicable tribal law, including but not limited to the Habematolel Tribal Consumer Financial Services Regulatory Ordinance. You hereby agree that this governing law provision applies no matter where You reside at the time You request Your loan . . . .

Ex. 1 at 7 ("Governing Law Provision"). Neither this provision nor any other repudiates "United States state or federal law." *Hayes*, 811 F.3d at 670. In fact, the Arbitration Provision in the Agreement invokes "*both interstate commerce* and Indian commerce under *the United States Constitution and other federal* and tribal laws," and it states that "arbitration shall be *governed by the FAA* and subject to the laws of the Habematolel Pomo of Upper Lake." *Id*. (emphases added).

Third, the Agreement recognizes federal law protections, such as "the Truth in Lending Act, Regulation Z, The Electronic Funds Transfer Act, Regulation E, The Equal Credit Opportunity Act, Regulation B, Title V of the Gramm-Leach-Bliley Act, Regulation P (or its applicable equivalent), The Fair Credit Reporting Act, and/or any other provision of applicable federal or tribal law." Ex. 1 at 6; *see also, e.g.*, *id.* at 7 (referencing "disclosures which federal law requires"); *id*. at 9 (stating that information is provided "in a manner consistent with principles under United States federal law"); *id.* at 11 (requiring indemnification for certain claims based on "violation of applicable federal, state or local law, regulation or ordinance").

Finally, the Arbitration Provision here directly acknowledges federal law claims. It recognizes that an arbitrator is fully empowered to consider whatever federal claims might exist against Asner and Landy, as well as any federal claims that might lie against the Tribal Officials. It states that the borrower is required to arbitrate "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." Ex. 1 at 7, ¶ 1(b), (e) (emphases added). This language "does not reject the wholesale application of federal and state law as it explicitly allows for such laws to be applied at arbitration." *Jarry v. Allied Cash Advance Virginia, L.L.C.*, 175 F. Supp. 3d 622, 626 (W.D. Va. 2016). The inclusion of similar language in *Jarry* (which defined "claim" to include "any claim arising under the following: a federal or state statute, or legislative enactment; a federal or state administrative regulation or rule") caused the *Jarry* court to distinguish *Hayes* and reject its application there. *Id.* (quotation marks omitted). As the court explained, the language in *Jarry* demonstrated that "[t]he agreement in this case is very different" from *Hayes*. *Id*. So too here.

For all of the above reasons, the Consumer Loan and Arbitration Agreement is dramatically different from that in *Hayes* and *Dillon* and does not reflect the intent "to renounce wholesale the application of any federal law.'" *Hayes*, 811 F.3d at 673. Simply put, its references to federal law would make no sense if the impermissible intent in *Hayes* and *Dillon* was the intent here. Accordingly, if Plaintiffs attempt to argue unconscionability based on *Hayes* or *Dillon*, that argument fails.

IV. The Arbitration Provision Is Severable From The Governing Law Provision.

For all of the reasons set forth above, there is no basis in *Hayes* or *Dillon* for the Court to declare any provision of the arbitration agreement unenforceable. But even if the Court were to conclude that the Governing Law Provision is unconscionable (it is not), the Court should sever

the Governing Law Provision from the Arbitration Provision and accept Asner and Landy's concession to the application of federal law in arbitration. The invocation of tribal law in the Governing Law Provision is entirely distinct from the Arbitration Provision in the Agreement. Indeed, the Arbitration Provision contains a severability provision stating as much. Ex. 1 at 6, ¶ 8 (stating that "the remainder shall remain in effect" if any term "is held invalid"). In addition to the express severability provision, the Agreement as a whole shows that these respective provisions are independent. While the Agreement references in multiple places that tribal law governs the loans, the Arbitration Provision is not limited to tribal law and directly acknowledges "federal or state law claims, disputes or controversies," as well as all "claims based upon a violation of any . . . state or federal constitution, statute or regulation." Ex. 1 at 5, ¶ 1(b), (e). In other words, the Arbitration Provision itself does not forsake federal law, and it requires arbitration of federal law claims along with all other types of disputes. Severance is therefore proper.

Neither *Hayes* nor *Dillon* prevents this Court from severing the Arbitration Provision. The Fourth Circuit rejected severability in those cases because the loan agreements repeatedly and expressly disclaimed the application of federal law, making clear that the repudiation of federal law formed the "essence" of the arbitration agreement. *Dillon*, 856 F.3d at 336-37; *Hayes*, 811 F.3d at 675-76. Unlike in *Hayes* and *Dillon*, the Governing Law Provision here is not the "essence" of the agreement to arbitrate; it is completely separate. Indeed, the Arbitration Provision repeatedly references federal law rather than renouncing it. It is not true here that the Governing Law Provision is "essential to the purpose of the arbitration agreement," *Dillon*, 856 F.3d at 336. The definite purpose of the Arbitration Provision is to require arbitration of all disputes, regardless of what law applies to them, and the Agreements do not use the Arbitration Provision to

surreptitiously dodge substantive federal law. Accordingly, even if this Court reads the Governing Law Provision as unconscionable, it should sever and uphold the Arbitration Provision.

