No. 19-2470

In the United States Court of Appeals for the Sixth Circuit

NICOLE SWIGER, on behalf of herself and all individuals similarly situated,
Plaintiff-Appellee,

v.

JOEL ROSETTE, TED WHITFORD, AND TIM MCINERNEY,
Defendants,

AND

KENNETH E. REES,
Defendant-Appellant.

On Appeal From the United States District Court
for the Eastern District of Michigan
The Honorable Bernard A. Friedman, Presiding
No. 2:19-cv-12014-BAF-RSW.

REPLY BRIEF OF DEFENDANT-APPELLANT KENNETH E. REES

Richard L. Scheff
Jonathan P. Boughrum
Michael C. Witsch
David F. Herman
ARMSTRONG TEASDALE LLP
2005 Market Street
One Commerce Square, 29th Floor
Philadelphia, PA 19103
Telephone: (267) 780-2000

Attorneys for Defendant-Appellant
Kenneth E. Rees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

In her Opposition, Plaintiff-Appellee fails to meaningfully engage the arguments and mandatory authority presented by Defendant-Appellant Rees's Opening Brief. Instead, Plaintiff forwards rejected theories of law relating to arbitration alongside meritless jurisdictional and preclusion arguments, seeking to avoid the core issues of this appeal. The Opposition also largely talks past the issues raised in the Opening Brief—using a morass of tangled arguments and quotations to argue Plaintiff's points. No amount of misdirection can however change the law, or the result required under the law: this case must be sent to arbitration, at least for an arbitrator to decide threshold issues of arbitrability.

Indeed, nowhere in the Opposition does the Plaintiff dispute the presence of a clear and conspicuous delegation provision, or offer a reason to not enforce that provision (rather than the arbitration agreement as a whole). That fact, alone, should require the court to compel arbitration.

The Opposition also asserts that Plaintiff's challenges to the enforceability of her arbitration agreement as a whole—including the ability of Rees to enforce the agreement as a non-signatory—require that a court (not an arbitrator) decide those issues. But that argument is directly at odds with the Supreme Court's decision in *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019), as well as this Court's recent decisions in *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842 (6th Cir. 2020), and *McGee v. Armstrong*, 941 F.3d 859 (6th Cir. 2019).

Finally, the Opposition attempts to divest this Court of jurisdiction to hear this appeal, as well as prevent meaningful review of the issues via the doctrine of collateral estoppel. Both arguments, however, are without merit and contrary to existing law.

In short, Plaintiff's Opposition seeks to avoid having to arbitrate with Rees by advancing a narrative of fact and law that has no basis. The Court should reject those arguments, and send this case to arbitration without delay.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS APPEAL.

Plaintiff argues (as she had in a previous Motion to Dismiss filed with this Court, Dkt. 14) that this Court lacks jurisdiction over the appeal for two reasons. See Opp'n at 6–13. First, Plaintiff briefly asserts that Rees lacks standing to compel arbitration, and therefore he also lacks standing to pursue this appeal. Opp'n at 9 n.8, at 36. Second, Plaintiff asserts that the terms of her arbitration agreement disclaim application of the FAA, Section 16 of the FAA does not apply, and, as such, this Court lacks jurisdiction to hear this appeal. Opp'n at 9–13. Neither argument has merit. To reach this conclusion, the Court need only apply the holding and reasoning of the Supreme Court's decision in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

In *Arthur Andersen*, the Supreme Court was asked to review this Court's jurisdictional dismissal of an appeal where the underlying appellate jurisdiction was predicated upon Section 16 of the FAA. *See id.* at 627 (citing *Carlisle v. Curtis, Mallet-*

Prevost, Colt & Mosle, LLP, 521 F.3d 597, 602 (6th Cir. 2008)). In dismissing the appeal in *Carlisle* for lack of jurisdiction, this Court determined that non-signatories to arbitration agreements could not invoke appellate jurisdiction under Section 16 of the FAA. *Carlisle*, 521 F.3d at 600, *rev'd sub nom. Arthur Andersen LLP v. Carlisle*, *supra*. The Supreme Court disagreed, holding appellate jurisdiction existed under Section 16 of the FAA even when the parties disputed whether a non-signatory could enforce an arbitration agreement. *Arthur Andersen*, 556 U.S. at 627–29.

The Supreme Court reasoned that Section 16 of the FAA confers jurisdiction on courts of appeal to review denials of motions to compel arbitration based solely upon a showing that a petitioner "explicitly asked for a stay pursuant to § 3." *Id.* at 627. Given Section 16's "clear and unambiguous terms," the Supreme Court held, "any litigant who asks for a stay under § 3 is entitled to an immediate appeal from denial of that motion—regardless of whether the litigant is in fact eligible for a stay." *Id.* The merits of the underlying request for a stay under Section 3 are irrelevant, "for even utter frivolousness of the underlying request for a § 3 stay cannot turn a denial into something other than '[a]n order ... refusing a stay of any action under [S]ection 3.'" *Id.* at 628–29. That is because, "jurisdiction over the appeal," is based upon "the category of order appealed from." *Id.* at 628 (quoting *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996)).

