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.	

REPLY IN SUPPORT OF DEFENDANTS SCOTT ASNER AND JOSHUA LANDY'S MOTION FOR LEAVE TO APPEAL UNDER 28 U.S.C. § 1292(B)

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INTRODUCTION

In its January 9, 2020 Memorandum Opinion, this Court concluded that the choice-of-law provision contained in the Plaintiffs' loan agreements with the Tribal Lending Entities was not enforceable. However, "where parties to a contract have expressly declared that the agreement shall be construed as made with reference to the law of a particular jurisdiction, [Virginia courts] will recognize such agreement and enforce it, applying the law of the stipulated jurisdiction." *Paul Bus. Sys., Inc. v. Canon USA, Inc.*, 240 Va. 337, 342 (1990). Whether Tribal law governs the loan agreements—that is, whether the choice-of-law provision is enforceable—is a controlling question of law, as to which there is a substantial ground for difference of opinion, and for which an appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). Asner and Landy's motion for leave to appeal should be granted.

Asner and Landy's motion not only satisfies the legal requirements for certification, but also makes practical sense. This case is presently before the Fourth Circuit. Proceedings are stayed in the interim, pending review of the arbitration and sovereign immunity questions. Thus, no one is prejudiced by an interlocutory appeal of the choice-of-law issue. As will be set forth in Asner and Landy's brief in the appeal of the arbitration issue, Asner and Landy believe that the parties' arbitration agreement requires the case to be dismissed and sent to arbitration. In the event, however, that this case is not sent to arbitration, everyone would be better off if the Fourth Circuit had already reviewed this Court's choice-of-law determination. For if this Court is wrong, further proceedings in this case will be conducted on an erroneous premise that will waste this Court's and the parties' resources. Thus, certifying the choice-of-law question now will advance judicial efficiency.

Plaintiffs do not grapple with these practical realities. Instead, they claim that the question sought to be appealed is broad, sweeping in a number of additional arguments concerning the scope of the contract. But that is wrong and misconstrues Asner and Landy's motion. In seeking to certify for appeal "whether Tribal law governs the loan agreements," Asner & Landy Mem. Supp. Mot. for Leave to Appeal at 9, ECF No. 116, Asner and Landy only seek to appeal this Court's determination of whether the choice-of-law provision is enforceable. To the extent the Plaintiffs read the certification request more broadly, they misconstrue it.

Plaintiffs also contend that there is no substantial ground for difference of opinion on the choice-of-law issue. In so arguing, they misstate the standard under Section 1292 as requiring that courts must already have come to differing conclusions about the question. That is not the standard. Rather, substantial ground for difference of opinion exists if "reasonable jurists *might* disagree on an issue's resolution"—not only when they *already* have disagreed. *In re Trump*, 928 F.3d 360, 371 (4th Cir. 2019), *rehearing en banc granted on other grounds by* 780 F. App'x 36; *see also Reese v. BP Exploration (Alaska), Inc.*, 643 F.3d 681, 688 (9th Cir. 2011).

Regardless, even under Plaintiffs' incorrect standard, the *Settlement Fund* remand decision demonstrates a conflict over the very question presented, as the Virginia circuit court on remand interpreted the Virginia Supreme Court's holding differently than this Court. Plaintiffs do not respond to that point.

Plaintiffs speculate about how their case might still proceed if the choice-of-law provision is enforceable, and therefore assert that the choice-of-law provision is not controlling. But Plaintiffs' operative complaint pleads claims solely under Virginia law, including under specific Virginia statutes, and under RICO depending on finding a violation of Virginia statutory law. If the choice-of-law provision is enforceable, then the claims dependent upon Virginia law

necessarily fail. The speculative possibility that Plaintiffs might attempt to further amend their complaint does not make the choice-of-law issue any less controlling with respect to *this* complaint.

Finally, immediate appeal may materially advance this litigation. If the Court's decision on arbitration is affirmed, everyone would be better off ensuring that further litigation proceeds upon the correct premise about what law applies. Accordingly, Asner and Landy's motion to certify should be granted.

ARGUMENT

I. A Substantial Ground for Difference of Opinion Exists Concerning Enforceability of the Choice-of-Law Provision.

Reasonable jurists might disagree about this Court's conclusion that Virginia would not enforce the loan agreements' choice-of-law provision. The possibility of that disagreement is sufficient to establish a substantial ground for difference of opinion under 28 U.S.C. § 1292(b).

