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 TRIBAL DEFENDANTS'
MOTION FOR LEAVE TO APPEAL UNDER 28 U.S.C. § 1292(b)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs' Opposition to Tribal Defendants' Motion For Leave To Appeal Under 28 U.S.C. § 1292(b) ("Opp.") sidesteps the fundamental issue presented by the motion: whether judicial economy is better served by allowing Tribal Defendants to appeal three potentially case-ending issues, versus just two.

As the leading treatise on § 1292(b) makes clear, the three factors set forth in the statute "should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." 16 Charles Alan Wright, *et al.*, *Federal Practice & Procedure* § 3930 (3d ed. 2019 update) (hereinafter "Wright & Miller"). As evidenced by the Fourth Circuit's prior acceptances of choice-of-law questions certified under § 1292, there are clear benefits from obtaining the Court of Appeals' guidance on whether Tribal law, rather than Virginia law, governs Plaintiffs' loans. If the choice-of-law clauses in Plaintiffs' loan agreements are enforceable—contrary to this Court's conclusion—then the case is over. At minimum, clarification of the enforceability of those clauses will avoid the burdens placed on Tribal Defendants, and the potential wasted effort in the event of a remand, from litigating this case on the temporary premise that Virginia law applies. And there are no appreciable downsides to certifying the issue now, where there is already an appeal as of right pending in the Fourth Circuit and a stay of further proceedings in this Court.

Indeed, while Plaintiffs cite several cases noting that § 1292(b) review is "extraordinary" or "exceptional," they do not muster a single case denying certification where, as here, there already is an appeal as of right. That distinction makes all the difference. Courts may be reluctant to grant discretionary interlocutory review where it could result in endless piecemeal appeals that would delay the litigation. Here, by contrast, the Fourth Circuit will consider aspects of this

Court's ruling regardless how this Court rules on Tribal Defendants' motion. In these circumstances, adding the choice-of-law issue to the appeal promotes judicial economy by enabling the Court of Appeals to weigh in on another potentially dispositive issue before substantial judicial resources are expended. Tribal Defendants' motion should therefore be granted.

ARGUMENT

I. The Choice-Of-Law Issue Presents A "Controlling Question Of Law."

Plaintiffs' contention that the enforceability of the choice-of-law provisions is "neither controlling" nor a question "of law," Opp. 8, cannot be squared with the multiple instances in which the Fourth Circuit has accepted choice-of-law questions for interlocutory appeal. *See, e.g.*, *Flame S.A. v. Freight Bulk Pte. Ltd.*, 762 F.3d 352, 356 (4th Cir. 2014); *Grecon Dimter, Inc. v. Horner Flooring Co.*, 114 F. App'x 64, 65-66 (4th Cir. 2004). These cases reflect the "better view that a question is controlling, even though its disposition might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants." Wright & Miller § 3930. Plaintiffs do not dispute that their remaining claims against Tribal Defendants depend on Virginia law. Knowing, now, whether the loans instead are governed by Tribal law saves considerable "time and expense" by avoiding the possibility of lengthy litigation that rests on a premise that the Fourth Circuit might eventually reject.[1]

The case for deeming the choice-of-law issue controlling is even stronger where, as here, the party seeking review under § 1292(b) already has an appeal of right pending and further

[1] *Flame* and *Grecon Dimter* also compel rejection of Plaintiffs' suggestion that choice of law is a fact question categorically inappropriate for certification. *See* Opp. 9-10. In a similar vein, Plaintiffs' reliance on this Court's apparent acceptance of "Plaintiffs' allegation that they accepted their loans in Virginia," Opp. 10, cuts in the opposite direction: If the Fourth Circuit concludes that the choice-of-law clauses are enforceable even with that fact assumed to be true, it would eviscerate any argument against applying Tribal law to the loans.

proceedings in the district court are stayed. That fact distinguishes the welter of out-of-Circuit decisions cited by Plaintiffs in which courts declined to certify choice of law issues. For example, the case that Plaintiffs claim is "most analogous," Opp. 11, involved an effort to certify a choice-of-law question where no interlocutory appeal was permitted by right. *Inetianbor v. CashCall, Inc.*, No. 13-60066-CIV-COHN/SELTZER, 2016 WL 4249938, at *3 (S.D. Fla. Jan. 26, 2016). Moreover, in that case, the party seeking certification did "not state that the parties can avoid trial in this lawsuit" if the ruling under appeal were reversed, or "that the reversal will eliminate issues for trial or otherwise shorten the trial." *Id.* This case is different in every respect.

