Nos. 19-2058 & 19-2082

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CHRISTINA WILLIAMS, ET AL, *Plaintiffs-Appellee,*

v.

MEDLEY OPPORTUNITY FUND II, LP, ET AL., *Defendants-Appellant*.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, No. 2:18-cv-02747 (Goldberg, J.)

BRIEF OF THE NATIVE AMERICAN FINANCIAL SERVICES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT RED STONE, INC.

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CORPORATE DISCLOSURE STATEMENT OF *AMICUS CURIAE*

The Native American Financial Services Association ("NAFSA") is a non-profit trade association formed under Section 501(c)(6) of the Internal Revenue Code. NAFSA has no parent corporation and issues no stock.

IDENTITY OF *AMICUS CURIAE*

NAFSA is a non-profit trade association advocating for tribal sovereignty, responsible financial services, and better economic opportunities in Indian Country. NAFSA opposes discriminatory practices against tribal government-owned businesses operating in compliance with applicable federal and tribal laws. NAFSA has advocated for these positions in amicus briefs filed at the U.S. Supreme Court and in other federal courts.

INTERESTS OF *AMICUS CURIAE*

NAFSA members face comprehensive barriers impeding their economic prosperity, including extreme rural isolation, which eliminates the capacity to leverage gaming and other brick-and-mortar consumer-based industries as effective tools to stimulate their economies. NAFSA member tribes have found the internet and e-commerce to be great equalizers in providing for their people. Tribes have formed businesses, acting as arms of their tribal governments, to provide financial services to consumers that traditional banking interests are unwilling to serve. These tribes have promulgated and actively enforced

sophisticated financial services laws and regulations for many years, hiring nationally respected attorneys and banking professionals to assure regulatory compliance.

By creating tribal businesses, tribal leaders have championed their self-determination and sovereignty to supplement the deficit in federal funding to tribes for basic social services, while additionally working to alleviate generational reservation poverty. Increased tribal self-sufficiency reduces the burden on American taxpayers and the federal government. NAFSA defends the sovereign rights of tribal governments to determine their own economic futures. The legal positions taken by Plaintiffs and the district court below have the potential to harm many other tribes.

Tribal governments' sovereign right to self-determination depends, in large part, on the ability of tribes to engage in revenue-generating economic development activities, which necessarily includes the selection of arbitration for dispute resolution arising from such activities. Tribal governments face many challenges when seeking to promote economic development, but e-commerce offers new opportunities for consumers across the nation and across the world to access on-reservation goods and services. Harnessing the potential of e-commerce is vital to ensuring that American Indian tribes have not only the right, but also the ability, to exercise self-determination.

SOURCE OF AUTHORITY TO FILE

Counsel for all parties consented to NAFSA's participation as *amicus curiae*.

FRAP 29(a)(4)(E) DISCLOSURE STATEMENT

No party's counsel authored this brief, either in whole or in part, nor did any party or party's counsel contribute money intended to fund preparing or submitting the brief. No persons other than the *amicus curiae*, its members, or its counsel contributed money intended to fund preparing or submitting the brief.

Although not a required disclosure under Fed. R. App. P. 29(a)(4)(E), *amicus curiae* notes that defendant-appellant Red Stone, Inc. ("Red Stone") is a corporation wholly owned by the Otoe-Missouria Tribe of Indians ("Tribe"), a federally-recognized tribe. The Chairman of the Tribe also serves as the Chairman of NAFSA's Board of Directors.

SUMMARY OF ARGUMENT

"A nation cannot long exist without revenues. Destitute of this essential support, it must resign its independence, and sink into the degraded condition of a province."

The Federalist No. 12 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

This case presents serious challenges to the sovereign authority of federally-recognized Indian tribes to engage in commercial activity. Indian tribes have long been recognized as "domestic dependent nations" with inherent sovereign authority "pre-existing the Constitution." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). This sovereign authority extends to tribal commercial activities, which are critical to a tribal government's ability to raise revenue and provide basic governmental services to its members. *See id.* at 810 (J. Sotomayor, concurring) ("[T]ribal business operations are critical to the goals of tribal self-sufficiency[.]").

