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(s)-Appellee(s)

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,
Hon. Bernard A. Friedman presiding
No. 2:19-cv-12014-BAF-RSW.

BRIEF OF PLAINTIFF-APPELLEE NICOLE SWIGER (AND CLASS)

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STATEMENT REGARDING ORAL ARGUMENT

In accordance with Fed.R.App.P. 34(a) and 6th Cir. R. 34(a), plaintiff-appellee Nicole Swiger respectfully submits that this appeal does not merit oral argument. As shown in this brief, the issues presented have been addressed and resolved by (a) controlling authority (Issues I-III) and (b) five (5) other federal Courts of Appeals (Issue IV), all applying identical modes of analysis and citing the same Supreme Court decisions.

Properly understood, this case has nothing whatsoever to do with "the sovereignty of Native American tribes"—appellant Rees is NOT a Native American, not affiliated with any Native American Tribe, and neither a party to nor a third-party beneficiary of an arbitration agreement that, by its terms, applies solely (if it validly applies at all) between an "arm of the [Chippewa-Cree] tribe" and its agents and affiliates on the one hand and Nicole Swiger on the other.

The honorable judges of this Court have better uses of their time than to expend scarce judicial resources on oral argument in this case. If appellant Rees' attorneys have not persuaded this Court with their 50-page "opening brief" and, predictably, 25 page reply brief, 15-30 minutes of oral argument is unlikely in the extreme to alter that dynamic.

COUNTERSTATEMENT OF JURISDICTION

The district court has proper jurisdiction under

A. 28 U.S.C. §1332(a) (diversity of citizenship;

B. the Class Action Fairness Act (CAFA), 28 U.S.C. §1332(d)(2)(A);

C. 28 U.S.C. §1331 (federal statutory claims), such as the Electronic Funds Transfer Act, 15 U.S.C. §§1693 *et seq*.;

D. 18 U.S.C. §1964(c) (the Racketeer Influenced and Corrupt Organizations Act—RICO);

E. supplemental jurisdiction over state law claims under 28 U.S.C. §1367(a) and/or (b);

F. the Declaratory Judgment Act, 28 U.S.C. §2202.

This Court DOES NOT HAVE PROPER JURISDICTION over this interlocutory appeal, for reasons detailed in Issue I (pp. 6-13 below) and Issue III (pp. 23-37 below) of this brief.

COUNTERSTATEMENT OF ISSUES PRESENTED

Issue I: Because the Federal Arbitration Act (FAA) is not applicable to the subject arbitration agreement, is an appeal under Section 16 of the FAA, which restricts appeals to those arising under "this title", unavailable to appellant Rees in this case?

Issue II: Is Kenneth E. Rees' motion to compel arbitration, based on the arbitration provisions of a Plain Green, LLC loan contract, barred by collateral estoppel (issue preclusion)?

Issue III: As a non-party to the putative arbitration agreement between Nicole Swiger and Plain Green, LLC, as to whom there is no indication of the contracting parties' intent to benefit Kenneth E. Rees, does Rees lack standing to invoke arbitration under the Swiger-Plain Green loan contract?

Issue IV: Does the subject arbitration agreement, which disclaims application of the Federal Arbitration Act and thus cannot serve as a basis for compelling arbitration, offer an illusory arbitral forum, and is it invalid as contrary to the prospective waiver doctrine?

RESPONSE TO "INTRODUCTION"

Contrary to defendant Rees' efforts to recast the underlying facts, this appeal is not about "choice of law" at all—if Plain Green, LLC were still party to this case, it might be necessary to determine the applicability of Chippewa-Cree tribal law. But Plain Green has been dismissed as a party, has filed no appeal, and has not opted to align itself herein with Kenneth Rees.

Rees repetitively refers to "parties" who have "agreed that the laws of other sovereigns will govern their arbitrations". But Rees is *not* a party to any agreement relevant to this lawsuit, not party to a choice of law clause, not party to an agreement to arbitrate. Rees does not even *attempt* to establish he is a third-party beneficiary to the contract between plaintiff Swiger and Plain Green —although that is one of plaintiff's key arguments in opposition to arbitration (Plaintiff's Brief in Opposition to Motion to Compel Arbitration, RE 9, PageID 376-384).

Rees also contends he is being sued as former CEO of Think Finance, Inc., which "formerly" provided various services that assisted Plain Green in violating state usury laws and various federal laws. Rees bases his contention on a single paragraph in a 199 paragraph Complaint (RE 2), ignoring the main theory of liability pleaded against him.[1]

[1] Rees disputes the assertion in ¶21 of the Complaint (RE 2, PageID 33) that he continues his operational role in Think Finance. Rees claims he stepped down as CEO (while remaining Chairman of the Board) in May, 2014, resigned from the

Rees treats it as given that, merely because plaintiff Swiger agreed to arbitrate issues with her Plain Green lender, she somehow agreed to arbitrate with Kenneth Rees, a person nowhere mentioned or described in the Swiger-Plain Green contract—without any effort to show how the arbitration provisions of Swiger's loan contract extend to embrace claims against Rees individually.

COUNTERSTATEMENT OF THE CASE

Predictably, Rees offers a fact summary that is tendentious, argumentative, and replete with falsehoods and mischaracterizations. In lieu of point-by-point

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Board of Directors in 2015, and never owned a controlling interest. Rees mentions only Think Finance, Inc.—and says nothing about Think Finance, LLC, Think Finance SPV, LLC, Financial U, LLC, TC Loan Service, LLC, Tailwind Marketing, LLC, TC Administrative Services, LLC, or TC Decision Sciences, LLC—entities so closely affiliated with Think Finance, Inc. all are involved in a single Chapter 11 bankruptcy proceeding.

Even assuming ¶21 is incorrect, Mr. Rees was nonetheless at the center of the "rent-a-tribe" scheme, and, whatever his corporate status, having once set in motion a conspiracy to violate Michigan criminal usury laws *inter alia*, Rees is civilly liable for the consequences of the conspiracy unless and until he takes affirmative steps to withdraw from the conspiracy. The crime of conspiracy is complete when the illegal agreement is reached, and the conspiracy "continues until the common enterprise has been fully completed, abandoned, or terminated." *People v Bushard*, 444 Mich. 384, 394; 508 N.W.2d 745 (1993); *People v Deni*o, 454 Mich. 691, 710; 564 N.W.2d 13 (1997). Accord: *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 616 (7th Cir.1997) (defendant could be held jointly liable for later acts of co-conspirators where it did not withdraw from conspiracy); *Hoffman-La Roche, Inc. v. Greenberg*, 447 F.2d 872, 874 n. 2 (7th Cir.1971) (parties to a civil conspiracy are jointly and severally liable for injuries to plaintiff). That Rees may have acted as agent for some juristic entity does not insulate him from personal liability for his tortious or criminal wrongdoing. *Baranowski v. Strating*, 72 Mich.App. 548, 560, 250 N.W.2d 744 (1976); *Browning-Ferris Indus. of Il. v. Ter Mat,* 195 F.3d 953, 955-956 (7th Cir. 1999).

rebuttal, plaintiff simply notes this is an interlocutory appeal from a December 6, 2019 Eastern District of Michigan opinion and order denying Rees' Motion to Compel Arbitration (RE 14, PageID 734-737).

Judge Bernard Friedman summarized the underlying facts and his *ratio decidendi* sufficiently for present purposes as follows (*id*.):

> Plaintiff has brought this action against Rees and three other individuals[1] for their involvement in lending her money on usurious terms (354% APR) through an entity called Plain Green LLC ("Plain Green"). Plain Green was allegedly created[2] by Think Finance LLC ("Think Finance") whose principal is defendant Rees. Plaintiff alleges that Plain Green is a "rent-a-tribe enterprise ... formed under the law of the Chippewa Cree, to serve as the front to disguise Think Finance's role and to shield the scheme from application of federal and state law by exploiting tribal sovereign immunity." Compl. ¶¶ 2, 4. Plaintiff asserts claims for civil RICO, unjust enrichment, violation of Michigan's Consumer Protection Act, among other claims.
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>
> [1] Plaintiff recently voluntarily dismissed the complaint as to these other individuals. Therefore, the only remaining defendant in this matter is Rees.
>
> ---
>
> ***Arbitration***
>
> In the first motion now before the Court, Rees seeks "an order staying this matter and compelling arbitration pursuant to a written agreement to arbitrate signed by Plaintiff and contained within her loan agreement." Def.'s Mot. to Compel at 1. The arbitration clause, which is found at pages 8-9 of the loan agreement, states that the borrower had sixty days from the origination dates to opt out of this clause, and in that event "any disputes shall be governed under tribal

[2] Not quite right—Plain Green, LLC was created by the Chippewa Cree Tribe of the Rocky Boy Reservation, with the connivance of Kenneth Rees and Think Finance, Inc. as part of Rees' "rent-a-tribe" scheme for evading state usury laws and various federal laws.

> law and must be brought in the Chippewa Cree Tribal Court." Compl. Ex. B. If the borrower does not opt out, then "any dispute you have related to this agreement will be resolved through binding arbitration" at JAMS or the American Arbitration Association (" AAA"). *Id*. Further, the arbitration clause requires the arbitrator to apply tribal law, deprives the arbitrator of any "authority to conduct class-wide proceedings," and permits review of an arbitrator's decision only by a tribal court. *Id*. Rees seeks to compel plaintiff to arbitrate the instant dispute, as she did not opt out of the arbitration clause.