Given this clear directive from the Supreme Court, all that is required for Section 16 to vest this Court with jurisdiction to hear the appeal is: (1) a showing that

a litigant asked for a stay of the case pursuant to the FAA, and (2) the district court refused to enter such a stay to permit arbitration. That occurred here. Rees's Motion to Compel Arbitration specifically requested:

> 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.

Motion to Compel Arbitration, RE-5, PageID # 76. The district court then denied the request for stay made pursuant to the FAA. Order and Opinion, RE-14, PageID # 737.

Section 16 of the FAA, therefore, plainly confers this Court with *jurisdiction* to hear this appeal of the district court's denial of his motion to compel arbitration. *Arthur Andersen*, 556 U.S. at 627. Rees requested, and the district court denied, a motion to stay and compel arbitration made pursuant to the FAA. That is all the Supreme Court has said is required to provide this Court with jurisdiction over the appeal. *Id.* at 628. The procedural posture and facts at issue in *Arthur Andersen* are almost identical to those confronting this Court. The same result—at least as to jurisdiction—must follow, notwithstanding Plaintiff's arguments as to the frivolous nature of this appeal. *Id.* at 628–29 (confirming that even an appeal determined to be 'utterly frivolous' confers jurisdiction on this Court because frivolity "cannot turn a

denial [of the underlying motion] into something other than '[a]n order ... refusing a stay of any action under [S]ection 3'").

Perhaps aware of the result compelled by *Arthur Andersen*, Plaintiff also advances the argument that because she contends the contracts reject application of the FAA, this Court cannot exercise jurisdiction over the appeal. Plaintiff is wrong on the facts and the law. First, the loan agreements and arbitration provisions explicitly require application of the FAA. Specifically, the agreement to arbitrate expressly "comprehends the **application of the Federal Arbitration Act**." Loan Agreement, RE-1-3, PageID # 15 (emphasis added). There is no ambiguity. The parties agreed to the "**application** of the Federal Arbitration Act," in resolving any disputes that may arise. *Id.* (emphasis added).

Even if this were not so, Plaintiff is incorrect in her unsupported[1] legal argument that the FAA does not apply to these contracts. Opp'n at 12. As numerous courts have determined, a contract's invocations of the FAA is sufficient to reflect an intent to have the FAA apply to the arbitration agreements. *See Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294, 303 (6th Cir. 2008); *see also Muskegon Cent. Dispatch 911 v.*

[1] Beyond the naked assertion that the text of the arbitration agreement does not embrace the FAA, Plaintiff's brief identifies no legal reason why the FAA would not apply to her agreement. But the law is to the contrary. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) (noting that a court can enforce agreements to arbitrate and delegation provisions so long as the agreement "appears in a 'written provision in … a contract evidencing a transaction involving commerce.'" (quoting 9 U.S.C. § 2)). Plaintiff has never challenged that her loan agreement reflects a transaction involving commerce and, at least as a default matter, the FAA applies.

Tiburon, Inc., 462 Fed. App'x 517, 523 (6th Cir. 2012) (FAA can only be displaced through an "unambiguous intent" to do so, and "ambiguities are resolved in favor of the federal standard"); *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 921 (9th Cir. 2011) ("[C]ourts should apply federal arbitrability law absent clear and unmistakable evidence that the parties agreed to apply non-federal arbitrability law." (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Plaintiff has failed to demonstrate that the arbitration agreement reflects an "unambiguous intent" to disclaim application of the FAA.

Accordingly, the facts and the law establish that this Court has jurisdiction to decide the merits of this appeal. As discussed below, Plaintiff's merits challenges to the enforceability of her arbitration agreement must be submitted to an arbitrator.

II. MANDATORY AUTHORITY CONFIRMS ARBITRATION MUST BE COMPELLED ON THRESHOLD ISSUES OF ARBITRABILITY, INCLUDING ENFORCEABILITY, IN THE PRESENCE OF A DELEGATION CLAUSE.

