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

GEORGE HENGLE, *et al*	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 3:19-cv-00250 (REP)
	:	
SCOTT ASNER, *et al*	:	
	:	
Defendants.	:	

PLAINTIFFS' OPPOSITION TO SCOTT ASNER AND JOSHUA LANDY'S RENEWED MOTION TO COMPEL ARBITRATION

Plaintiffs, by counsel, respectfully submit this Opposition to Defendants Scott Asner and Joshua Landy's Renewed Motion to Compel Arbitration (ECF No. 57).

INTRODUCTION

"This case, and the tribe-payday lending partnership it challenges, is not unique. Courts across the country have confronted transparent attempts to deploy tribal sovereign immunity to skirt state and federal consumer protection laws." *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 (2d Cir. 2019) (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 825 (2014) ((Scalia, J., dissenting)). "Part of this scheme involves crafting arbitration agreements like the ones here, in which borrowers are forced to disclaim the application of federal and state law in favor of tribal law (that may or may not be exceedingly favorable to the tribal lending entity)." *Gingras*, 922 F.3d at 126-7. This case is no different. The arbitration agreements and the chosen law not only impermissibly waive consumers' federal rights, but they created a system so one sided that is "unworthy even of the name arbitration." *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999).

Courts across the country have refused to enforce such arbitration agreements on the basis that they prospectively waive all of consumers' federal and state rights and/or are unconscionable. Indeed, the Fourth, Seventh, and Second Circuit Courts of Appeals have all refused to enforce tribal arbitration agreements similar to the ones Asner and Landy attempt to enforce here. *See Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 336 (4th Cir. 2017); *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016); *Gingras*, 922 F.3d at 127; *Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014). The result in this case should be no different.

BACKGROUND

I. The arbitration agreement waives all federal and state rights.

In order to take out a loan with one of the Tribal Lenders, each of Plaintiffs was required to sign a "Consumer Loan and Arbitration Agreement." *See* 9/9/16 Myers Agreement, attached as Ex. 1.[1] Each arbitration agreement waives all consumer state and federal rights:

> The parties to such dispute will be governed by the laws of the Habematolel Pomo of Upper Lake and such rules and procedures used by the applicable arbitration organization applicable to consumer disputes, to the extent those rules and procedures do not contradict the express terms of this Arbitration Provision or the law of the Habematolel Pomo of Upper Lake, including the limitations on the arbitrator below.

Ex. 1 at 7. This restriction on the arbitrator from applying any federal or state law is repeated:

> You have the right to request that arbitration take place within thirty (30) miles of Your residence or some other mutually agreed upon location, provided, however, **that such election to have binding arbitration occur somewhere other than on Tribal land shall in no way** be construed as a waiver of sovereign immunity or **allow for the application of any other law other than the laws of the Habematolel Pomo of Upper Lake**.

Ex. 1 at 7. The next paragraph again repeats that the arbitrator is only to apply Tribal law:

[1] Asner and Landy refer to the September 9, 2016 agreement of Ms. Meyers as a representative example of all of the arbitration agreements they seek to enforce. Plaintiffs also cite to this agreement as representative of the other lending agreements other than Mr. Mwethuku's.

> The arbitrator shall apply substantive Tribal law consistent with the Federal Arbitration Act (FAA), and applicable statutes of limitation, and shall honor claims of privilege recognized at law.

Ex. 1 at 7.

Enforcement of the arbitration award is designated to a nonspecific "governing body":

> All parties, including related third parties, shall retain the right to enforce an arbitration award before the ***applicable governing body*** of the Habematolel Pomo of Upper Lake Tribe ("Tribal Forum"). Both You and We expressly consent to the jurisdiction of the Tribal Forum for the sole purpose of enforcing the arbitration award. The Tribe does not waive sovereign immunity.

Ex. 1 at 8 (emphasis added).

Other terms throughout the agreement further support the waiver of all federal and state claims in the arbitration agreement. The agreement's governing law provision states that the agreement "is made and accepted in the sovereign territory of the Habematolel Pomo of Upper Lake" and that the agreement "shall be governed by applicable tribal law, including but not limited to the Habematolel Tribal Consumer Financial Services Regulatory Ordinance." Dkt. 45-43 at 8. You hereby agree that this governing law provision applies no matter where You reside at the time You request your loan . . . ." Ex. 1 at 8. The governing law provision also represents that the lender "is regulated by the Habematolel Pomo of Upper Lake Tribal Consumer Financial Services Regulatory Commission." Ex. 1 at 8.

II. The applicable Tribal Law is either unavailable or specifically designed to insulate participants in the tribal lending scheme from liability for state and federal violations.

As discussed above, the arbitration agreement specifies that Tribal Law applies to the parties to the exclusion of all state and federal laws. However, it appears that Tribal Law remains either undeveloped or unavailable. For example, it appears that the Tribe does not have a court

system and thus would not have caselaw or rules that would apply, including, for example, conflicts of law rules and rules applying to the construction of contracts and ordinances.[2]

Worse yet, the Habematolel Pomo of Upper Lake Tribal Consumer Finance Services Regulatory Ordinance (the "Tribal Code" or "Code") represents that no state or federal laws would apply to licensees of the Tribe. The Tribal Code was specifically enacted to facilitate the online lending business, and it repeatedly frames its participation in "e-commerce" in a contradictory manner. On the one hand the Code recognizes that an online business would engage in commerce on a national level over the internet, but it also disingenuously maintains that this business somehow takes place solely on Tribal Land. For example, the Code states the following:

> ***Due to its remote location***, the Tribe has determined that it can best meet its members' needs through offering goods and services ***by participating in the world*** of electronic commerce. Electronic commerce (or e-commerce) is defined by the Tribe as the purchase of goods and services from Indian Country.

See December 2015 Consumer Financial Services Regulatory Ordinance ("Tribal Code") § 1.1(c) (emphasis added), attached as Ex. 2. On the one hand, this provision recognizes that the Tribe must go outside the reservation in order to engage in profitable business, and on the other hand, it attempts to define "e-commerce" as occurring exclusively on Tribal Lands.[3] Similarly, the Tribal Code recognizes that a licensee would be engaging in interstate commerce while simultaneously attempting to define the conduct as occurring exclusively on Tribal Lands:

> Legislative Authority and Parameters. This Ordinance is enacted pursuant to the inherent sovereign powers of the Habematolel Pomo of Upper Lake and in accordance with the Tribe's Constitution and the interstate and Indian commerce

[2] Plaintiffs were unable to find any information regarding a Tribal court system or any rules of court or decisions.