Rees falsely asserts (Rees' brief, R 26 at p. 20) that the Swiger-Plain Green arbitration clause contains "several provisions favorable to Plaintiff", including that applicatino of the consumer rules of either AAA or JAMS. That is a glaring misrepresentation; the actual arbitration language significantly limits the use of AAA/ JAMS rules:

> The policies and procedures of the selected arbitration firm applicable to consumer transactions will apply **provided such policies and procedures do not contradict this Agreement to Arbitrate or Tribal Law. To the extent the arbitration firm's rules or procedures are different than the terms of this Agreement to Arbitrate, the terms of this Agreement to Arbitrate will apply.** [RE 1-3, PageID 16-17; boldfaced emphasis added.]

Rees also misrepresents that the contract requires "the Lender to pay for all filing fees and costs charged by the arbitrator". To the contrary, the contract actually provides only that "Plain Green will advance or reimburse filing fees and other costs or fees of arbitration,"[3] but that "the arbitrator may award fees, costs,

[3] This makes abundantly clear that Rees cannot rely on this contract to invoke arbitration—Plain Green is hardly going to advance *his* costs and fees.

and reasonable attorneys' fees to the party who substantially prevails in the arbitration." (*Id*.). Meanwhile, Rees ignores the provision specifying that the arbitrator must apply *only* Tribal Law.

Notably, although Rees' Motion to Compel Arbitration cited 35 cases[4] (RE 5, PageID 80-82), not one involves a rent-a-tribe arbitration agreement, still less an arbitration agreement with terms similar to those found in RE 1-3, PageID 9-17. The reason is painfully clear—every federal court to consider the issue on its merits since 2015[5] has found the very same Plain Green arbitration clauses void and unenforceable—the list includes 5 US Courts of Appeals—the 2nd, 3rd, 4th, 7th and 11th (below, pp. 40-41) and 2 District Courts (other than those who rulings were addressed on direct appeal to the 2nd, 3rd, 4th, 7th and 11th Circuits): *Gibbs v Haynes Investments, LLC*, 368 F.Supp.3d 901, 919-925 (E.D.Va. 2019)[6], *Gibbs v Stinson*, 421 F.Supp.3d 267 (ED Va 2019)[6] and *Brice v Plain Green*, 372

[4] As a mark of the dishonesty with which counsel for Rees approached this case from the outset, Rees' supporting brief in District Court fails to cite any of the cases expressly noted in the Swiger Complaint (RE 2, PageID 57-58 and 61—¶¶161-162 and 172), still less to distinguish (or even attempt to distinguish) one or more of them.

[5] Candor requires acknowledgement there was series of cases that did compel arbitration prior to 2016, the last of which seems to be *Yaroma v CashCall, Inc.*, 130 F.Supp.3d 1055 (E.D.Ky. Sept. 16, 2015). Subsequently, the reasoning of those cases has been uniformly rejected by 5 federal circuits and numerous district courts (below, pp. 40-41).

[6] Rees' current lead counsel Richard Scheff, *inter alia*, was counsel of record in the indicated cases, yet nowhere references them before this Court, R 26, pp. 5-9 (nor in District Court), contrary to counsel's duty of candor under Model Rule of Professional Conduct 3.3(a)(1)-(3) per 6th Cir. R. 46(b).

F.Supp.3d 955, 964-974 (N.D.Cal. 2019).

Additionally, in a class action against Rees imitator Mark Curry, whose "rent-a-tribe" operation suborned the Otoe-Missouria Tribe, Hon. Henry Coke Morgan, Jr. denied motions to compel arbitration, holding:

> Plaintiffs have produced enough evidence to show that Curry shifted all of the risk of his scheme to the Tribe and kept the lion's share of the revenue for himself, through a scheme that infringed upon the Tribe's self-governance and placed the Tribe's treasury at risk. In other words, Plaintiffs have made a sufficient showing that Curry was acting for himself, not for the Tribe.

Solomon v. American Web Loan, 375 F.Supp.3d 638, 645 (E.D.Va., 2019). To like effect, see *Titus v Zestfinance, Inc.* (W.D. Wash. No. 18-5373 RJB October 18, 2018); *Rideout v Cashcall, Inc.* (Nev. No. 2:16-cv-02817-RFB-VCF March 7, 2018); *Ryan v Delbert Services Corp*, 2016 WL 4702352. (E.D.Pa. 2016).

Following the filing of Rees' appeal herein, plaintiff moved to dismiss for lack of jurisdiction (R 14). That motion was denied (R 21) without prejudice, on grounds the issue is sufficiently complex it should be addressed to a merits panel.

ARGUMENT

Issue I: Because the Federal Arbitration Act (FAA) is not applicable to the subject arbitration agreement, an appeal under Section 16 of the FAA, 9 U.S.C. §16, which restricts appeals to those arising under "this title", is not available to Kenneth Rees in this case.

Standard of Review

As held in *McNutt v. General Motors Acceptance Corp*., 298 U.S. 178, 184

(1936):

> The Act of 1875, * * * applies to both actions at law and suits in equity. The trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, "inquire into the facts as they really exist."

This Court must likewise inquire into its own jurisdiction.

As a general proposition, having limited rather than general jurisdiction, federal courts must confine themselves to the bounds set by Congress or the Constitution. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)[7]. Parties cannot stipulate to jurisdiction or jurisdictional facts; every federal court must satisfy itself that it has proper jurisdiction. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938).

A federal court, at any time, on motion or *sua sponte*, may enter "upon an inquiry to ascertain whether the cause was one over which it had jurisdiction." *KVOS, Inc. v. United States*, 299 U.S. 269, 277-8 (1936). Rees, as appellant, bears the burden of supporting his position by competent proof, *McNutt, supra*, at 189, or citation to proper authority.

Legal Analysis

Federal appellate jurisdiction is purely statutory. *Heike v United States*, 217 U.S. 423, 428 (1910), citing *American Construction Co. v. Jacksonville, Tampa &*

[7] "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case."

Key West Ry. Co., 148 U.S. 372, 378 (1893). The federal Courts of Appeals are creatures of statute, 28 U.S.C. §§41-43, with strictly statutory jurisdiction. *Whitney v. Dick*, 202 U.S. 132, 137 (1906) ("It will be borne in mind that the circuit court of appeals, which is a court created by statute, *Kentucky v. Powers*, 201 U.S. 1, 24, is not in terms endowed with any original jurisdiction."); *United States v. Mayer*, 235 U.S. 55, 65 (1914) ("But the jurisdiction of the circuit courts of appeals is exclusively appellate (act of March 3, 1891, §§ 2, 6, 26 Stat. 826, 828, c. 517, Judicial Code, §§ 117, 128; *Whitney v. Dick*, 202 U.S. 132, 137-138 (1906)), and their authority to issue writs is only that which may properly be deemed to be auxiliary to their appellate power (Judicial Code, § 262; Rev.Stat. § 716; Act of March 3, 1891, c. 517, § 12, 26 Stat. 826, 829; *Whitney v. Dick, supra; McClellan v. Carland*, 217 U.S. 268, 279-280)."); *Montgomery v. Realty Acceptance Corp*., 284 U.S. 547, 549 (1932) ("[T]he circuit court of appeals has no original jurisdiction, and possesses only such appellate jurisdiction as is conferred by statute.").

Generally, the appellate jurisdiction of the Courts of Appeals is limited to reviewing "final orders" of the District Courts. 28 U.S.C. §1291. One statutory exception is section 16 of the Federal Arbitration Act (FAA), 9 U.S.C. §16(a)(1)(B), which provides:

> (a) An appeal may be taken from-
> (1) an order-

> * * *
> (B) denying a petition under section 4[8] of this title to order arbitration to proceed,
> * * *

This statute provides the sole basis for Rees' invocation of this Court's jurisdiction herein (Rees' brief on appeal, R 26, p. 11).

The arbitration agreement upon which appellant Rees predicates his demand for arbitration in this case provides, however, that the Federal Arbitration Act is ***not*** applicable. One key contract provision specifies (RE 1-3, PageID 15):

> **GOVERNING LAW: NON-APPLICABILITY OF STATE LAW; INTERSTATE COMMERCE:** This Agreement and the Agreement to Arbitrate are governed by Tribal Law. *The Agreement to Arbitrate also comprehends the application of the Federal Arbitration Act, as provided*

[8] Section 4 in turn provides, in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28,* * * of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, * * * the court shall hear and determine such issue. * * * If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Here, there is no agreement to arbitrate as between Kenneth Rees and Nicole Swiger (see Issue III below).

> *below*. Plain Green does not have a presence in Montana or any other state of the United States of America. Neither this Agreement nor the Plain Green is subject to the laws of any state of the United States. *Plain Green may choose to voluntarily use certain federal laws as guidelines for the provision of services*. Such voluntary use does not represent acquiescence of the Chippewa Cree Tribe to any federal law unless found expressly applicable to the operations of the Chippewa Cree Tribe. You and Plain Green agree that the transaction represented by this Agreement involves interstate commerce for all purposes. [Italicized emphasis added.]