Plaintiffs claim that district courts may only certify, or the Courts of Appeals may only accept, an appeal under Section 1292(b) if courts have issued conflicting decisions that create a difference of opinion on an issue. Pls.' Opp'n at 5-6, ECF No. 124. That is not the standard. Section 1292 itself simply requires that a court be "of the opinion" that there exist "substantial ground for difference of opinion" concerning its order, 28 U.S.C. § 1292(b)—not that courts have actually rendered decisions that are in disagreement. And "[a] substantial ground for difference of opinion exists where reasonable jurists *might disagree* on an issue's resolution, *not merely where they have already disagreed*." *Reese*, 643 F.3d at 688 (emphasis added); *In re Trump*, 928 F.3d at 371 (quoting *Reese*). The "open-ended terms" used in Section 1292(b) "to define the statutory criteria" for certification are intended to give "broad discretion" to the district court to determine whether to certify. *In re Trump*, 928 F.3d at 369.

Indeed, the Fourth Circuit, other circuits, and the Supreme Court have all explained that even *novel* questions may be certified under Section 1292(b), so long as reasonable jurists "*might disagree*" about the issue's resolution. *Trump*, 928 F.3d at 371 (emphasis in original); *Reese*, 643 F.3d at 688; *In re Trump*, 874 F.3d 948, 952 (6th Cir. 2017). District courts "should not hesitate" to certify an issue for appeal that "involves a new legal question or is of special consequence." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). Interlocutory appellate jurisdiction, then, "does not turn on a prior court's having reached a conclusion adverse to that from which appellants seek relief." *Reese*, 643 F.3d at 688. All that matters is whether there are substantial grounds to conclude that judges could come to a different opinion. 28 U.S.C. § 1292(b).

To be sure, courts might be particularly apt to certify where a split of opinion has developed. Yet, to the extent that the cases cited by Plaintiffs hold that this is the *only* circumstance in which an issue can be certified, those cases are wrong. Plaintiffs primarily rely on a bankruptcy court opinion, *KPMG Peat Marwick, LLP v. Estate of Nelco, Ltd., Inc.*, 250 B.R. 74 (E.D. Va. 2000), citing the statement that an interlocutory appeal "will lie only if a difference of opinion exists between courts on a given controlling question of law." *KPMG*, 250 B.R. at 82. But the case on which *KPMG* itself relies, *McDaniel v. Mehfoud*, 708 F. Supp. 754 (E.D. Va. 1989), merely stated that a "difference in opinion . . . between [the movant's] counsel and the Order of this Court" does not suffice to warrant certification. 708 F. Supp. at 756. *McDaniel* does not support Plaintiffs' restrictive interpretation of Section 1292(b).[1]

[1] The other case Plaintiffs cite, *Cooke-Bates v. Bayer Corp.*, No. 3:10-CV-261, 2010 WL 4789838, at *2 (E.D. Va. Nov. 10, 2010) simply cites back to *KPMG*. *KPMG* cited two other cases, but both were even more off-point. One merely holds that grounds for a difference of opinion "*may be demonstrated*" by pointing to conflicting court decisions—not that such a conflict is required. *Oyster v. Johns-Manville Corp.*, 568 F. Supp. 83, 86 (E.D. Pa. 1983) (emphasis added). The other, like *McDaniel*, simply reiterates that a party's mere disagreement with the district court's ruling,

Even if conflicting judicial decisions were a prerequisite for certification, moreover, Asner and Landy have satisfied that requirement. In *Settlement Funding*, the Virginia Supreme Court held that the circuit court had erred in refusing to apply Utah law to the parties' loan agreement and that Utah law, like the Tribal law at issue here, did not "recognize *any usury protections*." 645 S.E.2d 436, 438 (Va. 2007) (emphasis added). On remand, in the course of conducting "further proceedings consistent with the [Virginia] Supreme Court's decision," the Virginia circuit court interpreted the Virginia Supreme Court to hold that a choice-of-law provision adopting a body of law without usury protection is enforceable. Thus, the circuit court required that the merits of the defendant's "usury defense must be determined under Utah state law." *Commonwealth, State Lottery Dep't v. Settlement Funding, LLC*, 75 Va. Cir. 248, 2008 WL 6759945, at *2 (2008). The circuit court's decision on remand thus conflicts with this Court's interpretation of *Settlement Funding*.[2]

Tellingly, Plaintiffs largely ignore the circuit court's decision on remand in *Settlement Funding*. They assert that the circuit court "never consider[ed] the validity of the choice-of-law

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alone, does not demonstrate a substantial ground for difference of opinion among jurists. *Hulmes v. Honda Motor Co.*, 936 F. Supp. 195, 208 (D.N.J. 1996). Neither case establishes that conflicting court decisions are an essential prerequisite to certification.

