UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

NICOLE MARIE SWIGER, *on behalf of herself and all individuals similarly situated*,	:	CIVIL ACTION
Plaintiff,	:	NO. 2:19-cv-12014-BAF-RSW
v.	:	
JOEL ROSETTE, TED WHITFORD, TIM MCINERNEY, and KENNETH E. REES,	:	
Defendants.	:	

DEFENDANT KENNETH E. REES'S MOTION TO COMPEL ARBITRATION

Pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* Defendant Kenneth E. Rees ("Rees") respectfully moves this Court for an order staying this matter and compelling arbitration pursuant to a written agreement to arbitrate signed by Plaintiff and contained within her loan agreement requiring her to arbitrate all disputes arising out of her loan agreement, including any dispute "concerning the validity, enforceability, or scope of" her agreement to arbitrate.

The reasons for this motion are set forth in the accompanying brief in support of the Motion to Compel Arbitration.

Pursuant to Local Rule 7.1(a)(1), Defendants sought concurrence after a conference between the parties' attorneys, during which the nature of the motion and its legal basis were explained. Plaintiff declined to concur in the relief requested.

Respectfully Submitted,

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BRIEF IN SUPPORT OF DEFENDANT KENNETH E. REES'S MOTION TO COMPEL ARBITRATION

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STATEMENT OF THE ISSUES PRESENTED

1. Given the clear and conspicuous agreement to arbitrate present in Plaintiff's loan agreement with Plain Green, LLC, is this Court required by the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, to stay this matter and require Plaintiff to arbitrate all claims arising from or relating to her loan agreement in conformity with the plain terms of the arbitration agreement to which Plaintiff freely agreed?

   SUGGESTED ANSWER: Yes.

2. Given the clear and conspicuous delegation provision present in Plaintiff's Agreement to Arbitrate, is this Court required by the is this Court required by the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, to stay this matter and send any disputes over issues of arbitrability, including the enforceability of the arbitration agreement, to arbitration?

   SUGGESTED ANSWER: Yes.

CONTROLLING AUTHORITIES

The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, and case law interpreting the Federal Arbitration Act—particularly the Supreme Court's recent decision in *Henry Schein v. Archer & Whites Sales, Inc.*, 586 U.S. ----, 139 S. Ct. 524, 529 (2019)—are controlling.

I. INTRODUCTION

Plaintiff has filed this putative class action alleging that a $1,200 loan she applied for and accepted from a sovereign Native American lender, Plain Green, LLC constitutes an "unlawful debt" under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and violates several other state and federal laws. Plaintiff's substantive claims against Defendants have no legal merit—chief among a host of issues requiring dismissal are that Plaintiff both lacks standing given that she has actually received *more* in loan principal from her lender than she has paid back, and that Plaintiff cannot demonstrate that she has been proximately harmed by Defendant Rees' actions.[1] But before any decisionmaker reaches the merits of

[1] Even at first blush, it clear that Plaintiff has failed to complete an adequate pre-filing investigation into the facts and law applicable to her claims. Plaintiff's Complaint has plagiarized whole swaths (including incorrect citations) from complaints filed in other jurisdictions. Worse still, Plaintiff has ignored the portions of the cases she has plagiarized from, including numerous declarations signed under penalty of perjury, which **conclusively prove** that her claims against Mr. Rees are without merit. For example, Plaintiff claims that Rees continues his "controlling interest and operational role in Think Finance" through to the present. Compl. ¶ 21. That is entirely false. Mr. Rees has never held a controlling interest of shares in Think Finance, and he stepped down as CEO of Think Finance in May 2014, as from the board of Think Finance in 2015—long before Plaintiff's loan in December 2018. Ex. 'B,' Decl. of Kenneth E. Rees, *Gingras v. Rosette*, 5:15-cv-101, ECF No. 67-1 at ¶¶ 2-4 (Sept. 22, 2015) (publicly filed declaration from Kenneth Rees affirmatively confirming his complete non-affiliation from Think Finance, including that he "do[es] not maintain an operational role in Think Finance"). Since stepping down, Rees has had no involvement in Think Finance. *Id.* Similarly, public filings confirm that since June 1, 2016, Plain Green has operated entirely separate from Think Finance. Ex. 'C,' Decl. of Steve Parker, *Brice v. Rees*, 3:18-cv-1200, ECF No. 89 at ¶¶ 10-11 (N.D. Cal. Oct. 10, 2018); Ex. 'D,' Decl. of Stephen Smith, *In re Think Finance, LLC*, 17-33964-hdh11,

her claims, Plaintiff must first take those claims to arbitration on an individual basis—as she agreed to do in her consumer loan agreement with her lender. In individual arbitration, Plaintiff has the ability to pursue any and all relevant claims arising out of her loan, and the arbitrator can resolve those claims. This includes any dispute over the scope and enforceability of Plaintiff's agreement to arbitrate. But Plaintiff has ignored her agreement to arbitrate. And, Plaintiff has provided no evidence that could possibly support her refusal to arbitrate her claims in accordance with her arbitration agreement. As such, the Federal Arbitration Act, 9 U.S.C. § 2, requires that this Court send Plaintiff's claims to arbitration, as is set forth in the terms of the arbitration agreement in Plaintiff's Loan Agreement.