The contract goes on to provide (RE 1-3, PageID 17):

> **APPLICABLE LAW AND JUDICIAL REVIEW OF ARBITRATOR'S AWARD: THIS AGREEMENT TO ARBITRATE IS MADE PURSUANT TO A TRANSACTION INVOLVING INTERSTATE COMMERCE AND *SHALL BE GOVERNED BY TRIBAL LAW*[.] *THE PARTIES ADDITIONALLY AGREE TO LOOK TO THE FEDERAL ARBITRATION ACT AND JUDICIAL INTERPRETATIONS THEREOF FOR GUIDANCE IN ANY ARBITRATION THAT MAY BE CONDUCTED HEREUNDER***. The arbitrator shall apply Tribal Law and the terms of this Agreement, including this Agreement to Arbitrate and the waivers included herein. The arbitrator may decide, with or without a hearing, any motion that is substantially similar to a motion to dismiss for failure to state a claim or a motion for summary judgment. The arbitrator shall make written findings and the arbitrator's award may be filed with a Tribal court. *The arbitration award shall be supported by substantial evidence and must be consistent with this Agreement and Tribal Law, and if it is not, it may be set aside by a Tribal court upon judicial review*. The parties will have the right to judicial review in a Tribal court of (a) whether the findings of fact rendered by the arbitrator are supported by substantial evidence and (b) whether the conclusions of law are erroneous under Tribal Law. Judgment confirming an award in such a proceeding may be entered only if a Tribal court determines that the award is supported by substantial evidence and is not based on legal error under Tribal Law. [Italicized emphasis added.]

Note that, although the FAA is *mentioned* as something to which the parties "agree to look * * * for *guidance*", the agreement is declared to be *solely* "governed by

tribal law", and the arbitrator is mandated to "apply Tribal Law"[9]. Moreover, where any arbitral award under the FAA is subject to restricted federal judicial review expressly limited to grounds iterated in 9 U.S.C. §§10(a)[10] and 11(a)-(c)[11], the subject arbitration clause instead exclusively authorizes only a Tribal Court to

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[9] Although not central to jurisdiction, the referenced "Tribal Law" is not readily available for perusal off the reservation. Such Tribal Law as can be found on the Chippewa-Cree tribal website is extraordinarily limited, although it is unclear if the entire tribal code is that tiny, or if only a fraction of the tribe's ordinances have been posted, or if "Tribal Law" consists mainly of oral traditions known only to tribal members steeped therein. The 2nd Circuit in *Gingras v Think Finance, Inc*, 922 F.3d 112, 127 (2nd Cir. 2019) noted:

> Tribal law is generally unavailable outside of the reservation, and Plaintiffs plausibly allege that any tribal law that would be applied has been carefully tailored to protect Plain Green's interests. * * * Tribal law provides no guarantee that federal and state statutory rights could be pursued, much less vindicated, in this arbitral forum.

[10] "(1) where the award was procured by corruption, fraud, or undue means;
"(2) where there was evident partiality or corruption in the arbitrators, or either of them;
"(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
"(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

[11] "(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
"(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
"(c) Where the award is imperfect in matter of form not affecting the merits of the controversy."

review the award to determine if any fact findings are supported by "substantial evidence", whether the arbitrator made any errors in applying Tribal Law, and whether the ruling is "consistent with this Agreement". Enforcement of the award may only be had in a Tribal Court, whereas FAA §10 provides for federal court involvement. Moreover, any arbitrator is strictly limited to awarding "all remedies available under Tribal Law", without regard to state or federal law.

By the express terms of the contract between Plain Green and Nicole Swiger, the Federal Arbitration Act does not apply, and merely serves as something to provide "guidance" to the application of Tribal Law. But the right to appeal under §16 of the FAA is an exception to the general statutory jurisdictional limitation that appeals must be from "final orders". 28 U.S.C. §1291. Being limited *by the terms of the FAA itself* to appeals arising under "this title", Section 16 can thus only be invoked when arbitration is subject to or governed by the FAA[12]. This not being such a case, §16 simply does not apply, and this Court is without jurisdiction over this appeal.

This Court has made clear that it frowns on the dilatory tactic of claiming an appeal from a non-appealable order. In *Cochran v. Birkel*, 651 F.2d 1219, 1222 (6th Cir. 1981), this Court reasoned (boldfaced emphasis added):

[12] Title 9 also includes the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (§§201-208) and the Inter-American Convention on International Commercial Arbitration (§§301-307), no part of which has any application here.

> We are persuaded that filing a notice of appeal from a nonappealable order should not divest the district court of jurisdiction and that the reasoning of the cases that so hold is sound. **The contrary rule leaves the court powerless to prevent intentional dilatory tactics, forecloses without remedy the nonappealing party's right to continuing trial court jurisdiction, and inhibits the smooth and efficient functioning of the judicial process.**

Therefore, this case must be dismissed forthwith so that the "smooth and efficient functioning of the judicial process" may go forward unimpeded.

Issue II. Kenneth E. Rees' motion to compel arbitration based on the arbitration provisions of a Plain Green, LLC loan contract is barred by collateral estoppel (issue preclusion).

Counterstatement of the Standard of Review

Generally, appellate review of a district court's decision to apply either res judicata or collateral estoppel is de novo. *Buck v. Thomas M. Cooley Law Sch.*, 597 F.3d 812, 816 (6th Cir. 2010); *Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ.*, 158 F.3d 361, 371 (6th Cir. 1998). However, a district court's decision to allow offensive invocation of collateral estoppel is reviewed for abuse of discretion. *Parklane Hosiery Co, Inc v Shore*, 439 U.S. 322, 331, (1979).

"Issue preclusion reflects the fundamental principle that courts should not revisit factual matters that a party previously litigated and another court actually decided." 18 Wright, Miller, & Cooper, Federal Practice and Procedure § 4416 at 424 n.3 (quoting *Miller v. Nichols*, 586 F.3d 53, 60 (1st Cir. 2009)).

Legal Analysis

Kenneth E. Rees was a party (appellant) in *Gingras v Think Finance, Inc*, 922 F.3d 112, 127-128 (2nd Cir. 2019), in which the 2nd Circuit held the Plain Green arbitration language void and unenforceable (as well as not severable), rejecting all the same arguments Rees purports to advance here, and affirming denial of Rees' motion to compel arbitration on that very basis.[13]

Under the federal standard for collateral estoppel (issue preclusion), the party claiming preclusion must demonstrate:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Kosinski v. Commissioner of Internal Revenue, 541 F.3d 671, 675 (6th Cir. 2008), quoting *United States v. Cinemark USA, Inc*., 348 F.3d 569, 583 (6th Cir. 2003).

Those criteria are indisputably fulfilled here. Rees filed his motion to compel arbitration in Vermont District Court, which denied the motion on grounds the Plain Green arbitration provisions are designed to circumvent federal and state consumer protection laws, contrary to *Am. Exp. Co. v. Italian Colors Rest*., 570

[13] In that case as well, Richard L. Scheff and David F. Herman were counsel for Mr. Rees, and, as in district court, again they have failed to cite *Gingras* anywhere in their brief on appeal, in violation of Model Rule of Professional Conduct 3.3 (a)(1)-(3).

U.S. 228, 235-36 (2013), and that the arbitration provisions are substantively unconscionable because the arbitral forum is illusory. The 2nd Circuit, on appeal *by Rees*, agreed on both prongs. *Gingras*, *id*. The validity of the arbitration clauses was a central issue raised by Rees as appellant, and represented an issue not resolved by the 2nd Circuit's decision on other issues (such as tribal immunity). *Id*. at 124-127. The 2nd Circuit determined it had proper jurisdiction over an order denying referral to arbitration pursuant to 9 U.S.C. §16(a)(1)(C). Thus, Mr. Rees has had his full and fair opportunity to litigate the issue, and he lost definitively. He is not entitled to a second bite at the same apple.

Rees attacks the district court's ruling on grounds Judge Friedman's opinion was "perfunctory"[14]. Because an appellate court may affirm a district court where the district court reached the right result for the wrong reason, *Union CATV Inc. v. City of Sturgis*, 107 F.3d 434, 442 (6th Cir. 1997), a district court's economy of words can hardly serve as reversible error.

Rees contends that he did not have "full and fair opportunity" to litigate the issue in *Gingras* because he "had no ability to present evidence or witnesses on the

[14] Regarding collateral estoppel, after finding the reasoning in *Gingras* persuasive and adopting it (RE 14, PageID 735-737), Judge Friedman turned attention to plaintiff's invocation of collateral estoppel (RE 14, PageID 737):

> Additionally, Rees is collaterally estopped from relitigating this issue, as he was a party in *Gingras*, and the issue is identical in both cases and was fully litigated in *Gingras*. *See Wolfe v. Perry*, 412 F.3d 707, 716 (6th Cir. 2005).

issue under consideration". That argument represents hypocrisy at its apex—in *Gingras*, Rees' affiliated corporations moved to compel arbitration, supported by a dozen affidavits and other exhibits[15], and Rees opted to join the motion without proffering additional affidavits or exhibits of his own (here, Rees personally produced exhibits from prior cases[16]). Rees also chose to participate in the appeal in *Gingras* as an appellant (represented by counsel of his choice, who were not the attorneys or law firm representing the corporate entities), raising no argument that he had been denied the opportunity to produce witnesses or evidence on the arbitration issue. The issue of whether arbitration should be compelled was identical—and if Rees failed to raise additional arguments in *Gingras* that he wishes to advance here, it is precisely the purpose of collateral estoppel to prevent that. Rees had his opportunity to argue as many reasons to compel arbitration as he desired in *Gingras*, and he is not entitled to another opportunity to do the same in this case.

