RECORD NO. 19-1434

In The

United States Court of Appeals

For The Fourth Circuit

DARLENE GIBBS; STEPHANIE EDWARDS; LULA WILLIAMS; PATRICK INSCHO; LAWRENCE MWETHUKU, on behalf of themselves and all individuals similarly situated,

Plaintiffs – Appellees,

v.

HAYNES INVESTMENTS, LLC; L. STEPHEN HAYNES; SOVEREIGN BUSINESS SOLUTIONS, LLC,

Defendants – Appellants,

and

VICTORY PARK CAPITAL ADVISORS, LLC; VICTORY PARK MANAGEMENT, LLC; SCOTT ZEMNICK; JEFFREY SCHNEIDER; THOMAS WELCH,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Plaintiffs-Appellees ("Plaintiffs") have failed to answer the key questions posed by this appeal: (1) whether the district court erred when it ignored the presence of a clear and enforceable delegation provision and proceeded to decide issues of arbitrability for itself (it did); and (2) whether the district court erred in its analysis of the prospective waiver doctrine where its analysis of Native American law under that doctrine differed from the analysis applicable laws of all other sovereigns (it did). Instead, as predicted, Plaintiffs' Opposition continues in their attempt to legitimize the unsound and stigmatizing argument that an arbitration agreement exclusively selecting the law of any sovereign Native American tribe must be treated differently under the prospective waiver doctrine than an agreement that exclusively selects the laws of a foreign country, or the laws of "pre-revolutionary Russia." *DirecTV v. Imburgia*, 136 S. Ct. 463, 468 (2015).

Indeed, throughout their Opposition, Plaintiffs repeat the mantra that a contract that selects tribal law to the exclusion of state and federal law is **always** unenforceable because it will **always** violate the prospective waiver doctrine. *See* Opp'n 3, 14, 15-16, 19, 24-26, 28-30, 32, 33, 37, 39-40 n.6, 42. No analysis of the particular sovereign law, or the remedies available to litigants under that law, is necessary. The conclusion is required merely because Native American law is not state and federal law.

But Plaintiffs' arguments find no support in the Fourth Circuit's general case law interpreting the prospective waiver doctrine, such as in *Aggarao v. MOL Ship Management Co., Ltd.*, 675 F.3d 355 (4th Cir. 2012), and *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996). In both those cases—along with scores of other cases, including from the Supreme Court—the prospective waiver doctrine does not apply merely because the laws of another country are selected to the exclusion of state and federal law.

Worse still, Plaintiffs use their mantra to ignore, almost entirely, the presence and effect of the delegation clauses to which they agreed. But Plaintiffs cannot avoid the Supreme Court's holding in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019)—a decision directly on point, and which Plaintiffs discuss only once, in passing. But the Supreme Court's decision in *Henry Schein* is determinative of the issue concerning the enforceability of the clear and conspicuous delegation provision that Plaintiffs each agreed to as part of their loan agreements. Any issue as to the enforceability of their agreement to arbitrate—including a prospective waiver challenge—must be decided by an arbitrator in the first instance, as the parties agreed to in their contract.

In short, proper application of the law that must guide consideration of the issues in this appeal, requires that this Court reverse the district court, and remand this case with instructions to compel arbitration.

ARGUMENT

I. THE DELEGATION PROVISION REMAINS ENFORCEABLE AND REQUIRES THAT AN ARBITRATOR RESOLVE ARBITRABILITY CONCERNS, INCLUDING THE PROSPECTIVE WAIVER CHALLENGE.

Buried 38 pages into their Opposition—after lengthy discussions of the merits of their arbitrability arguments—Plaintiffs finally address the very first issue the Court must confront: that the presence of clear and conspicuous delegation provisions in each of the loan agreements require that an arbitrator, not the district court, decide any issues of arbitrability. In addressing the delegation provision arguments, however, Plaintiffs fail to meaningfully engage with the implications of their agreement to arbitrate issues of arbitrability. Instead, Plaintiffs largely ignore the delegation provision, advance their arbitrability arguments notwithstanding the presence of a delegation provision, and hope that the Court (like the district court) will ignore that Plaintiffs all agreed to arbitrate gateway issues of arbitrability.