II. FACTS AND BACKGROUND INFORMATION

On or about December 13, 2018, Plaintiff voluntarily used the internet to obtain at least one short term loan from Plain Green, LLC—a lender operating as an arm and instrumentality of the Chippewa Cree Tribe of the Rocky Boys' Reservation,

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ECF 714-2 at ¶ 25 (N.D. Tex. Bankr. July 27, 2018). As the CEO of Plain Green unequivocally stated under penalty of perjury:

> Plain Green's operations are located on the Reservation, save a handful of workers on the Salt River Pima Maricopa Indian Community reservation and it controls and operates its own platforms and its loan products; it markets, underwrites, approves, funds, processes, and collects on Plain Green loans to its customers. In short, Plain Green alone controls its business from the Tribe's Reservation.

Ex. 'C,' Parker Decl. at ¶ 14. These sworn statements—all contained in the public record **prior** to Plaintiff's Complaint—contradict the unfounded allegations contained within the Complaint.

Montana. Compl. at Ex. B. Plaintiff went to Plain Green's website and completed an online application. See Exhibit "A," Decl. of Stephen Smith at ¶¶ 9-10 (which Declaration was filed by Think Finance in support of its motion to compel arbitration in *Gibbs, et al. v. Rees, et al.*, No. 3:17-cv-00386-MHL, ECF No. 17 (E.D. Va. Aug. 17, 2017)).[2] Plaintiff completed the loan application form, chose a date of payment and a loan amount, and reviewed and agreed to the terms and conditions of the loans, including an arbitration agreement. *See id.* at ¶¶ 11-12. At the end of the application process, Plaintiff was provided with a copy of her loan agreement, which she could print or save. *See id.* at ¶ 13. Plaintiff attached a copy of her loan agreement to her Complaint. *See* Compl. at Ex. B. Plaintiff's application was then sent to Plain Green for final processing, decisioning, and, if approved, funding.

A. The Arbitration Agreement

Plaintiff's loan agreement contains a clear and conspicuous agreement to arbitrate the claims that she has brought against Rees in this Court. Specifically, as part of her loan agreement, Plaintiff agreed to arbitrate "any Dispute […] involving this Agreement or the Loan." Compl. at Ex. B at 8. The scope of the arbitration agreement requires Plaintiff to arbitrate disputes arising out of her loan agreement, and includes disputes with Plain Green, Plain Green's "affiliated companies," the Chippewa Cree tribe, as well as the Plain Green's "servicing and collection

[2] Mr. Smith has provided similar affidavits for Think Finance, all of which have been filed publicly.

representatives and agents, and each of their respective agents, representatives, employees, officers, directors, members, managers, attorneys, successors, predecessors, and assigns."

The Arbitration Agreement informed Plaintiff as to the breadth of what she was agreeing to arbitrate—namely "any Dispute" which "is to be given its broadest possible meaning." *Id.* The Arbitration Agreement also includes a 'delegation clause,' which provides that the term "Dispute" "includes any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." *Id.* That is, in general, threshold issues relating to arbitrability are delegated to the arbitrator in the first instance.

Plaintiff was given several notices as to the fact that she was agreeing to arbitrate her claims, many of which were set off in bold print and all-caps. For example, Plaintiff was told to "**PLEASE CAREFULLY READ THIS AGREEMENT TO ARBITRATE. UNLESS YOU OPT-OUT OF ARBITRATION AS DESCRIBED ABOVE, YOU AGREE THAT ANY DISPUTE YOU HAVE RELATED TO THIS AGREEMENT WILL BE RESOLVED THROUGH BINDING ARBITRATION**." *Id.* Similarly, Plaintiff was alerted to the fact that "**BY ENTERING INTO THIS AGREEMENT, YOU ACKNOWLEDGE AND AGREE THAT YOU ARE WAIVING YOUR RIGHT TO (A) HAVE A JURY TRIAL TO RESOLVE DISPUTES, (B) HAVE A COURT RESOLVE DISPUTES, (C) PARTICIPATE IN A CLASS**

ACTION LAWSUIT, AND (D) HAVE ACCESS TO DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT." *Id.* If Plaintiff had a question about the loan agreement or the agreement to arbitrate, the loan agreement (again in bold and all-caps) covered such a situation, stating, "**IF YOU HAVE QUESTIONS, PLEASE CONTACT CUSTOMER SERVICE AT (866) 420-7157**." *Id.* at 9. These disclosures ensured that Plaintiff was fully aware of her agreement to arbitrate, as well as the rights she was potentially giving up as a result of that agreement to arbitrate.