"The preclusive effect of a federal-court judgment is determined by federal common law." *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). This rule applies regardless of whether the prior federal-court judgment was based on federal

[15] See *Gingras*, Vermont District Court Case No 15-cv-101, RE 64 and RE 64-1 through RE 64-12.

[16] In his Motion to Compel Arbitration herein, Rees included the affidavits of Stephen Smith (two affidavits, RE 5-1, PageID 113-120, with Exhibits 1-5, RE 5-1, PageID 121-171, and RE 5-4, PageID 182-190), himself (RE 5-2, PageID 174-175), and Steve Parker (RE 5-3, PageID 177-180).

question or diversity jurisdiction. *Allied Erecting & Dismantling Co. v. Genesis Equip. & Mfg., Inc.*, 805 F.3d 701, 708 (6th Cir. 2015).

Under collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v McCurry*, 449 U.S. 90, 94 (1980). The application of collateral estoppel is conditioned on the fulfillment of four requirements above-quoted from *Kosinski*. *Hamilton's Bogarts, Inc v Michigan*, 501 F.3d 644, 650 (6th Cir. 2007), citing *NAACP, Detroit Branch v. Detroit Police Officers Ass'n (DPOA)*, 821 F.2d 328, 330 (6th Cir. 1987). In evaluating application of collateral estoppel, this Court looks "to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts." *Allen v. McCurry*, 449 U.S. at 96.

The first three requirements are readily satisfied here. *Gingras* involved the identical Plain Green arbitration clauses. 922 F.3d at 118. Determination of the issue was necessary to the appeal—Rees could not have participated in the appeal otherwise, as he had no standing to raise tribal sovereign immunity as a basis for interlocutory appeal. The 2nd Circuit's discussion of the arbitration issues comprises Part IV of its decision, 922 F.3d at 125-128, and is a final judgment on the arbitration issues—the time for further appeal has long since expired, and the

2nd Circuit's mandate was issued on July 17, 2019 (Rees advances no argument as to lack of finality).

> Although mutuality originally was a requirement, federal courts have allowed a litigant who was not a party to a federal case to use collateral estoppel 'offensively' in a new federal suit against the party who lost on the decided issue in the first case. But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case.

Allen v McCurry, 449 U.S. at 94-95.

"Offensive collateral estoppel" occurs when "a plaintiff [seeks] to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Parklane Hosiery Co, Inc v Shore, supra*, 439 U.S. at 329). Trial courts have *broad* discretion to determine whether to permit the use of offensive collateral estoppel. *Id*. at 331.

In *Parklane Hosiery*, the Supreme Court reviewed four possible reasons why offensive use of collateral estoppel ought not be allowed:

1. "offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does", *id*. at 329-330;

2. "it may be unfair to a defendant. If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable", *id*. at 330;

3. "Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant", *id*.;

4. "it might be unfair to apply offensive estoppel * * * where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result", *id*. at 330-331.

But rather than prohibit offensive use of collateral estoppel, the Supreme Court instead left the matter to the broad discretion of trial courts. "The general rule should be that. in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." *Id*. at 331.

In *Parklane Hosiery* itself, the Supreme Court went on to evaluate and apply those concepts to the case before it, 449 US at 331-333:

> In the present case, however, none of the circumstances that might justify reluctance to allow the offensive use of collateral estoppel is present. The application of offensive collateral estoppel will not here reward a private plaintiff who could have joined in the previous action, since the respondent probably could not have joined in the injunctive action brought by the SEC even had he so desired. Similarly, there is no unfairness to the petitioners in applying offensive collateral estoppel in this case. First, in light of the serious allegations made in the SEC's complaint against the petitioners, as well as the foreseeability of subsequent private suits that typically follow a successful Government judgment, the petitioners had every incentive to litigate the SEC lawsuit fully and vigorously. Second, the

> judgment in the SEC action was not inconsistent with any previous decision. Finally, there will in the respondent's action be no procedural opportunities available to the petitioners that were unavailable in the first action of a kind that might be likely to cause a different result.
>
> We conclude, therefore, that none of the considerations that would justify a refusal to allow the use of offensive collateral estoppel is present in this case. Since the petitioners received a "full and fair" opportunity to litigate their claims in the SEC action, the contemporary law of collateral estoppel leads inescapably to the conclusion that the petitioners are collaterally estopped from relitigating the question of whether the proxy statement was materially false and misleading.

Here, *Gingras* was a class action, not a suit by a single private litigant seeking relatively nominal damages, so Rees had both every incentive, as well as exactly the same motivation, to fully and vigorously litigate issues regarding arbitration in *Gingras* as here. *Gingras* was, like the present case, a lawsuit originally filed in federal district court, subject to the identical Federal Rules of Civil Procedure, and grounded in some of the same federal statutory causes of action, as this case. Rees can identify no prior federal Court of Appeals ruling on the same arbitration issue that went the opposite way and ruled in his favor. Class plaintiff Nicole Swiger obtained her loan from Plain Green in December, 2018; *Gingras* was filed as a class action on May 13, 2015, based on loans the latest of which occurred in July, 2013, long before Plain Green supposedly severed ties with Think Finance, Inc. So Nicole Swiger was not a member of the putative class in *Gingras*, has made no claim against Think Finance or related entities (all of

which are in bankruptcy), and could hardly have joined a lawsuit filed 3.5 years *before* she had any dealings with Plain Green or became a victim of Kenneth Rees' rent-a-tribe brainchild. Also, unlike the class plaintiffs in *Gingras*, Nicole Swiger did not seek or obtain a "payday loan"[17], and so could not have joined *Gingras* even if the class definition were broadened temporally. Indeed, Rees makes no argument that offensive use of collateral estoppel herein would be unfair under *Parklane Hosiery*[18]. Nor does Rees so much as mention abuse of discretion—but any such contention would be without merit per *Gilbert v. Ferry*, 413 F.3d 578, 580 (6th Cir. 2005):

> The purposes of collateral estoppel are to shield litigants (and the judicial system) from the burden of re-litigating identical issues and to avoid inconsistent results. See 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4403 at 11-18. * * * "[w]here the [defendants] have had a full and fair opportunity to actually litigate the issue and did in fact litigate it, they can not ordinarily be prejudiced by subsequently being held to the prior determination[,]" We will apply collateral estoppel in this case despite the * * * failure to raise the issue properly. *Clements*, 69 F.3d at 330.

Rees contends that there is no mutuality of estoppel, and that collateral estoppel cannot be used "offensively" [19]—but mutuality is not required by federal

[17] Only specially licensed lenders may participate in payday loans in Michigan, where the loan must be repaid within 31 days. MCL 487.2131(1). Plain Green is not so licensed, and makes ordinary installment loans.

[18] Rees only cites *Parklane Hosiery* in a footnote (Rees' brief, R 26, p. 40, footnote 5) for the definition of "offensive use of collateral estoppel", and the discretion of federal courts to permit it

[19] Rees acknowledges mutuality is not required under Michigan law. *Monat v.*

law, and "offensive" use of collateral estoppel is permitted by federal law within the district court's discretion (again, with Rees offering no contention Judge Friedman abused his discretion in this regard).

Rees also makes the fatuous assertion that collateral estoppel requires that an issue have been submitted to a trier of *fact*, citing only *People v. Zitka*, 325 Mich.App. 38, 45; 922 N.W.2d 696, 701 (2018)[20]. But, again, *Michigan* case law is irrelevant to this issue, because *Gingras* is a *federal* court ruling, the preclusive effect of which turns on *federal* common law, *Taylor v. Sturgell, supra*, and under federal law, collateral estoppel applies equally to questions of fact *or law*, *Allen v. McCurry, supra,* 449 U.S. at 94.

Moreover, application of collateral estoppel fulfills the central purpose of the doctrine—"the conclusive resolution of disputes within their jurisdiction.".

State Farm Ins. Co., 469 Mich. 679, 689, 677 N.W.2d 843, 848 (2004). But Rees contends *Monat* does not allow use of collateral estoppel "offensively". There is no need to address this contention, as, per *Allen v. McCurry,* it is *federal* jurisprudence that controls the preclusive effect of *Gingras*.

[20] Even if Michigan law were controlling, *Zitka* is simply wrong if understood to limit collateral estoppel to issues of fact decided by a trier of fact (*Zitka*, and all Michigan Court of Appeals decisions purporting to frame the doctrine in the same fashion, are *obiter dicta* regarding application of collateral estoppel to issues of law, as none encountered or addressed such an issue). The Michigan Supreme Court has recognized collateral estoppel applies *equally* to issues of fact or law, *People v Wilson*, 496 Mich. 91, 98; 852 N.W.2d 134 (2014), citing *Allen v. McCurry*, 449 U.S. at 94; *City of Detroit v. Qualls*, 434 Mich. 340, 357, 454 N.W.2d 374, 382 (1990). Thus, any lower court decision inconsistent with *Wilson* or *Qualls* precedent is, literally, not worth the paper on which it is printed. *Boyd v. WG Wade Shows*, 443 Mich. 515, 523; 505 N.W.2d 544, 547 (1993).

