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

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|---|---|---|
| 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. | ) | |

**MEMORANDUM IN SUPPORT OF TRIBAL DEFENDANTS'**
**MOTION TO COMPEL ARBITRATION**

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## INTRODUCTION

With one exception, Plaintiffs agreed that any disputes arising out of the loan agreements they signed with Golden Valley Lending, Inc., Silver Cloud Financial, Inc., Mountain Summit Financial, Inc., and Majestic Lake Financial, Inc.—including all claims against "directors" and "officers" of these Tribal lending entities—would be resolved through arbitration, not litigation. The requirement to arbitrate could not have been clearer—it was included in the title of the loan agreement ("Consumer Loan and Arbitration Agreement"); it was described in detail in multiple different provisions of that agreement; and Plaintiffs had to affirm that they read, understood, and agreed to those provisions before obtaining each loan.

The arbitration process contemplated by the agreements Plaintiffs signed is no different from the process used across the country in hundreds of arbitrations each day. Plaintiffs' loan agreements specify that the borrower may choose one of the two most prominent national arbitration organizations to conduct the arbitration, and that the arbitration will be administered according to that organization's rules and procedures and the Federal Arbitration Act ("FAA"). To make the process more convenient and accessible to the borrower, the agreements provide that the arbitration will take place within 30 miles of the borrower's home at the borrower's request, and that the Tribal lending entity will advance the costs of the arbitration. The arbitrator's decision is also final and binding, rather than being subject to further review by a Tribal court.

Plaintiffs' claims against Tribal Defendants[1]—who are officers of the Tribal government and the directors of each of the Tribal lending entities—should be referred to that arbitration

[1] As in the concurrently filed Motion to Dismiss, the term "Tribal Defendants" refers to the following members of the Habematolel Pomo of Upper Lake Tribe Executive Council in their official Tribal governmental capacities: Sherry Treppa; Tracey Treppa; Kathleen Treppa; Iris Picton; Sam Icay; Aimee Jackson-Penn; and Amber Jackson. For ease of reference, the remainder of this brief uses "Plaintiffs" to refer to all Plaintiffs other than Mr. Mwethuku.

process. There is a "'strong federal policy in favor of enforcing arbitration agreements.'" *Hayes v. Delbert Servs. Corp*., 811 F.3d 666, 671 (4th Cir. 2016) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). Indeed, the FAA makes clear that arbitration agreements are presumptively "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Plaintiffs accordingly bear the burden of demonstrating why they should be excused from the agreements they signed. But Plaintiffs have made little effort to do so. Indeed, despite extensive prior briefing seeking to enforce the arbitration agreements, *see, e.g.*, ECF Nos. 37-38, 46-47, the First Amended Complaint barely even acknowledges their existence, let alone attempts to explain, beyond a vague allegation of unconscionability, why those agreements should not be enforced.

Plaintiffs should therefore be held to their agreements to arbitrate. If Plaintiffs wish to challenge the validity or scope of their arbitration agreements, that challenge must be resolved by the arbitrator, and the Court should stay this action pending the arbitrator's resolution of that issue. *See* 9 U.S.C. § 3. The agreements make clear that any disputes about the validity and scope of the arbitration provision are for the arbitrator to decide. The language of that delegation provision is materially identical to—if not more explicit than—language in delegation provisions that have been enforced by the Fourth Circuit and the Supreme Court. Even if this Court concludes that it should resolve the question of arbitrability, the agreements are enforceable and the Court should compel arbitration and dismiss these proceedings, because the arbitration agreements on their face apply to the parties and the types of claims asserted here.

The clear requirement that Plaintiffs arbitrate their claims is not unenforceable simply because the loan agreements do not permit Plaintiffs to raise their federal RICO claim against Tribal Defendants, which is premised on Virginia state usury law. As the agreements made clear to Plaintiffs, their loans were issued by four lending entities that are economic development arms

of the Habematolel Pomo of Upper Lake Tribe, a sovereign Indian Nation, and are governed by applicable Tribal law. The Fourth Circuit's decision in *Williams v. Big Picture Loans*, 929 F.3d 170, 197-98 (4th Cir. 2019), confirms that those lending entities are entitled to sovereign immunity. And Plaintiffs' current claims are against the members of the Tribe's government, and directed at their actions in operating those lending entities. These facts distinguish *Hayes v. Delbert Services Corporation* and *Dillon v. BMO Harris Bank*. In those cases, the Fourth Circuit declined requests by *non-tribal* entities or individuals to enforce arbitration agreements that foreclosed all potential federal claims. At the same time, the court made clear that the result would have been different if, as here, the party seeking to invoke arbitration had been entitled to sovereign immunity. *See Hayes*, 811 F.3d at 673; Tribal Defendants' Motion to Dismiss at II. In the alternative, even if the Court believes that Plaintiffs' federal-law claims can proceed, those claims must still be referred to arbitration because the loan agreements make the arbitration provisions severable from the remainder of the agreements.

Only one Plaintiff, Lawrence Mwethuku, may avoid arbitration—but that does not mean he is entitled to litigate his case in this Court. Subsequent to signing his loan agreement, Mr. Mwethuku opted out of its arbitration provisions pursuant to his agreement. But this opt-out triggered other terms of his loan agreement that require him to bring his claims to a Tribal Forum, which includes the possibility of administrative review by the Tribal Consumer Financial Services Regulatory Commission, as well as review of the Commission's decision by the American Arbitration Association ("AAA"). Mr. Mwethuku, who plainly read his loan agreement and elected to opt out of arbitration, cannot possibly claim that he unwittingly agreed to other provisions of that same agreement, including the Tribal Forum provision.

## BACKGROUND

As noted above, the First Amended Complaint does little to acknowledge the existence of the requirement that Plaintiffs arbitrate their claims. But it is well established that the Court can consider evidence outside the pleadings when resolving a motion to enforce an arbitration agreement under the FAA. *See Meridian Imaging Solutions, Inc. v. OMNI Business Solutions, LLC*, 250 F. Supp. 3d 13, 16 n.5 (E.D. Va. 2017) (finding it "appropriate—indeed necessary—to consider materials outside the pleadings" to analyze defendant's motion to compel arbitration pursuant to the FAA and "apply[ing] a standard similar to that applicable for a motion for summary judgment") (quoting *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016)). The evidence Tribal Defendants have submitted—including the loan agreements themselves—demonstrates that the agreements (1) were crystal clear that all disputes involving Tribal Defendants would be resolved in arbitration, (2) made explicit that the loans were issued by sovereign entities and subject to Tribal law, and (3) contemplated a fair arbitration process in which the borrower could meaningfully participate.

