No. 19-15707

In the United States Court of Appeals for the Ninth Circuit

KIMETRA BRICE, EARL BROWNE, AND JILL NOVOROT, on behalf of themselves and all individuals similarly situated,
Plaintiffs-Appellees,

v.

PLAIN GREEN, LLC,
Defendant,

AND

HAYNES INVESTMENTS, LLC, AND L. STEPHEN HAYNES,
Defendant-Appellants.

On Appeal From the United States District Court for the Northern District of California
The Honorable William H. Orrick, Presiding
No. 3:18-cv-01200-WHO.

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CORPORATE DISCLOSURE STATEMENT

Appellants Haynes Investments, LLC, has no parent corporation or stock, and no publicly held corporation owns more than 10% of any Appellant's stock. No publicly traded entity has a direct financial interest in the outcome of this litigation.

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Haynes Investments, LLC, and L. Stephen Haynes, (collectively, "Appellants" or the "Haynes Defendants"), appeal from the decision below denying their motion to compel arbitration.

INTRODUCTION

Switzerland, England, Tibet, and pre-Revolutionary Russia all have at least one thing in common: established Supreme Court jurisprudence has allowed parties to structure arbitration agreements to select those laws—and the laws of many other foreign nations—to the exclusion of the state and federal laws of the United States. Indeed, where parties have agreed that the laws of other sovereigns will govern the parties' disputes, and those laws provide plaintiffs with some ability to vindicate their claims, the Supreme Court has consistently refused to intervene. The parties need not be able to pursue identical claims, or receive identical relief, under foreign law. An en banc panel of this Court has agreed with this proposition, and required application of foreign laws notwithstanding that those laws prohibited plaintiffs from even asserting certain claims under federal laws.

Given these holdings, the question before this Court is is whether there is a legitimate basis in law or the record below to place the laws of Native American sovereigns on a footing unequal to the laws of any other sovereign. Specifically, Appellants have argued that the laws of the sovereign Chippewa Cree and Otoe-Missoura tribes must be subject to the same analysis—and afforded the same respect—as the laws of all other sovereign nations.

The district court disagreed. Instead, lacking any evidentiary support, it refused to enforce parties' freely contracted-for agreements to have the laws of another sovereign nation govern their arbitration solely based on the court's belief that state and federal law would not apply in that arbitration. Seeking to justify its departure from binding precedent, the district court turned to decisions from other circuits, and ignored mandatory authority from this Court and the Supreme Court.

The district court held that—unlike the laws of England, Tibet, or even pre-Revolutionary Russia—any Native American tribal law must, by its very nature, violate the prospective waiver doctrine. In so concluding, the district court failed to even acknowledge, let alone distinguish, controlling authority from an en banc decision of this Court that altogether preempted the district court's conclusions and reasoning. Further, the district court relied uncritically on cases from other circuits invalidating Native American choice of law clauses, without even **considering** differences between the tribal laws at issue here and those in the other cases. The district court's decision was thus both legally improper and offensive to the concept of Native American sovereignty.

Plaintiffs here freely entered into materially similar consumer loan agreements with Plain Green and Great Plains. Under the agreements, Plaintiffs agreed to arbitrate all disputes arising out of these contracts, including disputes about the validity, enforceability, and scope of the arbitration agreement. No party below has disputed that Plaintiffs knowingly and voluntary accepted this arbitration agreement.

Plaintiffs have not disputed its application to their claims; the presence of a delegation clause in the agreement; the availability of a neutral arbitral forum before the American Arbitration Association, JAMS, or the International Institute for Conflict Prevention and Resolution; or Appellants' ability to enforce the arbitration agreement against Plaintiffs. These facts alone should have been enough for the district court to compel arbitration.

Rather than hold Plaintiffs to the terms of these freely bargained-for contracts, the district court permitted Plaintiffs to renege on their agreements to arbitrate their claims. Indeed, the court refused to compel arbitration for both substantive claims and threshold issues of arbitrability, and instead allowed Plaintiffs to advance their claims in federal court instead of arbitration. And it did so despite the parties' valid and unambiguous agreement *to delegate all threshold questions of arbitrability to an arbitrator*.