Plaintiffs' remaining arguments likewise lack merit. Their assertion that this Court "did not *conclusively* determine" whether Tribal law governs, Opp. 8, is beside the point. The Court at minimum concluded that the choice-of-law provisions are unenforceable. *See* Mem. Op., Dkt. No. 109, at 53 ("For these reasons, the Court will not enforce the Choice-Of-Law Provision and will instead apply Virginia's standard choice-of-law rules for contract claims."). Knowing whether that decision is correct will shape the contours of this case going forward, most notably by determining what source of law applies in determining whether or not Plaintiffs' loans are unlawful. Plaintiffs cite no authority, and Tribal Defendants are aware of none, suggesting that a more conclusive determination is required for certification.

Plaintiffs' suggestion that there is an "absence of a body of tribal law," and that it may prove complicated to apply Tribal law, Opp. 9, is as wrong as it is irrelevant. In responding to the first iteration of Plaintiffs' Complaint, Tribal Defendants submitted an 87-page affidavit that, among many other things, describes the creation and content of the Tribal Consumer Financial Services Regulatory Ordinance, which is also part of the record. *See* Treppa Aff., Dkt. No. 44, ¶¶ 69-71, 228-39; Treppa Aff. Ex. 7, Dkt. No. 44-8. Like the laws of several other states, that

Ordinance does not contain a usury limit, but does contain numerous protections for consumers, including express incorporation of many federal banking and consumer protection statutes, including Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and the Truth in Lending Act, 15 U.S.C. § 1601, *et seq*. *See* Treppa Aff., Dkt. No. 44, ¶¶ 69-71, 236-39; Treppa Aff. Ex. 7, Dkt. No. 44-8. The "content of [T]ribal law," Opp. 12, accordingly is no mystery. In any event, while Plaintiffs have pleaded no claims under Tribal law, potential difficulties in applying that law—like potential difficulties in applying any state's law—would provide no basis for disregarding a contractual term to which the parties agreed.[2]

Accordingly, under both Fourth Circuit precedent and common sense, the choice-of-law question is "controlling" in this case.

II. There Is A "Substantial Ground For Difference Of Opinion."

Plaintiffs' emphasis on the "substantial ground for difference of opinion" factor misses the mark. Plaintiffs place all their weight on this factor, claiming that § 1292 requires a split among courts on the question to be certified, Opp. 5, and that because no split is present, "the motion should be denied without even considering the other two requirements." Opp. 7. Plaintiffs are wrong on all counts.

[2] Plaintiffs' repeated insults of Tribal law are largely beside the point for purposes of this motion, but a few points bear mention. The Tribe has enacted a lending ordinance that provides substantial protections to consumers and has established a Regulatory Commission that ensures compliance with that ordinance, which together have resulted in a consumer complaint rate of less than one percent. *See* Treppa Aff., Dkt. No. 44, at ¶¶ 23, 69-71. "[C]aselaw or rules" about "conflicts of law" and "contract construction," Opp. 9 n.5, are not necessary in this case given the clarity of Tribal law and the generally high level of consumer satisfaction. That is especially so because the Tribe's policy choices are not unique—other jurisdictions, including Utah, have chosen not to include a usury limit in their law, but to provide ample other protections to consumers. Plaintiffs notably offer no critique of those jurisdictions' legal policy choices, much less suggest they were developed as part of a "scheme" to defraud customers. Opp. 13 n.8.

Nothing in the text of § 1292(b) requires a "disagreement among courts," Opp. 5, on the issue to be certified. *See* 28 U.S.C. § 1292(b). In fact, the leading civil procedure treatise makes clear that a split among courts is not required. Instead, Wright & Miller instruct that "[t]he level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case," including whether "proceedings that threaten to endure for several years depend on an initial question of jurisdiction, limitations, or the like." Wright & Miller § 3930. Here, the fact that there will be an appeal no matter the outcome of Tribal Defendants' § 1292(b) motion militates against requiring a strict division of authority on a question that will provide valuable guidance to the parties as the litigation proceeds. *See In re Trump*, 928 F.3d 360, 369, 371 (4th Cir. 2019) (noting "[t]he broad discretion given to district courts under § 1292(b)" and stating that "[a] substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution") (emphasis omitted) (quoting *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011)), *reh'g en banc granted on other grounds*, 780 F. App'x 36 (4th Cir. 2019); *Reese*, 643 F.3d at 688 n.5 (rejecting the "formalistic requirement . . . that adverse authority develop around an issue before we review it on interlocutory appeal" because that approach "could lead to unnecessary, protracted litigation and a considerable waste of judicial resources"); *see also APCC Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003) ("The 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 ground for difference of opinion.").