Plaintiff's Opposition refuses to analyze the first issue that the Court must confront in this appeal—the presence and effect of a clear and conspicuous delegation provision requiring arbitration of threshold issues of arbitrability. To this end, the Opposition ignores and fails to contest the presence of a delegation provision in the loan agreement. Such a delegation clause is both explicit, *see* Loan Agreement, RE-1-3, PageID # 16, and embodied in the agreement's incorporation of the AAA consumer rules. *Id.* The Opposition similarly ignores the pages of detailed briefing on this issue in Rees's Opening Brief (at 24–36), and the analysis required to evaluate the

separate antecedent agreement to arbitrate threshold issues of arbitrability. The Opposition also ignores the mandatory authority from this Court in the form of *McGee v. Armstrong*,[2] a case issued *after* the close of briefing below, and which is determinative of the delegation clause issues. *McGee*, 941 F.3d at 867 (holding after the Supreme Court's decision in *Henry Schein*, a court's analysis of threshold issues of arbitrability is restrained, and compelling arbitration based on nothing more than a finding that "the parties delegated the threshold arbitrability question to an arbitrator") (internal quotation omitted). Indeed, the Opposition goes so far as to avoid all references to delegation provisions, and the phrase 'delegation provision' does not appear once in the brief. Plaintiff's refusal to confront this case law and the effect of the delegation provision is revealing.

Rather than engage with the effect of the delegation provision, Plaintiff argues that the "threshold question of validity is properly resolved in federal court" Opp'n at 44-45, and that a non-signatory cannot compel arbitration of any issues. Opp'n at 36-

[2] Plaintiff's lone reference to *McGee* in the Opposition admits that the case "concerns arbitrability," but attempts to distinguish the case on the basis that *McGee* analyzed an agreement "*between contracting parties*, not whether any agreement to arbitrate actually subsists between a signatory and a non-signatory to a contract." Opp'n at 36–37 (emphasis in original). This misses the point. In *McGee*, this Court noted "[b]efore deciding the scope of the agreement, we must decide who determines what disputes are arbitrable." 941 F.3d at 865. After the Supreme Court's decision in *Henry Schein*—which expressly overruled *Turi v. Main Street Adoption Servs., LLP*, 633 F.3d 496 (6th Cir. 2011)—courts within this circuit are no longer able to perform an initial analysis to determine whether claims "are at least arguably covered by the agreement." *McGee*, 941 F.3d at 866–67. Given the presence of a facially valid delegation provision, a court is without ability to analyze whether the claims or parties are within the scope of the arbitration clause. *Id.* That issue is for an arbitrator.

37. Plaintiff is simply wrong, as illustrated by this Court's recent decision in *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842 (6th Cir. 2020), which conclusively resolves the issue.

In *Blanton*, just as here, this Court was confronted with an argument from a plaintiff resisting arbitration that a particular defendant "couldn't enforce the arbitration agreements because the [defendant] hadn't signed the agreements." *Id.* at 844. This included an attempt by the defendant to compel arbitration of threshold issues pursuant to a delegation provision. *Id.* This Court, however, enforced the delegation provision, affirmed the lower court's decision to compel arbitration, and ordered all parties (including the non-signatory) to arbitration. *Id.* at 851–52. Much like the straightforward analysis in *McGee*, the panel in *Blanton* held that enforceability issues—including the ability of a non-signatory to enforce an arbitration agreement—must be considered by an arbitrator in the presence of a delegation provision. *Id.* Such a result, this Court noted, was ***required*** by the Supreme Court's decision in *Henry Schein* notwithstanding the plaintiff's concern that "a ruling for [the non-signatory] would mean that *anyone* could force him to arbitrate 'arbitrability' no matter how frivolous the argument for arbitration." *Id.* (citing *Henry Schein*, 139 S. Ct. at 531) (emphasis in original). This was because the mere presence of a delegation provision required the signatory to arbitrate issues of arbitrability, including the ability of a non-signatory to enforce the arbitration agreement.

If this were not clear enough, *Blanton* also rejected an attempt to vacate the lower court's opinion to the extent it decided whether the non-signatory "can enforce the arbitration agreement under state contract law (specifically equitable estoppel)" because "this question should be decided by an arbitrator, not a court," and the Court's "opinion makes clear that the arbitrator should decide for itself whether [the non-signatory] can enforce the arbitration agreement." *Id.* at 852.[3]

There is no daylight between the Court's prior holding in *Blanton* and the facts here. Just as in *Blanton*, Plaintiff argues that a non-signatory cannot enforce the arbitration agreement. Just as in *Blanton*, the arbitration agreement entered into by Plaintiff contains a clear and conspicuous delegation provision—a fact that Plaintiff does not contest. And just as in *Blanton*, the Court should compel arbitration of preliminary issues, including the enforceability of the arbitration agreement by a non-signatory.