Finally, the district court misallocated the required evidentiary burden when it refused to compel arbitration. In doing so, it permitted Plaintiffs to evade their contractual agreement to arbitrate their claims by merely *alleging* prospective waiver. Plaintiffs offered *no evidence* that they would be unable to vindicate their claims in arbitration under the laws of the Chippewa Cree or Otoe-Missouria Tribes. Instead, Plaintiffs merely speculated about the effects the arbitration provisions would have on their claims. Similarly, the district court did not require Plaintiffs to prove—and Plaintiffs offered no evidence to prove—that the delegation provision itself was

invalid. The law, however, requires parties to do more than waive their hands and say "I object" before invalidating valid, binding contracts.

In sum, this appeal simply asks the Court to compel Plaintiffs to do what they agreed to do and what the law requires. This Court need only abide by Supreme Court precedent, and the en banc holding of this Circuit, to reach the correct decision, thereby restoring integrity to Native American law, and validating the contractual wishes of the parties. Given the district court's errors, this Court should reverse the decision below, and remand the case with instructions to stay the case pending the arbitration of all disputes between Plaintiffs and Haynes Defendants.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had federal-question jurisdiction under 28 U.S.C. § 1331, because Plaintiffs seek relief under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* The district court also exercised jurisdiction over state-law claims under 28 U.S.C. § 1367.

This Court has jurisdiction over this interlocutory appeal under 9 U.S.C. § 16. The Order from which this appeal is taken was entered on March 12, 2019. ER001. Appellants timely filed their notice of appeal on April 10, 2019. ER056.

ISSUES PRESENTED

1. Did the district court err when it refused to enforce a clear and conspicuous delegation provision—requiring arbitration of "any issue concerning the validity, enforceability, or scope" of the arbitration agreements— in each of the loan agreements, and instead decided issues of arbitrability?

2. Did the district court further err in finding, without evidence and contrary to mandatory authority from both the Supreme Court and this Court, that the contractual choice-of-law and forum-selection clauses caused Plaintiffs to prospectively waive their rights?

3. Did the district court misapply Plaintiffs' evidentiary burden by accepting Plaintiffs' prospective waiver argument despite their failure to offer evidence of their purported inability to vindicate their rights under Native American law?

STATEMENT OF THE CASE

This appeal arises from a lawsuit brought by three individuals against Appellants, and against other defendants not party to this appeal, asserting claims arising from loan agreements between the individuals and two sovereign Native American lenders. Plaintiffs initiated the suit against Appellants in February 2018 in the United States District Court for the Northern District of California. ER243-ER280. While the nature of the underlying lawsuits is not relevant to the issues on appeal, a brief discussion of relevant topics may provide helpful background for the Court.

I. FACTUAL BACKGROUND

Plaintiffs are three California consumers who borrowed money from one of two lenders that are both wholly owned by two separate Native American tribes. ER247–ER248; ER264–ER265. The first, Plain Green, LLC, is a company owned by the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana, and which is operated for the benefit of that tribe. ER151–ER156; ER190–ER193; ER248. The second, Great Plains Lending, LLC, is owned and operated by the Otoe-Missouria Tribe of Indians, and is operated for the benefit of that tribe. ER248. Appellants are a business (Haynes Investments, LLC) alleged to have served as a lender to Plain Green in 2011 and 2013, and the managing member of that company (L. Stephen Haynes), who is alleged to have assisted in identifying banks potentially willing to

provide banking and ACH processing services to Plain Green and Great Plains. ER258–ER260.

A. Plaintiffs' Agreements to Arbitrate

As part of the loan-application process, Plaintiffs entered into loan agreements with one of the Native American lenders discussed above. ER092–ER097; ER195 (Browne Plain Green Loan Agreement); ER205 (Brice Great Plains Loan Agreement); ER213 (Novorot September 2016 Great Plains Loan Agreement); ER224 (Novorot February 2016 Great Plains Loan Agreement). These agreements include two provisions that are central to this action. First, each loan agreement contained an arbitration provision, through which plaintiffs agreed that "***ANY DISPUTE YOU HAVE RELATED TO THIS AGREEMENT WILL BE RESOLVED THROUGH BINDING ARBITRATION***." ER201 (emphasis in original); *see also* ER209; ER220; ER230–ER231. The arbitration provision also states that the term "Dispute" is "to be given its broadest possible meaning," and specifically includes "any dispute involving this Agreement or the Loan." ER201; ER209; ER220; ER231; ER240. It also includes a clause which delegates to the arbitrator to resolve "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to arbitrate." ER201; ER209; ER220; ER231; ER240. The arbitration agreements cover disputes between borrowers and their respective lenders; the lenders' "affiliated companies"; the tribes; and the lenders' "respective agents, representatives, employees, officers, directors, members, managers, attorneys, successors,

predecessors, and assigns." ER 201; *see also* ER209(similar, and also including "lender's servicing and collection companies, representatives and agents, and each of their respective agents, representatives, employees, officers, directors, members, managers, attorneys, successors, predecessors, and assigns); ER220; ER231; ER240 (similar, and also including "lender's servicers, assigns, vendors or any third-party").