In any event, there is a division of authority on whether the choice-of-law provisions must be enforced based on the Virginia Supreme Court's ruling in *Settlement Funding*. As Tribal Defendants explained in their initial motion, the circuit court on remand in *Settlement Funding*

read the Virginia Supreme Court's ruling differently than this Court. *See* Tribal Defs.' Mem. 4-5. If, like this Court, the circuit court had read the Virginia Supreme Court as addressing only an evidentiary issue, it would have had to engage in a separate analysis on remand as to whether Utah or Virginia law applied. But the circuit court engaged in no such analysis. Rather, it treated the choice-of-law issue as conclusively decided, explaining that "consistent with the Supreme Court's decision," "the merits of [the borrower's] usury defense *must be determined under Utah state law*." *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). This Court evidently disagrees, but this disagreement is sufficient to justify appellate review.

Plaintiffs offer no response to the circuit court's decision, let alone an explanation of how it is consistent with the Court's interpretation of *Settlement Funding.* Nor is the circuit court's opinion addressed in any of the opinions or commentary that Plaintiffs cite in support of their position. *See* Opp. 6-7. But Plaintiffs' silence does not erase the circuit court's decision, which supports the conclusion that there is a "substantial ground for difference of opinion" on the choice-of-law issue.

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

Plaintiffs' arguments as to the remaining § 1292(b) factor fare no better. Whether the choice-of-law provisions are enforceable is an issue that has a profound impact on the litigation. The basis for Plaintiffs' claims against Tribal Defendants is that Virginia's usury limitations apply to Plaintiffs' loans. If Tribal Defendants are correct that Virginia law does not apply, Plaintiffs' claims fail. That is the very definition of an issue that would "advance the ultimate termination of the litigation."

Plaintiffs' strained efforts to construct scenarios in which the Fourth Circuit could rule in Tribal Defendants' favor, yet still leave issues for remand, change nothing. For example, beyond rekindling their nonsensical argument that the content of Tribal law is unknown, *see* Opp. 12-13, addressed *supra* at 3-4, Plaintiffs hypothesize a scenario in which the Court of Appeals rules that applying Tribal law does not violate Virginia public policy, but remands for further proceedings (including a possible further amendment of the Complaint) regarding Plaintiffs' conclusory allegations of unconscionability. Opp. 12; *see also* First Am. Compl., Dkt. No. 54, ¶ 211. There certainly would be no warrant for permitting further amendments of the Complaint, where Plaintiffs have already had an opportunity to revisit what they could plausibly allege consistent with Rule 11, and came up with no more than a bare legal allegation. Nor are Plaintiffs' arguments on unconscionability plausible: Under Virginia law, Plaintiffs must show that the choice-of-law 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," an impossible burden for them to meet given that parties enter contracts every day in states that have no usury limits in their laws. *Fransmart, LLC v. Freshii Dev., LLC*, 768 F. Supp. 2d 851, 870-71 (E.D. Va. 2011) (quoting *Mgmt Enters., Inc. v. Thorncroft Co., Inc.*, 243 Va. 469, 473 (1992)). But for present purposes, the relevant point is that even the limited holding Plaintiffs imagine would have materially advanced the ultimate termination of the litigation, by narrowing the issues before this Court, limiting the scenarios in which Virginia law might apply, and lowering the risk that the parties and the Court would spend substantial time and energy litigating this case on an incorrect premise regarding which jurisdiction's laws control.[3]

[3] Plaintiffs' feint at the idea that the interest rates in their loan agreements could be declared unconscionable "regardless of the substantive law that applies," Opp. 9 n.5, is similarly unavailing. In support of this proposition, Plaintiffs cite three cases applying California, New Mexico, and

Plaintiffs close with the puzzling suggestion that the Court should deny certification of the choice-of-law issue because the Fourth Circuit might rule in Tribal Defendants' favor on the other issues up on appeal. The relevant question is not whether the issue to be certified will *necessarily* decide the litigation, but whether reversal could *materially advance* the litigation. And the choice-of-law issue could do just that, in the event the Court of Appeals reaches it. The purpose of certification under § 1292(b) is "minimizing the total burdens of litigation on parties and the judicial system by accelerating or at least simplifying trial court proceedings." Wright & Miller § 3930. Certification of the choice-of-law question easily satisfies that standard.

CONCLUSION

For the foregoing reasons, Tribal Defendants' Motion for Leave to Appeal Under 28 U.S.C. § 1292(b) should be granted.

Delaware law and finding high interest rates to be unconscionable under those states' laws. But all that proves is that loans with high interest rates might be invalid under those states' laws. Those cases provide no basis for concluding that Plaintiffs' claims could proceed if Tribal law applies. Nor is there any federal common law of unconscionability that could supersede the Tribe's sovereign policy choices regarding the best way to prove protections to consumers.

DATED: February 10, 2020

Respectfully Submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 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: February 10, 2020

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