### A. The Plaintiffs (Other Than Mr. Mwethuku) Unequivocally Agreed To Arbitrate Any Claims Raised Against Tribal Defendants.

Each Plaintiff voluntarily used the internet to obtain at least one short-term loan from one of the Tribe's four lending entities.[2] As part of the application process, Plaintiffs were required to

[2] Plaintiffs' Consumer Loan and Arbitration Agreements are attached as Exhibits 83 through 100 to the Affidavit of Sherry Treppa, which was filed in connection with the Motion to Dismiss the original Complaint. *See* ECF No. 44 ("Treppa Aff."). Five of the eight Plaintiffs took out multiple loans and signed multiple loan agreements with the Tribe's lending entities: Sherry Blackburn (4); Sue Collins (3); George Hengle (3); Tiffani Myers (2); and Willie Rose (3). Treppa Affidavit, ECF No. 44, ¶¶ 225(b), (d), (e), (f), (g). The terms of Plaintiffs' loan agreements are largely identical. For ease of reference, this memorandum will refer to the September 9, 2016 agreement of Ms. Tiffani Myers with Mountain Summit Financial, Inc. (Treppa Affidavit Ex. 93, ECF No. 45-43) as a representative example unless the provision cited materially differs in another agreement.

complete an online application and assert that they had read and agreed to the terms and conditions of the loans, including a document entitled the "Consumer Loan and Arbitration Agreement." Treppa Aff., ECF No. 44, ¶¶ 221-26. The five Plaintiffs who took out multiple loans went through this process multiple times. The agreements Plaintiffs signed demonstrate their intent and acceptance that all disputes directly or indirectly related to the loans be resolved through arbitration.

To begin, the first page of each agreement identifies the document as a "**CONSUMER LOAN AND ARBITRATION AGREEMENT**." Treppa Aff. Ex. 93, ECF 45-43, at 2. Several pages later, in a provision titled "**RESOLVING DISPUTES; WAIVER OF JURY TRIAL AND ARBITRATION PROVISION**," each agreement explains that:

> In general, binding arbitration is a process in which persons with a dispute waive their rights to file a lawsuit in court and waive their rights to have a jury trial. Instead, the parties agree to submit their disputes to a neutral third person (an "arbitrator") for a decision. Arbitration provisions are private and less formal than court proceedings. Each party to a dispute has an opportunity to present their evidence to the arbitrator regarding the dispute. After considering each party's evidence and arguments, the arbitrator then issues a final and binding decision resolving the dispute. We will follow and you agree to follow Our policy of arbitrating all disputes, including the scope and validity of this Arbitration Provision. As part of agreeing to arbitrate any dispute, You explicitly waive any right You may have to participate in any class action against Us.

*Id.* at 6.[3]

Two other definitional provisions clarify the scope of this requirement to arbitrate. The first is the definition of "We," "Our," and "Us," as "Mountain Summit Financial, Inc., an arm of

[3] Mr. Mwethuku's agreement contains a slightly different version of the second-to-last sentence. It states: "Unless You opt out of the arbitration process set forth below, We will follow our Policy of arbitrating all disputes with customers, including the scope and validity of this Arbitration Provision." Treppa Aff. Ex. 100, ECF No. 45-50, at 3.

the Habematolel Pomo of Upper Lake Tribe of Indians that is a federally recognized Native American Indian Tribe, and any authorized representative, *agent*, independent contractor, affiliate or assignee We use in the provision of your loan." Treppa Aff. Ex. 93, ECF No. 45-43, at 2 (emphasis added).

Second, the agreements define "dispute" with "the broadest possible meaning" and as explicitly including, among other claims:

- "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;"
- "all tribal, federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to this Agreement, the information You gave Us before entering into this Agreement, including the customer information application, and/or any past agreement or agreements between You and Us;"
- "all counterclaims, cross-claims and third-party claims;"
- "all common law claims, based upon contract, tort, fraud, or other intentional torts;"
- "all claims based upon a violation of any tribal, state or federal constitution, statute or regulation;"
- "all claims asserted by Us against You, including claims for money damages to collect any sum We claim You owe us;"
- "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'*), including claims for money damages *and/or equitable or injunctive relief*;"
- "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* . . . ."

*Id*. at 6 (emphases added).