Montana v. United States, 440 U.S. 147, 153 (1979); "Collateral estoppel has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329 (1971).

Issue III. As a non-party to the putative arbitration agreement between Nicole Swiger and Plain Green, LLC, as to whom there is no indication of the contracting parties' intent to benefit Kenneth E. Rees, Rees lacks standing to invoke arbitration under the Swiger-Plain Green loan contract.

Counterstatement of the Standard Of Review

This Court reviews "a district court's ruling on a motion to compel arbitration de novo." *Richmond Health Facilities v. Nichols*, 811 F.3d 192, 194 (6th Cir. 2016). Because "[a]rbitration is strictly a matter of consent," *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010), "[b]efore compelling an unwilling party to arbitrate . . . the court must engage in a limited review to determine whether the dispute is arbitrable; meaning that a valid agreement to arbitrate exists **between the parties** and that the specific dispute falls within the substantive scope of that agreement." *Richmond Health Facilities* at 195 (quoting *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 624 (6th Cir. 2003) [Boldfaced emphasis added.]). The existence of a valid arbitration agreement is also reviewed *de novo*. *VIP, Inc. v. KYB Corp.*, 951 F.3d 377, 382 (6th Cir. 2020).

Under the FAA, arbitration agreements are "valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA "is at bottom a policy guaranteeing the enforcement of private contractual agreements" arising from a "liberal federal policy favoring arbitration agreements." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

"We review the enforceability of an arbitration agreement according to the **applicable state law of contract formation**." *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666 (6th Cir. 2003). Here, that state is Michigan, where the preprinted loan contract was accepted by Nicole Swiger. "In applying state law, we anticipate how the relevant state's highest court would rule in the case and are bound by controlling decisions of that court. Intermediate state appellate courts' decisions are also viewed as persuasive unless it is shown that the state's highest court would decide the issue differently." *In re Dow Corning Corp.*, 419 F.3d 543, 549 (6th Cir. 2005) (citation omitted). "[W]here a state appellate court has resolved an issue to which the high court has not spoken, we will normally treat [those] decisions . . . as authoritative absent a strong showing that the state's highest court would decide the issue differently," regardless of whether the decision is published or unpublished. *Aarti Hospitality, LLC v. City of Grove City, Ohio*, 350 Fed.Appx. 1, 7-8 (6th Cir. 2009) (alterations in original) (quoting *Hisrich v. Volvo Cars of N.*

Am., Inc., 226 F.3d 445, 449 n.3 (6th Cir. 2000)). "We may refuse to follow intermediate appellate court decisions where we are persuaded that they fail to reflect state law correctly, but we 'should not reject a state rule just because it was not announced by the highest court of the state,' even if we believe that the rule is 'unsound.'" *Ziebart Int'l Corp. v. CNA Ins. Cos.*, 78 F.3d 245, 251 (6th Cir. 1996) (quoting *FL Aerospace v. Aetna Cas. & Sur. Co.*, 897 F.2d 214, 219 (6th Cir. 1990)). Here, appellant Rees cites only two (2) Michigan decisions (neither of which properly applies to any aspect of this appeal).

In evaluating the arbitration agreement's validity, the Court analyzes only the arbitration clause itself; arguments concerning the contract's validity as a whole are inapposite at this stage. *Great Earth Cos., Inc. v. Simons*, 288 F.3d 878, 889-90 (6th Cir. 2002). "[G]enerally applicable state-law contract defenses like fraud, forgery, duress, mistake, lack of consideration or mutual obligation, or unconscionability, may invalidate arbitration agreements." *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 498 (6th Cir. 2004).

Legal Analysis

Kenneth Rees is not a party to the December, 2018 loan agreement between Nicole Swiger and Plain Green. Indeed, Rees maintains he has had no business relationship with Plain Green, direct or indirect, since June 1, 2016 (RE 9-3,

PageID 462; RE 5, PageID 85-86, n. 1)[21], so there was no reason for the contracting parties—Plain Green and Nicole Swiger—to include Rees within the ambit of their Arbitration Clauses. The first task of a federal court considering a motion to compel arbitration is to "determine whether the parties agreed to arbitrate." *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000).

In *Arthur Andersen, LLP v. Carlisle*, 556 U.S. 624 (2009), the Supreme Court addressed whether "litigants who were not parties to the relevant arbitration agreement" can nonetheless invoke arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. §§1 *et seq.*, Construing §2 of the FAA, the act's "substantive mandate", which "makes written arbitration agreements 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of a contract', *id*. at 629-30, *Arthur Andersen* held (at 630-31) that "background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)" are therefore (boldfaced emphasis added)

> applicable to determine which contracts are binding under §2 and enforceable under §3 "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 493, n. 9 (1987). See also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Because "traditional principles" of state law allow a contract to be enforced by or against nonparties to the contract through "assumption, piercing the corporate veil, alter ego,

[21] So the fact that the arbitration clauses broadly extend to " Plain Green's affiliated companies " and "Plain Green's servicing and collection representatives and agents, and each of their respective agents, representatives, [etc.]" is irrelevant, because Mr. Rees is none of those things.

> incorporation by reference, **third-party beneficiary theories**, waiver and estoppel," 21 R. Lord, Williston on Contracts §57:19, p. 183 (4th ed. 2001),

Rees' Motion failed to identify any of these bases for his invocation of arbitration as a non-party, non-signatory to the loan agreement, and he continues to ignore the requirement here[22].

Because Nicole Swiger executed the contract in Michigan, received the loan proceeds in Michigan, and all communications to her (including the original advertising) were sent to and received by her in Michigan, Michigan is the "[S]tate law" to which *Arthur Andersen* applies[23]. There are no facts identifiable in the Complaint herein to support "assumption, piercing the corporate veil[24], alter ego, incorporation by reference, waiver or estoppel" as a basis for Rees to invoke the arbitration clauses[25].

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[22] Rees' brief (R 26) does not cite *Arthur Andersen* anywhere, and ignores his non-party status entirely.

[23] Access by non-tribal members to the Chippewa-Cree Tribal Code is limited (https://narf.org/nill/codes/chippewa_cree/index.html; see also footnote 9 above), and there appears to be no provision within what is available addressing third-party beneficiary issues, or contract law at all. If there is tribal court case law on the subject, it is entirely unavailable. Rees has never cited any tribal code provision or tribal case law supporting his claim to third-party beneficiary status under the Plain Green-Swiger loan contract.

[24] Rees is sued in his individual capacity; a corporate agent or officer may acquire personal liability for torts or criminal acts in which he or she actively participates. See *Attorney Gen v. Ankersen*, 148 Mich.App. 524, 557; 385 N.W.2d 658 (1986); *Baranowski v. Strating*, *supra*.

[25] Rees' failure to either claim or present authority in support of third-party beneficiary status should be fatal to his appeal, independently of all other issues. As held in *Domino's Pizza, Inc v. McDonald*, 546 U.S. 470, 476 n. 3 (2006):

That leaves only possible third party beneficiary status as a valid basis on which Rees might invoke arbitration as a non-party non-signatory. In Michigan, a person can be a third-party beneficiary of a contract *only* if the contract establishes a promisor has undertaken a promise *directly* to or for that person. *Koenig v. South Haven*, 460 Mich. 667, 676-677; 597 N.W.2d 99 (1999). Michigan's third-party beneficiary statute, MCL 600.1405, provides:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee. (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

To achieve third-party beneficiary status, the contract must "expressly contain a promise to act to benefit the third party." *White v Taylor Distrib Co, Inc*,

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> We say "[identify an impaired 'contractual relationship'] under which the plaintiff has rights" rather than "to which the plaintiff is a party" because we do not mean to exclude the possibility that a third-party intended beneficiary of a contract may have rights under §1981. See, *e.g.*, 2 Restatement (Second) of Contracts §304, p. 448 (1979) ("A promise in a contract creates a duty in the promisor to any **intended beneficiary** to perform the promise, and the **intended beneficiary** may enforce the duty"). Neither do we mean to affirm that possibility. See, *e.g., Blessing v. Freestone*, 520 U.S. 329, 349 (1997) (SCALIA, J., concurring) ("Until relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it"). **The issue is not before us here, McDonald having made no such claim.** [Boldfaced emphasis added.]

Rees likewise has not claimed such status, and has not attempted to show he is an "intended beneficiary" of the loan contract.

289 Mich.App. 731, 734; 798 N.W.2d 354 (2010). "[T]he plain language of this statute reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise." *Brunsell v Zeeland*, 467 Mich. 293, 296; 651 N.W.2d 388 (2002). Rather, only *intended* beneficiaries, not merely incidental beneficiaries, may sue for breach of a contract. *Schmalfeldt v North Pointe Ins Co*, 469 Mich. 422, 427; 670 N.W.2d 651 (2003).

An objective standard is used to determine from the language of the contract whether the promisor undertook to give, do, or refrain from doing, something directly to or for the person asserting status as a third-party beneficiary. *Brunsell*, 467 Mich. at 298. The focus is upon the objective "form and meaning" of the contract to determine whether the promisor undertook to give, do, or refrain from doing something directly to or for the person claiming third-party beneficiary status. *Shay v Aldrich*, 487 Mich. 648, 665, 790 N.W.2d 629 (2010).