[3] This, of course, is contrary to what it means to "participat[e] in the world of electronic commerce." For example, Black's Law Dictionary defines "e-commerce": "The practice of buying and selling goods and services through online consumer services and of conducting other business activities using an electronic device and the Internet." *E-commerce*, Black's Law Dictionary (11th ed. 2019).

> clauses of the United States Constitution. All Consumer Data is considered to be in interstate commerce before it enters Tribal jurisdiction, and the Tribe, in keeping with the United States Constitutional parameters does not assert jurisdiction over Consumer Data until it enters Tribal jurisdiction pursuant to Section 9 of this Ordinance and is considered Indian commerce at that time.

Tribal Code § 3.1.

Even though the Tribal Code expressly contemplates that licensees would be engaging in e-commerce and interstate commerce, it unambiguously provides that "any federal law not applicable to Indian tribes . . . shall not apply to extensions of credit issued in accordance with this subchapter." Tribal Code § 8.2(j). Additionally, it provides that any licensee or "third-party provider of products or services in support of a Licensee" "shall conduct business in a manner ***consistent*** with principles of federal consumer protection laws." Tribal Code §§ 6.1(a), 7.2 (emphasis added). Thus, indicating that its licensees and even "service providers" to its licensees are not required to follow federal consumer protection laws.

III. Tribal law provides a mandatory consumer dispute resolution process, which is one sided and designed to ensure no legal accountability.

Even though the arbitration agreement, appears to allow for binding arbitration of claims through a neutral third party, the Tribal code takes any possibility of that away through its Mandatory Consumer Dispute Resolution Procedure. *See* Tribal Code §§ 11. This procedure is "mandatory"[4] for consumer disputes and provides that a consumer "who is aggrieved by an action of a Licensee may request the Licensee address the complaint." Tribal Code §§ 11.1-11.2.[5] The

[4] *See also* Tribal Code § 11.5(9) ("By entering the loan agreement, the Consumer has agreed to abide by the Dispute Resolution Procedure within this Ordinance . . . ."); *id.* § 11.5(18) (stating that the Tribe will only "allow enforcement" of an arbitration decision if it was issued in compliance with the Tribe's mandatory dispute resolution procedure).

[5] Notably, the Code contemplates that a Lender would still be able to pursue claims for default against the consumer in any available forum and would be able to collect attorneys fees and costs against the consumer. Tribal Code § 8.2(i).

Tribal Code states that the "request must be made in accordance with the terms of the Consumer's loan agreement." Tribal Code §§ 11.2(a). The lender has 30 days to respond to the consumer's complaint. Tribal Code §§ 11.2(b).

Once a consumer has complied with the initial complaint procedure, the consumer may request "administrative review" by the Tribe's Tribal Consumer Financial Services Regulatory Commission ("Tribal Regulatory Commission" or "Commission"). Tribal Code §§ 11.3(a). "The Commission may investigate the dispute in any manner it chooses" and "may deny a Consumer's request for a hearing." Tribal Code § 11.3(b)-(c). The Commission is not authorized to award an amount in excess "of the amount of the Consumer's debt plus reimbursement of payments," and the Commission may not award fees and costs. Tribal Code § 11.4(e), (i). In order to obtain review by the Tribal Regulatory Commission, a consumer is supposed to submit a written request to the Commission within ninety (90) days after the lender makes its determination. Tribal Code § 11.3(a). It is unclear where the consumer would obtain the Commission's contact information as it is not in the Code, the arbitration agreement with the lender, or readily available on the Tribe's website.

Further, the Commission is not independent of the lender's business interests. Critically, commissioners are appointed by Tribal Council, their compensation is controlled by Tribal Council, and they are subject to removal by Tribal Council. Tribal Code §§ 4.5(a)-(b), 4.8. Additionally, the Commission is subject to significant oversight by the Tribal Council. Tribal Code § 4.6 (must hold meetings when requested by Tribal Council), 4.11 (Tribal Council determines budget), 4.12 (reporting to Tribal Council). And, the Tribal Council requires that its commissioners

"be capable of balancing business interests of the Tribe in advancing the Consumer Financial Services Enterprise."[6]

Only after a consumer has complied with both the initial complaint procedure and the administrative review process of the Tribal Regulatory Commission, is the consumer permitted to request arbitration. Tribal Code § 11.5. There can be no question that the Tribal dispute process is the only available avenue for consumers to seek relief for their claims for any "disputes" covered by their arbitration agreements. For example, the Code states the following:

> There is no small claims court option for either party. By entering into the loan agreement, the Consumer has agreed to abide by the Dispute Resolution Procedure within this Ordinance and that arbitration with the AAA is the final opportunity for adjudication of a Consumer's complaints.

Tribal Code § 11.5(a)(9). It also states that the arbitration association's "jurisdiction is limited to resolution of a Consumer's dispute" that otherwise complies with the mandatory Tribal Dispute Resolution Process. Tribal Code § 11.5(a)(10). Additionally, the Tribe will only "allow enforcement" of an arbitration decision that "fully complied with the Mandatory Dispute Resolution process" and it does not allow for the enforcement of punitive damages or equitable relief. Tribal Code § 11.5(a)(18).

And, the arbitrator is only permitted to "review" the Commission's decision and "the scope of the arbitrator's award is limited to the maximum value of the Loan at issue" and no punitive damages or equitable relief may be awarded. Tribal Code § 11.5(a)(15). Even though the arbitration agreement incorporates Tribal Law—including this mandatory consumer dispute resolution process—the arbitration agreement makes no mention of the mandatory consumer dispute resolution process or the Tribal Regulatory Commission. Instead, the arbitration agreement

[6] *See* Commissioner Job Description, *available at* https://www.upperlakepomo.com/forms/TLE-Financial-Services-Regulatory-Commissioner.pdf, attached as Ex. 3.

only refers to "the applicable governing body of the Habematolel Pomo of Upper Lake Tribe ('Tribal Forum')." Ex. 1 at 8.

LEGAL STANDARD

The legal standard that applies to the Court's determination of whether arbitration may be judicially compelled is similar to that applied at summary judgment. *Meridian Imaging Sols., Inc. v. OMNI Bus. Sols. LLC*, E.D. Va. No. 1:17-CV-186, 2017 WL 1491134, at *6 (E.D. Va. Apr. 25, 2017). Accordingly, "the pleadings and 'all relevant, admissible evidence submitted by the parties' are considered and all 'reasonable inferences' are drawn in favor of the non-moving party." *Id.* (quoting *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016)).

ARGUMENT

I. The arbitration agreement is unenforceable because it requires consumers to prospectively waive their federal statutory rights.