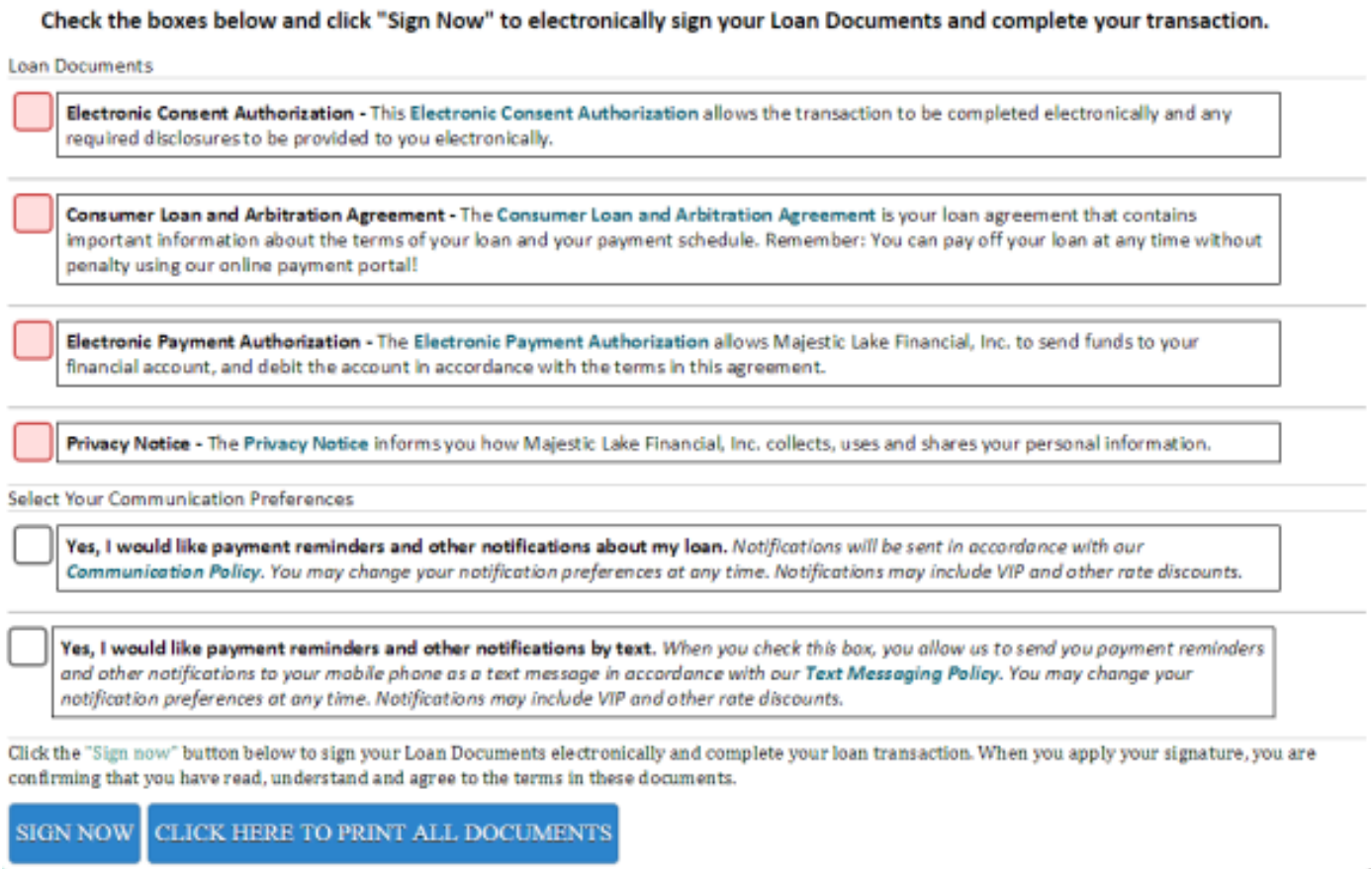
What follows is a series of acknowledgements to which all borrowers must agree before obtaining a loan. Those provisions made clear to Plaintiffs that "by entering into this Arbitration Provision,"

> (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 . . . IN ANY REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FLED AGAINST US AND/OR RELATED THIRD PARTIES.

*Id.* That was not all—the next paragraph of the contract underscores that "[a]ll 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." *Id.*

During the loan application process, each Plaintiff was presented with this agreement for review. Treppa Aff., ECF No. 44, ¶¶ 224-26. Plaintiffs then had to acknowledge the agreement before obtaining each loan. *Id.* A representative image of the signature authorization page for Majestic Lake Financial, Inc. is included below as an example. As the image reflects, each Plaintiff was informed that the "Consumer Loan and Arbitration Agreement is your loan agreement that contains important information about the terms of your loan and your payment schedule." *Id.* ¶ 224-25. The words "Consumer Loan and Arbitration Agreement" were highlighted in a branded color to indicate a clickable hyperlink. Each Plaintiff could click on that link to view the full agreement before signing. *Id.* ¶ 224. Before receiving each loan, as depicted by the red highlighting identifying required fields, Plaintiffs were required to check a box next to the hyperlink and explanation of the Consumer Loan and Arbitration Agreement to indicate that they

were signing the Agreement. *Id.* ¶¶ 224-26. The last line of the authorization reminded them that by signing the loan documents they were confirming that they had read, understood, and agreed to the terms of the loan documents. *Id.* ¶ 224.




Each agreement signed by Plaintiffs shows the date and time at which he or she checked the relevant box, clicked the button triggering electronic signing of the loan agreement (including the arbitration agreement), and initiated the processing procedures for the loan—as well as the IP address from which he or she did so. *See, e.g.*, Treppa Aff. Ex. 93, ECF No. 45-43, at 8-9.

Only one Plaintiff, Mr. Mwethuku, submitted an opt-out request pertaining to the arbitration provisions of his loan agreement subsequent to signing it. Treppa Aff. Ex. 101, ECF No. 45-51. He did so pursuant to a provision of his loan agreement that allowed for such an opt-out. Treppa Aff. Ex. 100, ECF No. 45-50, at 4. But that same loan agreement explained that by

opting out of the arbitration provisions, he agreed to bring any disputes arising from the agreement before the Tribal Forum, and that he consented to the Tribal Forum's jurisdiction over such claims. *Id.* Notwithstanding these directives, Mr. Mwethuku has not raised any of his claims before that forum—the contours of which are described further below.

### B. The Agreements Make Clear That Tribal Defendants Have Sovereign Immunity And That The Agreements Are Governed By Tribal Law.

The loan agreements repeatedly made clear that the Tribe is entitled to sovereign immunity and that its lending entities, including the entities' authorized agents, share in that immunity. For example, the paragraph of the agreement titled "Promise to Pay" explains that the borrower "promise[s] to pay to the order of Mountain Summit Financial, Inc., an arm of the Habematolel Pomo of Upper Lake Tribe of Indians, a federally recognized Native American Indian Tribe, or any subsequent holder of this Agreement any and all sums due hereunder." Treppa Aff. Ex. 93, ECF No. 45-43, at 2-3. The agreement later highlights the consequence of this earlier provision, explaining in the "Preservation of Sovereign Immunity" provision that:

> This loan and all related documents are being submitted by you to *us* as an economic arm, instrumentality, and corporation owned by the Tribe. The Tribe is a federally-recognized Tribe and enjoys governmental sovereign immunity. Because *we* and the Tribe are entitled to sovereign immunity, you will be limited as to what claims, if any, you may be able to assert against the Tribe and *Us*. Any complaint must be submitted by you or on your behalf to us as described below. It is the express intention of the Tribe and *Us* operating as an economic arm of the Tribe, to fully preserve, and not waive either in whole or in part, sovereign governmental immunity, and any other rights, titles, privileges, and immunities, to which *we* and the Tribe are entitled. To protect and preserve the rights of the parties, no person may assume a waiver of sovereign immunity.