The Arbitration Agreement includes many provisions for Plaintiff's benefit. Plaintiff was given the choice of conducting arbitration before one of two nationally recognized and well-respected arbitration service providers: the American Arbitration Association ("AAA") or JAMS. *Id.* at 8. The Arbitration Agreement further calls for the arbitration to proceed pursuant to the policies, procedures, and consumer rules[3] of the selected arbitral organization, and provide Plaintiff with contact information, including websites, for the arbitration providers. *Id.* Regardless of which organization is selected by Plaintiff, the Arbitration Agreement provides for a choice to have the arbitration conducted "either on Tribal land or within thirty (30) miles of [Plaintiff's]

[3] *See* JAMS, JAMS Comprehensive Arbitration Rules & Procedures (July 1, 2014), available at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf ("JAMS Rules"); American Arbitration Association, Consumer Arbitration Rules (Sept. 1, 2018), available at https://www.adr.org/sites/default/files/Consumer _Rules _Web_0.pdf ("AAA Rules").

residence." *Id.* The Agreement also requires the Lender to pay for all filing fees and any costs or fees charged by the arbitrator regardless of who initiates the arbitration or ultimately prevails. *Id.*

If Plaintiff did not wish to have all disputes relating to her loan agreement resolved via arbitration, she was able to opt-out of the arbitration agreement within sixty days of signing the loan agreement by sending written notice to Plain Green via mail or email. In fact, the ability to opt-out is highlighted at the front of the Arbitration Agreement. The first two sentences of the Arbitration Agreement read: "**This Agreement includes the following binding Waiver of Jury Trial and Arbitration Agreement (the "Agreement to Arbitrate"). You may opt out of the Agreement to Arbitrate by following these instructions**…" *Id.* at 8.

B. The arbitration provision includes a clearly-disclosed and prominent choice-of-law clause.

Both the loan agreement and the Arbitration Agreement contain choice-of-law clauses selecting the laws of the Chippewa Cree Tribe. *Id.* at 7 ("This Agreement and the Agreement to Arbitrate are governed by Tribal Law. The Agreement to Arbitrate also comprehends the application of the Federal Arbitration Act"); *see also id.* at 9 ("The arbitrator shall apply Tribal Law and the terms of this Agreement, including this Agreement to Arbitrate and the waivers included herein"). Importantly, the choice-of-law provision in the Arbitration Agreement sets forth that in addition to Tribal Law, the parties "**AGREE TO LOOK TO THE FEDERAL**

ARBITRATION ACT AND JUDICIAL INTERPRETATIONS THEREOF FOR GUIDANCE IN ANY ARBITRATION THAT MAY BE CONDUCTED." *Id.* at 9.

The choice-of law provisions were not hidden. At the top of the first page of Plaintiff's consumer loan agreement, under a header containing the words "**IMPORTANT DISCLOSURES**," it is clearly and conspicuously disclosed that the "Lender" selected by Plaintiff is a Native American tribe. *Id.* at 1 ("**THE LENDER […] IS THE TRIBAL GOVERNMENTAL LENDING ARM OF THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION, MONTANA**…."). Plaintiff was also informed on the first page, again in bold, all-caps:

> **THE BORROWER EXPRESSLY CONSENTS AND AGREE THAT THIS LOAN IS MADE WITHIN THE TRIBE'S JURISDICTION AND IS SUBJECT TO AND GOVERNED BY TRIBAL LAW AND NOT THE LAW OF THE BORROWER'S RESIDENT STATE. THE BORROWER IS STRONGLY CAUTIONED THAT IF THE BORROWER DOES NOT UNDERSTAND THIS CONSENT, OR DOES NOT WISH TO EXPRESSLY CONSENT TO TRIBAL JURISDICTION OR DOES NOT WISH TO HAVE THE LOAN GOVERNED BY THE LAWS OF THE TRIBE, THEN THE BORROWER SHOULD REFRAIN FROM ACCEPTING THE LOAN OR RESCIND THE LOAN WITHIN THE TERMS OF THE AGREEMENT. […] THE BORROWER'S RESIDENT STATE'S LAW MAY HAVE INTEREST RATE LIMITS AND OTHER CONSUMER PROTECTION PROVISIONS THAT ARE MORE FAVORABLE TO THE BORROWER. IF THE BORROWER WISHES TO HAVE THE BORROWER'S RESIDENT STATE LAW APPLY TO ANY LOAN THAT THE BORROWER OBTAINS, THE BORROWER SHOULD**

CONSIDER OBTAINING A LOAN FROM A LICENSED LENDER IN THE BORROWER'S STATE.

Id. at 1. Similarly, before signing her loan agreement, Plaintiff was also required to check a box indicated that:

> by checking here and signing below, you understand, acknowledge and agree that Plain Green, LLC is an tribal lending entity wholly owned by Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, Montana, a federally recognized tribe. You further understand, acknowledge and agree that this loan is governed by the laws of the Chippewa Cree Tribe and is not subject to the provisions or protections of the laws of your home state or any other state. If you wish to have your resident state's law apply to any loan that you obtain, you should consider obtaining a loan from a licensed lender in your state.