A. The arbitration agreement waives all federal and state rights.

As recently recognized by the Second Circuit Court of Appeals, "tribe-payday lending partnership" model used by the Defendants in this case "is not unique." *Gingras*, 922 F.3d at 112. And, an essential "[p]art of this scheme involves crafting arbitration agreements like the ones here, in which borrowers are forced to disclaim the application of federal and state law in favor of tribal law (that may or may not be exceedingly favorable to the tribal lending entity)." *Id.* The arbitration agreement that Asner and Landy seek to enforce in this case is no different.

Here, the arbitration agreements required consumers to prospectively waive all state and federal rights. Arbitration agreements often include governing law provisions that select the law of a specific jurisdiction to govern the interpretation and enforcement of the agreement. *See Hayes*

v. Delbert Services Corp., 811 F.3d 666, 675 (4th Cir. 2016).[7] Notably, governing law provisions do not define what laws an arbitrator is and is not allowed to consider throughout the course of the proceedings. And, arbitration agreements do not typically include applicable law clauses that limit what laws an arbitrator is allowed to apply and what laws apply to the parties outside the interpretation and enforcement of the agreement.[8]

Here, the arbitration provision includes an applicable law clause that precludes the arbitrator from applying any law other than Tribal law. It provides, in relevant part,

> **The parties** to such dispute **will be governed by the laws of the Habematolel Pomo of Upper Lake** and such rules and procedures used by the applicable arbitration organization applicable to consumer disputes, to the extent those rules and procedures do not contradict the express terms of this Arbitration Provision or the law of the Habematolel Pomo of Upper Lake, including the limitations on the arbitrator below.[9]

Ex. 1 at 7 (emphasis added). Unlike a typical choice of law clause, which defines the law governing the interpretation and enforcement of the agreement, this applicable law clause defines the only law that will apply to the parties. The very next paragraph precludes any dispute regarding the agreement's unambiguous restriction on the arbitrator from applying any federal or state law:

> You have the right to request that arbitration take place within thirty (30) miles of Your residence or some other mutually agreed upon location, provided, however, **that such election to have binding arbitration occur somewhere other than on Tribal land shall in no way** be construed as a waiver of sovereign immunity or

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[7] For example, a standard governing law provision in an arbitration agreement would be the following: "This Agreement and the rights of the parties hereunder shall be governed by and construed in accordance with the laws of the State of _____, exclusive of conflict or choice of law rules." *See* JAMS Clause Workbook 5 (June 1, 2018), *available at* https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf.

[8] *See AAA-ICDR® Clause Drafting*, AAA, https://www.adr.org/Clauses (last visited July 17, 2019) (listing standard arbitration provision options).

[9] Similarly, in *Hayes*, the arbitration agreement provided, "The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement." 811 F.3d at 675.

> **allow for the application of any other law other than the laws of the Habematolel Pomo of Upper Lake**.[10]

Ex. 1 at 7. Thus, the agreement expressly prohibits the arbitrator from applying any law other than Tribal law. The next paragraph again repeats that the arbitrator is only to apply Tribal law:

> The arbitrator shall apply substantive Tribal law consistent with the Federal Arbitration Act (FAA), and applicable statutes of limitation, and shall honor claims of privilege recognized at law.

Ex. 1 at 7.

As the Fourth Circuit observed in an analogous case, "[i]nstead of selecting the law of a certain jurisdiction to govern the agreement, as is normally done with a choice of law clause, this arbitration agreement uses its 'choice of law' provision to waive all of a potential claimant's federal rights." *Hayes*, 811 F.3d at 675; *Gibbs v. Haynes Investments, LLC*, 368 F. Supp. 3d 901, 923 (E.D. Va. 2019) (applying *Hayes* and *Dillon* to contract that provided, among other things, that "the arbitrator 'shall apply Tribal Law and terms of this Agreement"). As discussed below, this renders the arbitration agreement unenforceable under the federal prospective waiver doctrine.

B. Arbitration agreements requiring a prospective waiver of all federal rights are unenforceable.

It is well established that an arbitration agreement is unenforceable if it "prospective[ly] waived" a "party's right to pursue statutory remedies." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *see also Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (discussing the prospective waiver doctrine and the Supreme Court's "willingness to invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] ... as a prospective waiver of a party's right to pursue statutory remedies'" (quoting *Mitsubishi*, 473 U.S.

[10] The agreement in *Hayes* provided the same—that no matter where the arbitration occurs, the arbitrator will not apply "any law other than the law of the Cheyenne River Sioux Tribe of Indians to this Agreement."

at 637 n.19)). Indeed, while the Supreme Court "has affirmed that the FAA gives parties the freedom to structure arbitration in the way they choose, it has repeatedly cautioned that this freedom does not extend to a 'substantive waiver of federally protected civil rights' in an arbitration agreement." *Hayes*, 811 F.3d at 674 (quoting *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009)).

The Fourth Circuit recently applied the prospective waiver doctrine in two cases, holding that similar payday lending agreements—which also waived all federal law in favor of only tribal law—were void as a matter of law. *Dillon*, 856 F.3d at 337; *Hayes*, 811 F.3d at 673. The loan agreement considered by the Fourth Circuit in *Hayes* stated that no federal law or regulation would apply to the agreement. *Hayes*, 811 F.3d at 669. Invoking the prospective waiver doctrine, the *Hayes* court held that the loan agreement was unenforceable, reasoning that "a party may not underhandedly convert a choice of law clause into a choice of no law clause—it may not flatly and categorically renounce the authority of federal statutes to which it is and must remain subject." *Id.* at 675. A little over a year later, the Fourth Circuit expanded on this principal in *Dillon*, holding that a loan agreement that "implicitly accomplishes" what the agreement in *Hayes* expressly stated was also unenforceable. *Dillon*, 856 F.3d at 336.

These decisions completely foreclose any attempt to enforce the arbitration provisions in this case. *See supra* notes 9 and 10 and accompanying text. As discussed above, the prospective waiver of all federal and state law is accomplished through the arbitration agreement's unambiguous specification that the arbitrator may only apply tribal law to the exclusion of all state and federal law. Thus, the choice of law provision does not merely select the law of a certain jurisdiction to govern the agreement as such provisions are meant to do, but instead, "this

arbitration agreement uses its 'choice of law' provision to waive all of a potential claimant's federal rights." *Hayes*, 811 F.3d at 675.