*Id.* at 6 (emphases added). This provision thus clarifies that the Tribe and all the entities that fall in the definition of "We" and "Us," *see supra* at 5-6, are entitled to immunity. With the exception of Mr. Mwethuku's agreement, the agreements signed by the Plaintiffs contain this language.[4]

The loan agreements also specify that the loans are governed by Tribal law. In a provision titled "Governing Law," the agreements state:

> 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 from Mountain Summit Financial, Inc. Mountain Summit Financial, Inc. is regulated by the Habematolel Pomo of Upper Lake Tribal Consumer Financial Services Regulatory Commission. You may contact the Commission by mail at P.O. Box 516 Upper Lake CA 95485.

*Id.* at 8. Other provisions of the agreement similarly mention Tribal law, including those setting forth the process for arbitration, the location for arbitration, the lending entities' commitment to advance the borrower's fees for arbitration, and the law that governs in arbitration. *Id.* at 6-7.

While the loan agreements invoke the Tribe's law, that law expressly incorporates numerous federal consumer protection laws. The Habematolel Pomo of Upper Lake Tribal Consumer Financial Services Regulatory Ordinance, which is incorporated by reference into the Loan Agreements, is attached to the original affidavit of Sherry Treppa as Exhibit 7, ECF No. 44-8. It explains that it "is essential that the Tribal government regulate Consumer Financial Services in a manner commensurate with Tribal law and policy, and applicable federal law." Treppa Aff. Ex. 7, ECF No. 44-8 (Habematolel Pomo of Upper Lake Tribal Consumer Financial Service

[4] Although Mr. Mwethuku's agreement did not contain the "Preservation of Sovereign Immunity" provision, it did include the "Promise to Pay" provisions making clear that the relevant lending entity, Golden Valley, was "an arm of the Habematolel Pomo of Upper Lake Tribe of Indians." Treppa Aff. Ex. 100, ECF No. 45-50, at 2-3.

Regulatory Ordinance (2015)), at 3. It also provides that as licensees under the Ordinance, the lending entities "shall . . . comply with . . . federal laws as applicable," and "shall conduct business in a manner consistent with principles of federal consumer protection law, including, without limitation, the following":

a. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5491-5493;

b. Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and related regulations at 12 C.F.R. Part 226;

c. Consumer Leasing Act, 15 U.S.C. §§ 1667 *et seq.*, and related regulations at 12 C.F.R. Part 213;

d. Fair Credit Billing Act, 15 U.S.C. § 1666a;

e. Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, and related regulations at 15 C.F.R. Part 202;

f. Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*, and related regulations at 12 C.F.R. Part 205;

g. Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and related regulations at 12 C.F.R. Part 222;

h. Privacy provisions of Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 *et seq.*, and related regulations at 16 C.F.R. Part 313 and 16 C.F.R. Part 314;

i. Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, and related regulations at 16 C.F.R. Part 901;

j. Talent Amendment, 10 U.S.C. § 987, and related regulations of the Department of Defense at 32 C.F.R. Part 232;

k. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, and related regulation at 47 C.F.R. § 64.1200;

l. Telemarketing Sales Rule at 16 C.F.R. § 310;

m. Section 5 of the Federal Trade Commission Act at 15 U.S.C. § 45(a);

n. Servicemembers' Civil Relief Act, 50 U.S.C. App. §§ 501-96.

*Id.* at 20-21.

### C. The Agreements Provide For A Fair Arbitration Process.

The loan agreements also specify the contours of the arbitration process to ensure that it is efficient and fair to both sides. As to arbitration, the agreements provide that the borrower is entitled to select one of the two most prominent national arbitration organizations (AAA or JAMS) to conduct the arbitration, and that the "rules and procedures used by the applicable arbitration organization applicable to consumer disputes" will govern the dispute in tandem with the laws of the Tribe. Treppa Aff. Ex. 93, ECF No. 45-43, at 6-7. These rules and procedures are designed specifically for disputes raised by consumers. *See, e.g.*, AAA Consumer Arbitration Rules, https://www.adr.org/sites/default/files/Consumer_Rules_Web_0.pdf; JAMS Arbitration Rules, https://www.jamsadr.com/rules-comprehensive-arbitration/. The agreements mandate that the arbitration be "governed by" the FAA, and that the arbitrator "apply substantive Tribal law consistent with the" FAA. Treppa Aff. Ex. 93, ECF No. 45-43, at 7.

The agreements also take steps to ensure that the borrower can meaningfully participate in the process. Regardless of which party initiates arbitration, the borrower may request that the arbitration take place within 30 miles of his or her residence or another mutually agreed-upon location. *Id*. And the Tribal lending entities agree to advance the borrower's portion of the arbitration expenses (which the entities agree not to recoup in the event the borrower is successful). *Id.* The decision of the arbitrator is final and binding; the lending entities and related third parties, including Tribal Defendants, do not have recourse to any further review in Tribal court. *Id.*

Mr. Mwethuku's agreement likewise sets forth the processes that would apply in the event he elected to opt out of arbitration. His loan document states that "any disputes arising from this Agreement shall be governed by the laws of the [Tribe] and must be brought before the Tribal Forum. You explicitly consent to the jurisdiction of the Tribal Forum to resolve disputes should You opt out of the Arbitration Provision." Treppa Aff. Ex. 100, ECF No. 45-50, at 4. As a result,

Mr. Mwethuku was required to assert his claims through the Tribe's consumer dispute resolution process. Under this process, borrowers must submit their complaints to the lending entity from which they received their loans and are entitled to a written response within thirty days. Treppa Aff. Ex. 103, ECF No. 45-53 (Habematolel Pomo of Upper Lake Tribal Consumer Financial Service Regulatory Ordinance (2012)), at 30-35. That response is subject to administrative review by the Tribal Consumer Financial Services Regulatory Commission, which consists of a Commissioner knowledgeable in Tribal law who receives technical support from a former U.S. Attorney and a former high-ranking enforcement official at the federal Consumer Financial Protection Bureau. *Id.* at 31; Treppa Aff., ECF No. 44, ¶ 71. That administrative review process can include an expansive evidentiary hearing to aid the Commission's investigation and review. Treppa Aff. Ex. 103, ECF No. 45-53, at 31-33. And the borrower may request that a AAA arbitrator review the Commission's decisions. *Id.* at 33-35.