The Court, however, must follow mandatory authority from the Supreme Court in *Henry Schein* and "respect the parties' decision as embodied in the contract," and refuse to consider the merits of any challenge to arbitrability. *Henry Schein*, 139 S.Ct at 530. The district court's failure to follow the commands of *Henry Schein* has proven the prescience of the Supreme Court—the refusal to enforce the delegation provision has already "spark[ed]" a "time-consuming

sideshow" of "collateral litigation," that could have been easily avoided. *Id.* at 531.

* * *

From a factual standpoint, Plaintiffs do nothing to contest the presence and scope of the delegation provision. Plaintiffs do not challenge the presence of a clear and conspicuous delegation provision in each of their loan agreements. Similarly, Plaintiffs do not dispute that the terms of the delegation provisions in their agreements require that an arbitrator, not a court, decide all gateway issues of arbitrability, including "any issue concerning the validity, enforceability, or scope" of their agreement to arbitrate. And, Plaintiffs even admit that "[t]he district court did not separately analyze the delegation clause," apart from the merits of their challenge to the arbitration agreements, generally. Opp'n at 41 n.7.

Instead, Plaintiffs' only argument to avoid their delegation provision is that Plaintiffs' defense to the enforceability of their agreement to arbitrate under the prospective waiver doctrine renders the entire contract, including the delegation provision, invalid. Opp'n at 38. In other words, because Plaintiffs argue that the underlying arbitration agreement is unenforceable pursuant to the prospective waiver doctrine, a court is free to ignore a delegation provision requiring that an arbitrator decide such issues of enforceability. That is nothing more than circular

reasoning designed to avoid the mandatory authority highlighted by Appellants brief (at 23-31). Plaintiffs' arguments must be rejected.

A. Plaintiffs fail to adequately challenge the core holding of the Supreme Court's decision in *Henry Schein* requiring arbitration of arbitrability in the presence of a delegation provision.

Plaintiffs assert (Opp'n at 40) that Appellants have advanced a "radical new rule of arbitrability" by asking that any prospective waiver argument be submitted to an arbitrator given the clear and conspicuous delegation clause in each of the loan agreements. But there is nothing radical about Appellants' argument. As pointed out in Appellant's brief (at 23-24), the Supreme Court's decision in *Henry Schein* all but requires this outcome. That is because, as other courts have recognized, "an effective vindication challenge is a challenge to the enforceability of the arbitration agreement," which "after *Henry Schein,* [ ] are heard by the arbitrator where [ ] 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); *see also Davis v. TMC Rest. of Charlotte, LLC*, No. 318CV00313RJCDCK, 2019 WL 4491529, at *2 (W.D.N.C. Sept. 18, 2019) (noting that after *Henry Schein* "when the parties' agreement delegates arbitrability issues to the arbitrator, the Court is without power to decide arbitrability issues—the arbitrator must determine issues regarding the validity, enforceability, or scope of the arbitration agreement,

including its delegation provision," but finding an exception where challenge is to formation of arbitration agreement).

Plaintiffs do not meaningfully engage with the decision in *Henry Schein*, or its clear command that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue." *Henry Schein*, 139 S.Ct. at 529. Instead, Plaintiffs point to a footnote from the Second Circuit's decision in *Gingras v. Think Finance*, 922 F.3d 112 (2d Cir. 2019), to argue that the decision in *Henry Schein* was limited to instances where the 'wholly groundless' exception was invoked, and does not apply to "a challenge to the validity of an arbitration clause itself." Opp'n at 40 (quoting *Gingras*, 922 F.3d at 126 n.3). But the Second Circuit's anemic analysis of *Henry Schein* ignores the breadth of the Supreme Court's reasoning in enforcing delegation provisions—going well beyond just an examination of the 'wholly groundless' exception previously used by courts. 139 S.Ct. at 529-31. Clearly, the Supreme Court's decision in *Henry Schein* goes well beyond the analysis of a single, judge-made exception. Rather, it requires that courts honor the agreements that parties made and compel arbitration of arbitrability questions in the presence of a delegation provision even where a court believes that there are good reasons to refuse to do so. *Id.*

Additionally, the Second Circuit's belief that "a challenge to the validity of an arbitration clause itself," 922 F.3d at 126 n.3, can nullify an otherwise enforceable delegation provision, ignores that delegation provisions are discreet **antecedent** agreements to arbitrate that must evaluated **before** evaluating a challenge to the arbitration agreement as a whole. *See Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1264 (11th Cir. 2017) (finding that that a court can review the validity of an agreement to arbitrate only after the court first "determine[s] that the **delegation clause is itself invalid or unenforceable**") (emphasis added); *accord Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 74 (2010) (requiring plaintiff to show that challenges to the delegation provision "rendered **that provision** unconscionable") (emphasis in original).

