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

GEORGE HENGLE, SHERRY BLACKBURN, WILLIE ROSE, ELWOOD BUMBRAY, TIFFANI MYERS, STEVEN PIKE, SUE COLLINS, LAWRENCE MWETHUKU, *on behalf of themselves and all individuals similarly situated*,	)	
Plaintiffs,	)	Civil Action No. 3:19-cv-250-DJN
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 FOR LEAVE TO APPEAL UNDER 28 U.S.C. § 1292(b)

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INTRODUCTION

Tribal Defendants request that this Court permit immediate appellate review under 28 U.S.C. § 1292(b) of the following issue addressed by the Court's Order on Tribal Defendants' Motion to Dismiss: whether Tribal law governs the loan agreements.

As explained below, the Court's choice-of-law ruling satisfies the requirements of section 1292(b). Choice of law is a "controlling question of law" because it has the potential to fully resolve all of Plaintiffs' remaining claims against Tribal Defendants. There is "substantial ground for difference of opinion" on the question, as evidenced by the Virginia Supreme Court's *Settlement Funding* decision—which held that a contract's choice-of-law provision should be enforced even where the chosen jurisdiction's law includes no usury limit—and the absence of any Virginia Supreme Court opinion holding otherwise. And certifying the choice-of-law question will "materially advance the ultimate termination of the litigation" and further judicial efficiency. Tribal Defendants have the right to immediately appeal the Court's denial of their Motion to Compel Arbitration and their Motion to Dismiss for lack of jurisdiction on sovereign immunity grounds, and have filed their notice of appeal on those two issues simultaneously with this motion. Adding the choice-of-law issue to the appeal thus will not create any further delay; the only question is whether Tribal Defendants' appeal will raise two threshold and potentially dispositive legal issues or three. Judicial economy counsels in favor of all three, as resolution of the choice-of-law issue in Tribal Defendants' favor would eliminate the need for the Court to expend further resources on Plaintiffs' claims against Tribal Defendants. Certification should therefore be granted.

ARGUMENT

Immediate appellate review of the choice-of-law issue is warranted because the issue (1) "involves a controlling question of law" (2) "as to which there is substantial ground for

difference of opinion" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C § 1292(b); *Fannin v. CSX Transp., Inc*., 1989 WL 42583, at *2 (4th Cir. Apr. 26, 1989); *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 741, 741 (D. Md. 2003).[1] Those requirements are all satisfied here.

I. Whether Plaintiffs Should Be Held To Their Agreement To Apply Tribal Law Is A "Controlling Question Of Law."

First, the choice-of-law issue is a controlling question of law. A question of law is "controlling" for purposes of § 1292(b) if "(1) reversal . . . would terminate the action, or (2) determination of the issue on appeal would materially affect the outcome of the litigation." *In re Health Diagnostic Lab., Inc.*, Nos. 15-32919-KRH, 3:17-cv-297-HEH, 2017 WL 2129849, at *3 (E.D. Va. May 16, 2017); *see also Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc*., 86 F.3d 656, 659 (7th Cir. 1996) (question is "controlling" so long as it "is quite likely to affect the further course of the litigation, even if not certain to do so"); *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981) ("[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court.").

The choice-of-law issue is controlling because its resolution in Tribal Defendants' favor would terminate all claims against them. As this Court recognized in its ruling on Tribal Defendants' Motions to Dismiss, the fundamental premise of Plaintiffs' claims is that their loans are governed by and violate Virginia's usury cap. *See, e.g.*, Memorandum Opinion, ECF No. 109,

[1] Section 1292(b) permits certification of an order to the Court of Appeals if the district court "state[s] in writing *in such order*" that the statute's elements are satisfied. The Court's Order on choice of law does not specifically state that the question is suitable for interlocutory appeal. Accordingly, if the Court grants this Motion, it should "amend its [original] order . . . to include the required permission or statement." Fed. R. App. P. 5(a)(3).