The district court erred when it failed to compel arbitration of Plaintiffs' claims. The loan agreement[1] included a binding agreement to arbitrate. The Court should protect the right of tribal enterprises to contract for arbitration and avoid the expense of litigation that can drain tribal treasuries. A statement in the loan agreement calling for the application of "such federal law as is applicable under the

[1] Three separate loan agreements are at issue in this case, the terms of which are materially indistinguishable. Consistent with Red Stone's brief, this brief refers to the loan agreement of Michael Stermel (JA274-99). Brief for Appellant Red Stone, Inc. at 4 ("Red Stone Br.").

Indian Commerce Clause" is not a prospective waiver of federal statutory rights. Rather it is a necessary and appropriate recognition that the Constitution grants Congress—not the states—the sole authority to regulate the commercial activities of tribes and that not every law that Congress passes applies to tribes.

ARGUMENT

I. The Indian Commerce Clause Embodies the Sovereign Authority of Tribes to Exercise Self-Determination.

Federal law has long recognized that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Bay Mills*, 572 U.S. at 788 (quotation marks and citation omitted). The Indian Commerce Clause's[2] primary purpose is to "provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (citations omitted); *see also United States v. Lara*, 541 U.S. 193, 200 (2004) (noting that Congress' power regarding Indian tribes has consistently been described as "plenary and exclusive"). The Indian Commerce Clause serves an equally vital function of "protect[ing] tribal self-government from state interference." *Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 574 (10th Cir. 2000) (citation omitted). The Indian Commerce Clause establishes the plenary

[2] The Indian Commerce Clause provides that "The Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8, cl. 3.

authority of Congress over the external affairs of tribal nations to the exclusion of state law.

A. The District Court Failed to Support Its Conclusion that the Arbitration Agreement Is Unenforceable.

The loan agreement central to this case included an arbitration provision ("Arbitration Agreement") setting forth a dispute resolution process for the binding resolution of disputes arising under the loan agreement.[3] Red Stone Br. at 5 (citing JA289). The Arbitration Agreement allowed for the choice of a prominent nationwide organization to conduct the arbitration,[4] and provided that the arbitrator "shall apply Tribal Law and the terms of this Agreement." *Id.* at 25 (citing JA291). Such "terms" of the loan agreement included a provision entitled "Governing Law," which stated that the agreement was "governed only by Tribal Law and such federal law as is applicable under the Indian Commerce Clause [of the United States Constitution]." *Id.* at 5 (citing JA292). The Arbitration Agreement specified that the rules and procedures of the selected arbitration organization would apply to the extent such rules and procedures did not "contradict the Agreement to Arbitrate or Tribal law." JA3. If a conflict occurs, the Arbitration Agreement would apply. *Id.*

[3] Plaintiffs had the opportunity to opt out of the Arbitration Agreement within 60 days of loan origination, but did not exercise this right. Red Stone Br. at 6.

[4] The party initiating arbitration had the choice of the American Arbitration Association ("AAA") or JAMS, The Resolution Experts ("JAMS"). *Id.* at 5 (citing JA290).

Plaintiffs challenged the enforceability of the binding Arbitration Agreement on the theory that it impermissibly waived Plaintiffs' federal statutory rights, in violation of the "prospective waiver doctrine." JA5 (citing Dist. Ct. Dkt. 100 at 2). The district court noted that "[t]he broad reach of the Federal Arbitration Act cannot be invoked to avoid federal law." *Id.* (citing *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 674 (4th Cir. 2016)). With no analysis of whether the Arbitration Agreement actually waived federal law, the district court inexplicably found problematic the "choice of arbitrator" provision allowing the parties to select AAA or JAMS. *Id.* The district court relied on an alleged "clear Third Circuit rule" set forth in *MacDonald v. CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018), wherein the Third Circuit held unenforceable an arbitration agreement that when taken in totatlity, designated an "illusory" arbitral forum. *Id.* According to the district court, because the Arbitration Agreement specified that such organization's rules and procedures could not contradict the Arbitration Agreement or Tribal law, the arbitrator would be "unable to consider any of the plaintiff's claims because the arbitrator 'would be prohibited from applying relevant [federal and state] law.'" *Id.* (quoting *Smith v. W. Sky Fin., LLC*, 168 F. Supp. 3d 778, 785 (E.D. Pa. 2016)). In a single paragraph, the district court held that the Arbitration Agreement was unenforceable because it contained the "impermissible" clause providing that "the

policies and procedures of AAA or JAMS cannot contradict the agreement or Tribal law." JA6.