Finally, because Plaintiff advances no argument in the Opposition that the delegation provision, rather than the arbitration agreement as a whole, is invalid or

[3] Numerous district courts within this circuit have reached an identical conclusion. *See, e.g.*, *De Angelis v. Icon Entm't Grp.*, 364 F. Supp. 3d 787, 796–79 (S.D. Ohio 2019) (enforcing delegation provision and compelling arbitration on issue of ability of non-signatory to arbitration agreement (and prospective waiver argument) because "to adjudicate whether [plaintiff] is bound to arbitrate with parties she alleges are nonsignatories would be to engage in the type of analysis that the Supreme Court held impermissible in *Henry Schein*."); *Victim v. Larry Flynt's Hustler Club*, No. 1:20-CV-1195, 2020 WL 5944317, at *4 (N.D. Ohio Oct. 7, 2020) (holding "the issue of whether [plaintiff's] claims against [defendant], a non-signatory to [plaintiff's] Lease, are indeed arbitrable[,] is for the arbitrator to decide.").

unenforceable, this Court must enforce the delegation provision. *Rent-A-Center, West, Inc.*, 561 U.S. 63, 72 (2010) ("[U]nless [a party seeking to avoid arbitration] challenge[s] the delegation provision specifically, we must treat it as valid ..., and must enforce it ..., [and] leav[e] any challenge to the validity of the Agreement as a whole for the arbitrator."); *Danley v. Encore Capital Grp., Inc.*, 680 Fed. App'x 394, 399 (6th Cir. 2017) (holding that *Rent-A-Center* required arbitration with non-signatory assignees as to threshold issues of enforceability pursuant to delegation clause, because litigants "did not acknowledge their delegation provisions, let alone challenge them" and instead advanced "various arguments regarding the validity of the assignment of the arbitration agreements as a whole").

In sum, the presence of a clear, conspicuous, and unchallenged delegation provision requires this Court to compel arbitration of—at a minimum—threshold issues of arbitrability. This includes arguments about the enforceability of an arbitration agreement by a non-signatory. *Blanton*, 962 F.3d at 85152.

III. NOTWITHSTANDING THE DELEGATION CLAUSE, PLAINTIFF'S CHALLENGES TO THE ARBITRATION AGREEMENT ARE WITHOUT MERIT.

Even if this Court ignored the clear and conspicuous delegation provision present in Plaintiff's arbitration agreement, it should nevertheless compel arbitration of these claims. Plaintiff offers only two reasons to avoid this result—that Rees, as a non-signatory, cannot enforce the agreement (Opp'n at 26–37), and that the

prospective waiver doctrine invalidates the arbitration agreement as a whole. Opp'n at 40–45. Such arguments, however, conflict with existing precedent.

Even as a non-signatory, Rees can properly compel arbitration of claims under circumstances present here. Rees—an executive at a company the Complaint alleges is affiliated with her lender—is expressly within the scope of the individuals and entities covered by the arbitration agreement. Even if that were not so, Plaintiff is also equitably estopped from refusing to arbitrate with a non-signatory given the factual allegations underlying her claims against that non-signatory.

Finally, Plaintiff fails to support her prospective waiver arguments. Specifically, Plaintiff fails to address mandatory authority from this Court on the proper application of that doctrine, and instead relies exclusively on out of circuit precedent applying a markedly different standard. Plaintiff offers no valid reason to avoid this Court's mandatory authority.

A. Plaintiff must Arbitrate her claims against Rees, despite Rees's status as non-signatory.

1. The Arbitration Agreement expressly contemplates arbitration of the claims against Rees, an individual alleged to be an officer of a service provider to Plaintiff's lender.

Plaintiff is wrong in her assertion that Rees is prohibited from directly invoking arbitration. The scope of the arbitration agreement at issue is exceedingly broad. The arbitration agreement explicitly covers "any claim or controversy … involving [Plaintiff's] agreement or her loan," as well as all disputes with "Plain Green's

affiliated companies" and "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." Loan Agreement, RE-1-3, PageID # 16. This breadth covers Plaintiff's dispute with Rees, including the claims in the Complaint.

As described in the Complaint, Plaintiff's claims against Rees all involve and invoke her loan agreement. *See generally* Complaint, RE-2, PageID # 28–66. That fact alone brings any claim arising from the loan agreement within the scope of claims Plaintiff must arbitrate. Moreover, the claims against Rees are founded upon allegations that he is the "current chairman of the board of Think Finance," he continues to "maintai[n] a controlling interest and operational role," in Think Finance, and that he acted in concert with Plain Green officers to directly harm Plaintiff. Complaint, RE-2 ¶¶ 21, 95–98, 105, 107–108 PageID # 33, 47–49. The Complaint also alleges that Think Finance continues to "provide the infrastructure to run the lending operations, including the software, 'risk management, application processing, underwriting assistance, payment processing, and ongoing service support' for consumer loans" originated by Plain Green. Complaint, RE-2 ¶ 61, PageID # 42.