at 52-54; *see also, e.g.*, First Am. Compl., ECF No. 54, ¶ 209 (requesting injunctive and declaratory relief under "Virginia's general usury law"); *id.* ¶ 224 *et seq*. (alleging violations of Virginia's Consumer Finance Act); *id.* ¶ 140-41 (alleging RICO claims involving unlawful collection of debt because the loans "imposed interest rates" that were "in excess of the enforceable rates in Virginia"). By contrast, it is undisputed that Tribal law, which Plaintiffs agreed to apply to their loan agreements, does not cap interest rates. As a result, if the Fourth Circuit concludes that Tribal law applies, Plaintiffs' remaining claims against Tribal Defendants must be dismissed. The choice-of-law issue is thus, by definition, "controlling." *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) ("Although the resolution of an issue need not necessarily terminate an action in order to be controlling, it is clear that a question of law is controlling if reversal of the [order] would terminate the action.").

Indeed, the case for certification is even stronger here than in a number of other cases in which the Fourth Circuit has previously accepted certification of a choice-of-law question. In those cases, the appellate ruling would simply have provided guidance on how further proceedings should unfold in the district court. *See, e.g.*, *Grecon Dimter, Inc. v. Horner Flooring Co.*, 114 F. App'x 64, 65-67 (4th Cir. 2004) (holding that choice-of-law provision was enforceable and that German law should apply in further district court proceedings); *see also Flame S.A. v. Freight Bulk Pte. Ltd.*, 762 F.3d 352, 356 (4th Cir. 2014) (resolving similar choice-of-law question certified by district court). Other courts have granted certification in similar circumstances. *See, e.g.*, *Schalliol v. Fare*, 206 F. Supp. 2d 689, 701 (E.D. Pa. 2002) ("The choice of law determination is a controlling question of law in that reversal of this decision by the Court of Appeals could result in the application of different jurisdiction's substantive law on the primary issues of liability and/or damages."); *Anderson v. Dassault Aviation*, 2005 WL 8164289, at *3 (E.D. Ark. Mar. 15, 2005)

(finding that choice of law was "controlling" because "a contrary ruling by the Eighth Circuit after trial on this Court's decision to apply Michigan law to the entire action would create the need of a second trial"); *see also Galilea, LLC v. AGCS Marine Ins. Co.*, 879 F.3d 1052, 1056 (9th Cir. 2018) (addressing interlocutory appeal of an order holding that "under relevant choice-of-law principles, federal maritime law governs"). Here, by contrast, the appellate court's ruling could dispose of the case entirely.

II. There Is "Substantial Ground For Difference Of Opinion" About Whether Tribal Law Applies To Plaintiffs' Claims.

Second, there is substantial ground for difference of opinion concerning the choice-of-law issue. An issue presents a "substantial ground for difference of opinion" if there is "a genuine doubt as to whether the district court applied the correct legal standard in its order." *Commonwealth of Virginia ex rel. Integra Rec LLC v. Countrywide Sec. Corp*., No. 3:14-cv-706, 2015 WL 3540473, at *5 (E.D. Va. June 3, 2015) (quoting *Wyeth v. Sandoz, Inc.*, 703 F. Supp. 2d 508, 527 (E.D.N.C. 2010)).

That standard is satisfied here. This Court acknowledged that Virginia law ordinarily requires that choice-of-law provisions be enforced, and that such provisions can be set aside only in "unusual circumstances." Mem. Op., ECF No. 109, at 46; *see also Sydnor v. Conesco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) (an unconscionable contract provision is "one in which no reasonable person would enter into, and the 'inequality must be so gross as to shock the conscience'" (citation omitted)); *Fransmart, LLC v. Freshii Dev., LLC*, 768 F. Supp. 2d 851, 870-71 (E.D. Va. 2011) (invalidating a choice-of-law provision requiring the party asserting unconscionability to demonstrate with clear and convincing evidence 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") (quoting *Mgmt. Enters., Inc. v. Thorncroft Co.*, 416 S.E.2d 229,

231 (Va. 1992))). The Court then held that Virginia's policy in favor of usury limitations is so strong that it overrides the parties' choice to apply law that does not feature an interest rate cap. Mem. Op., ECF No. 109, at 52-53. But in so holding, this Court was predicting how the Virginia Supreme Court would rule on this case. The Court did not cite any authority—and Tribal Defendants are not aware of any—in which the Virginia Supreme Court declined to apply a choice-of-law agreement based on the state's alleged anti-usury policy.