The Tribal lending entities have received few complaints from consumers about their loans. The complaint rate in 2018 for the four lending portfolios combined was less than one percent. Treppa Aff., ECF No. 44, ¶ 23. Among approved borrowers, only one has pursued arbitration to date. In that case, a Nevada resident complained that his Majestic Lake loan was contrary to a Nevada statute on high interest lending. The parties submitted the dispute to a JAMS arbitrator and agreed to be bound by the arbitrator's resolution. The arbitrator first assessed the agreement's arbitration provisions and concluded that they were valid. Treppa Aff. Ex. 102, ECF No. 45-52, at 4-6. The arbitrator then determined that the loan contract was not unconscionable, noting that the requirements to arbitrate claims and have claims be governed by Tribal law appeared in multiple places in the contract, and that the application of "the law of another sovereign nation does not necessarily render a contract unconscionable." *Id.* at 7-11. The arbitrator did, however,

allow the claimant to submit additional briefing on several issues, including on the enforceability of any award against Majestic Lake and the "take it or leave it" nature of the loan contract as applied to the claimant. *Id.* at 11. The matter was subsequently resolved outside arbitration. Treppa Aff., ECF No. 44, ¶ 235.

## ARGUMENT

Arbitrability disputes "necessitate a two-step inquiry." *Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 101 (4th Cir. 2012). The Court should first "determine *who* decides whether a particular dispute is arbitrable: the arbitrator or the court." *Id*. (emphasis in original). In the event the Court "conclude[s] that the court is the proper forum in which to adjudicate arbitrability, [the court] then decide[s] *whether* the dispute is, in fact, arbitrable." *Id*. (emphasis in original).

As explained below, the agreements make clear that an arbitrator should determine whether these disputes should be subject to arbitration. But even if this Court were to address that issue, the agreements to arbitrate should be honored.

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

The plain language of the agreements demonstrates that Plaintiffs agreed to delegate decision-making authority on the scope and validity of their arbitration agreements to an arbitrator. The enforceability of the arbitration agreements is thus an arbitrable question itself, and the Court should stay these proceedings pending the arbitrator's assessment of that issue.

Given the contractual nature of arbitration agreements, "parties are generally free to structure their arbitration agreements as they see fit." *Volt Info Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). This includes the freedom 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); *see also Hayes*, 811 F.3d at 671 n.1 ("Consistent with arbitration's contractual nature, parties may give arbitrability questions to an arbitrator."). Because "the question of who decides arbitrability is itself a question of contract," *Henry Schein*, 139 S. Ct. at 527, it is ultimately a question of the parties' intent, *Carson v. Giant Food, Inc.*, 175 F.3d 325, 330 (4th Cir. 1999).

Accordingly, if an arbitration agreement contains a provision delegating threshold issues to an arbitrator, the delegation should be enforced so long as the parties clearly and unmistakably demonstrated that it was their intent to do so. *See Henry Schein, Inc.*, 139 S. Ct. at 531 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)); *see also Carson*, 175 F.3d at 329-30. Such evidence exists when the 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, 265-66 (4th Cir. 2019) (unpublished). In particular, "[t]hose who wish to let an arbitrator decide which issues are arbitrable need only state 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.

That standard is satisfied here. The opening paragraph of the arbitration provisions states that "We"—*i.e.*, the Tribe's lending entities and their agents (including Tribal Defendants), *see supra* at 5—"will follow and you agree to follow Our policy of arbitrating all disputes, including the scope and validity of this Arbitration Provision." Treppa Aff. Ex. 93, ECF No. 45-43, at 6. The agreements later confirm that "all disputes" include disputes over the scope and validity of the arbitration agreement. *Id.* (defining "all disputes" as "[a]ll 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*") (emphasis added).

These provisions are at least as specific as (if not more specific than) the provisions courts have considered sufficient to meet the "clear and unmistakable intent" standard. In *Rent-A-Center, West, Inc. v. Jackson*, the Supreme Court enforced a delegation provision stating that "[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement including . . . any claim that all or any part of this Agreement is void or voidable." 561 U.S. 63, 66, 75-76 (2010). In *Novic*, the Fourth Circuit enforced an arbitration clause that "unambiguously" made arbitrable questions regarding "*the application, enforceability or interpretation of* [the cardholder] Agreement, including this *arbitration provision*" on the ground that it stood "in direct contrast to the broad wording of general arbitration provisions" it had rejected in the past. 757 F. App'x at 266 (emphasis in original). And in *Artis v. Lyon Shipyard, Inc.*, Judge Davis enforced a delegation provision that provided the arbitrator with exclusive authority "to resolve any dispute relating to the applicability or enforceability of this Agreement, or the validity of any Claim." No. 17cv595, 2018 WL 2013073, at *1, *5 (E.D. Va. Apr. 26, 2018).

The delegation is even clearer in this case because the agreements also incorporate rules requiring disputes about arbitration to be submitted to the arbitrator, which is an independent basis for sending scope and validity challenges to arbitration. Courts in this District have regularly concluded that the clear-and-unmistakable standard is met even where arbitration provisions themselves do not include express delegation language, so long as the provisions "incorporate[ ] a specific set of rules . . . that authorizes arbitrators to determine arbitrability." *Brenco Enters., Inc. v. Bitesquad.com, LLC*, 297 F. Supp. 3d 608, 611 (E.D. Va. 2018); *see also Terra Holding GmbH*

*v. Unitrans Int'l, Inc.*, 124 F. Supp. 3d 745, 748 (E.D. Va. 2015) (same).[5] In both *Brenco Enterprises, Inc.*, and *Beauchamp v. Academi Training Center*, the courts concluded that the standard had been met because the arbitration agreements incorporated the AAA Commercial Rules, which include a rule allowing an arbitrator to determine his or her own jurisdiction. *See Brenco Enterprises*, 297 F. Supp. 3d at 611; *Beauchamp*, No. 11cv371, 2013 WL 1332028, at *1 (E.D. Va. Mar. 29, 2013). And in *Innospec, Ltd. v. Ethyl Corporation*, Judge Gibney reached the same conclusion with respect to an agreement incorporating the Rules of the London Court of International Arbitration. *See* No. 14-cv-158, 2014 WL 5460413, at *3-*4 (E.D. Va. Oct. 27, 2014).