Finally, Plaintiffs argue (Opp'n at 41) that even in the presence of a clear and conspicuous delegation provision, issues of arbitrability must be decided by a court where a litigant does nothing more than assert a challenge to the delegation clause. That argument ignores myriad authority that requires a determination that a delegation provision is unenforceable (and not just plaintiff's unadorned challenge) before a court can consider arbitrability arguments otherwise reserved for an arbitrator. *See, e.g., Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449, 455 (4th Cir. 2017). To

hold otherwise would allow litigants to avoid their agreements to arbitrate arbitrability (not to mention the holding of *Henry Schein*) at will.

* * *

In short, Plaintiffs fail to offer any legitimate reason to avoid the holding of *Henry Schein*. The presence of the delegation provision in each of the loan agreements required that an arbitrator, not the district court, decide issues of arbitrability. The failure to honor that contractual agreement and compel arbitration—at least on preliminary issues of arbitrability—was in error.

B. Plaintiffs cannot avoid the delegation provision by reference to the strength of their arbitrability arguments.

Even if the Court were to accept that Plaintiffs sufficiently raised a challenge to the delegation provision—and they have not—Plaintiffs offer nothing in the way of evidence that could be used to invalidate the delegation clause "upon such grounds as exist at law or in equity for the revocation of any contract." *Minnieland*, 867 F.3d at 455 (quoting 9 U.S.C. § 2). Instead, Plaintiffs offer generalized arguments that go to the contract as a whole—not the delegation provision specifically. Opp'n at 38-41. Such an argument, however, is clearly not enough.

Plaintiffs main argument to avoid application of the delegation provision is that any "contract that contains an FAA-prohibited prospective waiver is unenforceable in its entirety, delegation clause included." Opp'n at 38. But, as

discussed above, that argument puts the cart before the horse insomuch as it utilizes a defense to the contract as a whole to invalidate an independent antecedent agreement that sets forth who gets to decide issues of enforceability. Other courts have rejected similar arguments. *Cf. Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 231 (3d Cir. 1997) (rejecting argument that a waiver of statutory rights could overcome requirement to have arbitrator decide arbitrability because "[i]t would be anomalous for a court to decide that a claim should be referred to an arbitrator rather than a court, and then, by deciding issues unrelated to the question of forum, foreclose the arbitrator from deciding them"); *De Angelis*, 364 F. Supp. 3d at 795 (compelling arbitration of prospective waiver challenge post-*Henry Schein* in the presence of a delegation provision, and holding the court had no discretion to do otherwise).

Worse still, Plaintiffs' position ignores that the Supreme Court has repeatedly stated that arguments going to the unenforceability of a contract, as a whole, are simply inapplicable to the determination of whether the delegation provision is invalid. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006); *Rent-A-Center*, 561 U.S. at 70. Instead, as Appellants noted previously in their brief (at 24-25, 28-29), the proper inquiry is whether Plaintiffs' prospective waiver arguments "*as applied* to the delegation provision rendered *that provision* unenforceable." *See Rent-A-Center*, 561 U.S. at 74 (emphasis in

original). Plaintiffs present no cogent argument as to how their prospective waiver arguments render the delegation provision unenforceable.

On this point, Plaintiffs muster (at 33-36) only an argument that litigation in the courts is always superior to arbitration because, while judges are free to decline to enforce choice of law clauses, arbitrators have no ability to do so. As an initial matter, Plaintiffs' largely unsupported assertion flies in the face of the decision in *Aggarao*, which declined to consider a prospective waiver argument because "[i]t is possible that **the Philippine arbitrator(s) will apply United States law**. . . ." *Aggarao*, 675 F.3d at 373 n.16 (emphasis added). It similarly flies in the face of the Supreme Court's decision in *Vimar Seguros*, which refused to consider a prospective waiver argument because, in part, "it is not established what law the arbitrators will apply to petitioner's claims" and that "the arbitrators may conclude that [a federal statute] applies of its own force or that Japanese law does not apply." 515 U.S. at 540.

