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-REP
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 DEFENDANTS SCOTT ASNER AND JOSHUA LANDY'S MOTION FOR LEAVE TO APPEAL UNDER 28 U.S.C. § 1292(B)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Defendants Scott Asner ("Asner") and Joshua Landy ("Landy") respectfully submit this memorandum in support of their motion for leave to appeal pursuant to 28 U.S.C. § 1292(b).

INTRODUCTION

Tribal Defendants have filed a motion requesting this Court's permission to immediately appeal, under 28 U.S.C. § 1292(b), the question of whether Plaintiffs' loan agreements are governed by Tribal Law. *See* ECF No. 112. That issue was addressed in this Court's January 9, 2020 Memorandum Opinion, was raised in both the Tribal Defendants' and Asner and Landy's respective Motions to Dismiss, and is central to each claim Plaintiffs have alleged against the defendants, including Asner and Landy. *See* Memorandum Opinion at 45-54, ECF No. 109 ("Mem. Op."). For substantially the same reasons advanced by Tribal Defendants, Asner and Landy likewise request certification of the choice-of-law issue for immediate appeal.

This Court's choice-of-law ruling meets each of the three requirements for interlocutory appeal under Section 1292(b). *First*, the choice-of-law issue is a "controlling question of law" because the application of Virginia law is necessary for Plaintiffs to prevail on every claim. Resolving the question in the defendants' favor (and consistent with the plain terms of the loan agreements) would require dismissal of all of Plaintiffs' claims against Asner and Landy. *Second*, there is "substantial ground for difference of opinion" about this Court's resolution of the question. While this Court read the Virginia Supreme Court's *Settlement Funding* decision narrowly as addressing only an evidentiary issue, the Virginia Supreme Court's own opinion and the proceedings on remand demonstrate that Virginia courts do not have a public policy forbidding the application of another forum's law that lacks an interest rate cap. The absence of any Virginia Supreme Court opinion to the contrary, at a minimum, establishes substantial grounds for a difference of opinion. *Third*, certifying the choice of law question will advance judicial efficiency

and would "materially advance the ultimate termination of the litigation." Resolving the question in favor of Tribal law would require dismissal of each of Plaintiffs' claims. Nor is there any risk that certifying the question for appeal will lead to piecemeal litigation or otherwise waste valuable judicial resources. In fact, quite the opposite: this action is now stayed in light of the parties' respective appeals of the arbitration and sovereign immunity issues. Certifying the question now while the Fourth Circuit is already considering other appeals in this case would not disrupt or impede proceedings in this Court. In addition, resolving the choice-of-law issue at the outset will prevent the waste of judicial resources. This Court should grant Asner and Landy's motion.

ARGUMENT

Even where an order in a civil action is not otherwise immediately appealable, a district court may certify a non-final order for interlocutory appeal. *See* 28 U.S.C. § 1292(b). A district court may do so when it "finds that the order sought for appeal involves (1) a controlling question of law (2) about which there is substantial ground for difference of opinion and (3) an immediate appeal therefrom may materially advance the termination of the litigation." *Va. ex rel. Integra Rec LLC v. Countrywide Sec. Corp.*, No. 3:14-cv-706, 2015 WL 3540473, at *3 (E.D. Va. June 3, 2015) (citing 28 U.S.C. § 1292(b)); *see also Fannin v. CSX Transp., Inc.*, 873 F.2d 1438, 1989 WL 42583, at *2 (4th Cir. Apr. 26, 1989) (unpublished table decision).

Here, all three requirements are satisfied. Section 1292(b) allows a district court to "state in writing" in an order certified under the statute that the statute's elements are satisfied. 28 U.S.C. § 1292(b). Because this Court's Order does not specifically state that the choice-of-law question is suitable for interlocutory appeal, this Court should grant Asner and Landy's motion and should "amend its [original] order . . . to include the required permission or statement." Fed. R. App. P. 5(a)(3).