Id. at 9. Plaintiff checked the box indicating that she had read and agreed to the acknowledgement. *Id.*

In sum, on multiple occasions before finalizing and agreeing to the terms of her loans, Plaintiff consented to the Arbitration Agreement and affirmed that:

- any dispute, including past disputes, between Plaintiff and her Lender, servicer, vendor or other third-party, along with any officer, employee, or manager of those entities, would be arbitrated unless Plaintiff exercised the right to opt-out from the arbitration procedure within sixty days;
- any arbitration would take place, at Plaintiff's choice, on tribal land or within 30 miles of her residence in Michigan;
- Plain Green would pay the costs of arbitration;
- any arbitration would be administered, at Plaintiff's election, at one of two highly qualified, professional arbitration associations;

- the arbitration would be governed by the laws of the Chippewa Cree Tribe;

- the arbitrator, not a court, would make gateway determinations about the arbitrability of any disputes; and

- Plaintiff had the opportunity to opt out of the arbitration provision.

The provisions of the Arbitration Agreement were conspicuously and repeatedly disclosed to Plaintiff in her loan agreement. Plaintiff had no barriers to access arbitration to resolve any dispute. Yet, despite these clear protections and contractual obligations, Plaintiff did not pursue her claims in the arbitral forum required by the loan agreement. Instead, Plaintiff instituted this lawsuit.

III. ARGUMENT

A. Plaintiff's loan agreement contains an enforceable agreement to arbitrate.

As an initial matter, there can be no doubt that Plaintiff has agreed to arbitrate, rather than litigate, the claims in her Complaint. Plaintiff's Complaint acknowledges the presence of the arbitration agreement in her loan agreement, while simultaneously attempting to avoid enforcement of that arbitration agreement. Compl. at ¶¶ 159-172. Even if this were not the case, the terms of the arbitration agreement make clear that Plaintiff's claims are within the scope of the arbitration agreement and must, accordingly, be sent to arbitration.

Arbitration agreements are subject to clear and well-understood rules. The Federal Arbitration Act ("FAA") provides that a written arbitration provision

contained in a "contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Courts are required to "rigorously enforce arbitration agreements according to their terms." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (internal quotation marks and citation omitted), without regard to policy judgments about the nature of the underlying business. *See Ngoc Hoang v. Auto. Lease Guide, Inc.*, No. 08-CV-11321, 2008 WL 11355525, at *2 (E.D. Mich. Oct. 6, 2008) (Friedman, J.) (noting that "both the Supreme Court and the Sixth Circuit have held that arbitration agreements should be 'rigorously' enforced"). The FAA, therefore, reflects a strong national policy in favor of arbitration. *See, e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019).

Where a court is satisfied that the parties agreed to arbitrate a dispute, a district court must grant a motion to compel arbitration and stay the proceedings pending the outcome of that arbitration. 9 U.S.C. §§ 3, 4; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (noting that the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed"). As a matter of federal law, to the extent there are "any doubts concerning the scope of arbitrable issues," such doubts must "be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *GGNSC Louisville Hillcreek, LLC v. Estate of Bramer by & through Bramer*, 932 F.3d 480, 484 (6th

Cir. 2019) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)). Given this command, where the language of an arbitration agreement is broad, such as here, "only an express provision excluding a specific dispute," will take a dispute outside of the scope of this issues that must be referred to arbitration. *Masco Corp. v. Zurich American Ins. Co.*, 382 F.3d 624, 627 (6th Cir. 2004). And, as this Court recently determined, "an arbitration provision within a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration," because under those circumstances, the parties have "presumptively" agreed to arbitrate disputes arising from or about the contract. *Roasting Plant of Michigan JV, LLC v. Roasting Plant, Inc.*, No. 18-CV-10295, 2018 WL 5885508, at *4 (E.D. Mich. Nov. 9, 2018) (Friedman, J.) (quoting *Johnson v. Stellar Recovery, Inc.*, No. 13-13829, 2014 WL 5705027, at *4 (E.D. Mich. Nov. 5, 2014)).

Here, Plaintiff has unquestionably agreed to arbitrate any dispute that arises from her loan agreement, including claims against Rees. First, Plaintiff's claims are plainly covered by the arbitration agreement's expansive definition of "Disputes." By its very terms, the arbitration agreement applies to any "Dispute," which expressly includes "any claim or controversy of any kind […] otherwise involving this Agreement or the Loan." Compl. Ex. Ex. B. Similarly, the definition of a "Dispute" that Plaintiff agreed to arbitrate includes claims and controversies between Plaintiff and "Plain Green, LLC as the Lender, Plain Green's affiliated companies, the Tribe,

Plain Green's servicing and collection representatives and agents, and each of their respective agents, representatives, employees, officers, directors, members, managers, attorneys, successors, predecessors, and assigns." *Id.* There can be no doubt that Plaintiff's claims arise from, and otherwise involve her loan. And, Plaintiff's claims against Rees are all based upon her (false) assertion that Think Finance and Rees (as CEO of Think Finance) provided services to Plain Green that caused Plaintiff's harm. Those allegations place Plaintiff's claims squarely within the scope of a "Dispute" against an officer of a "servicing and collection representative" of Plain Green.[4]

Accordingly, the plain language of the arbitration agreement reveals Plaintiff's claims are within the definition of a "Dispute" that she agreed to arbitrate. The FAA requires this Court to compel such an arbitration. 9 U.S.C. § 3.