Moreover, Plaintiffs' argument on this point ignores that they are free to press their prospective waiver argument to an arbitrator who, if they are successful, will be forced to send the case back to the district court. *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 231 (3d Cir. 1997) (holding that "Any argument that the provisions of the Arbitration Agreement involve a waiver of substantive rights afforded by the state statute may be presented in the arbitral forum"); *Larry's*

United Super, Inc. v. Werries, 253 F.3d 1083, 1085–86 (8th Cir. 2001) (same, but federal statute); *De Angelis*, 364 F. Supp. 3d at 795 (same). And, Plaintiffs offer no meaningful response to Appellants' argument (Br. at 25) that an arbitrator (just like a court) is free to apply federal arbitration law when evaluating the delegation provision, even in the presence of a general choice of law provision selecting foreign law.

These cases, therefore, undercut any possibility that Plaintiffs' generalized prospective waiver argument going to the agreement to arbitrate generally, have any application to the invalidation of *delegation clause*, specifically. In short, Plaintiffs offer no legitimate reason why having an arbitrator (rather than a court) decide their prospective waiver challenge is grounds upon which to set aside the distinct antecedent agreement to arbitrate.

* * *

Delegation provisions do nothing more than decide, *ex ante*, who gets to decide issues of arbitrability—a court or an arbitrator. *Rent–A–Center*, 561 U.S. at 70. Here it is uncontested that the parties contracted for an arbitrator to decide all such issues of arbitrability. The district court's failure to even acknowledge the presence of a delegation provision was clear error and robbed the parties of their agreement to have an arbitrator decide any challenges to arbitrability. The district court erred in doing so, and Plaintiffs' offer no basis why this Court should do

anything other than reverse the decision below, and remand with instructions to compel arbitration of any threshold issues of arbitrability.

II. PLAINTIFFS' PROSPECTIVE WAIVER ARGUMENTS REMAIN FUNDAMENTALLY FLAWED.

The vast majority of Plaintiffs' Opposition Brief focuses on their general challenge to the arbitration agreements as a whole. Plaintiffs make repeatedly clear that they believe that the contract's choice of Native American law, standing alone, renders their agreement to arbitrate void. That is because Native American law is not co-extensive with state and federal law. Leaving aside that such arguments are for an arbitrator, not a court, to decide given the presence of a clear and conspicuous delegation provision, Plaintiffs' arguments are based upon a flawed conceptualization of the prospective waiver doctrine. At each turn, Plaintiffs' arguments ignore scores of earlier decisions of both the Fourth Circuit and the Supreme Court. Plaintiffs' position is, therefore, legally unsupportable and cannot be the basis to set aside their agreements to arbitrate.

A. Plaintiffs' formulation of the prospective waiver doctrine ignores mandatory authority.

As an initial matter, Plaintiffs are simply incorrect as to the proper analysis a court must conduct when resolving a prospective waiver challenge. Indeed, throughout their brief, Plaintiffs repeatedly conflate a right to pursue a remedy with the right to bring a specific statutory claim. For example, Plaintiffs argue that

"[w]hat matters" in the prospective waiver analysis is whether the choice of law clause "precludes a plaintiff from pursuing the specific statutory rights at issue in the case, **namely the claims under RICO and state consumer-protection laws**." Opp'n at 29 (emphasis added); *see also id* at 16 (arguing that the prospective waiver doctrine applies when the choice of law and choice of forum clauses "forbids the consumer from pursuing the specific statutory remedies afforded by federal and state law," rather than merely "the right to pursue some remedy"). But the right to pursue a *remedy* is not co-extensive with the right to pursue a specific *statutory claim*. To the contrary, courts have roundly rejected attempts by litigants to confuse the two.