So too here. The agreements provide that the arbitrator will be selected from AAA or JAMS and that the arbitration "will be governed by . . . such rules and procedures used by the applicable arbitration organization applicable to consumer disputes." Treppa Aff. Ex. 93, ECF No. 45-43, at 7. Both AAA's and JAMS's rules for consumer arbitration state that the arbitrator determines whether the dispute is subject to arbitration. Rule 14(a) of the AAA Consumer Arbitration Rules provides:

> 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.

[5] Although the Fourth Circuit has not yet addressed this issue, the majority of circuit courts to do so have held that the incorporation of specific rules allowing arbitrators to determine arbitrability meets the clear-and-unmistakable standard. *See, e.g.*, *Fadal Machining Centers, LLC v. Compumachine, Inc.*, 461 F. App'x 630, 632 (9th Cir. 2011) (unpublished); *Fallo v. High-Tech Institute*, 559 F.3d 874, 878 (8th Cir. 2009); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp. v. Remote Solution, Co., Ltd.*, 398 F.3d 205, 211 (2d Cir. 2005); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989).

AAA Consumer Arbitration Rules, *available at* https://www.adr.org/sites/default/files/Consumer_Rules_Web_0.pdf, at 17. Rule 14(b) continues: "The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part." *Id.* Similarly, Rule 11(b) of the JAMS Comprehensive Arbitration Rules states that:

> 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. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

JAMS Comprehensive Arbitration Rules, *available at* https://www.jamsadr.com/rules-comprehensive-arbitration/, at 14. It is therefore doubly clear that the agreements at issue in this case demonstrate the parties' clear and unmistakable intent to allow an arbitrator to determine issues of arbitrability.

Accordingly, the Court should stay this case pursuant to 9 U.S.C. § 3 pending a determination by an arbitrator as to the arbitrability of these disputes. *See, e.g.*, *Brenco Enterprises*, 297 F. Supp. 3d at 613 (concluding that "arbitrability should be determined in the first instance by an arbitrator" and staying the proceeding pending arbitration); *ROI Properties Inc. v. Burford Capital Ltd.*, No. CV-18-03300, 2019 WL 1359254, at *7 (D. Ariz. Jan. 14, 2019) (same). If the arbitrator determines that this dispute is subject to arbitration, the Court should dismiss the lawsuit. *See, e.g.*, *Mercadante v. XE Servs., LLC*, 78 F. Supp. 3d 131, 147 (D.D.C. 2015) (noting that issuance of a stay pending arbitration "does not prevent Defendants from seeking dismissal of this action if an arbitrator determines that all the issues in this case are, indeed, arbitrable").[6]

[6] Some courts have gone further, and dismissed plaintiffs' claims even before an arbitrator ruled on the question of arbitrability. *See Innospec*, 2014 WL 5460413, at *4 (dismissing all claims after compelling arbitration because "the determination of arbitrability has been committed to the arbitrator"); *see also Harris v. Equifax Info. Servs.*, No. 18-cv-00558, 2019 WL 1714218, at *5 (S.D. W. Va. Apr. 17, 2019) (same). Tribal Defendants are not seeking that remedy here but are

## II. IF THE COURT WERE TO DECIDE THE ARBITRABILITY QUESTION, IT SHOULD HONOR THE AGREEMENTS AND ORDER ARBITRATION.

Even if the Court concludes, contrary to the language of the agreements, that it should decide whether this dispute is subject to arbitration, the Court should uphold the arbitration provisions and order arbitration pursuant to 9 U.S.C. § 4.

Under the FAA, agreements to arbitrate are presumptively "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Considering that statutory directive, both the Supreme Court and the Fourth Circuit have recognized a "'strong federal policy in favor of enforcing arbitration agreements.'" *Hayes*, 811 F.3d at 671 (quoting *Dean Witter Reynolds*, 470 U.S. at 217). This policy dictates that the Court "rigorously enforce" these arbitration provisions "according to their terms," *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (internal quotation marks omitted), and "on an equal footing with other contracts," *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 334 (4th Cir. 2017) (internal quotation marks omitted). Any ambiguities or doubts as to the scope of arbitral issues should be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Adkins v Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002).

"In order for a court to compel arbitration, the court must first find that an arbitration agreement exists between the parties" and then that "the dispute at issue falls within the scope of the agreement." *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001); *see also Greenville Hosp. Sys. v. Employee Welfare Ben. Plan for Employees of Hazelhurst Mgmt. Co.*, 628 F. App'x 842, 845 (4th Cir. 2015) (unpublished) ("[W]here the parties have agreed to an arbitration clause, a court should order arbitration unless it may be said with positive assurance that the arbitration

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confident that Plaintiffs' claims must eventually be dismissed, either because an arbitrator should enforce the arbitrability of the agreements or because this Court should.

clause is not susceptible of an interpretation that covers the asserted dispute." ) (internal quotation marks omitted).

That standard is easily met here. As discussed above, Plaintiffs "agree[d] to submit their disputes to a neutral third person ('an arbitrator') for a decision." Treppa Aff. Ex. 93, ECF No. 45-43, at 6. Tribal Defendants are covered by the agreements' definition of the Tribal contracting party. *Id.* at 2 (defining "'Company,' 'We,' 'Our' and 'Us'" as not only the Tribal lending entities but also "any authorized representative, *agent*, independent contractor, affiliate or assignee We use in the provision of your loan") (emphasis added). And even if this Court were to find that Tribal Defendants are not parties to the loan agreements, they would plainly qualify as "related third parties" entitled to arbitration. *Id.* at 6 (defining arbitrable "disputes" to include "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')*" and "all claims asserted by You as a . . . representative or member of a class of persons, or in any other representative capacity, against *Us and/or related third parties*.") (emphases added).[7]

[7] Tribal Defendants would also be entitled to arbitrate this dispute even if the agreement did not expressly incorporate them as it does. 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). In particular, a nonsignatory may enforce an arbitration agreement under principles of equitable estoppel "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 a 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." *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 395 (4th Cir. 2005) (alterations in original); *see also Hunter v. NHcash.com, LLC*, No. 3:17cv348-HEH, 2017 WL 4052386, at *5 (E.D. Va. Sep. 12, 2017). Tribal Defendants meet this test as well. Plaintiffs' claims stem from the interest rates and fees set forth in their loan agreements, and there can be no question that their allegations involve "interdependent and concerted" conduct with the