Accordingly, Plaintiff's Complaint admits that Think Finance is a company that falls within the definition of "Plain Green's servicing and collection representative," and whose "representatives, employees, officers, directors, members, [and] managers," are expressly able to invoke arbitration under the agreement. Rees, who the

Complaint expressly alleges is the CEO of Think Finance, falls within the category of individuals contemplated and covered by the arbitration agreement.[4]

2. Plaintiff is also Estopped from Refusing to Arbitrate with Rees for Claims Intertwined with her Loan Agreement.

The Opposition (at 27–37) also asserts that Rees is a third party, without ability to compel arbitration. That is, again, incorrect. Michigan courts have uniformly recognized that non-signatories to an arbitration agreement can compel arbitration with unwilling signatories to that agreement in some cases. One such theory is the doctrine of equitable estoppel. Under that doctrine, Plaintiff cannot refuse to

[4] Plaintiff tries to distance herself from her prior allegations, arguing that Rees and Think Finance have "had no business relationship with Plain Green, direct or indirect, since June 1, 2016," and that therefore Rees cannot directly invoke the arbitration agreement. *See, e.g.*, Opp'n at 25–26, 26 n.21. While it is unquestionably correct that Rees lacked any connection with both Plain Green and Think Finance as of the date of Plaintiff's loan in December 2018, Plaintiff has continued to advocate these positions against Rees in this litigation, and has not sought to amend her Complaint to withdraw any contrary allegations.

Litigants are "impressed with a continuing responsibility to review and reevaluate his pleadings and where appropriate modify them to conform to Rule 11." *Merritt v. Int'l Ass'n of Machinists & Aerospace Workers*, 613 F.3d 609, 626 (6th Cir. 2010) (quoting *Runfola & Assocs., Inc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 374 (6th Cir. 1996)). Plaintiff cannot simultaneously advance arguments seeking to avoid arbitrating her claims against Rees based on his purported lack of involvement in the scheme in December 2018, while simultaneously maintaining factual and legal allegations in her Complaint that assert he was intimately involved in the business. Plaintiff cannot have it both ways.

Ultimately, Plaintiff's shifting allegations against Rees, while troubling, are superfluous to the overall enforceability analysis. This is because even if Plaintiff amended her allegations to make clear Rees is no longer actively involved in any dealings with Think Finance or Plain Green, arbitration with Rees would still be compelled under principals of equitable estoppel notwithstanding Rees's status as non-signatory.

arbitrate claims arising from her loan agreement or that allege a scheme wherein signatories and non-signatories, acting in concert, caused her harm. Both circumstances are present here.

First, it is undisputed that Plaintiff freely agreed to arbitrate any dispute "involving this Agreement [to arbitrate] or the Loan," including "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." Loan Agreement, RE 1-3, PageID # 16. Similarly broad language requiring a plaintiff to arbitrate "any dispute or controversy arising out of or relating to" an agreement, has been held to "ves[t] the arbitrator with authority to clear plaintiffs' … claims, even if they involve nonparties to the agreement." *Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C.*, 742 N.W.2d 409, 421 (Mich. App. 2007)[5]; *see also Scodeller v. Compo*, No. 332269, 2017 WL 2791452, at *3 (Mich. App. June 27,

[5] The Opposition misconstrues the holding of *Rooyakker*, stating the case "held non-parties could invoke arbitration because 'Michigan courts clearly favor keeping all issues in a single forum', which policy would be 'thwarted if all disputed issues in an arbitration must be segregated into arbitrable and non-arbitrable categories.'" Opp'n at 33. Moreover, the Opposition asserts that the rationale of *Rooyakker* does not apply because there is no arbitration underway with a contracting party. Opp'n at 34. But Plaintiff's summary of *Rooyakker* is misleading at best. Rather, while the quotes from *Rooyakker* are accurate, the Opposition hides that these quotes formed an additional basis for the court's holding, not the primary holding. The Court's primary holding was embodied in its unequivocal statement that "the broad language of the arbitration clause—'any dispute or controversy arising out of or relating to' the agreement—vests the arbitrator with the authority to hear plaintiffs' tortious interference and defamation claims, **even if they involve nonparties to the agreement**." *Rooyakker*, 742 N.W.2d at 421 (emphasis added). Nowhere in this holding did the *Rooyakker* court limit its holding to circumstances in which a contracting party was first compelled to arbitration. Identically broad language is present in Plaintiff's arbitration agreement, and the same result should be compelled.

2017) (unpublished) (interpreting similar language, and holding that all claims arising out of a contract were subject to arbitration "regardless of whether they are against a party that signed the agreement or against a party that did not sign the agreement").

This Court, and others, have recognized this principle: "a signatory [ ] may be estopped from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the underlying contract." *Javitch v. First Union Sec., Inc.*, 315 F3d 619, 629 (6th Cir. 2003); *see also CD Partners, LLC v. Grizzle*, 424 F.3d 795, 799 (8th Cir. 2005) (noting that "a willing non-signatory seeking to arbitrate with a signatory that is unwilling may do so under what has been called an alternative estoppel theory").

Interpreting these principles, Michigan courts have recognized that:

> a non-signatory to an arbitration agreement can compel arbitration: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against a non-signatory; or (2) when the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more signatories to the contract.