Perhaps most analogous is the decision in *Richards v. Lloyds of London*. 135 F.3d 1289, 1292 (9th Cir. 1998) (en banc). There, the plaintiffs pressed an argument **identical** to the one advanced by Plaintiffs here—that the prospective wavier doctrine applied because they would not be permitted to pursue their RICO claims (as well as claims under state and federal securities laws) if forced to litigate in a British forum under British law. 135 F.3d at 1292 (summarizing litigants argument that "the choice clauses are invalid because they offend the strong public policy of preserving an investor's remedies under federal and state securities law and RICO"). The *en banc* Ninth Circuit, however, squarely rejected the argument as a basis to invoke the prospective waiver doctrine, and enforced the

clauses notwithstanding the plaintiffs' inability to assert claims under the state and federal securities laws as well as RICO claims. *Id.* at 1296.

The appropriate inquiry, the court held, was whether the litigants had any reasonable recourse against the defendants under British law—not whether the litigants could assert specific statutory claims under state and federal law. *Id.* (finding that an ability to recover remedies under common law torts such as fraud and negligent misrepresentation precluded a prospective waiver argument based upon the loss of state and federal securities claims and RICO claims). Indeed, the *Richards* court reached this decision notwithstanding the recognition that British law explicitly "immunize[d] [defendants] from many actions possible under our securities laws. . . ." *Id.*[1]

The Fourth Circuit reached an identical conclusion in *Allen v. Lloyd's of London*, when it, too, enforced a choice of British law clause and stated that "the fact that an international transaction may be subject to laws and remedies different

[1] The decision in *Richards* is also significant because it is an *en banc* decision of the Ninth Circuit that arguably conflicts with the Ninth Circuit's earlier decision in *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994). Throughout their brief, Plaintiffs assert that *Graham Oil* stands for the proposition that a court can "invalidat[e] an arbitration contract even though it authorized a party to bring a federal statutory claim because it foreclosed the right to seek certain remedies afforded under the statute." Opp'n at 30, 32 n.5. The *en banc* decision in *Richards*, with its enforcement of choice of law and choice of forum clauses that forfeit federal statutory claims entirely, clearly supersedes the decision in *Graham Oil*.

or less favorable than those of the United States is not a valid basis to deny enforcement," of the choice clause. 94 F.3d at 929 (quoting *Riley v. Kingsley Underwriting Agencies, Ltd.*, 929 F.2d 953, 958 (10th Cir. 1992)). Similarly, in *In re Cotton Yarn Antitrust Litig.*, the Fourth Circuit noted that the "'crucial inquiry' when considering a claim that an arbitration agreement prevents a plaintiff from vindicating his statutory rights 'is whether the particular claimant has an adequate and accessible substitute forum in which to resolve his statutory rights.'" 505 F.3d 274, 290 (rejecting argument that a litigant's rights under antitrust statutes could only be effectively vindicated if their arbitration agreement permitted recovery of identical damages available under Clayton Act). And, of course, as discussed herein, there is also *Aggarao*.

These decisions do not stand alone. *See, e.g., Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360–61 (2d Cir. 1993) (rejecting argument that forfeiture of statutory claims under federal law required choice of law and choice of forum clauses to be set aside because "the agreement to submit to arbitration or the jurisdiction of the English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum"); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1297 (11th Cir. 1998) (holding that choice clauses are not invalid "simply because the remedies available in the contractually chosen forum are less favorable than those available in the

courts of the United States," but rather are invalidated only upon a showing that "the remedies available in the chosen forum are so inadequate that enforcement would be fundamentally unfair"); *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1017 (5th Cir. 2015) (noting that "[t]he Supreme Court has rejected the 'concept that all disputes must be resolved under our laws and in our courts,' even when remedies under foreign law do not comport with American standards of justice"). Rather, there is wide acceptance—across multiple courts, deciding different types of cases, involving numerous different laws—that a successful prospective waiver challenge can be based on the inability to pursue state and federal claims in the forum and laws selected the parties.

Accordingly, Plaintiffs' formulation of the prospective waiver doctrine is incorrect as a foundational matter. Whether Plaintiffs can pursue their chosen claims under RICO and state consumer-protection laws is irrelevant to the 'crucial inquiry' the court must conduct. What *actually* matters—as Appellants correctly noted in their opening brief (at 33-37, 43-44)—is whether Plaintiffs have presented evidence that enforcement of the choice of law and choice of forum clauses will deprive Plaintiffs them of any remedy. *See Aggarao*, 675 F.3d at 373 n.16 (refusing to apply the prospective waiver doctrine where it was possible that the plaintiff could "obtain an adequate remedy" under foreign law notwithstanding that

it was unclear whether federal law would apply in arbitration). And, if there is even the smallest doubt as to how an arbitrator might resolve a prospective waiver challenge, or the effect of choice clauses on the ability of Plaintiffs to pursue some remedies, arbitration must be compelled. *See Vimar Seguros*, 515 U.S. at 540-41.