It is similarly undeniable that this dispute falls within the scope of the agreements. As discussed above, the agreements make clear that Plaintiffs agreed to arbitrate "[a]ll disputes," including all individual claims "against . . . related third parties, including claims for money damages and/or equitable or injunctive relief," and all claims asserted "as a representative and member of a class of persons . . . against . . . related third parties." Treppa Aff. Ex. 93, ECF No. 45-43, at 6. If that were not enough, the agreements also define "dispute" to include "all . . . federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to this Agreement"; "all common law claims, based upon contract, tort, fraud, or other intentional torts"; and "all claims based upon violation of any . . . state or federal . . . statute." *Id*. Plaintiffs' claims, including their requests for specific injunctive relief, fit well within the parameters established in their agreements. Accordingly, the Court should compel arbitration of Plaintiffs' claims.

## III. THE ARBITRATION AGREEMENTS ARE ENFORCEABLE.

Given that the agreements unequivocally provide that Plaintiffs' claims against Tribal Defendants must be resolved through arbitration, Plaintiffs bear the burden of demonstrating that their arbitration agreements are unconscionable and thus should not be enforced. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000) ("[T]he party resisting arbitration bears the burden . . . ."); *see also Garrett v. Monterey Fin. Servs., LLC*, Civ. No. 18-325, 2018 WL 3579856, at *3 (D. Md. July 25, 2018) (concluding that the plaintiff had failed to carry her burden of demonstrating that the arbitration provision is unconscionable); *Roach v. Navient Solutions, Inc.*, 165 F. Supp. 3d 343, 347 (D. Md. 2015) (same).

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Tribal lending entities, given that Plaintiffs initially filed a virtually identical complaint against those entities.

Plaintiffs cannot carry this burden. The First Amended Complaint states only that the "forum selection clauses" are "unconscionable" without any further explanation. First Am. Compl., ECF No. 54, ¶ 211. But there can be no dispute that the agreements are valid and enforceable under the laws of the Tribe, which govern the agreements and the arbitration provisions therein. *See* Treppa Aff., ECF No. 44, ¶¶ 236-38; *see also* Tribal Defendants' Motion to Dismiss at I.

Even if the Court disregards the choice-of law provisions contained in the agreements, Plaintiffs cannot demonstrate that the agreements are unconscionable under the Virginia law they seek to apply. Under Virginia law, establishing a contract provision to be unconscionable requires extraordinary proof. The provision must "shock[] the conscience"; in other words, Plaintiffs must demonstrate that the provision is "one that no man in his senses and not under a delusion would make, on the one hand, and [that] no fair man would accept on the other." *Fransmart, LLC v. Freshii Development, LLC*, 768 F. Supp. 2d 851, 871 (E.D. Va. 2011) (quoting *Mgmt. Enters., Inc. v. Thorncroft Co., Inc.*, 416 S.E.2d 229, 231 (Va. 1992)); *see also*, *e.g.*, *Sydnor v. Conseco Financial Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) (an unconscionable contract provision is "one which no reasonable person would enter into, and the inequality must be so gross as to shock the conscience") (internal quotation marks omitted). Plaintiffs must demonstrate unconscionability with "clear and convincing evidence." *Fransmart*, 786 F. Supp. 2d at 871 (citing *Pelfrey v. Pelfrey*, 487 S.E.2d 281, 284 (Va. App. 1997)).

Plaintiffs cannot make this showing. They have not alleged that the arbitration provisions were somehow hidden from them. To the contrary, the agreements go out of their way to make clear to Plaintiffs that they would be agreeing to arbitration. *See supra* at 4-9. And five of the eight Plaintiffs went through the loan application and agreement process—which required them to

acknowledge and sign the agreement, including the provisions regarding arbitration—on multiple occasions. Nor have Plaintiffs alleged that the arbitration provisions are somehow tilted in favor of Tribal Defendants. To the contrary, the agreements specifically provide that the arbitration should be conducted by a well-respected arbitration organization—either AAA or JAMS; should be subject to rules of those organizations as well as the FAA; and cannot be revisited in a Tribal forum except to enforce the arbitrator's award. Treppa Aff. Ex. 93, ECF No. 45-43, at 6-7.

The Fourth Circuit's decisions in *Hayes v. Delbert Services Corp.* and *Dillon v. BMO Harris Bank, N.A.* do not support a finding of unconscionability. In both cases, the Fourth Circuit held that that agreements to arbitrate disputes under loan contracts governed exclusively by tribal law failed because they "purport[ed] to renounce wholesale the application of any federal law to the plaintiffs' federal claims." *Hayes*, 811 F.3d at 673; *see also Dillon*, 856 F.3d at 336-37. But critically, in both cases, the party seeking to enforce the arbitration agreement *was not a tribal entity or official entitled to sovereign immunity*. The Fourth Circuit made clear "at the onset" in *Hayes* that this distinction was load bearing:

> 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.

*Hayes*, 811 F.3d at 673 (emphasis added). As the *Hayes* court summarized in its holding, a party may not 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 (emphasis added).

By contrast, the Tribal lending entities are entitled to sovereign immunity under *Williams v. Big Picture Loans*, 929 F.3d 170, 197-98 (4th Cir. 2019), as Plaintiffs have acknowledged by

dropping their claims against those entities. Tribal Defendants are entitled to sovereign immunity as well; they, on behalf of the Tribe, created and operate those immune entities, and Plaintiffs have sued them in their official capacities as the members of the Tribal government, which likewise entitles them to immunity. *See* Tribal Defendants' Motion to Dismiss at II. And as noted above, the loan agreements are governed by Tribal law, which incorporates multiple federal consumer protection laws but—like federal law and the laws of several states, including Arizona, Idaho, Massachusetts, Nevada, South Dakota, and Utah—does not contain a usury protection enforceable through RICO. As a result, the arbitration agreements do not strip the Plaintiffs of any federal rights that they can assert against Tribal Defendants—a fact that the loan agreements repeatedly made clear. *See, e.g.*, Treppa Aff. Ex. 93, ECF No. 45-43, at 6 (explicitly providing that "we and the Tribe are entitled to sovereign immunity" and that as a result of that immunity, borrowers "will be limited as to what claims, if any, [they] may be able to assert against the Tribe and Us"); *see also supra* at 9-10. *Hayes* and *Dillon* therefore provide no basis for setting aside Plaintiffs' agreement to arbitrate.