City of Detroit Police & Fire Ret. Sys. v. GSC CDO Fund Ltd., No. 289185, 2010 WL 1875758, at *7 (Mich. App. May 11, 2010) (unpublished) (compelling arbitration because signatory to an arbitration agreement was estopped from arguing that claims against non-signatory were not subject to arbitration); *see also Kaki v. Tenet Healthcare Corp.*, No. 19-10863, 2019 WL 5068456, at *3–4 (E.D. Mich. Oct. 9, 2019) (citing *City*

of Detroit and compelling arbitration of federal claims against non-signatory defendants). Both circumstances are present here.

All of Plaintiff's claims against Rees rely on the terms of her purportedly usurious loan agreement containing the arbitration agreement. *See generally* Complaint, RE-2, PageID # 28–66. Plaintiff's claims against Rees cannot be resolved without reference to her loan agreement and the purportedly usurious interest rates charged by her lender.

Similarly, Plaintiff has placed Rees at the center of all of the Complaint's allegations of misconduct. *Id.* For example, the operative Complaint alleges that Rees has "personally designed and directed the business activity described in this Complaint," and that he also "maintains a controlling interest and operational role in" a service provider to Plaintiff's lender. *Id.* ¶¶ 21–22, PageID #33. Throughout the Complaint, Plaintiff also is explicit in alleging that Rees acted "in combination with" other defendants (each of whom also alleged to be officers of Plaintiff's lender), and that he "personally participated in and oversaw the illegal lending enterprise." *Id.* ¶¶ 7–8, 95–98, 107–108, PageID # 2, 47–49. Rees is even alleged to have "created," the "Plain Green enterprise" that made the loan to Plaintiff. *Id.* ¶¶ 90, PageID # 47.

These allegations establish that Plaintiff's allegations of misconduct by her lender (a signatory to the arbitration agreement) are inextricably intertwined with her claims against Rees (a non-signatory). Thus, Michigan law requires Plaintiff to

arbitrate her claims against Rees, notwithstanding his status as a non-signatory to the arbitration agreement. *City of Detroit*, 2010 WL 1875758, at *7.

Plaintiff attempts (Opp'n at 34–35) to avoid this clear line of authority by arguing that a recent decision from the Michigan Supreme Court—*Beck v. Park W. Galleries, Inc.*, 878 N.W.2d 804 (Mich. 2016)—requires a different outcome. But *Beck* involved materially different circumstances and is wholly inapplicable here. Specifically, in *Beck* the court was confronted with the question of whether arbitration agreements contained in later purchase agreements could apply to require arbitration of claims arising from earlier purchase agreements between the same parties. *Id.* at 878 N.W.2d at 808–810. In holding that the later arbitration agreements could not provide a basis upon which to compel arbitration of claims arising under separate, earlier purchase agreements, the Michigan Supreme Court did not break new ground or overrule, *sub silentio,* cases such as *Rooyakker*. Rather, *Beck* is limited to its holding—that arbitration agreements in separate contracts are considered separately. *Id.* at 810.

To this end, Plaintiff's assertion that *Beck* is relevant to this Court's decision is erroneous. *Beck* does not address the doctrine of equitable estoppel, or any of the other bases upon which a non-signatory could be forced to arbitrate a claim with a non-signatory. It has no application to this case.

Plaintiff agreed, without qualification, to arbitrate all claim "arising out of or relating to" her loan agreement. Plaintiff's claims require interpretation and analysis of her loan agreement, and allege causes of action against Rees that are intertwined

with alleged misconduct by a signatory to her loan agreement. Put differently, Plaintiff could not possibly assert claims against Rees without referencing her loan agreement and the alleged misconduct of her lender. Given this Court's equitable estoppel case law, these facts require that Plaintiff arbitrate her claims against Rees.

B. Plaintiff Fails to Engage With This Court's Prospective Waiver Case Law.

Plaintiff also asserts (Opp'n at 40–44) that the prospective waiver doctrine invalidates her agreement to arbitrate. But the prospective waiver arguments advanced in the Opposition are contrary to existing controlling authority. The Court should therefore reject Plaintiff's prospective waiver arguments.

First, as set forth above, the presence of a clear, conspicuous, and unchallenged delegation provision requires that an arbitrator, and not a court, decide such threshold issues going to the enforceability of the arbitration agreement. *See De Angelis*, 364 F. Supp. 3d at 795 (holding a prospective waiver argument "is a challenge to the enforceability of the arbitration agreement. After *Henry Schein*…these challenges are heard by the arbitrator where, as here, the parties' agreement includes a delegation clause. [Plaintiff's] effective vindication challenge must, therefore, be raised before the arbitrator in the first instance."). The Opposition also fails to examine or discuss the effect of the clear and conspicuous delegation provision. Like all other arguments that go to the enforceability of an arbitration agreement, the Supreme Court's decision

in *Henry Schein* requires that an arbitrator hear such prospective waiver challenges in the presence of a delegation provision.