B. Plaintiffs fail to resolve the fundamental conflict between *Aggarao* and the later decided cases in *Hayes* and *Dillon*.

In their opening brief (at 39-43), Appellants laid bare the fundamental and unavoidable conflict between this Court's 2012 decision in *Aggarao*, and it's later-decided decisions in *Hayes* and *Dillon*. In *Aggarao*, the Fourth Circuit confronted a prospective waiver argument founded upon choice of law and choice of forum clauses that purported to require the exclusive application of the laws of the Philippines to the exclusion of state and federal law. 675 F.3d at 361. In *Hayes* and *Dillon*, the Fourth Circuit again examined prospective waiver arguments founded upon choice of law and choice of forum clauses that purported to require the exclusive application of Native American law to the exclusion of state and federal law. *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 336 (4th Cir. 2017); *Hayes v. Delbert Services Corp.*, 811 F.3d 666, 675 (4th Cir. 2016). Yet despite the near identical facts and choice clauses presented to the Court in those cases, this Court reached vastly different holdings.

In *Aggarao* this Court held the prospective waiver doctrine did not apply to invalidate the choice clause selecting the laws of the Philippines because "[i]t is

possible that the Philippine arbitrator(s) will apply United States law . . . **or** that Aggarao will be able to effectively vindicate the substance of those claims **under Philippine law and obtain an adequate remedy**." *Aggarao*, at 373 n.16 (emphasis added). Indeed, there is no way to interpret the Court's holding in *Aggarao* other than to acknowledge that it recognized that the prospective waiver doctrine could apply in a situation where Philippine law applied to the exclusion of the litigant's federal law claims under the Jones Act and the Seaman's Wage Act. *Id.* Indeed, so long as it was possible that Philippine law could provide some remedy to the litigant, the prospective waiver doctrine did not invalidate the choice clauses. That holding, however, is in direct conflict with Plaintiffs' formulation of the prospective waiver doctrine (based largely on *Hayes* and *Dillon*) which would have this Court invalidate any choice clause that selects the laws of any jurisdiction to the exclusion of state and federal law. *See* Opp'n at 3, 14, 15-16, 19, 24-26, 28-30, 32, 33, 37, 39-40 n.6, 42.

Rather than acknowledge and attempt to reconcile the inherent conflict between the Fourth Circuit's decision in *Aggarao* and the later decisions in *Hayes* and *Dillon*, Plaintiffs take a different tack. They practically ignore *Aggarao*—citing it just three times in their Opposition, and assert there is no conflict because *Aggarao* concerned an international arbitration agreement. Specifically, they press (at 36-37) the idea that international agreements to arbitrate are fundamentally

different from all other agreements to arbitrate because the international agreements are subject to Chapter 2 of the FAA rather than Chapter 1 of the FAA. That is nonsense. The Supreme Court has explicitly used the prospective waiver doctrine cases arising under Section 2 of the FAA interchangeably with those that arise under Section 1 of the FAA. *See, e.g.*, *Pacific Health Systems, Inc. v. Book*, 538 U.S. 401, 404-05, 407 (2003) (utilizing the rationale from *Vimar Seguros* to analyze a prospective waiver argument involving remedies under RICO). Better still, the Plaintiffs routinely cite and utilize prospective waiver doctrine cases arising under Section 2 throughout their briefing when it suits them. That, alone, should demonstrate that Plaintiffs' purported distinction is without merit.

Given the interchangeability of cases and holdings interpreting the prospective waiver doctrine under Section 1 of the FAA and Section 2 of the FAA, Plaintiffs' grounds for ignoring the holdings of the Supreme Court and Courts of Appeal fade away. Indeed, a simple question reveals the irreconcilable conflict between *Aggarao*, *Hayes* and *Dillon*: if the Court were to apply Plaintiffs' prospective waiver standard (based upon the reasoning in *Hayes* and *Dillon*) to the facts of *Aggarao*, would a different result be forthcoming? The answer is, undoubtedly, yes. The Court in *Aggarao* reached its conclusion by doing what Plaintiffs allege is forbidden: rejection of a prospective waiver challenge

notwithstanding the selection of foreign law to the exclusion of state and federal law.