## IV. THE ARBITRATION AGREEMENTS ARE SEVERABLE FROM THE REMAINDER OF THE AGREEMENTS.

Even if the Court concludes that Plaintiffs retain the right to bring federal RICO claims against Tribal Defendants, those claims are still subject to arbitration, because the requirement to arbitrate is severable from the remainder of Plaintiffs' agreements.

As an initial matter, it is "substantive federal arbitration law [that] an arbitration provision is severable from the remainder of the contract" or "another provision of the contract." *Rent-A-Center*, 561 U.S. at 70-71 (internal quotation marks omitted); *see also Buckeye Check Cashing, Inc. v. Cardegna.* 546 U.S. 440, 445-46 (2006) (holding the same and noting that this rule of severability "applies in state as well as federal courts"). In addition, the loan agreements here all

include an express severability provision. *See, e.g.*, Treppa Aff. Ex. 93, ECF No. 45-43, at 7 ("If any of this Arbitration Provision is held invalid, the remainder shall remain in effect."). "Clauses of contracts" may be "severed from the main contract if the parties manifest the intent that the portions of the contract can survive on their own." *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958, 965 (W.D. Va. 2000). The parties have manifested that intent here.

Moreover, the arbitration provisions make clear that "all tribal, *federal* or state law claims, disputes or controversies" should be arbitrated. Treppa Aff. Ex. 93, ECF No. 45-43, at 6 (emphasis added). Accordingly, to the extent that any federal law claims survive under the contract, they are expressly committed to arbitration.

Here too, the Fourth Circuit's decisions in *Dillon* and *Hayes* do not suggest otherwise. In those cases, the court concluded that the parties' choice of law provisions could not be severed from the arbitration agreements. *Dillon*, 856 F.3d at 336-37; *Hayes*, 811 F.3d at 675-76. But in both cases, the courts determined that the choice-of-law provisions, and the desire to avoid any application of federal law, made up the "core" or "essence" of the parties' arbitration agreements, especially in light of the defendants' repeated and express disclaimers that federal law could ever apply. *Dillon*, 856 F.3d at 337; *Hayes*, 811 F.3d at 675-76. Here, by contrast, the agreements not only call for severability, but also display a clear intent to require arbitration regardless of which substantive law may ultimately apply. Accordingly, the choice of law provisions in Plaintiffs' agreements may be severed from the remaining arbitration provisions and Plaintiffs' claims should be arbitrated.

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

Although Mr. Mwethuku opted out of the arbitration provisions in his loan agreement, this Court is the wrong forum for him to raise his claims. His loan agreement requires that he bring

any dispute arising from his loan to the Tribal Forum, which includes an opportunity for Tribal Defendants to respond to his complaint and then tiered review by the independent Tribal Consumer Financial Services Regulatory Commission and possibly an independent arbitrator. Because Mr. Mwethuku consented to the jurisdiction of the Tribal Forum but opted not to pursue his claims in that Forum, this Court must abstain from addressing his claims until he has first exhausted them. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985) (holding that tribal exhaustion requires a federal court to "stay[ ] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction"); *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 784 (7th Cir. 2014) (noting that the tribal exhaustion doctrine requires federal courts to abstain from "hearing certain claims relating to Indian tribes until the plaintiff has first exhausted those claims in tribal court"); *see also Brown v. Western Sky Financial, LLC*, 84 F. Supp. 3d 467, 476-82 (M.D.N.C. 2015) (dismissing claims to allow for tribal exhaustion); *Heldt v. Payday Financial, LLC*, 12 F. Supp. 3d 1170, 1193 (D.S.D. 2014) (same).[8]

**CONCLUSION**

Plaintiffs' claims against Tribal Defendants belong in arbitration. Plaintiffs agreed to arbitrate those claims and submit any disputes over the scope of the arbitration agreements to an arbitrator. Accordingly, the Court should stay these proceedings so that an arbitrator may determine arbitrability in the first instance, consistent with the delegation provision agreed to by the Plaintiffs, and dismiss the First Amended Complaint if the arbitrator agrees that the delegation

[8] If the Court determines that Mr. Mwethuku's claims survive dismissal, it should stay his claims pending the outcome of arbitration of the other Plaintiffs' claims. *Am. Heart Disease Prevention Found., Inc. v. Hughey*, 106 F.3d 389, 1997 WL 42714 at *6 (4th Cir. 1997) (unpublished) ("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.'") (quoting *Am. Home Assur. Co. v. Vecco Concrete Const. Co. of Virginia*, 629 F.2d 961, 964 (4th Cir. 1980)).

provision is valid. If the Court instead decides to address the arbitrability question, it should hold the Plaintiffs to their agreement, because Plaintiffs have not attempted to—and cannot—meet their burden of setting the plain terms of that agreement aside. Finally, the Court should dismiss Mr. Mwethuku's claims for failure to submit his claims to the proper forum.

DATED: August 9, 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 August 9, 2019, I electronically filed the foregoing document with the Clerk of Court using the ECF system, which will send notification of such filing to the following:

Kristi C. Kelly
kkelly@kellyguzzo.com
Andrew J. Guzzo
aguzzo@kellyguzzo.com
Casey S. Nash
casey@kellyguzzo.com
KELLY GUZZO, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030

Leonard A. Bennett
lenbennett@clalegal.com
Craig C. Marchiando
craig@clalegal.com
Elizabeth W. Hanes
elizabeth@clalegal.com
CONSUMER LITIGATION ASSOCIATES, P.C.
1800 Diagonal Road, Suite 600
Alexandria, VA 22314

James W. Speer
jay@vplc.org
VIRGINIA POVERTY LAW CENTER
919 East Main Street, Suite 610
Richmond, VA 23219

*Counsel for Plaintiffs*

Thomas J. Perrelli
TPerrelli@jenner.com
Jan A. Larson
JanLarson@jenner.com
JENNER & BLOCK LLP
1099 New York Avenue,NW
Washington DC, 20001

*Counsel for Defendants Scott Asner and Joshua Landy*

DATED: August 9, 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*