B. The Loan Agreement's Reference to the Indian Commerce Clause Reinforces, Rather than Waives, Applicable Federal Law.

The district court's opinion provides little analysis or support for its conclusion that the "choice of arbitrator" provision automatically renders the Agreement to Arbitrate unenforceable. This provision is entirely different from the problematic provision in *MacDonald*, where this Court found the designated arbitral forum to be "nonexistent." 883 F.3d at 227, 228.[5] If the district court's conclusion is based on the alleged prospective waiver of statutory rights, the district court's concern is misplaced. The "prospective waiver" doctrine applies when a contract forces a party to waive *federal* statutory rights. *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 334 (4th Cir. 2017) ("Under this 'prospective waiver' doctrine, courts will not enforce an arbitration agreement if doing so would prevent a litigant from vindicating federal substantive statutory rights.") (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235-36 (2013)). As explained above, reference to laws applicable under the Indian Commerce Clause identifies

[5] *See* Red Stone Br. at 19-20 (summarizing illusory nature of arbitration provision in *MacDonald*, including that the selected firm would only "administer" the arbitration, versus conduct the arbitration). *See also* Brief of Defendant-Appellants Mark Curry, Brian McGowan, and Vincent Ney at 17-22 ("Curry et al. Brief") (explaining why Arbitration Agreement, unlike the provision at issue in *MacDonald*, does not create an illusory forum).

Congress' plenary authority over the external affairs of tribes, to the exclusion of *state* law. The loan agreement's governing law clause thus reinforces, rather than waives, the application of federal law that would otherwise apply to tribes. To the extent that Plaintiffs raise claims under federal laws applicable to tribes under the Indian Commerce Clause, the Arbitration Agreement does not prohibit or prevent the arbitrator from applying such law.[6] *See contra Smith*, 168 F. Supp. 3d at 785 (agreement prevented arbitrator from considering *any* asserted claims by prohibiting arbitrator "from applying the relevant law").[7] Rather, the Arbitration Agreement *requires* the arbitrator to apply such law.

C. Even Absent Reference to the Indian Commerce Clause, the Arbitration Agreement Incorporates Applicable Federal Law.

Even if the Court finds that the Arbitration Agreement, standing alone without incorporation of the Governing Law provision, directs the arbitrator to apply only "Tribal Law," the result is the same—the dispute would be governed by Tribal law *and* federal laws which would normally apply to tribes. Tribes are not

[6] The prospective waiver doctrine does not prohibit tribes from disclaiming the application of *state* law. *See infra* note 11. As a result, the Arbitration Agreement may permissibly "waive" Plaintiffs' claims based on Pennslyvania law.

[7] The agreement in *Smith* was "nearly identical" to the agreements found unenforceable by the Fourth Circuit in *Hayes* and *Dillon*, which "flatly and categorically renounce[d] the authority of the federal statutes to which [the party] is and must remain subject." *Hayes*, 811 F.3d at 675; *Dillon*, 856 F.3d at 335-36). By contrast, the loan agreement in this case not only preserves but requires the arbitrator to apply applicable federal law. *See also* Curry et al. Brief at 31-32 (distinguishing loan agreement at issue in this case from those found unenforceable in *Hayes*, *Dillon*, and *Smith*).

bound by all federal law—only those laws which Congress has made applicable to Indian tribes through the exercise of its plenary authority under the Indian Commerce Clause.[8] Tribes are not required to explicitly reference "applicable federal law" for that federal law to remain applicable. If that were the case, tribes could prevent the application of federal law that Congress intended to apply to Indian tribes by merely failing to explicitly reference federal law in contracts.

Although the issue of *which* federal laws apply to Indian tribes is not settled among the Circuits,[9] this case does not require a determination of which specific federal laws apply.[10] The legal question presented is whether the loan agreement's provisions, taken in their entirety, prospectively waive Plaintiffs' federal statutory rights. Appellants concede that the Racketeer Influenced and Corrupt

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[8] *See, e.g.*, *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116-17 (1960); *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 551 (6th Cir. 2015) (collecting cases and adopting "presumption that generally applicable federal statutes also apply to Indian tribes, reflecting Congress's power to modify or even extinguish tribal power to regulate the activities of members and non-members alike"). *But see NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) (finding inapplicable the presumption that federal statutes of general applicability apply "where an Indian tribe has exercised its authority as a sovereign").