As such, the failure to resolve this inherent conflict requires that the district court (as well as this Court) to follow the earlier-decided *Aggarao*, rather than the decisions in *Hayes* and *Dillon*. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004).[2]

C. Plaintiffs remain able to effectively vindicate their claims under the Native American law selected by their agreements.

Perhaps recognizing that Appellants may be correct in their analysis of the prospective waiver doctrine, Plaintiffs (at 31-32) argue that those laws fail to provide them with remedies equal to what they could receive under state and federal law. But, as described above, the remedies available to a litigant need not be identical or equal to those available under state and federal law—they need only be available and not so limited so as to be unfair. That clearly is not the case with both Chippewa Cree and Otoe Missouria law.

[2] Plaintiffs' analysis of the prospective waiver doctrine is incorrect in one other aspect. In an explanatory parenthetical, Plaintiffs (at 33), misleadingly quote from footnote 19 of *Mitsubishi Motors* in an effort to have this Court believe the Supreme Court "explain[ed] that, to be effective, a foreign choice-of-law clause cannot 'wholly [] displace American law even where it otherwise would apply.'" But the Supreme Court was not speaking in the quoted language. Rather the sentence Plaintiffs quote from *Mitsubishi Motors* begins with "[t]he United States raises the possibility that..." and ends with a citation to the brief of the United States as *amicus*. 473 U.S. 614, 637 n.19 (1985). Clearly then, the Supreme Court did not explain anything of the sort—it merely laid out arguments raised by *amici*.

First, Plaintiffs are forced to admit (albeit buried in a footnote, at 32 n.5), that as Appellants noted in their opening brief (at 30-31), Chippewa Cree law indisputably provides consumers with the ability to recover actual damages, injunctive relief, and equitable relief. *See* Chippewa Cree Tribal Lending and Regulatory Code § 10-6-201. And Plaintiffs admit (at 31-32), again as they must, that the Otoe-Missouria Code both requires compliance with a non-exhaustive list of federal laws, and provides for potential remedies under those laws and/or the possibility of a grant of "*any relief* as the Commission deems appropriate," should consumers utilize the dispute resolution procedures called for under the Code. These remedies are neither illusive, nor unfair. They are real remedies and preclude any argument that Plaintiffs are unable to effectively vindicate their rights.[3]

D. Plaintiffs' remaining arguments also fail.

Beyond the main thrust of their arguments, Plaintiffs offer a number of last-ditch arguments to avoid arbitration. None are meritorious. First, Plaintiffs argue (at 25-26, 42-44) that the district court will not be able to perform any 'back end' review of the arbitrator's decision pursuant to 9 U.S.C. § 10. Second, Plaintiffs ask

[3] It bears repeating, however, that Plaintiffs, as the party resisting arbitration, bear the substantial burden of conclusively demonstrating that they will be unable to effectively vindicate their rights. *In re Cotton Yarn*, 505 F.3d at 286-87. Mere reference to the contracts, the laws of the tribes, or a listing of how arbitration is different from litigation, however, are not enough to satisfy that burden.

(at 45-47) the Court to consider the policy implications of enforcing any part of the arbitration agreements, stating that to do so would "invite a race to the bottom." Neither argument has merit.

1. The district court will be able to perform a back end review of any decision.

Plaintiffs first erect a strawman (at 43-44) to avoid having to arbitrate their claims—that the district court is somehow deprived of a back-end review of the arbitral process because the parties have agreed to the tribal court review process. That is, again, wrong. While it is undoubtedly correct that the Supreme Court has held that an arbitration contract cannot alter the scope of a *federal court*'s review under Section 10 of the F.A.A., *see Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585-86 (2008), parties remain free to craft the procedures and rules under which that *arbitration* will proceed. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