Other terms in the agreement "evince an explicit attempt to disavow the application of federal or state law to any part of the contract or its parties." *Dillon*, 856 F.3d at 336; *see also Hayes*, 811 F.3d at 676 ("[A]lthough our focus must be on the arbitration agreement, not the underlying loan agreement, it is only natural for us to interpret the arbitration agreement in light of the broader contract in which it is situated."). For example, the agreement includes a governing law provision that provides that the agreement "shall be governed by applicable tribal law, including but not limited to the Habematolel Tribal Consumer Financial Services Regulatory Ordinance." Ex. 1 at 7. As discussed in the next section, this Tribal law further exhibits the intent that the agreement would waive all federal and state rights. And, in providing notices regarding disclosures, the agreement states "The Lender . . . is providing you the following information in a manner consistent with principles under United States federal law." Dkt. 45-43 at 10. Thus, it suggests that federal law does not apply to the Lender if it only is voluntarily providing the information "consistent with" the "principles" of United States federal law. *See Gibbs*, 368 F. Supp. 3d at 925 (explaining that review of contract "as a whole fortifie[d] Court's conclusion" of prospective waiver, including provision indicating that the lender "may choose to voluntarily use certain federal laws as guidelines for the provision of services.").

C. The waiver of all federal and state rights is further demonstrated by the contents of the Tribal law, the arbitration agreement's sham forum selection clause, and the unavailability of statutory damages.

The agreement's unambiguous waiver of all federal and state rights is further illuminated when viewing the Tribal code's intent that no state or federal law would apply to its licensees, the arbitration agreement's sham forum selection clause, and the unavailability of statutory damages.

First, the Tribal code reflects the intent that consumers would prospectively waive all state and federal laws whenever taking out a loan with one of the Tribal Lenders. The Tribal Council adopted the Habematolel Pomo of Upper Lake Tribal Consumer Financial Services Regulatory Ordinance for the express purpose of promoting its own interest in engaging in consumer financial services online. *See* Tribal Code § 1.1. The Tribal Code contemplates that no state or federal law will apply to any of its licensees. For example, the Tribal Code provides that no federal law and no state financing law will apply to any entity licensed by the Tribe:

> Application of other laws: Any federal law not applicable to Indian tribes or state law limiting the rate or amount of interest, discount, points, finance charges, service charges or other charges which may be charged, taken, collected, received or reserved shall not apply to extensions of credit issued in accordance with this subchapter.

See Tribal Code § 8.2(j). Thus, the law expressly contemplates that no federal law will apply to any licensee unless it is "applicable to Indian tribes." However, it is a gross simplification to suggest that there is a set of federal laws that apply to tribes and a set that does not. Critically, when a tribe goes beyond its reservation and beyond its sovereign authority, state and federal laws of general applicability apply to the tribe as they would to any other sovereign nation. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."). Thus, the idea that the Tribe can somehow bestow immunity from federal laws onto any licensee is highly problematic.

The intent that no federal law would apply to any activity of any business licensed by the Tribe is further demonstrated by its section on "Federal Consumer Protection Laws," which requires, "A Licensee of any type shall conduct business in a manner ***consistent with principles*** of federal consumer protection law . . . ." *See* Tribal Code § 7.2 (emphasis added). This section

would even apply to "[a]ny third party-provider of products or services in support of a Licensee business not provided directly to a Licensee." *See* Tribal Code § 6.1.

These provisions are particularly problematic in light of the fact that there is no restriction that a licensee's business take place exclusively on Tribal Land. To the contrary, the code was specifically designed to promote the Tribe's "offering goods and services by participating in the world of electronic commerce." Tribal Code § 1.1(c); *see also id.* § 3.1 ("[A]ll Consumer Data is considered to be in interstate commerce before it enters Tribal jurisdiction . . . ."). Thus, the Tribal Code contemplates that its licensees would be conducting business at a national level without regard to applicable federal or state law. It would be analogous if a foreign country adopted a licensing law indicating that its licensees could conduct business in the United States without complying with the laws of the United States.

Second, the arbitration agreement includes an illusory forum selection clause, which leaves the consumer with no forum for enforcement of an arbitration award. Plaintiffs more thoroughly discuss the arbitration agreement's forum selection clause in Part II of this brief but note here that, even if a consumer was successful in arbitration, it is unclear whether there is a forum available to enforce an arbitration agreement. Additionally, this provision of the arbitration agreement is inconsistent with the Tribe's law, which requires completion of the Tribal Code's Consumer Dispute Resolution Process before the case would be subject to review by an arbitrator. In other words, if an arbitrator ruled in favor of a consumer, the Tribe could refuse to enforce the arbitration decision for the failure to follow the mandatory procedure under tribal law.

Finally, the arbitration agreement provides that the arbitrator may award statutory damages "[i]f allowed by statute or applicable law." Ex. 1 at 7. However, under Tribal law a consumer is limited to "the maximum value of the Loan at issue" and is expressly prohibited from receiving

punitive damages or equitable relief. Tribal Code § 11.5(a)(15). Thus, the arbitrator would be unable to award damages that would properly compensate a consumer for a Tribal licensee's violations of state and federal statutory rights.

D. *Hayes* and *Dillon* has been widely accepted and is not meaningfully distinguishable from this case .

Other courts have agreed with and adopted the Fourth Circuit's application of the prospective waiver doctrine in cases such as this one. *See Gingras v. Think Fin., Inc.*, 922 F.3d 112, 127 (2d Cir. 2019) (concluding defendants could not enforce arbitration agreement because they were designed to avoid federal and state consumer protection laws); *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955, 972-73 (N.D. Cal. 2019) (agreeing with and applying *Hayes* and *Dillon*); *Titus v. ZestFinance, Inc.*, No. 18-5373 RJB, 2018 WL 5084844, at *4 (W.D. Wash. Oct. 18, 2018) (agreeing with and applying *Hayes*); *Rideout v. CashCall, Inc.*, No. 216CV02817RFBVCF, 2018 WL 1220565, at *6 (D. Nev. Mar. 8, 2018); *MacDonald v. CashCall, Inc*., No. CV 16-2781, 2017 WL 1536427, at *13 (D.N.J. Apr. 28, 2017) (agreeing with and applying the analysis in *Hayes*), *aff'd*, 883 F.3d 220 (3d Cir. 2018); *Eisen v. Venulum Ltd.*, 244 F. Supp. 3d 324, 344-45 (W.D.N.Y. 2017) (agreeing with and applying *Hayes*); *Parnell v. CashCall, Inc.*, 181 F. Supp. 3d 1025, 1042 (N.D. Ga. 2016) (agreeing with and applying the analysis from *Hayes*), *aff'd sub nom. Parnell v. W. Sky Fin., LLC*, 664 Fed. App. 841 (11th Cir. 2016); *Smith v. W. Sky Fin., LLC*, 168 F. Supp. 3d 778, 785 (E.D. Pa. 2016) (agreeing with and applying *Hayes*); *Ryan v. Delbert Services Corp.*, No. 5:15-CV-05044, 2016 WL 4702352, at *4 (E.D. Pa. Sept. 8, 2016) (agreeing with and applying *Hayes*); *see also Gibbs*, 368 F. Supp. 3d at 923 (concluding that arbitration agreement used by tribal payday partnership prospectively excluded the application of federal law); *Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 672 (E.D. Va. 2019) (same). The same reasoning should be applied in this case.