In an unpublished decision involving analogous (actually, more compelling) facts[26], *Riley v. Ennis*. (Mich.App. No. 290510, released Feb. 25, 2010)(RE 9-4, PageID 464-466), the Michigan Court of Appeals held an agreement to arbitrate any dispute arising from a two-party agreement did not extend to a signatory in his personal capacity as a third party beneficiary (boldfaced emphasis added):

[26] *Viz.*, a defendant charged with personal liability but personally a non-signatory to an arbitration agreement which he signed in his capacity as agent for an entity, seeking to compel arbitration.

* * *Here, the arbitration provision is contained in an employment contract, and it is clear from the terms of the agreement that the only parties to the contract are the Ennis Center for Children, Inc., ("Ennis Center"), and plaintiff. The employment contract defines the Ennis Center as "the Agency," and provides, in pertinent part:

> The employee and the Agency agree that if the employee has *any dispute with the Agency* concerning his/her employment or termination of employment (including any allegation of breach of contract or discrimination), such dispute shall be submitted to arbitration administered by the American Arbitration Association under its Employment Arbitration Rules. . . . [Emphasis added.]

Although defendant signed the employment contract, the contract specifies that he did so "For the Agency." It is well settled that a corporation can only act through its officers and agents. *Oakland Co v. Allen*, 295 Mich 61, 74; 294 NW 98 (1940). * * * "Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract." *Riddle v Lacey & Jones*, 135 Mich.App. 241, 246; 351 N.W.2d 916 (1984), quoting 2 Restatement Agency, 2d, § 320, p 67. * * * Here, the language in the contract specifying that defendant signed it "For the Agency" clearly indicates that he signed the contract solely as an agent for the Ennis Center.

Plaintiff's claim against defendant implicates his potential personal liability under the CRA, not the Ennis Center's potential vicarious liability for defendant's alleged discriminatory conduct. See *Elezovic v Ford Motor Co*, 472 Mich 408, 426; 697 NW2d 851 (2005) * * *. We note, however, that a statutory action is not the sole basis for an agent to acquire personal liability when acting in an agency capacity. A corporate agent or officer of a corporation may acquire personal liability for torts or criminal acts in which he or she actively participates. See *Attorney Gen v. Ankersen*, 148 Mich.App. 524, 557; 385 N.W.2d 658 (1986); *Baranowski v. Strating*, 72 Mich.App. 548, 559; 250 N.W.2d 744 (1976).

But regardless of the basis for plaintiff's personal liability claim against defendant, when interpreting an arbitration agreement, "a court should not interpret a contract's language beyond determining whether arbitration applies and should not allow the *parties* to divide their disputes between the court and arbitrator." *Fromm v. MEEMIC Ins Co*, 264 Mich.App. 302, 306;

690 N.W.2d 528 (2004) (emphasis added). The rationale for not allowing the bifurcation of the dispute is that it will defeat the efficiency of arbitration and undermine its value. *Id*. at 306. But this is not a case where plaintiff's dispute with the Ennis Center has the potential for bifurcation. **The potential bifurcation arises from the fact that defendant is not a party to the arbitration provision in the employment contract and, therefore, plaintiff's claim against him must be resolved in a different forum.**

We reject defendant's argument that the clause specifying that the "agreement shall be binding on the heirs and representatives of parties hereto" allows him or any other person, as Ennis Center's agent, to compel arbitration in an individual capacity. The phrase does nothing more than state what the law might presume in the absence of express language to bind heirs and representatives of a contracting party. * * *

The phrase "agreement shall be binding on the heirs and representatives of parties hereto" also does not make defendant an intended third-party beneficiary of any contractual promise under MCL 600.1405. See *Schmalfeldt v North Pointe Ins Co*, 469 Mich. 422, 427; 670 N.W.2d 651 (2003) (only intended beneficiaries of a contractual promise may enforce the promise as a third-party beneficiary). Further, we decline to apply the broad construction given to an arbitration provision in a stock purchase agreement in *Arnold v Arnold Corp*, 920 F2d 1269 (CA 6, 1990), for purposes of holding that corporate agents had a right to compel arbitration of claims brought against them in an individual capacity. **The mere fact that an individual is a corporate agent does not reveal an intent to protect the individual through arbitration. *McCarthy v Azure*, 22 F3d 351 (CA 1, 1994)**. Unlike the broad language in *Arnold* that was found to reflect a basic intent to provide for a single arbitral forum to resolve any disputes arising out of a stock purchase agreement, plaintiff and the Ennis Center did not agree to arbitrate any dispute arising out of the employment relationship. The arbitration provision is confined to disputes with "the Agency," which is defined as the Ennis Center.

* * * But "a party cannot be required to arbitrate when it is not legally or factually a party to the agreement." *St Clair Prosecutor v AFSCME*, 425 Mich. 204, 223; 388 N.W.2d 231 (1986). Stated otherwise, a party cannot be required to arbitrate an issue that the party did not agree to submit to arbitration. *Hetrick v David A Friedman, DPM, PC*, 237 Mich.App. 264, 267; 602 N.W.2d 603 (1999), disapproved on other grounds in *Wold*

Architects & Engineers v Strat, 474 Mich. 223, 232 n 3; 713 N.W.2d 750 (2006).

Although plaintiff's claims against defendant might be interwoven with her claims against the Ennis Center, because plaintiff and the Ennis Center did not agree to give the Ennis Center's agents the protection of the arbitration provision in the employment contract with respect to their own potential individual liability, we conclude that defendant cannot compel arbitration. *Cf. McCarth*y, 22 F3d at 357-358 (arbitration provision in purchase agreement did not cover corporate purchaser's employees). Thus, the trial court erred in granting defendant's motion for summary disposition.

Here, *a fortiori*, not only is Rees not a signatory in any capacity, the Arbitration Clause limits the scope of arbitration to the contracting parties:

> **AGREEMENT TO ARBITRATE:** You and Plain Green agree that any Dispute (defined below) will be resolved by Arbitration.
>
> *** * ***
>
> For purposes of this Agreement to Arbitrate, (a) the terms "you" and "your" include any co-signer and also your heirs, guardian, personal representative. or trustee in bankruptcy, and (b) the term "Plain Green" means Plain Green, LLC as the Lender, Plain Green's affiliated companies, the Tribe, Plain Green's servicing and collection representatives and agents, and each of their respective agents. employees, officers, directors, members, managers, attorneys, successors, predecessors, and assigns.
>
> **HOW ARBITRATION WORKS:** If a Dispute arises, the party asserting the claim or demand must initiate arbitration, provided you or Plain Green may first try to resolve the matter informally or through customary business methods, including collection activity. The party requesting arbitration must choose either of the following arbitration firms for initiating and pursuing arbitration. the American Arbitration Association ("AAA") or JAMS, The Resolution Experts ("JAMS"). *If you claim you have a Dispute with Plain Green, but do not initiate arbitration or select an arbitration firm, Plain Green may do so.* * * * [RE 1-3, PageID 15-16] [Italics added.]

Every reference is to "you"—meaning Nicole Swiger as borrower and her successors in interest—or to Plain Green, which includes "the Tribe, Plain Green's servicing and collection representatives and agents," etc. And *only* Nicole Swiger and Plain Green are authorized to initiate arbitration. Kenneth Rees, *by his own declaration*, has never been a Plain Green agent or representative, and has had no relationship with Plain Green since June 1, 2016, while this loan was made in December, 2018 (RE 9-3, PageID 462). Therefore, Rees is NOT a third-party beneficiary. Swiger did not agree to arbitrate anything with Rees, and Rees lacks standing to invoke arbitration under the loan contract.

In responding to plaintiff's Motion to Dismiss before this Court, Rees (R 16, p. 25) cited two Michigan Court of Appeals' decisions, *Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC*, 276 Mich.App. 146, 742 N.W.2d 409, 421 (2007), and *Scodeller v. Compo* (Mich App No 332269, released June 27, 2017), 2017 WL 2791452 at *3. *Rooyakker* held non-parties could invoke arbitration because "Michigan courts clearly favor keeping all issues in a single forum", which policy[27] would be "thwarted if all disputed issues in an arbitration proceeding must be segregated into arbitrable and non-arbitrable categories". 742 N.W.2d at 421.

[27] *Rooyakker*'s application of policy, not linked to a statute, common law, or the Constitution, was inherently improper under controlling Michigan law. *Terrien v. Zwit*, 467 Mich 56, 66-7, 648 NW2d 602, 608 (2002).

But this *ratio decidendi* applies *only where arbitration between the contracting parties is underway*, Here, Plain Green has never demanded arbitration[28].

Scodeller relied on *Javitch v First Union Securities, Inc, supra*, 315 F3d at 629 for the notion that "a signatory [] may be estopped from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the underlying contract."

Putting aside that Swiger's Complaint pleads various claims, none of which (other than usury) derive from the loan agreement itself, the idea that "equitable principles" justify compelling a contract signatory to arbitrate with a non-signatory is contrary to controlling principles of Michigan law. Michigan's 1963 Constitution, art. 6, §1, makes the Michigan Supreme Court supreme. Lower Michigan courts cannot validly render judgment inconsistently with a Michigan Supreme Court precedent. *Boyd v. W G Wade Shows, supra*, 443 Mich. at 505.