Indeed, there is "genuine doubt" about the Court's ruling because the available law from the Virginia Supreme Court at least suggests it would rule the other way. In *Settlement Funding, LLC v. Von Neumann-Lillie*, 645 S.E.2d 436 (Va. 2007), the Virginia Supreme Court held that a circuit court erred in declining to honor the parties' preference for applying Utah law, even though Utah law included no usury limitation. Critically, on remand, the circuit court—which was in a uniquely good position to assess the scope of the Supreme Court's order—did not interpret the Supreme Court as having addressed only an "evidentiary issue." Mem. Op., ECF No. 109, at 50. Instead, it concluded that, "consistent with the Supreme Court's decision," "the merits of [the borrower's] usury defense *must be determined under Utah state law*," and allowed for the collection of "both the principal sum of [the] loan and all interest owed thereon." *Commonwealth of Virginia, State Lottery Dep't v. Settlement Funding, LLC*, 75 Va. Cir. 248, 2008 WL 6759945, at *2 (Cir. Ct. Fairfax Cty., June 9, 2008) (emphasis added). The circuit court concluded, in other words, that the Virginia Supreme Court had ordered it to enforce the parties' preference for Utah law, even though Utah had no statutory rate cap. In light of the *Settlement Funding* decisions, and in the absence of any contrary ruling from the Virginia Supreme Court, there is a "substantial ground for difference of opinion" on this issue.

III. Immediate Appeal Would "Advance The Ultimate Termination Of The Litigation."

Finally, an immediate appeal from the order would materially advance the ultimate termination of the litigation. If Tribal Defendants are correct that Tribal law applies, Plaintiffs' claims fail as a matter of law, which would require, not just advance, the ultimate termination of this litigation as to Tribal Defendants. *See Terry v. June*, 368 F. Supp. 2d 538, 539 (W.D. Va. 2005) (noting that this factor "overlaps" with the "controlling question of law" factor); 16 Charles Alan Wright, *et al*., Federal Practice & Procedure § 3930 (3d ed. 2019 update) (explaining that the two elements are "closely tied"). Accordingly, the choice-of-law issue satisfies the last § 1292(b) requirement.

Nor does certifying the choice-of-law issue for appeal create the potential for piecemeal interlocutory appeals that would unreasonably delay the litigation—a common ground for opposing certification. Tribal Defendants have an automatic right to appeal the arbitration and sovereign immunity questions, and appeal of these two questions divests this Court of jurisdiction. *See Levin v. Alms & Associates, Inc.*, 634 F.3d 260, 266 (4th Cir. 2011) ("[A]n appeal on the issue of arbitrability automatically divests the district court of jurisdiction over the underlying claims and requires a stay of the action . . . ."); *Eckert Int'l, Inc. v. Gov't of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167, 174 (E.D. Va. 1993) (denying Fiji's motion to stay pending appeal as moot because "this Court is divested of jurisdiction pending the determination of Fiji's sovereign immunity appeal"), *aff'd on other grounds*, 32 F.3d 77 (4th Cir. 1994). As a result, the Fourth Circuit will already be entertaining an appeal in this matter, and the district court litigation will be stayed in the meantime. The only question is how many dispositive legal issues will be up on appeal. The far more efficient approach is to have the Fourth Circuit address the choice-of-law issue now, rather than risking the invalidation of substantial judicial labor after a final judgment is entered in this case.

CONCLUSION

For the foregoing reasons, the Court should certify to the Fourth Circuit the following issue addressed by the Court's Opinion and Order: whether Tribal law governs the loan agreements.

DATED: January 16, 2020

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
Washington DC, 20036
Telephone: (202) 847-4000
Fax: (202) 847-4005

Counsel for Tribal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2020, I electronically filed the foregoing document with the Clerk of Court using the ECF system, which will send notification of such filing to all counsel of record.

DATED: January 16, 2020

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
Washington DC, 20036
Telephone: (202) 847-4000
Fax: (202) 847-4005

Counsel for Tribal Defendants