Asner and Landy raise several arguments in an attempt to distinguish the Fourth Circuit's controlling precedent. Plaintiffs address each of these arguments. ***First***, Asner and Landy argue that this case is distinguishable from *Hayes* because the plaintiffs in *Hayes* presented evidence that the tribal forum selected by the arbitration agreement in that case was illusory. *See* Defs.' Mem. at 20. Asner and Landy have either grossly misread *Hayes*, or they attempt to misdirect the Court regarding the significance of this fact. While the *Hayes* court acknowledged that the plaintiffs had presented evidence regarding the unavailability of the tribal forum, the court made it abundantly clear that "given the . . . agreement's outright rejection of the application of federal law to resolve the plaintiffs' federal claims, . . . we need not consider whether the agreement is invalid on the ***separate basis*** that the dispute resolution mechanism it establishes has inconsistencies that are apparently contradictory in substance." *Hayes*, 811 F.3d at 673 (emphasis added). The Fourth Circuit then proceeded to consider the enforceability of the arbitration provision based solely on the agreement's prospective waiver of all state and federal laws. *Id.* at 673-76.

Second, Asner and Landy argue that this case is distinguishable from *Hayes* and *Dillon* because "[u]nlike the defendants in those cases, Asner and Landy do not seek 'to avoid federal law.'" *See* Defs.' Mem at 20. Again, Asner and Landy have either misread *Dillon* or attempt to misdirect the Court, because the defendants in *Dillon* unsuccessfully attempted to make the same argument by requesting the Fourth Circuit to "accept [their] concession to the application of federal substantive law in arbitration notwithstanding the unambiguous choice of tribal law in the arbitration agreement." *Dillon*, 856 F.3d at 336. The Fourth Circuit found "no merit in this argument." *Id.* at 336. Here, just as in *Dillon*, the arbitration agreement was "purposefully drafted" "to avoid the application of state and federal consumer protection laws," and Asner and Landy's

"consent to application of federal law would defeat the purpose of the arbitration agreement in its entirety." *Id.* at 333-37.

Third, Asner and Landy argue that the validity of the arbitration agreement is saved because it "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.'" Defs.' Mem. at 26. However, similar references to the Indian Commerce Clause is a common feature of these types of arbitration agreements—including in *Hayes* and *Dillon*—that courts have held prospectively waive federal law.[11] Consistent with the overarching purpose of the arbitration agreement, the reference to the Indian Commerce Clause is another creative mechanism to legitimize the dubious claim that only Tribal law applies and to induce consumers to accept the terms of the lending agreement. *See Jackson*, 764 F.3d at 778 ("[T]he Loan Entities' claims concerning the scope of tribal jurisdiction, as well as their invocation of an irrelevant constitutional provision, 'may [have] induce[d] [the Plaintiffs] to believe, mistakenly, that they ha[d] no choice but to accede to resolution of their disputes on the Reservation.'"). By extension, it is unremarkable that the arbitration agreement would also seek the favorable federal policy favoring arbitration while simultaneously disclaiming the application of all state and federal laws. This does not somehow cure the waiver of all federal and state laws. For example, the agreement held unenforceable in *Titus* also referenced the FAA. *See Titus*, 2018 WL 5084844, at *2.

[11] *See, e.g.*, *Dillon*, 856 F.3d at 335-36 ("Indian Commerce Clause of the Constitution of the United States of America"); *Hayes*, 811 F.3d at 670 ("Indian Commerce Clause of the Constitution of the United States of America"); *Gibbs*, 368 F. Supp. 3d at 925 ("Indian Commerce Clause of the Constitution of the United States of America"); *Solomon*, 375 F. Supp. 3d at 668 ("such federal law as is applicable under the Indian Commerce Clause of the United States Constitution").

Fourth, Asner and Landy cite to the definition of disputes and the agreement to receive notices electronically as evidence that the agreement recognizes federal law protections and claims. *See* Defs.' Mem. at 22-23. Of course, the agreement would define disputes in as broad a manner as possible to include any federal and state claims; otherwise, Plaintiffs' federal and state claims would not be subject to the arbitration provision, and there would be no waiver of those claims. And, the fact that the lending agreement requires consumers to receive notices electronically does not undermine the arbitration agreement's waiver of all state and federal claims. The arbitration provision's waiver of all federal and state claims only waived all of a consumer's claims, and a consumer obviously does not have the authority to waive potential government enforcement of federal protection laws. The electronic notice agreement section may have been aimed at avoiding violations to prevent government enforcement of those laws.

II. The arbitration agreement is unenforceable because it is unconscionable.

"As a matter of policy, Virginia refuses to enforce unconscionable contracts." *March v. Tysinger Motor Co.*, 2007 WL 4358339, at *4 (E.D. Va. 2007). Unconscionability arises where the contract is "so grossly inequitable that it 'shocks the conscience.'" *March*, 2007 WL 4358339, at *4 (quoting *Sydnor v. Conseco Fin. Serv. Corp.*, 252 F.3d 302, 305-06 (4th Cir. 2001) (applying Virginia law). Determining "whether a contract is unconscionable is a question of law for a court to decide." *Fransmart, LLC v. Freshii Dev., LLC*, 768 F. Supp. 2d 851, 871 (E.D. Va. 2011).

Unlike many other jurisdictions, Virginia does not require both procedural and substantive unconscionability for a contract to be considered unconscionable. *March*, 2007 WL 4358339, at *4, n.5 ("Nor has Virginia adopted the position of some courts that an agreement must be procedurally and substantially flawed to be unconscionable."). Rather, a contract may be unconscionable in Virginia where it is "egregiously unfair," *i.e.*, what is often referred to as substantive unconscionability. *Id*. at *4. The contract "may also be unconscionable by virtue of

the way it was formed," *i.e.*, what is often referred to as procedural unconscionability. *Id*. Although either will suffice, the loan contracts are both procedurally and substantially unconscionable in this case.

A. The arbitration agreement is procedurally unconscionable.

"Whether procedural unconscionability exists is determined by what led to the formation of the contract." *See Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 391 (E.D.N.Y. 2015). In other words, "[p]rocedural unconscionability arises from inequities, improprieties, or unfairness in the bargaining process and the formation of the contract." *Sanders v. Certified Car Ctr., Inc.*, 2016 WL 9076185, at *2 (Va. Cir. 2016) (quoting *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 558 (W. Va. 2012)).