Plaintiffs have never disputed that the arbitration provision applies to Appellants or to Plaintiffs' claims. Nor could they plausibly do so given the broad scope of the provisions above and the nature of this suit, which challenges the validity and enforceability of the plaintiffs' loan agreements themselves. Even if Plaintiffs disputed the applicability of the arbitration clauses to their specific claims, such a dispute would be covered by the delegation provision.

Second, the arbitration provision also includes a prominent, clearly-disclosed choice-of-law clause. For example, the Plain Green arbitration provision states that the arbitration agreement is to be "governed by tribal law," and "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." ER202. The Great Plains arbitration provision states that the arbitration agreement is to be "governed by tribal law and such federal law as applies under the Indian Commerce Clause of the federal Constitution. ER209; ER219; ER230; ER239.

Plaintiffs agreed to their respective contracts containing these arbitration and choice-of-law provisions only after being presented with a prominent and

conspicuous disclosure notifying them of their agreement to arbitrate. Specifically, the Agreements to Arbitrate include the following disclosure in all caps and bold lettering.

> **PLEASE CAREFULLY READ THIS AGREEMENT TO ARBITRATE. UNLESS YOU EXERCISE YOUR RIGHT TO OPT-OUT OF ARBITRATION AS DESCRIBED ABOVE, YOU AGREE THAT ANY DISPUTE YOU HAVE RELATED TO THIS AGREEMENT WILL BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO HAVE A JURY, ENGAGE IN DISCOVERY (EXCEPT AS MAY BE PROVIDED IN THE ARBITRATION RULES), AND TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMAINTS OR IN ANY CONSOLIDATED ARBIRATION PROCEEDING OR AS A PRIVATE ATTORNEY GENERAL. OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MIGHT ALSO BE UNAVAILABLE IN ARBITRATION.**

ER201; ER209; ER220; ER230–ER231; ER240 (emphasis in original).

The Arbitration Agreements contain several provisions favorable to plaintiffs in arbitration proceedings that might arise from these contracts. For instance, Plaintiffs are afforded the opportunity to conduct arbitration before one of two nationally-recognized and well-respected arbitration service provider: the American Arbitration Association ("AAA") or the International Institute for Conflict Prevention and Resolution ("CPR") in the Great Plains agreements, and AAA or Judicial Arbitration Mediation Services ("JAMS") in the Plain Green agreements. ER201; ER209; ER220–ER221; ER231; ER240. The Agreements also call for the

arbitration to proceed pursuant to the policies, procedures and consumer rules[1] of the selected arbitral organization, and provide Plaintiffs with contact information, including websites, for the arbitration providers. ER201; ER210; ER221; ER232; ER241. The Agreements make arbitration convenient and affordable for Plaintiffs, permitting arbitration "either on Tribal land or within thirty (30) miles of [Plaintiffs'] residence," ER201–ER202; ER210; ER221; ER232; ER241, and requiring the Lender to pay for all filing fees and costs charged by the arbitrator regardless of who initiates or prevails in the arbitration. ER201; ER209–ER210; ER221; ER231–ER232; ER240–ER241.

The Agreements provide Plaintiffs sixty days to opt out of the arbitration provisions if they do not wish to have all disputes relating to their loan agreements resolved through arbitration. ER201; ER209; ER219–ER220; ER230; ER240. To do so, borrowers must simply notify the lenders by mail or email. ER201; ER209; ER219–ER220; ER230; ER240. Indeed, borrowers have elsewhere availed themselves of this opt-out provision. ER097 at ¶ 25(e) (describing Plain Green customer who opted out of Arbitration Agreement). Although they all received these notices, Plaintiffs did not opt-out, and thus agreed to have any claims arising from their Agreements resolved in arbitration under the terms provided in the Agreement.

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[1] *See* JAMS, JAMS Comprehensive Arbitration Rules & Procedures (July 1, 2014), available at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf ("JAMS Rules"); American Arbitration Association, Consumer Arbitration Rules (Sept. 1, 2018), available at https://www.adr.org/sites/default/files/Consumer_Rules_Web_0.pdf ("AAA Rules").