I. Whether Tribal Law Applies To Plaintiffs' Loan Agreements Is A Controlling Question of Law.

The choice-of-law issue is a controlling question of law because it would require dismissal of all of Plaintiffs' claims if it is resolved in Asner and Landy's favor. If a "determination of the issue on appeal would materially affect the outcome of the litigation" or a reversal would "terminate the action," a question of law is controlling. *Lemberg Law, LLC v. Arrowsmith (In re Health Diagnostic Lab., Inc.)*, No. 15-32919-KRH, 2017 WL 2129849, at *3 (E.D. Va. May 16, 2017) (quoting *In re Travelstead*, 250 B.R. 862, 865-66 (D. Md. 2000)). Indeed, if a question is "quite likely to affect the further course of the litigation," the question is considered controlling—even if resolution of the question is "not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc*., 86 F.3d 656, 659 (7th Cir. 1996).

There is no dispute between the parties that Tribal law does not provide for a cap on interest rates. For Plaintiffs to successfully allege that the loan agreements were unlawful, they must show that Virginia law, and not Tribal law, applies. Thus, each claim Plaintiffs have brought against Asner and Landy depends upon the argument that Virginia law applies to their loan agreements—notwithstanding the choice of law provision in those agreements selecting Tribal Law. Plaintiffs' claims under Virginia's usury laws obviously depend upon a finding that Virginia law applies. First Am. Compl. ¶ 162, ECF No. 54. Plaintiffs' unjust enrichment claim likewise depends upon a finding that loans made to "consumers in Virginia were void and unenforceable." *Id.* ¶ 172. And the predicate act necessary for Plaintiffs to establish their RICO claims—that the enterprise attempted to collect an unlawful debt—requires a finding that the loan agreements were governed by Virginia law. *Id.* ¶¶ 140-141 (alleging Section 1962(c) RICO claim because the loans "imposed interest rates" that were "in excess of the enforceable rates in Virginia"); *see also id.* ¶ 153. If Tribal law applies, however, Plaintiffs' claims against Asner and Landy must be dismissed.

Accordingly, the choice-of-law question is a "question of pure law" which, if resolved in Asner and Landy's favor, "will be completely dispositive of the litigation." *In re Health Diagnostic Lab., Inc.*, 2017 WL 2129849, at *3 (quoting *Fannin*, 1989 WL 42583, at *5).

The Fourth Circuit has not hesitated to accept certification of choice-of-law issues, even in situations where the Circuit's resolution would simply provide *guidance* to the district court on how proceedings should ensue. In *Grecon Dimter, Inc. v. Horner Flooring Co.*, for example, the Fourth Circuit accepted an appeal to determine whether German law or North Carolina law would apply to ongoing district court litigation—even though neither selection would terminate the litigation. *See* 114 F. App'x 64, 65-66 (4th Cir. 2004); *see also Flame S.A. v. Freight Bulk Pte. Ltd.*, 762 F.3d 352, 356 (4th Cir. 2014) (similarly resolving choice-of-law issue after certification under Section 1292). Nor is the Fourth Circuit alone. Other courts have also certified or accepted appeals raising choice-of-law questions, even when the determination of which law to apply would not necessarily doom the plaintiff's claims. *See, e.g.*, *Galilea, LLC v. AGCS Marine Ins. Co.*, 879 F.3d 1052, 1056 (9th Cir. 2018). Where resolving the choice-of-law question at the outset would avoid the possible "need of a second trial," *Anderson v. Dassault Aviation*, No. 02-cv-00629, 2005 WL 8164289, at *3 (E.D. Ark. Mar. 15, 2005), or the erroneous "application of different jurisdiction's substantive law," *Schalliol v. Fare*, 206 F. Supp. 2d 689, 701 (E.D. Pa. 2002), the question is considered controlling.

The case for certification here is even more compelling. If the Fourth Circuit were to resolve the choice-of-law question in Asner and Landy's favor, that would dispose of the case entirely. The question of law thus is "controlling." 28 U.S.C. § 1292(b).

II. Virginia Precedent Establishes That There is Substantial Ground For Difference Of Opinion About The Law That Applies To Plaintiffs' Loan Agreements.

There also is substantial ground for a difference of opinion about this Court's choice-of-law determination, and "a genuine doubt as to whether the district court applied the correct legal standard in its order." *Integra Rec LLC*, 2015 WL 3540473, at *5 (quotation marks omitted).