In *Beck v. Park West Galleries, Inc.*, 499 Mich. 40, 46, 878 N.W.2d 804, 807-8 (2016), the Michigan Supreme Court reiterated this fundamental principle:

> We conclude that the Court of Appeals erred because "[a] party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration," * * *.

[28] *Smith v. Ruberg*, 167 Mich.App. 13, 15-17, 421 N.W.2d 557, 558 (1988), held that, by statute (M.C.L. 600.5046(4)), non-parties can arbitrate *only if a contracting party invites them to join in an ongoing arbitration*. The statute applies only if contracting parties are *currently* arbitrating. Moreover, neither Plain Green nor Swiger issued such an invitation to Rees.

Beck continued, *id*. at 809 (boldfaced emphasis added):

> The Court of Appeals relied heavily on the proposition that Michigan courts " 'resolve all conflicts in favor of arbitration,' " and particularly on *Kaleva-Norman-Dickson Sch Dist No 6 v Kaleva-Norman-Dickson Sch Teachers' Ass'n*, in which this Court stated:
>
> > "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. . . ." * * *
>
> A majority of the Court of Appeals panel determined that this language was controlling and resolved the issue in favor of defendants. While this language recognized "[t]he policy favoring arbitration of disputes arising under collective bargaining agreements," it does not remotely suggest that an arbitration agreement between parties outside the collective-bargaining context applies to any dispute arising out of any aspect of their relationship. That is, **a general policy favoring arbitration cannot trump the actual intent and agreement of the parties.**

Both *Rooyakker* and *Scodeller* purported to do what *Beck* prohibits—apply a general policy favoring arbitration (within the collective bargaining context) to rewrite a contract to compel a contracting party to arbitrate with a non-contracting party[29]. *Rooyakker-Scodeller*'s reasoning is contrary to both Michigan contract law—"The Court may not make a new contract for the parties, but must enforce the contract according to its terms, if at all."[30]—and to federal principles:

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[29] *Rooyakker* was decided before *Beck*, so whatever its initial validity, *Beck* overruled *Rooyakker sub silentio*. *Scodeller*, being post-*Beck*, is inexcusable.

[30] *Kieffer v. Van Leeuwen*, 355 Mich. 430, 436, 94 N.W.2d 793, 796 (1955), citing *Henry v. Rouse*, 345 Mich. 86, 75 N.W.2d 836 (1956).

> [T]here is no strong arbitration-related policy favoring First Options in respect to its particular argument here. After all, **the basic objective in this area is** not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, *Dean Witter Reynolds, supra*, at 219-220, but **to ensure that commercial arbitration agreements, like other contracts, " 'are enforced according to their terms,' "** *Mastrobuono, ante*, at 54 (quoting *Volt Information Sciences*, 489 U.S., at 479), and according to the intentions of the parties, *Mitsubishi Motors*, 473 U.S., at 626. See *Allied-Bruce*, 513 U.S., at 271.

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947 (1995) (boldfaced emphasis added). Where the contracting parties limit arbitration to themselves and their agents, non-parties cannot demand arbitration. Rees thus lacks standing to appeal, since any appellate ruling upholding the validity of the arbitration clauses will not entitle Rees, as a non-party, to arbitrate. *Arthur Andersen, supra*.

Rees contends this issue is governed by *Shell v. R.W. Sturge, Ltd*., 55 F.3d 1227, 1230 (6th Cir. 1995)—a case he failed to cite in District Court , and in which enforcement of a choice of law clause was upheld *as between contracting parties*—which is typical of his ongoing effort to rely on factual premises that do not apply to him in any way, shape or form, without once acknowledging it forthrightly. Similarly, Rees seeks to overcome his status as a non-party to the arbitration agreement by contending the issue is governed by *McGee v Armstrong*, 941 F.3d 859, 866-867 (6th Cir. 2019)—another case he failed to cite in District Court, and which concerns arbitrability, again *between contracting parties*, not whether any agreement to arbitrate actually subsists between a signatory and a

non-signatory to a contract . "Arbitration is strictly a matter of consent," *Granite Rock Co. v. Teamsters, supra*, 561 U.S. at 299, and the task for courts and arbitrators is "to give effect to the intent of the parties," *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp*., 559 U.S. 662, 684 (2010). Nicole Swiger neither consented nor intended to arbitrate with Mr. Rees.

Issue IV: The subject arbitration agreement disclaims application of the Federal Arbitration Act (which thus cannot serve as a basis for compelling arbitration), offers an illusory arbitral forum, and is invalid as contrary to the prospective waiver doctrine.

Standard of Review

The validity of an arbitration agreement is subject to initial judicial determination. *Nitro-Lift Technologies, LLC v. Howard*, 568 U.S. 17, 21 (2012). A district court's decision as to validity is reviewed *de novo*. *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 311 (6th Cir. 2000).

Legal Analysis

Pursuant to the Federal Arbitration Act ("FAA"), "arbitration is a matter of contract and courts must enforce arbitration contracts according to their terms." *Schein v. Archer & White Sales, Inc.*, ___ U.S. ___, 139 S. Ct. 524, 529 (2019). But "before referring a dispute to an arbitrator, **the court determines whether a valid arbitration agreement exists**." *Id*, 139 S. Ct. at 530 (emphasis added); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010).

By their terms, the subject arbitration clauses fall outside the scope of the FAA. The key contract provision specifies (RE 1-3, PageID 17):

> **APPLICABLE LAW AND JUDICIAL REVIEW OF ARBITRATOR'S AWARD: THIS AGREEMENT TO ARBITRATE IS MADE PURSUANT TO A TRANSACTION INVOLVING INTERSTATE COMMERCE AND SHALL BE GOVERNED BY TRIBAL LAW[.] THE PARTIES ADDITIONALLY AGREE TO LOOK TO THE FEDERAL ARBITRATION ACT AND JUDICIAL INTERPRETATIONS THEREOF FOR GUIDANCE IN A**NY **ARBITRATION THAT MAY BE CONDUCTED HEREUNDER**. The arbitrator shall apply Tribal Law and the terms of this Agreement, including this Agreement to Arbitrate and the waivers included herein. The arbitrator may decide, with or without a hearing, any motion that is substantially similar to a motion to dismiss for failure to state a claim or a motion for summary judgment. The arbitrator shall make written findings and the arbitrator's award may be filed with a Tribal court. The arbitration award shall be supported by substantial evidence and must be consistent with this Agreement and Tribal Law, and if it is not, it may be set aside by a Tribal court upon judicial review_ The parties will have the right to judicial review in a Tribal court of (a) whether the findings of fact rendered by the arbitrator are supported by substantial evidence and (b) whether the conclusions of law are erroneous under Tribal Law. Judgment confirming an award in such a proceeding may be entered only if a Tribal court determines that the award is supported by substantial evidence and is not based on legal error under Tribal Law.

Although the FAA is *mentioned* as something to which the parties "agree to *look* * * * for *guidance*", the agreement is declared to be *solely* "governed by tribal law", and the arbitrator is mandated to "apply Tribal Law"[31]. Moreover, where any arbitral award under the FAA is subject to restricted federal judicial review

[31] See footnotes 10 and 24 above.

expressly limited to grounds iterated in 9 U.S.C. §§10(a)[32] and 11(a)-(c)[33], the subject arbitration clauses instead authorize a Tribal Court to review the award to determine if any fact findings are supported by "substantial evidence", whether the arbitrator made any errors in applying Tribal Law, and whether the ruling is "consistent with this Agreement". Enforcement of the award may *only* be had in a Tribal Court, whereas FAA §10 provides for federal court involvement. This role for a tribal court renders the arbitral forum illusory, particularly as to a non-Indian like Kenneth Rees.

Moreover, under the preceding paragraph of the contract (RE 1-3, PageID 17, line 1), an arbitrator can only award "remedies available under Tribal Law", without regard to remedies provided by state or federal law. Such an arbitration

[32] "(1) where the award was procured by corruption, fraud, or undue means;
"(2) where there was evident partiality or corruption in the arbitrators, or either of them;
"(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
"(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

[33] "(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
"(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
"(c) Where the award is imperfect in matter of form not affecting the merits of the controversy."

agreement is simply NOT within the scope of the FAA, and arbitration may not be compelled by a federal court.

Alternatively, the arbitration agreement is otherwise invalid as being in violation of the prospective waiver doctrine. As noted above, this arbitration agreement purports to limit an arbitrator to providing only remedies authorized by Tribal Law, thus precluding remedies authorized by federal or state law but not by Tribal Law. Additionally, the loan agreement disavows the application of federal or state law without a subsequent expression of consent by Plain Green[34].

Arbitration agreements that operate "as a prospective waiver of a party's right to pursue statutory remedies" are not enforceable because they are in violation of public policy. *Mitsubishi Motors Corp, supra*, 473 U.S. at 637 n.19. "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." *Id*. (citations omitted).

[34] In its "Truth in Lending Disclosure" section, the Agreement notes: "Plain Green's inclusion of these disclosures does **not** mean that Plain Green consents to the application of state or federal law to Plain Green, to the Loan, or this Agreement." (RE 1-3, PageID 10) In the "Governing Law; Non-Applicability of State Law" section of the Agreement, Plain Green further disavows the application of any external law: "Neither this Agreement nor Plain Green is subject to the laws of any state of the United States. **Plain Green may choose to voluntarily use certain federal laws as guidelines for the provision of services. Such voluntary use does not represent acquiescence of the Chippewa Cree Tribe to any federal law** unless found expressly applicable to the operations of the Chippewa Cree Tribe." (RE 1-3, PageID 15, last paragraph). See *Gingras*, *supra* at 127 footnote 4. [Boldfaced emphasis added.]