B. Applicable Native American Law

Each of Plaintiffs' loans was made pursuant to the laws of each lenders' respective tribes. Indeed, each loan includes a choice-of-law provision selecting the laws of the lenders' respective tribe, and consumers receive multiple notifications that they are agreeing to a contract that applies the laws of the corresponding Native American lender. ER201; ER209; ER219; ER230; ER239. Before obtaining their loans, Plaintiffs were required to affirmatively check a box acknowledging that they "understand, acknowledge, and agree that this Loan is governed by the laws of the Chippewa Cree tribe." ER202–ER203. The Great Plains loan agreements contain identical language requiring acknowledgement of the Otoe-Missouria law. ER210–ER211; ERE222–ER223; ER233; ER241–ER242

Like the laws of several states (such as Utah and Nevada), the laws of both the Chippewa Cree Tribe and the Otoe-Missouria Tribe permit parties to set interest rates by agreement. *Compare* Section 10-3-201, Title 10 Chippewa Cree Tribal Code—Chippewa Cree Tribal Lending and Regulatory Code, available at www.plaingreenloans.com/content/assets/Uploads/title10.pdf (last visited December 2, 2019) (Chippewa Cree usury law providing that unless otherwise stated, "there is no maximum Interest rate or charge, or usury rate restriction between or among Persons if they establish the Interest rate or charge by written agreement."), ER164, *and* Otoe-Missouria Tribal Consumer Financial Services Ordinance, § 6.4(b)(1), available at https://www.omtribe.org/useruploads/files/approved_ordinance_2018_pdf.pdf (last

visited December 2, 2019) (Otoe-Missouria Tribe law providing "[e]xcept as otherwise specified in this Ordinance, a Loan Agreement may provide for the interest rate or the fee equivalent as agreed upon by the parties."); *with* Utah Code § 15-1-1 ("The parties to a lawful written, verbal, or implied contract may agree upon any rate of interest for the contract, including a contract for services, a loan or forbearance of any money, goods, or services, or a claim for breach of contract."), *and* Nev. Rev. Stat. § 99.050 (2019) ("[P]arties may agree for the payment of any rate of interest on money due or to become due on any contract, for the compounding of interest if they choose, and for any other charges or fees.").

The laws of both the Chippewa Cree Tribe and the Otoe-Missouria Tribe expressly provide for the application of both state and federal law in cases brought against a lender under those laws. ER173, Chippewa Cree Tribal Lending and Regulatory Code § 10-4-108(c) (noting Tribal Consumer Protection Board is empowered to ensure Lender's compliance with "applicable Federal Consumer Protection Laws"); ER183, Chippewa Cree Tribal Lending and Regulatory Code § 10-6-101(b) ("The Consumer has the legal right to file a complaint that alleges any/all violations of this Title and any/all applicable Federal law relating to their Loan"); CFR Court of Indian Offenses, 25 CFR § 11.500 (stating that in Otoe-Missouria civil cases "any laws of the United States may be applicable" and "matters that are not covered by the laws or customs of the tribe, or by applicable Federal laws and regulations, may be decided by the Court of Indian Offenses according to the laws of the State in

which the matter in dispute lies"); *see also Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396, 1400 n.2 (S.D. Fla. 2014) ("Under Chippewa Cree tribal law, the Court 'may apply laws and regulations of the United States or the State of Montana.'"). The Native American lenders are also required, by their laws, to comply with a litany of federal consumer protection laws *See, e.g.,* Otoe-Missouria Tribal Consumer Financial Services Ordinance, §5.2(a), that requires licensees to comply with "all applicable federal and Tribal consumer protection law," and expressly naming fifteen separate federal consumer protection statutes/regulations a licensed Native American lender must comply with).

In addition to expressly incorporating applicable federal laws, the agreements also provide significant and concrete remedies under the laws of the sovereign Native American tribes to Plaintiffs who bring a claim against a lender. *See, e.g.*, ER184, Chippewa Cree Tribal Lending and Regulatory Code §§ 10-6-201(a)(1)-(2) (permitting consumers to recover actual damages as well as "injunctive and other similar equitable relief to stop a Person from violating any provisions of this Title.").