[2] Asner and Landy recognize that this Court did not believe that *Settlement Funding* squarely confronted the public policy question presented in this case. Mem. Op. at 50. But, even if the Court's view was correct, that cuts in favor of certification, not against it: when a federal court is presented with an issue of state law that the state's "highest court has not directly or indirectly addressed," the federal court is left to "anticipate how [the state court] would rule." *Liberty Univ., Inc. v. Citizens Ins. Co. of Am.*, 792 F.3d 520, 528 (4th Cir. 2015). This Court acknowledged that, in Virginia, another forum's law can be applied even if it does not provide the "same type or degree of protection as Virginia," but then found that another forum's law would not be applied if it lacked "comparable protections for aggrieved customers." Mem. Op. at 52-53. Respectfully, however, the Court did not identify any Virginia case establishing such a limitation. Moreover, if such a limitation existed, presumably it would have been mentioned in *Settlement Funding*, since, as the Virginia Supreme Court understood, Utah law "does not recognize usury protections." 645 S.E.2d at 438. Yet, *Settlement Funding* says nothing at all about such a limitation.

provision or mention[ed] public policy," Pls.' Opp'n at 8, but that proves the point: the circuit court did not consider the validity of the choice-of-law provision because it understood that the Virginia Supreme Court had already resolved that question.

Plaintiffs also cite various other decisions that accord with this Court's. But "[t]he mere fact that a substantially greater number of judges have resolved the issue one way rather than another does not, of itself, tend to show that there is no substantial ground for difference of opinion." *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 283 (E.D. Pa. 1983). Nor is the weight of authority as heavy as Plaintiffs claim. In addition to two other published opinions of this Court, Plaintiffs cite the transcript of a district court argument and an unreasoned summary order. Pls.' Opp'n at 6-7; *see id.* at 2 n.1. Neither is a rendered opinion refuting that other courts might reach a different view.[3]

II. Plaintiffs' Claims Depend Upon the Application of Virginia Law.

Whether the choice-of-law provision is enforceable also is "a controlling question of law." 28 U.S.C. § 1292(b). Plaintiffs do not dispute that their claims can succeed only if Virginia law applies. Plaintiffs have pleaded claims either under Virginia law (their usury and unjust enrichment claims) or under a federal law cause of action that is dependent upon the application of Virginia law (the RICO claims). *See* First Am. Compl. ¶¶ 140-141, 162, 172. They also purport to allege each claim only on behalf of a class of Virginia residents. First Am. Compl. ¶¶ 132, 146, 156, 166. Thus, unless Virginia law applies, Plaintiffs' claims must fail. The question whether the choice-of-law provision can be enforced therefore is a controlling question of law in this case.

[3] As the Court noted, and Plaintiffs point out, one unpublished decision of the Virginia circuit court is in accord with the outcome in this Court's memorandum opinion. *See Commonwealth v. NC Fin. Solutions of Utah, LLC*, 100 Va. Cir. 232, 2018 WL 9372461, at *12-13 (2018). At most, that decision is in conflict with the remand decision in *Settlement Funding*, indicating absence of consensus among Virginia courts. *See Settlement Funding, LLC*, 2008 WL 6759945, at *2.

Plaintiffs make three arguments to the contrary, but each fails. *First*, Plaintiffs claim that this Court did not determine "with finality" whether the choice-of-law provision was invalid, invoking the Court's brief reference to determining that Virginia law governs "at this stage." Pls.' Opp'n at 9. But the Court could hardly have been clearer in holding that it "will not enforce the Choice-of-Law Provision." *See* Mem. Op. at 53. The Court then went on to determine—in the absence of a contractual choice-of-law provision—what law to apply to the parties' agreement, applying "Virginia's standard choice-of-law rules for contract claims," *id.*, as a court sitting in diversity must, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Only in the course of *that* discussion—a question that the Court would not have reached had the choice-of-law provision been enforceable—did the Court consider the facts alleged in the Amended Complaint. Mem. Op. at 53.

Second, Plaintiffs argue that choice of law is typically a factual question inappropriate for certification. That is incorrect. Instead, "[c]hoice of law questions are generally questions of law" for the court to determine. *Kielar v. Granite Const. Co.*, 647 F. Supp. 2d 524, 527 (D. Md. 2009) (citing Second, Third, Fifth, Ninth, and Eleventh circuits). And the relevant question here—whether Virginia would enforce a provision selecting the law of a forum without a usury cap—is obviously a pure question of law.[4] Plaintiffs identify no disputed facts upon which that issue depends.[5]

[4] In any event, the Fourth Circuit and other courts frequently grant or accept certification of choice-of-law issues—even where the court must consider the parties' factual allegations. Mem. Supp. at 4. In *Grecon Dimter, Inc. v. Horner Flooring Co., Inc.*, for example, the Fourth Circuit accepted certification and affirmed, at the outset of the litigation, that German law applied to the parties' contract, finding that the parties' transaction had a reasonable relation to Germany. 114 Fed. App'x 64, 67 (4th Cir. 2004).