Plaintiff seeks to avoid this result by arguing that *Schein* requires a court to "determine whether a valid arbitration agreement exists," which, in turn, requires a court to consider whether the prospective waiver doctrine invalidates the agreement. Opp'n at 44. In other words, because Plaintiff claims the underlying arbitration agreement is unenforceable under the prospective waiver doctrine, Plaintiff's view is that a court is free to ignore a delegation provision requiring that an arbitrator decide such issues of enforceability. This is nothing more than circular reasoning designed to avoid the result compelled by *Henry Schein*. Were the Court to accept Plaintiff's argument, *Henry Schein* would be rendered meaningless—all threshold defenses to the validity and enforceability of an arbitration agreement would need to be adjudicated by a federal court rather than compelled to arbitration pursuant to a delegation clause so long as the defense, if accepted, would invalidate the arbitration agreement. No case stands for this proposition, and the Court must reject the argument as unsupported and contrary to the law.

Second, Plaintiff's prospective waiver arguments contradict mandatory authority from this Court, as well as the Supreme Court, as Rees points out in his Opening Brief (at 41–50). While the Opposition terms these arguments "extended bloviations" (Opp'n at 43), and seeks, instead, to have out-of-circuit precedent apply to this case (Opp'n at 43–44), this Court cannot ignore the authority to which it is

bound. While Plaintiff may prefer that this Court apply the out-of-circuit decisions interpreting the prospective waiver doctrine in what Plaintiff contends are similar circumstances based upon the presence of a Native American lender, this Court may not unjustifiably depart from its prior precedents based upon Plaintiff's preference.

Indeed, Plaintiff fails to engage with this Court's mandatory authority in *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995)—a case addressing the proper prospective waiver standard courts should apply (one that is different from the out-of-circuit cases relied upon by Plaintiff), and that was cited at length in Rees's Opening Brief. While the Opposition (at 43–44) cites out-of-circuit decisions for the proposition that loan agreements selecting the law of a Native American tribe will always run afoul of the prospective waiver doctrine, *Shell* requires a different analysis. Indeed, the analysis performed by *Shell* expressly rejects Plaintiff's preferred formulation of the prospective wavier doctrine, stating that it would "defy reason" to permit a litigant to "circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement." 55 F.3d at 1231. But that is precisely what Plaintiff's prospective waiver argument posits—that the choice of Native American law provision is not co-extensive with state and federal law, and therefore the prospective waiver doctrine invalidates the choice clause.

Plaintiff's interpretation of the prospective waiver doctrine is in direct conflict with this Court's earlier decision in *Shell*. This Court should not hesitate to apply the

standard set forth in *Shell*, reject Plaintiff's prospective waiver challenge, and compel arbitration.

IV. PLAINTIFF'S ISSUE PRECLUSION ARGUMENTS ARE SIMILARLY WITHOUT MERIT.

Perhaps nowhere is the Opposition's desperation to avoid having to arbitrate their claims more apparent than the twisted and strained attempts to have collateral estoppel prevent any analysis of the arbitration issues. *See* Opp'n at 13–23. In arguing that Rees is collaterally estopped from attempting to compel arbitration, the Opposition: (1) advances an incorrect standard of review, (2) applies the wrong law, and (3) ignores crucial facts and key differences between this case and the *Gingras* case upon which preclusion is purportedly based.

First, the Opposition presents an incorrect standard of review, arguing that "a district court's decision to allow offensive invocation of collateral estoppel is reviewed for abuse of discretion." Opp'n at 13 (citing *Parklane Hosiery Co., Inc v. Shore*, 439 U.S. 322, 331 (1979)). This statement of the law is troubling for several reasons, most notably because it is incorrect. There are no Sixth Circuit decisions that apply anything other than complete *de novo* review of all issues relating to collateral estoppel. *See, e.g.*, *Georgia-Pac. Consumer Prod. LP v. Four-U-Packaging, Inc.*, 701 F.3d 1093, 1097 (6th Cir. 2012) (applying *de novo* review of rulings on issue preclusion); *Stemler v. Florence*, 350 F.3d 578, 585 (6th Cir. 2003) (same). The lone support Plaintiff offers is the Supreme Court's decision in *Parklane Hosiery*, a decision that does not address the

relevant standard of review. Rather, the cited section of *Parklane Hosiery* states that district courts have discretion as to which factors to apply when evaluating the doctrine of offensive collateral estoppel. *Parklane Hosiery*, 439 U.S. at 331. The Opposition, therefore, confuses the applicable legal standard on review (*de novo*) with a statement permitting lower courts to freely consider many factors when ruling on issues of collateral estoppel. *De novo* review clearly applies.