In recent years arbitral associations such as the AAA, JAMS, and others have created options for litigants to have a panel of arbitrators provide a de novo appellate review of an arbitrator's decision. Federal courts have not hesitated to review and confirm the decisions of these panels pursuant to Section 10 of the FAA. *See, e.g., Hamilton v. Navient Sols., LLC*, No. 18 CIV. 5432 (PAC), 2019 WL 633066, at *3, *5-*6 (S.D.N.Y. Feb. 14, 2019) (confirming award rendered by

appellate arbitration panel, while also engaging in 'back-end' review of appellate panel's decision pursuant to 9 U.S.C. § 10). The tribal court review process is no different than the appellate options offered by the AAA, JAMS, and others. It does not run afoul of the Supreme Court's decision in *Hall St.*, and any decision rendered by the tribal court is still ultimately reviewable by the district court under the limited grounds provided by Section 10 of the FAA.

Contrary to Plaintiffs' views, this Court has made clear that a district court has the ability to stay any case (thus retaining jurisdiction over the case) pending completion of the arbitral process. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999); see also 9 U.S.C. § 3. So too have other courts. *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."); *Katz v. Cellco P'ship*, 794 F.3d 341, 347 (2d Cir. 2015) (holding that the FAA mandates a stay of proceedings pending resolution of cases sent to arbitration); *LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 903 (D.C. Cir. 1998) (holding stay was mandatory and noting that the court's "jurisdiction over the original suit, and the Arbitration Act did not divest it of jurisdiction to ensure that the parties adhered to its previous order under the Arbitration Act"); *U-Save Auto Rental of Am. Inc. v. Furlo*, 368 Fed. 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 enforcement of the award").

Given the directive to stay the case, and the district court's concomitant retention of jurisdiction over the case, Plaintiffs' argument that there will be no 'back end' relief rings entirely hollow. The parties are free to return to the court to seek enforcement of the ultimate award or, if appropriate, vacatur pursuant to Section 10 of the FAA.

2. *Policy arguments cannot overcome precedent.*

Plaintiffs' final argument (at 45-47) is that public policy concerns require the Court (and indeed all courts) to invalidate all choice of Native American law provisions because to do otherwise would be to "invite a race to the bottom." Elsewhere in their briefs, Plaintiffs ground their prospective waiver arguments in the argument that it is the choice of Native American law that requires application of the prospective waiver doctrine. Here, however, Plaintiffs make clear that it is actually the business operated by the Native American lenders, or the industry in which they operate, which should determine whether to enforce the arbitration agreements and delegation provisions. This argument gives up the ghost.

Plaintiffs' real argument to avoid their arbitration agreements is that payday lending is inherently wrong, and denying arbitration to payday lenders is a policy the Court should continue to enforce *regardless of precedent*. But that is just

wrong. *Cf. Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 185 (4th Cir. 2019) (rejecting policy arguments for abridging Native American sovereignty and immunity over arguments that consumers would have no redress for injuries against Native American payday because "an entity's entitlement to tribal immunity cannot and does not depend on *a court's evaluation of the respectability of the business in which a tribe has chosen to engage*") (emphasis added).

If Plaintiffs' prospective waiver arguments were to be accepted, this Court would be required to invalidate **all** choice of Native American law clauses and arbitration agreements, regardless of the underlying business. For example, Native American contractors would not be able to arbitrate a construction dispute pursuant to their laws. Native American businesses would not be able to arbitrate claims against their vendors pursuant to their laws. Doing so would defeat the strong federal policy in favor of tribal self-determination, economic development, and cultural autonomy. *See Id.* (citing *Breakthrough Mgmt. v. Chukchansi Gold Cas.*, 629 F.3d 1173, 1187-88 (10th Cir. 2010)).

In short, Plaintiffs' policy arguments—like their arguments as a whole—ask this court to do what it cannot: treat the laws of Native American tribes differently than the laws of any other sovereign. The Court must apply the law of the prospective waiver doctrine fairly, equally, and neutrally, policy considerations aside.

CONCLUSION

For these reasons, as well as those in Appellants 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,

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CERTIFICATE OF COMPLIANCE

This brief complies with complies with type-volume limits because it contains 6,062 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments). The brief also complies with the typeface and type style requirements because it was prepared in a proportionally-spaced typeface, Times New Roman, in 14pt font.

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CERTIFICATE OF SERVICE

On this 20th day of December, 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.

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