V. This Court Should, At A Minimum, Stay Litigation Of The Arbitrable Claims Against Asner and Landy.

Supreme Court precedent leaves no doubt about the proper course once this Court determines that this action includes arbitrable claims. When "a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration." *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011). Accordingly, it is mandatory to order arbitration of the arbitrable claims, irrespective of future proceedings on Plaintiff Mwethuku's nonarbitrable claims.

The appropriate relief hinges on this Court's basis for compelling arbitration. If this Court enforces the delegation clause, this Court should stay this action as to the arbitrable claims against Asner and Landy pending the arbitrator's decision on arbitrability. *Brenco*, 297 F. Supp. 3d at 613 (staying proceedings where "arbitrability should be determined in the first instance by an arbitrator"). Once the arbitrator determines that the claims are arbitrable, the claims should be dismissed from this action. *See Mercadante v. XE Servs., LLC*, 78 F. Supp. 3d 131, 147 (D.D.C. 2015) (defendants may later seek dismissal "if an arbitrator determines that all the issues in this case are, indeed, arbitrable"). If this Court instead determines arbitrability itself and compels arbitration, then dismissal of the claims compelled to arbitration is proper.

That leaves only Plaintiff Mwethuku's nonarbitrable claims. As discussed above, *see supra* at note 1, those claims cannot proceed in this Court for two reasons: (1) Mwethuku agreed to submit his claims to the tribal forum and has failed to exhaust his claims there, and (2) his allegations fail to state a claim upon which relief can be granted. Either reason is independently sufficient to dismiss Mwethuku's claims from this action.

If this Court nevertheless determines that Mwethuku's claims belong in litigation, this Court must then decide whether to stay litigation of his claims. Courts in this district have expressed "reluctan[ce] to proceed with the bifurcated suit during the arbitration," and, based on such reluctance, have stayed "the additional claims of the suit . . . which are not subject to the arbitration clause." *S. Coal Corp. v. IEG PTY, Ltd.*, No. 2:14-CV-617, 2016 WL 8735622, at *4 (E.D. Va. Feb. 26, 2016). This reluctance is well-founded. "When arbitration is likely to settle questions of fact pertinent to nonarbitrable claims, 'considerations of judicial economy and avoidance of confusion and possible inconsistent results . . . militate in favor of staying the entire action.'" *Am. Heart Disease Prevention Found., Inc. v. Hughey*, 106 F.3d 389, 1997 WL 42714, at *6 (4th Cir. 1997) (unpublished table decision) (quoting *Am. Home Assur. Co. v. Vecco Concrete Const. Co. of Va.*, 629 F.2d 961, 964 (4th Cir. 1980) (ellipsis in original)).

Since Plaintiff Mwethuku, whose claims are nonarbitrable, relies on the same factual allegations and legal theories as the Plaintiffs with arbitrable claims, these considerations weigh heavily against proceeding simultaneously in court and in arbitration. Accordingly, if Mwethuku's claims are not dismissed for failure to exhaust or for failure to state a claim, this Court should "stay the entirety of the suit" as against Asner and Landy—including the nonarbitrable claims asserted by Mwethuku—pending the outcome of arbitration. *S. Coal Corp.*, 2016 WL 8735622, at *4.

CONCLUSION

For the foregoing reasons, Defendants Scott Asner and Joshua Landy respectfully request that the Court enter an Order compelling individual arbitration of the claims asserted in this action by Plaintiffs George Hengle, Sherry Blackburn, Willie Rose, Elwood Bumbray, Tiffani Myers, Steven Pike, and Sue Collins, and staying or dismissing those claims as appropriate pursuant to the basis for the decision to compel arbitration, *see supra* at Part V. In addition, the Court should

dismiss with prejudice Plaintiff Mwethuku's claims for failure to exhaust in the tribal forum or, alternatively, for failure to state a claim. If Mwethuku's claims are allowed to remain in this forum, they should be stayed pending the outcome of arbitration.

Respectfully submitted:

Dated: August 9, 2019

/s/Jan A. Larson

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CERTIFICATE OF SERVICE

I certify that on August 9, 2019, I have electronically filed the MEMORANDUM 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 August 9, 2019.

/s/Jan A. Larson

Jan A. Larson (Bar No. 76959)