There is no doubt that Virginia and Tribal law's treatment of interest rate caps is different. But that difference, alone, is not sufficient to invalidate the loan agreements' choice-of-law provisions. The mere fact that the Tribe's "law differs from Virginia's does not, *ipso facto*, justify refusal to adhere to comity principles." *Chesapeake Supply & Equip. Co. v. J.I. Case Co.*, 700 F. Supp. 1415, 1421 (E.D. Va. 1988). Instead, the Tribe's policy must be "something immoral, shocking one's sense of right," *Tate v. Hain*, 25 S.E.2d 321, 325 (Va. 1943), and the Virginia public policy standing in contrast to that law must be "so compelling as to override the application of" the Tribe's law, *Williard v. Aetna Cas. & Sur. Co.*, 193 S.E.2d 776, 779 (Va. 1973).

The Court acknowledged that another forum's law can be applied even when it does not provide the "same type or degree of protection as Virginia," but nevertheless refused to apply the choice-of-law provision on the ground that the Tribe's law lacks "any comparable protections for aggrieved consumers." Mem. Op. at 52-53.

But the same argument could have been made in in *Settlement Funding, LLC v. Von Neumann-Lillie*, 645 S.E.2d 436, 438 (Va. 2007). In that case, the Virginia Supreme Court considered a loan agreement containing a choice-of-law provision selecting the law of Utah—another forum that, like the Court's view of Tribal law here, "does not recognize usury protections." *Id.* From the standpoint of Virginia's public policy, the Utah law selected in *Settlement Funding* is no different than the Tribal law selected here. Yet in *Settlement Funding*,

the Virginia Supreme Court expressly held that the circuit court had "*erred* in *refusing to apply* Utah law in the construction of the loan agreement." *Id.* at 439 (emphasis added).

In its Memorandum Opinion, this Court interpreted the Virginia Supreme Court's decision much more narrowly, concluding that *Settlement Funding* resolved only whether the party there had "met its burden to prove the substance of Utah law." Mem. Op. at 50. But the substance of Utah law mattered only because the Virginia Supreme Court held that the choice-of-law provision should be enforced. Specifically, the court held that "the circuit court erred in refusing to apply Utah law in the construction of the loan agreement"—notwithstanding that "Utah has not established any limits on maximum rates of interest for consumer loans." 645 S.E.2d at 439. Thus, *Settlement Funding* leaves no doubt that the Virginia Supreme Court instructed the lower court to apply Utah law, notwithstanding the absence of any interest rate cap. *Id.*

In rejecting this conclusion, this Court relied on the Virginia Supreme Court's statement that the court "need not address Settlement Funding's remaining assignment of error," *id.* at 439 n.2, which was that the circuit court had misapplied the Virginia usury statutes and erroneously concluded that the interest rate was usurious, *id.* at 438. Respectfully, this Court misinterprets that statement. The Virginia Supreme Court had no need to reach that question, because it had already concluded that Virginia law should not have been applied at all. In light of the court's decision to enforce the choice-of-law provision and apply Utah law, the question of whether Virginia statutes might have forbidden the interest rate was entirely academic.

As the Tribal Defendants explain in their own motion, Asner and Landy's interpretation of *Settlement Funding* is consistent with the circuit court's own understanding on remand. *See* Mem. Supp. Tribe's Motion to Certify at 5, ECF No. 113. The circuit court held that "consistent with the Supreme Court's decision, . . . the merits of [the borrower]'s usury defense must be determined

under Utah state law," and the court then found the loan agreement lawful under Utah law, permitting the collection of "the principal sum of [the] loan and all interest owed thereon." *Commonwealth, State Lottery Dep't v. Settlement Funding, LLC*, 75 Va. Cir. 248, 2008 WL 6759945, at *2 (2008). Despite the lack of any statutory interest rate cap, the court enforced the parties' agreement to apply Utah law.