B. The clear and conspicuous delegation provision requires arbitration of any challenge to the Arbitration Agreement.

Notwithstanding the presence of a clear agreement to arbitrate her claims arising out of her loan agreement, it is anticipated that Plaintiff will argue that the Court should nonetheless refuse to enforce the arbitration agreement. Specifically, it

[4] Even if this were not the case, "[t]he Sixth Circuit has recognized that nonsignatories may be bound to arbitration agreement under ordinary contract and agency principles." *D & R Co., LLC v. BASF Corp.*, No. 09-CV-10641, 2010 WL 11545257, at *3 (E.D. Mich. Mar. 26, 2010) (collecting cases). While there is no need to resort to such theories given that Plaintiff's allegations places Rees squarely within the scope of the agreement to arbitrate. Yet, Plaintiff clearly received a direct benefit from her loan agreement, and she is estopped, and cannot avoid having to arbitrate claims arising from that loan agreement.

is anticipated that Plaintiff will mirror her requests a declaratory judgment that declares the arbitration agreement to be void and unenforceable. Compl. at ¶¶ 159-173. But the arbitration agreement contains a clear and conspicuous delegation provision. Compl. at Ex. B at 8 (noting that a "Dispute" that must be arbitrated "includes any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate"). Given the presence of a delegation provision, the Court must refer all questions of enforceability and arbitrability to arbitration.

Because "arbitration is a matter of contract," the Supreme Court has repeatedly reaffirmed that parties "may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability." *Henry Schein v. Archer & Whites Sales, Inc.*, 586 U.S. ----, 139 S. Ct. 524, 529 (2019). Such a provision is referred to as a "delegation provision," and is evaluated as "an additional, antecedent agreement," which is "valid under § 2 [of the FAA] 'save upon such grounds as exist at least or in equity…." *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 70-71 (2010); *see also First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (noting that parties can agree for arbitrators to decide arbitrability).

Where, as here, the parties have expressly delegated initial gateway questions of arbitrability to an arbitrator, a district court's task under the FAA is exceedingly clear: it is required to "respect the parties' decision as embodied in the contract," and send the matter to arbitration for an arbitrator to determine whether the agreement is enforceable. *Henry Schein*, 139 S. Ct. at 528, 531. As the Supreme Court made clear in

Henry Schein, "if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, **a court may not decide the arbitrability issue**." *Id.* at 530 (emphasis added). This is so, even where a district court believes that the resolution of arbitrability issues will not be meritorious. *Id.* In other words, where, as here, the parties express a clear and unmistakable intent to arbitrate issues of arbitrability, it is the obligation of a court to enforce the delegation provision even where the court believes the answers to arbitrability questions are free from doubt. *Id.* Indeed, a district court in this circuit recently recognized that a prospective waiver/effective vindication challenge, like the one likely to be asserted by Plaintiff, must be "heard by the arbitrator where, as here, the parties' agreement includes a delegation clause." *De Angelis v. Icon Entm't Grp. Inc.*, 364 F. Supp. 3d 787, 795 (S.D. Ohio 2019) (ultimately holding plaintiff's "effective vindication challenge must, therefore, be raised before the arbitrator in the first instance"). The Court in *De Angelis*, along with numerous others, has also applied *Henry Schein* to require "challenges based on mutual assent, lack of consideration, and unconscionability," to be submitted to an arbitrator in the presence of a delegation clause. *Id.*

Plaintiff's loan agreement unquestionably contains a clear, conspicuous, and enforceable delegation provision requiring arbitration of "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." Compl. at Ex. B at 8; *see also See Rent-A-Center*, 561 U.S. at 68-69 (holding that similar language constitutes a clear and unmistakable intent to delegation provision requiring

arbitration of threshold issues of arbitrability); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199–2000 (2d Cir. 1996) (ruling that where an arbitration provision indicates an intent to arbitrate "any and all" claims, it reflects a "broad grant of power to the arbitrators" that evidences the parties' clear "inten[t] to arbitrate issues of arbitrability"). Given the presence of such an express delegation clause in the arbitration agreement, *Henry Schein* compels only a single result—to send any dispute over arbitrability to an arbitrator.