The laws of the sovereign Native American tribes also include clear and easily applied standards for unconscionability. Under Otoe-Missouria law, a loan may be declared unconscionable only if "the underlying Agreement was formed through improprieties in the process of its construction and formation or the actual terms are unduly harsh, commercially unreasonable, or grossly unfair given the existing circumstances." Otoe-Missouria Tribal Consumer Financial Services Ordinance §

5.2(c). And under the laws of the Chippewa Cree Tribe, "[a] mandatory arbitration clause that complies with the applicable standards of the American Arbitration Association must be presumed to not violate," the prohibition against oppressive, unconscionable, and unfair arbitration agreements. ER167, Chippewa Cree Tribal Lending and Regulatory Code, § 10-3-602.[2]

C. Procedural History

Despite their agreements to arbitrate all disputes arising out of their loan agreements, Plaintiffs filed two separate complaints in the Northern District of California, against more than twenty defendants, alleging claims based upon the legality of their loan agreements. Relevant to this appeal, Plaintiffs filed suit against the Haynes Defendants on February 23, 2018. ER243. Plaintiffs alleged that the Haynes Defendants violated California usury laws and were unjustly enriched because either Plain Green or Great Plains issued loans to Plaintiffs, and the Haynes Defendants assisted those companies. ER246; ER258–ER260. Plaintiffs also alleged

[2] Section 10-3-602 of the Chippewa Cree Tribal Lending and Regulatory code reads:

10-3-602 Arbitration.

a. A Loan Agreement may not contain a mandatory arbitration clause that is oppressive, unconscionable, unfair, or in substantial derogation of a Consumer's rights.

b. A mandatory arbitration clause that complies with the applicable standards of the American Arbitration Association must be presumed to not violate the provisions of § 10-3-602(a).

that the Haynes Defendants' violated RICO by serving as a lender to Plain Green, and serving as a member of the purported enterprise. ER246; ER258–ER260.

Appellants then moved to compel arbitration. ER058. After full briefing and a hearing on both issues, the district court issued an order denying the motion to compel arbitration, as well as other pending motions. ER001. With respect to the motion to compel arbitration, the district court's order relied on the prospective waiver doctrine to invalidate the arbitration clauses—including the delegation provisions. ER004–ER018. Specifically, the district court determined that the arbitration and choice-of-law provisions caused Plaintiffs to prospectively waive their rights to pursue statutory remedies. ER012–ER016. The court found prospective waiver because it believed that the arbitration agreements and the choice-of-law provisions therein "disclaim" federal law and because "tribal laws do not provide remedies for Plaintiffs' Statutory Claims." ER012; ER017.

STANDARD OF REVIEW

The Ninth Circuit "review[s] de novo a district court's denial of a motion to compel arbitration." *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 931 (9th Cir. 2013) (citing *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1057 (9th Cir. 2013) (en banc)). Still, "[a]s arbitration is favored, those parties challenging the enforceability of an arbitration agreement bear the burden of proving that the provision is unenforceable." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013) (citing *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 91 (2000)).

SUMMARY OF ARGUMENT

The district court's refusal to compel arbitration under Section 2 of the FAA runs contrary to a litany of binding authority from the Supreme Court and this circuit, nullifies freely entered-into agreements, and degrades the sovereignty of the Chippewa Cree and Otoe-Missouria tribes. It also misconstrues and misapplies Plaintiffs' burden in challenging the validity of the contracts' delegation, arbitration, and choice-of-law clauses under the FAA.

Any disputes about the validity of the arbitration agreements or the choice-of-law provision should have been decided by an arbitrator, as the unambiguous delegation provisions in each of the contracts at issue state. The district court, however, put the cart before the horse: it first decided that the arbitration clause itself was invalid, and then refused to enforce the delegation provision given its belief that the arbitration agreements were invalid. ER011. The district court erroneously determined that the delegation provision was "secondary to the determination of whether the agreements are unenforceable prospective waivers." ER011. Rather, for the district court, if it believed that Plaintiffs could successfully assert a defense to arbitrability, it would ignore the delegation provision, because, "[r]egardless of whether a delegation provision is clear and unmistakable on its own terms, it will not be enforced if it results in enforcing an arbitration agreement that prospectively waives plaintiffs' statutory rights and remedies." ER011.

The district court's analysis is erroneous. It sidesteps a long line of binding Supreme Court precedent requiring courts to respect and rigorously apply delegation provisions according to their terms, and to do so **before** considering the enforceability of the underlying arbitration provision. Just this year, for example, the Supreme Court confirmed that a district court lacks authority to decide threshold issues of arbitrability where an arbitration agreement delegates such issues to an arbitrator. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019). This conclusion applies with equal force whether defenses to arbitrability have merit, and regardless of whether the outcome of party's arbitrability argument is "obvious." *Id.* at 531. Thus, by bestowing upon itself the authority to decide threshold questions of arbitrability—in this case the applicability of a defense to arbitrability, the prospective waiver doctrine—the district court disregarded Supreme Court precedent, and intruded upon the arbitrator's role in deciding threshold issues of arbitrability despite a clear delegation provision. The district court's disregard for the delegation provision is precisely the type of judicial hostility towards arbitration that the Supreme Court has criticized repeatedly.