This very form of arbitration agreement has been held to violate the prospective waiver doctrine, and its associated choice of law provision to be ruled equally invalid and unenforceable, by multiple federal appeals courts: *Hayes v. Delbert Services Corp*., 811 F.3d 666, 673-74 (4th Cir. 2016) ("This arbitration agreement fails for the fundamental reason that it purports to renounce wholesale the application of any federal law to the plaintiffs' federal claims."); *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 335-36 (4th Cir. 2017) (choice-of-law provision limiting the arbitrator to tribal law "implicitly accomplishes what the [*Hayes* contract] explicitly stated, namely, that the arbitrator shall not allow for the application of any law other than tribal law" held invalid); *McDonald v. CashCall, Inc.*, 883 F.3d 220, 232 (3rd Cir.2018); *Parnell v. Western Sky Financial, LLC*, 664 Fed.Appx. 841, 843-844 (11th Cir.2016), citing *Parm v. National Bank of California*, 835 F.3d 1331, 1334-38 (11th Cir. 2016); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 768 (7th Cir.2014); and of course *Gingras, supra*. This Court should join these other circuits—but need not reach this issue if it agrees with plaintiff as to Issues I, II or III (or the first part of this Issue IV).

Most recently, Judge M. Hannah Lauck—whose 2018 ruling was touted by defendant Rees as "particularly helpful and compelling" (Rees' Motion to Transfer Venue, RE 6, PageID 198)—flatly declared functionally identical Plain Green arbitration agreements invalid and unenforceable. *Gibbs v. Stinson, supra* ("*Gibbs*

2"—RE 9-2)[35]. After a thorough analysis, 421 F.Supp.3d at 289-291, including a debunking of Rees' reliance on *Henry Schein, Inc. v. Archer & White Sales, Inc.*, *supra*[36], Judge Lauck concluded, *id*. at 297):

> Considering the Arbitration Agreements, the full context of the corresponding Loan Contracts, and highly relevant, controlling Fourth Circuit precedent, the Court finds the Arbitration Agreements unenforceable and nonseverable.[49]
>
> [49] All five of the Plain Green and Great Plains Contracts proclaim that the other provisions of the Contracts would remain in full force and effect even if a court found some aspect, such as the arbitration agreement, unenforceable. * * *
>
> *Dillon* strongly suggests that such arbitration agreements—even with this purported workaround—would not be severable. See *Dillon*, 856 F.3d at 336–37. "Unlawful portions of a contract may be severed only if: (1) the unlawful provision is not central or essential to the parties' agreement; and (2) the party seeking to enforce the remainder negotiated the agreement in good faith." *Id*. at 336 (citing 8 WILLISTON ON CONTRACTS § 19:70 (4th ed. 1993 & Supp. 2010); Restatement (Second) of Contracts § 184 (1981)).
>
> The Arbitration Agreements fail to meet either prong of the test for severability. For example, four of these Arbitration Agreements include the following provision: "As an *integral* component of

[35] This ruling was available to Rees' counsel (who are counsel for multiple defendants in *Gibbs*) the same day they filed their Motion to Compel, major chunks of which (RE 5, PageID 96-100 *inter alia*) are wholly rejected by Judge Lauck's "helpful and compelling analysis", 421 F.Supp.3d at 289-297, yet Rees' Motion not only made no mention of Judge Lauck's ruling, but likewise Rees' counsel failed to file an addendum to disclose it, as their duty of candor required. MRPC 3.3(a)(1)-(3), applicable here pursuant to E.D. Mich L.R. 83.22(b).

[36] Rees' contention that judicial evaluation of arbitrability is absolutely proscribed by *Henry Schein* (RE 5, PageID 97-98) is erroneous; *Henry Schein* itself, *id*. at 530, expressly reaffirms that "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." (Emphasis added.)

> accepting this [Contract], you irrevocably consent to the exclusive jurisdiction of the Tribal courts for purposes of this [Contract]." * * *
>
> As in *Dillon*, the Court finds the unlawful choice-of-law provisions integral to the Arbitration Agreements, and declines to sever them from the Loan Contracts.

Judge Lauck also considered and rejected Rees' argument (RE 5, PageID 99-100) that reference to arbitration under the aegis of the American Arbitration Association or JAMS somehow makes a difference (*Gibbs 2*, RE 9-2, PageID 421-422). The 2nd Circuit made exactly the same ruling in *Gingras, supra* at 127-8.

Here, as in district court, Rees proffers extended bloviations (Rees brief, R 26, pp. 13, 51-57; RE 5, PageID 101-106) on choice of law, touting the general principle that contracting parties may specify almost any body of law and their choice will usually be respected. *DIRECTV v Imburgia*, 136 S.Ct. 463, 468 (2015). Rees maintains this is fatal to plaintiff's position[37]. It is not.

As Judge Lauck (and 5 Circuit Courts of Appeals and numerous district courts have, *post-DIRECTV*) held (Exhibit 9-2, p. 428),

[37] Although indicating where the Chippewa-Cree Tribal Lending and Regulatory Code can be found on the internet (https://www.plaingreenloans.com/content/assets/Uploads/title10.pdf), Rees fails to note the arbitration section (Chapter 1, Part 6, §10-3-602—RE 9-5, PageID 476) merely addresses the content of an agreement to arbitrate, while a consumer is limited to the remedies provided in the Code (Chapter 6, Part 2 §10-6-201—RE 9-5, PageID 493)—which completely bar any reliance on state law (Chapter 6 Part 2 §10-6-101b—RE 9-5, Page ID 492). But even if the Tribal Code furnishes sufficient remedies, the loan "agreement", by disavowing application of *both* federal and state law, purports to eliminate those remedies, and that is a clear contravention of the prospective waiver doctrine, as Judge Lauck (among numerous federal judges) concluded (RE 9-2, PageID 428).

> After reviewing all five contracts as a whole, the Court concludes that the Great Plains and Plain Green Loan Contracts attempt to disavow the application of any state and federal law, thereby contravening the prospective waiver doctrine.

The arbitration "agreement" is therefore invalid and unenforceable, independently of the Tribal Code. *Q.E.D.*

The final arrows to Rees' bow are his contentions that "[a] party resisting an otherwise facially valid arbitration agreement 'bears the burden of proving that the claims at issue are unsuitable for arbitration'", and that this requires unspecified "evidence" (Rees' brief, R 26, pp. 34-35; RE 5, PageID 100, 107). This sophistry must be rejected—Swiger has never contended her claims, if subject to a *valid* arbitration clause, could not be properly arbitrated. But Plaintiff—backed by the 2nd, 3rd, 4th, 7th, and 11th Circuits *inter alia*— simply contends the purported arbitration "agreement" suffers invalidity so patently apparent as to render the entire loan contract unenforceable, and correlatively not severable, per *Gibbs 2*, *supra*, 421 F.Supp.3d at 297, n. 49.

The upshot is that the subject arbitration "agreement" is so hopelessly flawed that, as in *Gibbs 2* at PageID 419 (and *Gingras*, *supra* at 127):

> As a plethora of Courts have rightly concluded, "[t]he just and efficient system of arbitration intended by Congress when it passed the FAA may not play host to this sort of farce." *Hayes*, 811 F.3d at 674.

Per *Henry Schein*, *supra*, 139 S.Ct. at 531, absent a *valid* arbitration agreement, there is no issue for an arbitrator to resolve. That threshold question of validity is

properly resolved in federal court. *Stout v. J.D. Byrider, supra; Richmond Health Facilities, supra; Javitch, supra*.

CONCLUSION

The appeal should be dismissed for want of jurisdiction or lack of standing.

Alternatively, the ruling of Judge Friedman of the Eastern District of Michigan should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 30, 2020, the foregoing document was served on Richard Scheff *et al*. through the CM/ECF system.

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DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

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1-3	Nicole Swiger-Plain Green LLC Loan Agreement	9-17
2	Complaint	28-66
5	Rees' Motion to Compel Arbitration	76-111
5-1	Declaration of Stephen Smith in *Gibbs v. Rees*	113-171
5-2	Affidavit of Kenneth Rees in *Gingras v. Rosette*	174-175
5-3	Affidavit of Steve Parker in *Brice v. Rees*	177-180
5-4	Affidavit of Stephen Smith in *In re Think Finance, LLC*	182-190
6	Rees' Motion to Transfer Venue	191-216
9	Plaintiff's Brief in Opposition to Motion to Compel Arbitration	355-394
9-2	*Gibbs v. Stinson*, USDC ED Va No. 3:17-cv-00386, September 30, 2019 opinion and order denying Rees' Motion to Compel Arbitration *inter alia*	396-461
9-3	September 3, 2019 e-mail from counsel for Rees to counsel for Swiger	462-463
9-4	*Riley v. Ennis.* (Mich.App. No. 290510, Feb. 25, 2010)	464-466
14	Opinion and Order Denying Defendant Rees' Motions to Compel Arbitration and to Transfer Venue December 6, 2019 (order appealed from)	734-738