Here, the agreement is procedurally unconscionable because it is a "boilerplate" contract of adhesion—borrowers must sign the contract to receive a loan, and they have no ability to modify its terms. *See Sanders*, 2016 WL 9076185, at *2 ("A contract of adhesion may suggest that a degree of procedural unconscionability exists."); *Philyaw v. Platinum Enterprises, Inc.*, 54 Va. Cir. 364, 2001 WL 112107, at *3 (2001) (concluding that an arbitration agreement was unconscionable because it was a contract of adhesion and the warranties were confusing and misleading). Indeed, here, the Asner and Landy seek to enforce 18 different arbitration agreements against Plaintiffs, the terms of which are largely identical. Plaintiffs were offered the arbitration agreement on a take it or leave it basis, and they were not in a position to bargain for better terms. Further, "[a]ssent to the Contract's terms is done by online electronic signature leaving no room for bargaining." *Re: Alessia McIntosh v. Flint Hill Sch.*, 100 Va. Cir. 32, 2018 WL 9393020, at *7 (2018).

And, the procedural unconscionability of the agreements goes far beyond this. For example, there are many inconsistencies between the arbitration agreement and Tribal law, rendering the agreement confusing and often misleading. For starters, the arbitration agreement

gives the impression that consumers will be provided the ability to arbitrate their claims under the administration of the American Arbitration Association or JAMs; however, in reality, the only law that applies—Tribal Law—forecloses all potential avenues for relief except through its mandatory consumer dispute resolution process. *See* Tribal Code § 11. Thus, the arbitration agreement's creation of the appearance that consumers would be entitled to arbitrate—without also referencing the Tribal Code's consumer dispute resolution process—misrepresented the fundamental nature of the agreement. In a similar case, the Seventh Circuit Court of Appeals found that the inconsistency between the loan contracts and the applicable tribal dispute resolution process, "without reconciling those provisions, also made it difficult for borrowers to understand exactly what form of dispute resolution they were agreeing to." *Jackson*, 764 F.3d at 778.

And, this is not the only inconsistency between the agreement and Tribal law, which it purports to incorporate. For example, the arbitration agreement represents that the arbitrator may award statutory damages even though Tribal law limits a consumer to recovery of the maximum value of the Loan against the lender only. *Compare* Ex. 1 at 7, *with* Tribal Code § 11.5(a)(15). Additionally, the loan contract broadly defines "disputes" to involve claims against third parties, *see* Ex. 1 at 6; however, the Tribal Code does not contemplate that a consumer would have any recourse against a third party such as Asner and Landy, *see generally* Tribal Code (only recognizing a potential dispute against the lender).

Additionally, while simultaneously disclaiming the application of any federal law, the arbitration agreement attempts to gain the benefit of the federal policy favoring arbitration by citing to the United States Constitution, the Indian Commerce Clause, and the Federal Arbitration Act. Ex. 1 at 7. As noted by the Seventh Circuit in *Jackson*, the Indian Commerce Clause is "irrelevant" in this context. *See Jackson*, 764 F.3d at 778. The arbitration agreement's reference to it here may

have further confused consumers and made them mistakenly believe that they had no choice but to accept Tribal law and jurisdiction. *Id.* For the reasons discussed, the arbitration agreement is unenforceable because it is procedurally unconscionable.

B. The arbitration agreement is also substantively unconscionable.

As discussed above, the agreement is unenforceable because it is a boilerplate contract of adhesion that is riddled with misleading and confusing representations. However, the egregiousness of the arbitration agreement is most apparent in light of the fundamental unfairness and unreasonableness of its terms—in other words its substantive unconscionability. *See Re: Alessia McIntosh*, 2018 WL 9393020, at *7 ("Substantive unconscionability involves unfairness in the terms of the contract itself . . . ." (quoting *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 558 (W. Va. 2012))) .

Here, the arbitration agreement was designed to prevent consumers from being able to pursue any claim against the lender's and its co-conspirators. Perhaps because the arbitration agreement was drafted with this bad faith purpose in mind, it is unconscionable for several independent reasons. Plaintiffs attempt to discuss them all below. However, the more time spent with this agreement, the more it reveals itself as an overtly one sided agreement that "is more than unwise or unfair, it is unconscionable." *Re: Alessia McIntosh,* 2018 WL 9393020, at *7.

First, it is unconscionable because, as discussed above, it waives all of a consumers state and federal rights. This is accomplished primarily through the agreement's requirement that the arbitrator apply only Tribal law to the exclusion of all state and federal laws. *See supra* Part I.

Second, the arbitration agreement is deeply flawed because it is completely nonsensical in light of Tribal Law—the only law that is supposed to apply under the agreement. Specifically, the arbitration agreement suggests that either party may request arbitration by disputing his or her dispute for arbitration, while, conversely, under Tribal Law, arbitration is not unavailable to a

consumer unless the consumer first participates in the Tribe's mandatory Dispute Resolution Process by submitting his or her claim to the lender and then to the Tribal Regulatory Commission. Tribal Code §§ 11.2-11.3. It is only through the Tribe's Mandatory Dispute Resolution Process that a consumer can seek review of the Commission's decision before an arbitrator. Tribal Code § 11.5. And, as expressly stated, the Tribe will only "allow enforcement" of an arbitration decision if it "has fully complied with the Mandatory Dispute Resolution process." Tribal Code § 11.5. When considered alone, this renders the arbitration agreement a nullity because arbitration is not available unless he or she has first pursued her claims through the Mandatory Dispute Resolution process, and the arbitrator may not consider Plaintiff's disputes in the first instance but is limited to reviewing the Commission's decision. *See* Tribal Code § 11.5. In other words, the arbitration agreement, on one hand, appears to create the right to resolution of any dispute before a neutral third party, but with the other hand, tribal law takes away the possibility of arbitrating disputes because the only law that applies requires the Mandatory Dispute Resolution process.

By extension, and ***third***, the arbitration agreement defines disputes to include "related third parties" and indicates that a consumer may arbitrate his or her claims against a related third party. *See* Ex. 1 at 6. However, Tribal Law only contemplates that the Mandatory Dispute Resolution process would include claims against the lender and does not contemplate that a consumer could bring a claim against a third party.[12] Thus, the arbitration agreement is unconscionable because it indicates that a consumer would be able to arbitrate claims against "related third parties" such as Asner and Landy when, in reality, the arbitration agreement and Tribal Code work together to waive any such claims.

[12] This must be taken together with the mandate that only Tribal Law applies and the Tribe's specification that an arbitration decision is only enforceable if obtained through the Mandatory Dispute Resolution process.