Similarly, courts have held that where an arbitration agreement incorporates or references the arbitration rules from AAA or JAMS, such incorporation is evidence of a clear and unmistakable intent to delegate arbitrability questions to an arbitrator. *See Bishop v. Gosiger, Inc.*, 692 F.Supp.2d 762, 769 (E.D. Mich. 2010) (collecting cases from six federal circuit courts and courts of the Sixth Circuit predicting the Circuit would adopt this line of authority, but refusing to expressly include the reasoning in its holding); *see also Brennan v. Opus Bank*, 796 F.3d 1125, 1130–31 (9th Cir. 2015) (collecting cases and noting that "the vast majority" of circuits have determined that reference to AAA or JAMS rules evinces an intent to arbitrate arbitrability, and have reached that conclusion "without explicitly limited that holding to sophisticated parties or to commercial contracts."). The consumer rules of both the AAA and JAMS are both referenced in the arbitration agreement, and arbitrations are required to take place according to those rules. Compl. at Ex. B. at 8. In fact, the consumer rules of those arbitral forums provide for additional protections for Plaintiff in any

arbitration—in some cases more than than she would receive in court. Accordingly, the reference to such rules, again, demonstrates a clear and unmistakable intent to delegate issues of arbitrability to an arbitrator, and this Court should not hesitate to send all questions of arbitrability to arbitration under *Henry Schein*.

C. Plaintiff offers no evidence to avoid her arbitration agreement.

Given the presence of a clear delegation provision, the Supreme Court's decision in *Henry Schein* leaves this Court with little to do other than send this case to arbitration. But to the extent the Court considers Plaintiff's challenges to the arbitration agreement, they are without merit.

A party resisting an otherwise facially valid arbitration agreement "bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000); *accord Smith v. ComputerTraining.com Inc.*, 772 F.Supp.2d 850, 855 (E.D. Mich. 2011) ("The party opposing arbitration has the burden to show that the agreement is not enforceable"). Similarly, the Sixth Circuit has noted that "the party opposing arbitration must show a genuine issue of material fact as to the validity of the agreement to arbitrate," by making an evidentiary showing akin to "that required to withstand summary judgment in a civil suit." *Green Earth Companies, Inc. v. Simons*, 288 F.3d 878, 899 (6th Cir. 2002). In making this evidentiary showing, reliance on citations to other cases alleged to be similar "is not an appropriate substitute for presenting […] evidence." *Yaroma v. Cashcall, Inc.*, 130 F.Supp.3d 1055, 1065 (E.D. Ky. 2015) (compelling arbitration of

claims against servicing and collection companies for Native American lender over plaintiff's allegations of unconscionability, prospective waiver, and that the loan agreement was void *ab initio* given the interest rates charged).

Plaintiff has, to date, made no such evidentiary showing. Instead, the Complaint contains only a patchwork of improper and irrelevant declaratory statements—offered solely on counsel's *ipse dixit* and stripped of any meaningful context—as well as citations to cases in other jurisdictions concerning other Native American lenders. That is clearly not enough.

1. The choice-of-law clause is enforceable.

Plaintiff's first, and chief, objection to arbitration, is that the arbitration agreements contain a choice-of-law clause selecting the laws of the Chippewa Cree Tribe. Plaintiff, through citations to other cases, argues that it is a certainty that any arbitration conducted pursuant to such a choice-of-law clause, prevents her from effectively vindicating her claims. But that conclusion is entirely unsupported by evidence and contrary to Supreme Court authority. Those shortcomings require the Court to compel arbitration in conformity with the FAA.

As the Supreme Court has repeatedly reaffirmed, "[n]ot only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures." *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018). As such, it is beyond question that parties to arbitration agreements can "specify by contract the rules under which the

arbitration will be conducted." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). This includes "considerable latitude to choose what law governs" an arbitration. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). Such latitude means that parties are free to have their arbitration agreement "governed by the laws of Tibet, [or] the law of pre-revolutionary Russia," if they so choose. *Id.*

To this end, the Supreme Court, and numerous other courts of appeal have routinely enforced choice-of-law clauses selecting the laws of any number of foreign countries—to the exclusion of state and federal law. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Swiss law); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (Japanese law); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*") (English law); *Aggarao v. MOL Ship Management Company, Ltd.*, 675 F.3d 355 (4th Cir. 2012) (Philippines law); *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257 (11th Cir. 2011) (Bahamian law); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998) (*en banc*) (law of the United Kingdom).

In *Mitsubishi Motors*, for example, the Supreme Court permitted an arbitration to be conducted under a choice of Swiss law provision, even where it was alleged that "a contrary result would be forthcoming in a domestic context" in litigation conducted pursuant to federal law. 473 U.S. at 629-30. In *Vimar Seguros*, the Supreme Court likewise permitted a foreign arbitration to go forward under Japanese law, notwithstanding that Japanese law provided for complete defenses to liability that

were unavailable under federal law and which might be outcome determinative. *Id.*, 515 U.S. at 540-41. In *The Bremen*, the Supreme Court required enforcement of a choice of English forum and English law clause, notwithstanding that English law was likely to limit a plaintiff's maximum recovery to approximately $80,000, rather than the $3,500,000 recoverable under United States law. 407 U.S. at 3-4, 7-8, 8 n.8, 13 n.15.