[9] *See supra* note 8.

[10] In any event, the issue of which federal laws apply to the Tribe is an issue for the arbitrator to decide pursuant to the Arbitration Agreement's valid delegation provision. *See* Red Stone Br. at 13-23 (Arbitration Agreement provided that any "dispute," including "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate," be resolved by binding arbitration). *See also* Curry et al. Brief at 23-28 (delegation clause reserves enforceability questions, including prospective waiver challenge, to arbitatrator).

Organizations Act applies. *See* Red Stone Br. at 34-35; Curry et al. Br. at 33-34. However, whether the specific federal statute on which Plaintiffs rely applies to the Tribe does not affect whether the loan agreement operates as a prospective waiver. The bottom line is that neither the loan agreement's Governing Law provision, nor the Arbitration Agreement's choice of law clause, operate as a prospective waiver of federal law applicable to the Tribe. Because the contractual language preserves, rather than waives, applicable federal law, the prospective waiver doctrine simply does not apply in this instance.

D. The District Court's Decision Erects a Barrier to the Tribe's Ability to Conduct Commercial Activity That Is Essential to Tribal Economic Development and Self-Determination.

Tribes have scarce resources with which to provide for their citizens, and must pursue economic development opportunities to ensure their right to self-determination and provide basic social services to their members. All commercial activity, even when conducted with scrupulous adherence to the law, involves the risk of litigation. A cost-effective means of resolving disputes is vital to therefore preserving the fruits of tribes' economic development efforts.

The district court's decision interferes with the ability of tribes to negotiate for a cost-effective dispute resolution that is widely available to other sovereigns. Tribal governments, like other governments and private parties throughout this country, are entitled to guard against the high costs and uncertainty of litigation by

bargaining for arbitration. This is especially true considering the strain on already scarce resources faced by many tribal governments. Indian Tribes stand on equal footing as any other party seeking to enforce the terms of a bargained-for arbitration agreement. Moreover, the U.S. Supreme Court recently reiterated that there is a "liberal federal policy favoring arbitration agreements." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citations and quotations omitted). The Court also recognized that "Congress has instructed federal courts to enforce arbitration agreements according to their terms[.]" *Id.* at 1619. Thus, the district court erred in treating the Tribe differently and refusing to enforce the Loan Agreement's bargained-for Arbitration Agreement.

E. The District Court's Decision Infringes Tribal Sovereignty and Usurps Congress' Exclusive Authority.

The district court's decision in effect requires tribes to explicitly agree to the application of *all* federal law (even those Congress has not intended to apply to tribes) as a condition to accessing arbitration.[11] By ignoring the Arbitration

[11] Because reference to laws applicable under the Indian Commerce Clause merely identifies Congress' plenary authority over the external affairs of tribes to the exclusion of state law, the district court's decision could also be interpreted to require tribes to agree to the application of state law in addition to all federal law. However, "in the absence of federal authorization . . . tribal sovereignty[] is privileged from diminution by the States." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 891 (1986); *see also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980) ("It must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.").

Agreement's reference to Tribal law as well as "law applicable under the Indian Commerce Clause," the district court essentially held that contracts with Indian tribes must specifically incorporate all federal law in order to be enforceable. This requirement not only encroaches on longstanding, inherent sovereign authority possessed by tribes, but usurps Congress' plenary authority over the external affairs of Indian nations because "[t]he special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *Bay Mills*, 572 U.S. at 800 (J. Sotomayor, concurring) (citation omitted).

CONCLUSION

This suit threatens the ability of tribal businesses to make a positive impact on their communities. The Tribe's treasury should be protected against excessive litigation costs by requiring arbitration of all claims, in accordance with the parties' agreement.

Respectfully submitted,

/s/ Patrick O. Daugherty

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations in Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7) in that, according to the word-count feature of the word-processing program with which it was prepared (Microsoft Word), the brief contains 2,933 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f).

/s/ Patrick O. Daugherty
PATRICK O. DAUGHERTY

CERTIFICATE OF SERVICE

On this 16th day of September, 2019, I electronically filed the foregoing using the Court's appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by that system.

/s/ Patrick O. Daugherty
PATRICK O. DAUGHERTY