[5] Thus, *Banner Life Ins. Co. v. Booney*, No. 2:11-cv-198, 2011 WL 5027498 (E.D. Va. Oct. 21, 2011), which Plaintiffs cite, is different. Pls.' Opp'n at 11. In that case, antecedent questions of fact may have had bearing on the choice-of-law determination.

Third, Plaintiffs contend that even if the choice-of-law provision is enforced, that will not end their suit. They speculate, for example, that they might still be able to raise "unique claims and defenses" under an "unknown body of law." Pls.' Opp'n at 3. But Plaintiffs are limited to the claims they chose to plead in the First Amended Complaint. Plaintiffs have not pleaded any claims under Tribal law. Instead, they allege claims that their contract is unlawful under the terms of *Virginia*'s usury statute. If Virginia allows enforcement of the contract's choice-of-law provision, then their Virginia-law-based claims must fail.

III. Immediate Appeal May Advance the Outcome of this Litigation.

Finally, resolution of the choice-of-law issue also "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also Terry v. June*, 368 F. Supp. 2d 538, 539 (W.D. Va. 2005) (the requirements that a question be a controlling question of law and may materially advance termination of the litigation overlap). Again, Plaintiffs do not dispute that the success of their claims depend entirely upon a finding that Virginia law applies. Asner & Landy Mem. Supp. at 7. Nor do they dispute that, given the automatic stay required by the parties' respective appeals of the sovereign immunity and arbitration issues, certifying appeal now would not result in piecemeal adjudication or impede ongoing proceedings in this court. *Id.* at 8.

Instead, Plaintiffs claim that reversal of the Court's choice-of-law holding would not necessarily end the litigation. They suggest that they might seek leave to amend their complaint, that the Court would have to apply "unclear" Tribal law, or that the Court would then need to consider Plaintiffs' unconscionability arguments. Pls.' Opp'n at 13. This speculation does not refute the point that certification "may materially advance" ultimate resolution of the case. 28 U.S.C. § 1292(b).

As to the possibility of amending the pleadings, Plaintiffs are bound by the claims pleaded in the operative Complaint—which they already amended once. ECF No. 54. The possibility that

they may seek leave to amend a second time is irrelevant. Based on the *operative* complaint, a Fourth Circuit decision finding the choice-of-law provision enforceable would be case dispositive.

For the same reason, Plaintiffs' speculation that they might seek to litigate the meaning of Tribal law is irrelevant. Plaintiffs have alleged claims under Virginia law only. They have not alleged any claims under Tribal law, nor have they claimed that, if Tribal law applies, their loan agreements remain unlawful. There is no dispute among the parties that Tribal law, at a minimum, does not contain a usury limitation. That fact about Tribal law, alone, is enough to resolve Plaintiffs' Virginia law claims.

As to Plaintiffs' arguments about unconscionability, that speculation does not refute the rationale for certification. For one thing, if the Fourth Circuit agrees with Landy and Asner that Virginia's public policy does not preclude a contractual agreement selecting a body of law without any usury limitation, that holding would foreclose Plaintiffs' unconscionability arguments as well. After all, if it is consistent with public policy to allow parties to select a body of law without a usury limitation, then there cannot be anything unconscionable about their having done so. And even if Plaintiffs are able to articulate some technical distinction between enforceability of a choice-of-law clause and the question of unconscionability, at the very least, a holding that the choice-of-law provision is enforceable will "quite likely affect the further course of the litigation," even if "not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). That is enough to meet the requirements of Section 1292(b).

Finally, Plaintiffs suggest that certifying the choice-of-law provision is unlikely to advance the outcome of the litigation, because if the Fourth Circuit reverses the arbitration decision, it would be unnecessary to reach the choice-of-law provision at all. Pls.' Opp'n at 14. But certification would provide the Fourth Circuit with an additional case-dispositive ground for

decision—with no prejudice to the parties, as the action is stayed pending appeal in any event. It would make little practical sense to hold back this purely legal question from the Fourth Circuit's interlocutory review while it is also considering other case-dispositive questions. If this Court's decision on arbitration is affirmed, ensuring that future litigation in this Court is based upon the correct body of law would promote the efficient use of the Court's and the parties' resources.

CONCLUSION

For the foregoing reasons, Defendants Scott Asner and Joshua Landy's motion to certify should be granted.

Respectfully submitted,

Dated: February 10, 2020

/s/ Jan A. Larson

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CERTIFICATE OF SERVICE

I certify that on February 10, 2020, I have electronically filed the foregoing REPLY 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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Aimee Jackson-Penn
Amber Jackson

Dated this February 10, 2020.

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