Results from the Courts of Appeal are similar. In *Richards v. Lloyd's of London*, the *en banc* Ninth Circuit required enforcement of choice of English forum and English law provisions, notwithstanding that enforcement of the choice clauses resulted in plaintiffs' inability to bring claims available under United States securities laws, as well as RICO claims (such as those plead here). 135 F.3d at 1295-96. The Second Circuit, in *Roby v. Corp. of Lloyd's*, also noted that "[i]t defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement." 996 F.2d 1353, 1360 (2d Cir. 1993). Similarly, the Tenth Circuit has recognized that "the fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement," of a forum selection clause. *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992). The Fourth Circuit in *Aggarao v. MOL Ship Management Company, Ltd.*, compelled arbitration of claims containing a choice of Philippines law, even where the defendants argued "that United States law should not

apply" under the choice clause, and where it was uncertain whether the plaintiff could "obtain an adequate remedy" under Philippines law. 675 F.3d at 372 n.16. These are just a selection of the numerous decisions from other courts of appeal that have properly applied the Supreme Court's prospective waiver case law.

The common theme throughout all of these cases is that the Supreme Court and the Circuits will routinely enforce choice-of-law and choice of forum clauses that apply to the exclusion of state and federal law. In each of these cases, the court required litigation or arbitration to proceed pursuant to the foreign choice-of-law and choice-of-forum provisions without finding a prospective waiver. That is because, as the Supreme Court recently reaffirmed, the prospective waiver doctrine will apply only when a litigant demonstrates that the arbitration and choice-of-law clauses work *eliminates the right to pursue a remedy*. *Italian Colors*, 570 U.S. at 236. Yet such cases are the extreme exception, and the Supreme Court has never invalidated an arbitration agreement on the basis that a consumer has been unable to effectively vindicate her rights. *Id.* at 235 (confirming the Supreme Court's repeated recognition of the effective vindication exemption but noting that the Court has always "declined to apply [the effective vindication doctrine] to invalidate the arbitration agreement at issue")

Given this case law, the proper question for the Court when considering an effective vindication/prospective waiver challenge is "whether the application of foreign law presents a danger that the [plaintiff] 'will be deprived of any remedy or

treated unfairly.'" *Roby*, 996 F.2d at 1363 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55 (1981)); *accord Lindo*, 652 F.3d at 1269 (summarizing Supreme Court precedent to hold that "choice-of-law clauses may be enforced even if the substantive law applied in arbitration potentially provides reduced remedies (or fewer defenses) than those available under U.S. law"). Plaintiff has, thus far, offered no **evidence** that she will be deprived of **any remedy** or that she will be treated unfairly in an arbitration conducted by one of the most respected arbitration associations.[5]

Rather than attempt to meet her evidentiary burden, Plaintiff has thus far merely cited to other cases and argues that her federal and state statutory rights will invariably be waived "under the guise of a choice of laws clause." Compl. ¶ 161. That conclusion is, however, merely asserted in the Complaint as conclusory fiat. There is no evidence of the certainty of such an outcome. In fact, the the laws of the Chippewa Cree Tribe (which are freely available online to consumers *prior* to

[5] Indeed, it is not a forgone conclusion that Plaintiff will be required to arbitrate under the laws of the Chippewa Cree Tribe. As *Yaroma* recognized "[t]he final decision about which law to apply would be left to the arbitrator given the broad scope of the arbitration agreement and the typical practice in such situations." 130 F.Supp.3d at 1064; *see also Vimar Seguros*, 515 U.S. at 541 (compelling arbitration pursuant to Japanese law but noting that a "choice-of-law question […] must be decided in the first instance by the arbitrator"). And, of course, "a contract's general choice-of-law provision does not displace federal arbitration law if the contract involves interstate commerce," as this one does. *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 697 n.7 (4th Cir. 2012). These cases, combined with the clear statement in the arbitration agreement that the parties will "look to the federal arbitration act and any judicial interpretations thereof for guidance in any arbitration that may be conducted," remove all doubt that an arbitrator may conduct a choice-of-law analysis that could provide for Michigan law to apply.

connumating their loan agreement) make clear that there are significant remedies available under that law. *See, e.g.,* Section 10-6-201, Chippewa Cree Tribal Lending and Regulatory Code, available at https://www.plaingreenloans.com/content/assets/Uploads/title10.pdf (last visited September 6, 2019) (permitting actions by consumers for actual damages, injunctive relief, and equitable relief). The availability of these remedies to consumers under Chippewa Cree law is fatal to Plaintiff's prospective waiver claim.

Plaintiff has clearly not done nearly enough to support her evidentiary burden akin to opposing summary judgment. *Cf. Vimar Seguros*, 515 U.S. at 541 (compelling arbitration pursuant to foreign choice-of-law clause because "mere speculation" about how an arbitrator may rule under foreign law is an insufficient justification to avoid arbitration). As such, the Court should not hesitate to reject any challenge to the arbitration clause based upon the presence of a choice of Chippewa Cree law provision.[6]