And even if the district court's efforts to avoid the delegation clause were appropriate, and they were not, the court still misinterpreted and misapplied the prospective waiver doctrine. The district court concluded that the arbitration and choice-of-law provisions were invalid because they selected the laws of the Native American lenders rather than the laws of the United States to govern the arbitration.

ER012. The court suggested that this fact by itself was enough to invalidate the arbitration clause. ER012. The district court also found that the choice-of-law provision caused plaintiffs to waive their statutory rights and remedies, because Chippewa Cree and Otoe-Missouria law could not adequately vindicate them. ER014–ER016.

As detailed herein, the district court's conclusions directly contradict Supreme Court precedent, which has consistently required courts to enforce choice-of-law and forum-selection clauses that exclude domestic law and appoint the laws of foreign nations. The law is abundantly clear: courts must assume that such clauses are valid and enforceable, except in the exceedingly rare circumstance where the clause deprives parties of the right **to pursue remedies** for their claims. Indeed, even though the Supreme Court has recognized prospective waiver as a hypothetical defense to arbitration, it has **never** found that a party prospectively waived its rights. To the contrary, the Supreme Court has highlighted that parties are free to select the laws of Switzerland, England, Tibet, or pre-Revolutionary Russia—none of which invoke federal law—when drafting their arbitration agreements. It is no surprise, then, that the district court did not cite a **single** Supreme Court opinion to support its conclusion that the contractual terms here created a prospective waiver.[3] Instead, the

[3] Indeed, the district court only cited Supreme Court cases to support its authority to invalidate a contract if it found prospective waiver existed, but did not do so with regard to the standard for a prospective waiver itself. ER016 (quoting *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 540 (1994),

district court merely stated that because state and federal law would not apply in any arbitration conducted pursuant to the choice-of-law clause, that clause cannot be enforced. That rationale directly conflicts with the Supreme Court's prior decisions on the subject, and is plainly incorrect.

Not only did the district court neglect a long line of Supreme Court decisions, it also failed to analyze binding precedent from an analogous case in which the Ninth Circuit, sitting en banc, set forth the standard for application of the prospective waiver doctrine in this circuit. Specifically, in *Richards v. Lloyd's of London*, 135 F.3d 1289, 1297 (9th Cir. 1998) (hereinafter "*Richards II*"), the Ninth Circuit refused to permit a party to use the prospective waiver doctrine to avoid the choice of law clause based solely on allegations that English law did not permit the party to assert claims under the federal securities laws and RICO. The same result is required here. That is particularly so given the district court's acknowledgment that Plaintiffs' prospective waiver arguments is based upon their purported inability to bring federal statutory claims under the choice of law clauses in their loan agreements.

The district court also erred when it assumed, **with no evidence**, that the laws of the Chippewa Cree and Otoe-Missouria tribes would be insufficient to provide remedies for Plaintiffs' claims. The laws of these tribes, the court held, are so inferior to other "demonstrably robust legal and court systems" that they could not possibly provide Plaintiffs with any remedy. The district court improperly put the burden on the Haynes Defendants to prove that tribal law "would enforce the state and federal

statutory rights of plaintiffs or analogous rights arising under tribal law." ER017. Worse still, the district court summarily concluded—again, without any evidence—that Native American law could not adequately safeguard a Plaintiffs' rights. ER017. But that is not the proper analysis required under the prospective waiver doctrine. Rather, as the party resisting arbitration, it is **Plaintiffs** who must prove (with evidence, not argument) that their claims are unsuitable for arbitration. The district court reversed the analysis, incorrectly reasoning that it must deny the motion to compel arbitration because the Haynes Defendants failed to provide evidence supporting the adequacy of Chippewa Cree or Otoe-Missouria law. Such an analysis turns the relative burdens of motions to compel arbitration on their head, and constitutes error requiring reversal. It also ignores the clear and indisputable fact that both Chippewa Cree and Otoe-Missouria law do, in fact, provide Plaintiffs with remedies for their claims.

For these reasons, reversal is the only appropriate remedy.