Second, the Opposition improperly argues that federal common law provides the rule of decision for issue preclusion in this action, and that state law has no applicability to this case. Opp'n at 17, 21 n.19 (citing *Allen v. McCurry*, 449 U.S. 90, 96 (1980)). This is, again, incorrect. As the Supreme Court noted in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001), in diversity cases, federal courts will apply the same rule "whether the dismissal has been ordered by a state or federal court." Specifically, a court sitting in diversity must apply the claim preclusion rules "that would be applied by state courts in the State in which the federal diversity court sits." *Id.* at 508; *accord Taveras v. Taveras*, 477 F.3d 767, 783 (6th Cir. 2007). Here, there is no doubt that the district court had jurisdiction, at least in part, under 28 U.S.C. §1332(a). Complaint, RE-2 ¶ 15(A) PageID # 31; Opp'n at xi. As a result, the claim preemption laws of the state in which the court sits, Michigan, apply.

This distinction is not insignificant. For example, Rees pointed out in his opening brief, Michigan claim preemption law does not permit the use of offensive collateral estoppel. *Lewis v. City of Detroit*, No. 09-CV-14792, 2011 WL 2084067, at *3

(E.D. Mich. May 24, 2011) ("Offensive use of nonmutual collateral estoppel—unlike defensive use of nonmutual collateral estoppel—is not permissible in Michigan."). Offensive collateral estoppel, as the Opposition admits, is precisely what Plaintiff attempts to assert here. *See* Opp'n at 18, 21.

Finally, the Opposition's estoppel misrepresents and assumes facts that are either unsupported, or untrue. For example, the Opposition asserts (without support) that "*Gingras* involved the identical Plain Green arbitration clauses," that are at issue in this case. Opp'n at 17. Not so. Indeed, as other courts have recognized, there are material differences in the arbitration clauses that were at issue in *Gingras* and those at issue here from 2018. *See* Hr'g Tr., *In re Think Finance, LLC*, Docket No. 17-33964, Dkt. 1017 at 24:25–25:7 (N.D. Tex. Bankr. Sept. 27, 2018) (oral ruling examining Plain Green loan agreements and noting material differences in loan agreements from 2015 through 2017 as compared to loan agreements from before 2015) (a copy of the transcript is attached as Exhibit 'A.').

Similarly, Plaintiff argues that Rees had a "full and fair opportunity" to present his claims solely because affidavits were submitted in support of the motion to compel arbitration. But this ignores (as Rees pointed out in his Opening Brief) that the district court refused to consider any of this evidence, and instead accepted only the allegations of the Complaint. *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163, at *18 (D. Vt. May 18, 2016). The court in *Gingras* failed to order a trial on these disputed issues of fact, as it was permitted to do pursuant to 9 U.S.C. § 4.

Instead, the *Gingras* court just accepted factual allegations in the Complaint at face value. Such a perfunctory analysis does not represent a full and fair opportunity to litigate the issues.

Finally, the Opposition (at 20–21) argues that offensive collateral estoppel is appropriate because Plaintiff could not have joined the action in *Gingras*. This, too, is wrong. Indeed, as the recently filed Second Amended Complaint in *Gingras* makes clear, the putative class in *Gingras* is not temporally or geographically limited, but seeks to represent "all persons who took out payday loans from Defendants." Second Am. Compl., *Gingras v. Rosette*, No. 5:15-CV-101, Dkt. 269 ¶ 170 (D. Vt. March 31, 2020). The plain putative class definition from *Gingras* makes clear that Plaintiff (and those she seeks to represent in this lawsuit) is a member of the putative class in that case, and could have joined the *Gingras* litigation to assert her claims against Rees as part of that lawsuit.

When applying the correct facts to the appropriate legal standards and applicable law, as well as for the reasons set forth in the Opening Brief, issue preclusion is simply not appropriate.

CONCLUSION

For these reasons, as well as those in Defendant-Appellant Rees's Opening Brief, the district court's order denying defendants' motion compel arbitration should be reversed, and the case remanded with instructions to compel arbitration.

Respectfully submitted,

Dated: October 21, 2020

/s/Richard L. Scheff

Richard L. Scheff
Jonathan P. Boughrum
Michael C. Witsch
David F. Herman
ARMSTRONG TEASDALE LLP
2005 Market Street
One Commerce Square, 29th Floor
Philadelphia, PA 19103
Telephone: (267) 780-2000

Attorneys for Defendant-Rees Kenneth E. Rees

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 6 Cir. R. 32(b) because it contains 6,443 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

Dated: October 21, 2020

s/ Richard L. Scheff
Richard L. Scheff

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Reply Brief Of Defendant-Appellant Kenneth E. Rees with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 21, 2020

s/ Richard L. Scheff
Richard L. Scheff