As a result, there is "genuine doubt as to whether the district court applied the correct legal standard in its order." *Integra Rec LLC*, 2015 WL 3540473, at *5 (quotation marks omitted). In the absence of any contrary rulings from the Virginia courts, there is a "substantial ground for difference of opinion" about this Court's resolution of the choice-of-law issue. 28 U.S.C. § 1292(b).

III. Permitting Immediate Appeal Would Advance The Ultimate Termination Of The Litigation Because Each Claim Against Asner And Landy Hinges On Plaintiffs' Contention That Virginia Law Applies.

Finally, an immediate appeal would materially advance the ultimate termination of this litigation. Indeed, that the question Asner and Landy seek to certify for immediate appeal is a controlling one means that resolving the question will advance the termination of litigation, given that the two showings "overlap[]." *Terry v. June*, 368 F. Supp. 2d 538, 539 (W.D. Va. 2005); 16 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3930, Westlaw (3d ed. database updated 2019).

As explained above, each of Plaintiffs' claims against Asner and Landy necessarily depend upon a finding that the loan agreements are invalid under Virginia law. If the choice-of-law question is resolved in Asner and Landy's favor, the entire case must be dismissed. Thus, resolution of the choice-of-law question could entirely "avoid protracted and expensive litigation" for both the parties and the Court. *Fannin*, 1989 WL 42583, at *2.

To be sure, Section 1292(b) is intended to safeguard against piecemeal adjudication and appeals and, by doing so, serve judicial efficiency. *See, e.g.*, *Estate of Giron Alvarez v. Johns Hopkins Univ.*, No. TDC-15-0950, 2019 WL 1779339, at *1 (D. Md. Apr. 23, 2019). For that reason, district courts deny certification where a favorable ruling on appeal "would not eliminate the need for a trial, or for that matter, simplify the trial," *Clark Constr. Grp., Inc. v. Allglass Sys., Inc.*, No. Civ.A. DKC 2002-1590, 2005 WL 736606, *4 (D. Md. Mar. 30, 2005), or would "obstruct[] or imped[e] an ongoing judicial proceeding," *Big Rock Sports, LLC v. AcuSport Corp.*, No. 4:08-CV-159-F, 2011 WL 579095, at *2 (E.D.N.C. Feb. 9, 2011) (quoting *United States v. Nixon*, 418 U.S. 683, 690 (1974)).

But there is no risk of that here. The Tribal Defendants have already exercised their automatic right to appeal the Court's resolution of both the arbitration and sovereign immunity issues. *See* Notice of Appeal, ECF No. 111. Likewise, contemporaneous with this motion, Asner and Landy have filed their own Notice of Appeal of the arbitration issues. The parties' appeals require a stay of the action. *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 266 (4th Cir. 2011); *Eckert Int'l, Inv. v. Fiji*, 834 F. Supp. 167, 174-75 (E.D. Va. 1993), *aff'd*, 32 F.3d 77 (4th Cir. 1994). Thus, there is no risk that adding the choice-of-law issue to the appeal will interfere with ongoing proceedings in this Court or otherwise result in piecemeal litigation. The Court's certification of an additional question for appeal would merely mean that another case dispositive issue will be placed before the Fourth Circuit. Even if the Fourth Circuit were to affirm this Court's determination, that would remove uncertainty about the course of the proceedings and prevent the possibility of reversal *after* trial, with the attendant waste of this Court's resources. Accordingly, certification would serve judicial efficiency and advance the ultimate termination of the litigation.

CONCLUSION

For the foregoing reasons, Defendants Scott Asner and Joshua Landy respectfully request that this Court certify the following issue addressed in the Court's Memorandum Opinion and Order to the U.S. Court of Appeals for the Fourth Circuit: Whether Tribal law governs the loan agreements.

Respectfully submitted,

Dated: January 21, 2020

/s/ Jan A. Larson

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CERTIFICATE OF SERVICE

I certify that on January 21, 2020, I have electronically filed the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS SCOTT ASNER AND JOSHUA LANDY'S MOTION FOR LEAVE TO APPEAL UNDER 28 U.S.C. § 1292(B) with the Clerk of Court using the ECF system which will send notification of such filing to the following:

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Dated this January 21, 2020.

/s/ Jan A. Larson
Jan A. Larson (Bar No. 76959)