LEGAL STANDARD

Agreements to arbitrate are subject to clear and well-understood rules. The Federal Arbitration Act ("FAA") provides that a written arbitration provision contained in a "contract evidencing a transaction involving commerce…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under the FAA, Courts must "rigorously enforce arbitration agreements according to their terms." *Am. Exp. Co. v.*

Italian Colors Rest., 570 U.S. 228, 233 (2013) (internal quotation marks and citations omitted). The FAA reflects a strong national policy in favor of arbitration, which must control over any individual court's policy views or judgments about the underlying business or the merits of the case. *See, e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019); *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999) ("[T]he FAA leaves **no place for the exercise of discretion by a district court**, but instead mandates that district courts direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.") (citing *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985)).

Once a district court finds that the parties agreed to arbitrate a dispute, it must grant a motion to compel arbitration and stay proceedings pending the outcome of that arbitration. 9 U.S.C. §§ 3, 4; *Dean Witter Reynolds*, 470 U.S. at 218 (observing that the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed") (emphasis in the original). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Simula, Inc.*, 175 F.3d at 719 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)) (alteration in the original).

As the Supreme Court has held repeatedly, "[n]ot only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration *procedures*." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (emphasis added). This authorizes parties to

"specify by contract the rules under which that arbitration will be conducted." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Parties also have "considerable latitude to consider what law governs" an arbitration. *DIRECTV, Inc. v. Iburgia*, 136 S. Ct. 463, 468 (2015). This latitude means that parties are free to have their arbitration agreement "governed by the law of Tibet,…[or] the law of pre-Revolutionary Russia." *Id.*

To this end, the Supreme Court, the Ninth Circuit, and courts of appeals around the country have routinely enforced choice-of-law clauses selecting the laws of foreign sovereigns to the exclusion of domestic state and federal law. *See, e.g.*, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (Japanese law); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Swiss law); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*") (English law); *Richards II*, 135 F.3d 1289 (en banc) (British law); *Cvoro v. Carnival Corp.*, No. 18-11815, 2019 WL 5257962, at *1 (11th Cir. Oct. 17, 2019) (Panamanian law); *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355 (4th Cir. 2012) (Philippine law); *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257 (11th Cir. 2011) (Bahamian law). There is no meaningful or legitimate difference between the laws of another country or state, and those of a sovereign Native American tribe. *See, e.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 158–59 (1980) (evaluating tribal law on equal footing with Washington state law in conflict-of-laws analysis). Indeed, as this Court just recognized, Native American law and Native American courts are entitled to

significant deference, which cannot be overcome through "baseless 'attacks' on the competence and fairness of the…Tribal Court." *FMC Corp. v. Shoshone-Bannock Tribes*, --- F.3d ----, No. 17-35840, 2019 WL 6042469, at *21 (9th Cir. Nov. 15, 2019).

A party seeking to challenge an otherwise facially valid arbitration agreement "bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala.*, 531 U.S. at 91; *see also Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1091 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1239 (2019) (same). "This burden is a substantial one and cannot be satisfied by a mere listing of ways that the arbitration proceeding will differ from a court proceeding, or by speculation about difficulties that *might* arise in sarbitration." *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 286–87 (4th Cir. 2007) (emphasis in original).

I. THE DISTRICT COURT FAILED TO APPLY SUPREME COURT PRECEDENT AND SIDESTEPPED ITS OBLIGATION TO ENFORCE THE VALID DELEGATION PROVISIONS.

The Supreme Court has routinely rebuked courts for doing precisely what the district court did here: deciding "gateway" issues of arbitrability despite a contractual agreement to delegate such issues to arbitrators. Plaintiffs agreed to a clear and conspicuous delegation clause which required them to arbitrate "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." ER201; ER209; ER220; ER231; ER240. Based on this clause alone and the district court's limited role under the FAA, the district court should have sent this case to an arbitrator to decide the threshold issue of arbitrability. Instead, the district

failed to apply Supreme Court precedent, substituted its own judgment for the parties' contractual agreement, and inappropriately determined to decide these "gateway" questions for itself. ER011–ER017. This was in error, and compels reversal.

A. Plaintiffs Agreed to Arbitration Clauses that Clearly and Unmistakably Delegated All Arbitrability Issues to an Arbitrator.