Fourth, the arbitration agreement and Tribal Code work together to require a dispute resolution procedure that is completely one sided. For starters, all disputes must first go through the lender and Tribal Regulatory Commission. Although the Tribal Regulatory Commission is presented as a neutral, regulatory authority, this is in fact not true as is demonstrated by the Tribal Code. The Tribal Regulatory Commission is controlled by Tribal Council, which appoints the Commissioners, determines their compensation, and may remove the Commissioners. Tribal Code §§ 4.5(a)-(b), 4.8. Additionally, the Commission reports to Tribal Council, must hold meetings at the request of Tribal Council, and is reliant on Tribal Council for its operating budget. Tribal Code §§ 4.6, 4.11, 4.12. Thus, the Tribal Council, which is responsible for protecting the Tribe's business interests, has direct control over the Commission responsible for investigating and making a determination as to a consumer's dispute. Indeed, even a job posting for a Commissioner by the Tribal Council states that its commissioners must "be capable of balancing business interests of the Tribe in advancing the Consumer Financial Services Enterprise." *See* Ex. 3.

By extension and ***fifth***, the Commission's partiality is particularly troubling because the Tribal Code grants it with the unilateral authority to investigate and decide disputes as it pleases with no procedural safeguards for consumers. For example, the Commission has the authority to "investigate the dispute in any manner it chooses" and "may deny a Consumer's request for a hearing." Tribal Code § 11.3. There is also no right to present evidence, testimony, or argument to the Commission. *See* Tribal Code §§ 11.3-11.4. And, although a consumer would have the option of arbitration after complying with the Mandatory Dispute Resolution process, the arbitration proceedings would be limited to the narrow "review of the Licensee and Commission decisions." *See* Tribal Code § 11.5(c).

Sixth, the arbitration agreement is one sided because it is far more restrictive on the consumer than on the lender and related third parties. As discussed, consumers are bound by both the Mandatory Dispute Resolution process and the arbitration agreement. However, the Tribal Code does not require the lender or any related third parties to pursue claims against the consumer through the Mandatory Dispute Resolution process. Instead, the Tribal Code expressly contemplates that a defaulting consumer may be subject to "court" proceedings, "alternative dispute resolution proceedings," or collection by a debt collector. Tribal Code § 8.2(i).

Seventh, even if a consumer were successful in arbitration, it is unclear whether the consumer would be able to enforce the arbitration award. The arbitration agreement states that arbitration awards may be enforced "before the applicable governing body of the Habematolel Pomo of Upper Lake Tribe ('Tribal Forum')." Ex. 1 at 8. It is unclear what the "applicable governing body" refers to. However, even assuming a consumer could identify the unidentified "applicable governing body," it is an unreasonable burden to require a consumer to go to such great lengths to enforce the arbitration award. Further, the unidentified "applicable governing body" would likely not have jurisdiction to enforce a claim between a consumer and a related third party.[13]

III. The Court must decide the enforceability of the arbitration agreement because the delegation clause is unenforceable, and regardless the prospective waiver issue is ripe for judicial determination.

A. The delegation clause is unenforceable.

Asner and Landy argue that the enforceability of the arbitration provision must be decided by the arbitrator in the first instance. However, "[t]he issue of whether there are clear and

[13] *See* Constitution of the Habematolel Pomo of Upper Lake art. II, § 2 (defining jurisdiction of the Tribe), *available at* https://www.upperlakepomo.com/forms/HPUL-Constitution.pdf (last visited Sept. 10, 2019).

unmistakable delegation provisions in the Agreements is secondary to the determination of whether the agreements are unenforceable prospective waivers." *Brice*, 372 F. Supp. 3d at 969; *see also Titus*, 2018 WL 5084844, at *6. "Regardless of whether a delegation provision is clear and unmistakable on its own terms, it will not be enforced if it results in enforcing an arbitration agreement that prospectively waives plaintiffs' statutory rights and remedies." *Id.* at 969.

Further, the "delegation clause is unenforceable for virtually the same reason as the underlying arbitration agreement—the Loan Agreement's wholesale waiver of the application of federal and state law makes [the delegation] clause invalid." *MacDonald*, 2017 WL 1536427, at *13. The reason for this is simple: "enforcing the delegation provision would place an arbitrator in the impossible position of deciding the enforceability of the agreement without authority to apply any applicable federal or state law." *Smith v. W. Sky Fin., LLC*, 168 F. Supp. 3d 778, 786 (E.D. Pa. 2016); *Ryan v. Delbert Servs. Corp.*, No. 5:15-CV-05044, 2016 WL 4702352, at *5 (E.D. Pa. Sept. 8, 2016) ("The wholesale waiver of federal and state law thus dooms both the delegation provision and the arbitration clause, but for different reasons."). In other words, the arbitrator cannot decide if the prospective waiver doctrine applies if he or she is prohibited from applying the prospective waiver doctrine—a federal doctrine.

By extension, the delegation clause is also unenforceable under Virginia law because it is unconscionable. Here, the delegation clause mandates that the arbitrator must decide the enforceability of the agreement, yet the arbitrator has no authority to entertain a consumer's disputes in the first instance under Tribal law—a fact that was not disclosed in the arbitration agreement. Further, the arbitration agreement prevents the application of any state law, including Virginia law, and thus, the arbitrator will be without authority to even consider Virginia law and whether the agreement is unenforceable under Virginia law. *See Brice*, 372 F. Supp. 3d at 969

("Further, although the Court in *Rent-A-Center* held that challenges to an arbitration agreement generally do not suffice to supersede a valid delegation provision, it recognized that the plaintiff may challenge the general arbitration procedures 'as applied to the delegation clause' to show that they rendered the delegation clause unenforceable." (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010)).

The delegation clause is also unenforceable under Virginia law providing that the "loan contract ***shall be void***" if it contains an interest rate above 12%. Va. Code. § 6.2-1541(A) (emphasis added). As recently explained by the Fourth Circuit, when a contract is void it is "unenforceable from its inception." *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, No. 16-1511, 2017 WL 3442728 at *5 (4th Cir. Aug. 11, 2017) (citing *Liverpool & London & Globe Ins. Co. v. Bolling*, 176 Va. 182, 10 S.E.2d 518, 522 (1940)); *see also* Joseph M. Perrillo, Calamari and Perrillo on Contracts § 1.8(b) (6th ed. 2009) ("A contract is void, a contradiction in terms, when it produces no legal obligation . . . . It would be more exact to say that no contract was created."). Applying these principles, the Fourth Circuit held that a delegation provision in an insurance contract was void because "Virginia's decision to treat delegation provisions in insurance contracts" makes the delegation provision "void from its inception." *Minnieland Private Day Sch.*, 2017 WL 3442728 at *5.