[6] To the extent the Court has any concerns about the arbitrator's ability to apply the choice-of-law provision, it is beyond debate that Section 10 of the FAA permits a court to retain jurisdiction to resolve any issues with the enforcement of the arbitral award. *See Henry Schein*, 139 S. Ct. at 530 (acknowledging that Section 10 of the FAA "provides for back-end judicial review of an arbitrator's decision. . . ."); *Hooters of Am., Inc. v. Phillips,* 173 F.3d 933, 937 (4th Cir.1999) (a court retains jurisdiction over a case sent to arbitration because "[w]hen a valid agreement to arbitrate exists between the parties and covers the matter in dispute, the FAA commands the federal courts to stay any ongoing judicial proceedings and to compel arbitration."); *U-Save Auto Rental of Am. Inc. v. Furlo*, 368 F. App'x 601, 602 (5th Cir. 2010) (noting that "[o]nce the district court determined its jurisdiction for the purpose of ordering arbitration, it properly could retain jurisdiction to resolve any issues stemming from its order, including the

2. Plaintiff's remaining attempts to avoid the arbitration agreement lack evidence and are without merit.

Plaintiff's remaining likely arguments to avoid having to arbitrate her claims are similarly without merit. For example, Plaintiff states that "[b]ecause the monetary damages suffered by each Plaintiff [sic] and other members of the Class is small, the individual incentive to bring an action is extremely limited, particularly since Plain Green targets people who have few resources to bring a claim." Compl. ¶ 163(a). But such a concern for the ability to vindicate small-dollar claims has already been presented to, and firmly rejected by, the Supreme Court on multiple occasions as a basis to avoid arbitration. *See AT&T Mobility v. Concepcion*, 563, U.S. 333, 351 (2011); *Italian Colors*, 570 U.S. at 238; *Epic Sys.*, 138 S.Ct. at 1622-23.

Similarly, Plaintiff attacks her understanding or ability to understand of the contractual terms she agreed to. Compl. ¶ 163 (b)-(c). But, Plaintiff not only was repeatedly warned to read her loan agreement "**CAREULLY**," she was also given five full business days to review her loan agreement and rescind or cancel her loan by simply calling customer service. Compl. Ex. B at 4. As the Sixth Circuit has recognized, "[o]ne who signs a contract is presumed to know its contents, and ... if he has had an opportunity to read the contract which he signs he is bound by its provisions." *Stout v. J.D. Byrider*, 228 F.3d 709, 715 (6th Cir. 2000) (quoting *Sears,*

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enforcement of the award"). This back end review alleviates any concerns, and undercuts any argument, that the Court must consider the prospective waiver/effective vindication issues now.

Roebuck & Co. v. Lea, 198 F.2d 1012, 1015 (6th Cir.1952)). And, Plaintiff asserts a generalized concern regarding the ability to negotiate her loan agreement along with concerns regarding other terms of the arbitration agreement. Compl. ¶ 163 (d)-(f). But as courts have recognized, "[u]nconscionability cannot be based simply on the fact that arbitration clauses have become an immutable fixture of financial services contracts." *Big City Small World Bakery Cafe, LLC v. Francis David Corp.*, 265 F. Supp. 3d 750, 764 (E.D. Mich. 2017). This is because notwithstanding that "with many financial service providers such as banks, brokers, credit card companies, and other lenders," consumers are forced to either "relinquish access to a court to resolve disputes (take it) or forgo the service (leave it)," it is for "Congress or appellate courts" to change the law of arbitration as to consumer agreements. *Id.* (reaching this conclusion despite the court's concern over the "adhesive nature of the relationship").

In short, Plaintiff's additional bases for avoiding having to arbitrate her claims, at least as they have been expressed in her Complaint, are without merit.

IV. CONCLUSION

This case belongs in arbitration—the forum selected by the parties *ex ante* to decide all disputes, including arbitrability. No one seriously disputes the presence of the arbitration agreement signed by Plaintiff, requiring her to arbitrate all claims arising out of her loan agreement. And, at an irreducible minimum, the arbitration agreement's clear and conspicuous delegation provision requires the Court to

compel arbitration at least as to matters of arbitrability. As such, this Court must, pursuant to the FAA, order this case stayed and sent to arbitration.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

NICOLE MARIE SWIGER, *on behalf of herself and all individuals similarly situated*,	:	CIVIL ACTION
Plaintiffs,	:	NO. 2:19-cv-12014-BAF-RSW
v.	:	
JOEL ROSETTE, TED WHITFORD, TIM MCINERNEY, and KENNETH E. REES,	:	
Defendants.	:	

[PROPOSED] ORDER

AND NOW, this _ day of _____, 2019, upon consideration of Defendant Kenneth E. Rees's Motion to Compel Arbitration, and any responses and replies thereto, it is hereby **ORDERED** that the Motion is **GRANTED**. This case shall be stayed pending the parties' completion of arbitration.

_____

, J.

CERTIFICATE OF SERVICE

I, MICHELLE L. ALAMO, hereby certify that on this 30h day of September 2019, I filed electronically a copy of the foregoing *Defendant Kenneth E. Rees's Motion to Compel Arbitration*. This document is available for viewing and downloading from the ECF system and electronic notification has been sent to all counsel of record via the court's CM/ECF system.

s/ Michelle L. Alamo
Michelle L. Alamo