Accordingly, because the delegation clause is also unenforceable, the validity of the arbitration provision should be considered by the court.[14] *Cf. Gingras*, 922 F.3d at 126 ("[I]f a party challenges the validity under [9 U.S.C.] § 2 of the precise agreement to arbitrate at issue, the

[14] Plaintiffs also note that they were not required "plead the validity or invalidity of [the] arbitration clause in their complaint; it is 'sufficient that they raised that issue in their response to the motion to compel.'" *Titus*, 2018 WL 5084844, at *6 (quoting *Smith v. Jem Grp., Inc.*, 737 F.3d 636, 639 (9th Cir. 2013)); *Brice*, 372 F. Supp. 3d at 969 n.8 (same).

federal court must consider the challenge before ordering compliance with that agreement under § 4." (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010)).

B. Regardless of the enforceability of the delegation provision, the prospective waiver issue is ripe for determination by the Court.

Regardless of the delegation provision, the prospective waiver issue is ripe for current determination by the Court just as it was in *Hayes* and *Dillon* because there is no uncertainty concerning the effect of the arbitration agreement's waiver of all federal statutory rights. In cases involving the prospective and categorical waiver of all federal law, there is no ambiguity concerning the effect of the waiver, and a federal court will refuse to enforce the arbitration agreement. *See Mitsubishi*, 473 U.S. at 637 n.19 (1985); *Dillon*, 856 F.3d at 335 (reasoning that the prospective waiver doctrine is ripe for review when there is no uncertainty regarding the effect of the choice of law provision).

A federal court would only defer determination of the waiver doctrine where there is uncertainty as to whether the foreign choice of law provision would preclude otherwise applicable federal substantive statutory remedies. *Dillon*, 856 F.3d at 334. "In such a case, the prospective waiver issue would not become ripe for final determination until the federal court is asked to enforce the arbitrator's decision." *Id.* For example, the mere possibility that an arbitrator may apply a foreign law, which may or may not reduce a party's legal obligations under federal law, was not sufficient for the court to determine the prospective waiver issue. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995). In other words, if the waiver is "mere speculation," then the issue is not ripe for judicial determination until the arbitrator's interpretation that waives federal law is effectuated. *See Dillon*, 856 F.3d at 334. On the other hand, where there is no uncertainty regarding the prospective waiver of federal statutory rights, the court should refuse to apply the unenforceable arbitration provision. *See Dillon*, 856 F.3d at 334

This is particularly compelling in cases, such as this one, where a federal court will not have an opportunity to review the arbitration award. *See Sky Reefer*, 515 U.S. at 540 ("Were there no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy.'" (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19)). Here, the agreements specify that an unidentified "applicable governing body" has jurisdiction to enforce the agreement. Accordingly, even if there were some ambiguity, a federal court would be deprived of the opportunity to review the arbitrator's decision, which makes it even more critical that the Court address this issue now.

IV. The choice of law clause and forum selection clause are not severable from the remainder of the arbitration provision.

Just as in *Hayes* and *Dillon*, the unenforceable foreign choice of law provision is not severable from the remainder of the arbitration agreement. "Unlawful portions of a contract may be severed *only* if: (1) the unlawful provision is not central or essential to the parties' agreement; and (2) the party seeking to enforce the remainder negotiated the agreement in good faith." *Dillon*, 856 F.3d at 336. As the Fourth Circuit observed in both *Dillon* and *Hayes*, "the offending provisions go to the core of the arbitration agreement." *Id.* (quoting *Hayes*, 811 F.3d at 676). In evaluating the severability of a similar term in an analogous case, the Fourth Circuit reasoned, "Great Plains purposefully drafted the choice of law provision in the arbitration agreement to avoid the application of state and federal consumer protection laws." *Id.* "Because the choice of law provisions were essential to the purpose of the arbitration agreement, [Defendants'] consent to application of federal law would defeat the purpose of the arbitration agreement in its entirety." *Id.* at 336-37; *see also Hayes*, 811 F.3d at 676 ("It is clear that one of the animating purposes of

the arbitration agreement was to ensure that Western Sky and its allies could engage in lending and collection practices free from the strictures of any federal law.").

Accordingly, the apparent purpose of avoiding the application of all state and federal law is not limited to the unenforceable choice of law provision, but it is present throughout the entire arbitration provision. Here, the arbitration agreement represents an "integrated scheme to contravene public policy," and as in *Hayes* and *Dillon*, "[g]ood authority counsels that severance should not be used." *Hayes*, 811 F.3d at 676 (quoting *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1249 (9th Cir. 1995)); *see also Dillon*, 856 F.3d at 337. As the Fourth Circuit explained in *Dillon*, the agreements were obtained using the lenders' "'dominant bargaining power' in a calculated attempt to avoid the application of state and federal law." *Dillon*, 856 F.3d at 337. Because the terms of Plaintiffs' agreements were not negotiated in good faith, the Court should "decline to give effect to this 'integrated scheme to contravene public policy.'" *Dillon*, 856 F.3d at 337 (quoting *Hayes*, 811 F.3d at 676).

V. Mwethuku's claims should proceed in this Court.

Asner and Landy incorporate the arguments of the Tribal Officials arguing that Mr. Mwethuku's claims must be dismissed with prejudice under the doctrine of tribal exhaustion. As discussed in Plaintiffs' brief responding to the Tribal Officials' motion to compel arbitration, the doctrine of tribal exhaustion does not apply in this case and the forum selection clause is unconscionable. *See* ECF No. 96 at 29-30. Additionally, with Mr. Mwethuku's claims against Asner and Landy, the doctrine of tribal exhaustion also does not apply because a Tribal court (even if one existed), would clearly not have jurisdiction over Mr. Mwethuku's claims against Asner and Landy. *See* Constitution of the Habematolel Pomo of Upper Lake art. II, § 2 (defining jurisdiction of the Tribe); *see also Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1242 (10th Cir. 2017) (listing each exception to tribal exhaustion recognized by the Supreme

Court). Additionally, there is no colorable claim of tribal jurisdiction pursuant to the *Montana* rule, which requires "nonmember conduct on tribal land." *Plains Comm. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 333 (2008).

Additionally, Asner and Landy request that the Court stay the litigation of Mr. Mwethuku's claims pending the arbitration of the remaining Plaintiffs' claims. *See* Defs.' Mem. at 25-26. There is no legitimate reason for the Court to do so other than to delay this case. The Court will need to decide the same issues—none of which are plaintiff specific. Likewise, Landy and Asner will be subject to the same discovery, which will focus on their role and facilitation of the enterprise, receipt of proceeds, and any defenses. Again, none of this will be plaintiff specific.

CONCLUSION

For the reasons stated above, the Court should deny the motion to compel arbitration.

Respectfully submitted,
PLAINTIFFS

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2019, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record.

/s/ Kristi C. Kelly

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