The Supreme Court has consistently reaffirmed that parties may contractually "agree to have an arbitrator decide not only the merits of a particular dispute, but also gateway questions of arbitrability." *Henry Schein*, 139 S. Ct. at 529. Such an agreement—referred to as a "delegation provision"—is treated as "an additional, antecedent agreement," which is "valid under § 2 [of the FAA] 'save upon such grounds as exist at law or in equity….'" *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70–71 (2010); *see also First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). A delegation agreement does nothing more than direct that an arbitrator, rather than a court, must decide initial issues of arbitrability. *See Henry Schein*, 139 S. Ct. at 529. Courts readily enforce delegation provisions so long as they demonstrate a "clear and unmistakable" intent to arbitrate gateway issues of arbitrability. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130–31 (9th Cir. 2015).

Plaintiffs each voluntarily agreed to loan agreements containing arbitration clauses and delegation provisions requiring the arbitration of "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." ER201; ER209; ER220; ER231; ER240. Functionally identical language

has repeatedly been recognized as a clear delegation provision requiring that an arbitrator—not a court—decide threshold issues of arbitrability. *See, e.g. Rent-A-Center*, 561, U.S. at 68–69 (holding that similar language evinced a clear and unmistakable intent to delegate all threshold issues of arbitrability). Additionally, Plaintiffs' arbitration agreements each adopt the consumer rules of arbitration for the arbitral forum selected by each plaintiff. ER201; ER209; ER220–ER221; ER231; ER240. As this Court has recognized, reference to, and incorporation of, the consumer arbitration rules of third party arbitration association serves as a clear and unmistakable intent to delegate questions of arbitrability to an arbitrator. *Brennan*, 796 F.3d at 1130–31 (collecting cases and noting that the "vast majority" of circuits have found that references to the AAA consumer rules demonstrates a clear and unmistakable intent to arbitrate arbitrability).

B. The Delegation Provision is Enforceable and Requires Arbitration of Plaintiffs' Challenges to the Arbitration Agreement.

Where, as here, parties have clearly and unmistakably delegated gateway questions of arbitrability to an arbitrator, the FAA and a litany of Supreme Court cases require district courts to "respect the parties' decisions as embodied in the contract," and send the matter to arbitration. *Henry Schein*, 139 S. Ct. at 528. The arbitrator—not the district court—will then determine whether the agreement is enforceable. *See id.* at 531 (discussing the arbitrator's role in deciding arbitrability issues). In *Henry Schein*, the Supreme Court held unequivocally that "if a valid

agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, **a court may not decide the arbitrability issue**." *Id.* at 530 (emphasis added). Critically, the *Henry Schein* Court made no exception to this holding where the gateway question at issue is the enforceability of the arbitration provision itself. *See id.* Thus, a delegation clause deprives the district court of all "power to decide the arbitrability issue," **even where the court believes that the arbitrability issue lacks merit**. *Id.* at 529. Similarly, if there is uncertainty as to the validity of the delegation clause, the district court must pass such threshold issues on to the arbitrator. *See Simula, Inc.*, 175 F.3d at 719 (stating that ambiguity regarding arbitrability must be resolved in favor of arbitration) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25).

1. The District Court Improperly Considered the Merits of Plaintiffs' Challenge to the Arbitration Provision Before Determining the Enforceability of the Delegation Provision.

The district court never decided whether the arbitration agreements included clear and unmistakable delegation provisions. Instead, the court concluded that delegation provisions are "secondary" where a defense to arbitrability—the prospective waiver doctrine—purportedly renders the arbitration agreements unenforceable as a whole. In so holding, the district court failed to properly apply controlling law, including the *Henry Schein* Court's clear instructions "not to decide the arbitrability issue," 139 S. Ct. at 530, and *Rent-A-Center*'s imperative to treat the delegation provision as a discrete, "additional, *antecedent* agreement." 561 U.S at 70–71 (emphasis added). It also failed to evaluate the delegation provision **first** for its own

validity before and apart from considering the arbitration clause's validity. Instead, the district court put the cart before the horse analytically: it first ruled on the validity of the underlying arbitration provision and, finding this provision unenforceable, considered itself free to ignore the delegation provision. ER011.

Indeed, the district court announced its divergence from Supreme Court precedent at the outset of its discussion of arbitrability issues, stating:

> "[t]he issue of whether there are clear and unmistakable delegation provisions is secondary to the determination of whether the agreements are unenforceable prospective waiver. Regardless of whether a delegation provision is clear and unmistakable on its own terms, it will not be enforced if it results in enforcing an arbitration agreement that prospectively waives plaintiffs' statutory rights and remedies."

ER011. The district court went on to analyze whether the arbitration agreements—as a whole—were unenforceable under the prospective waiver doctrine, and ultimately refused to enforce the delegation provision in the loan agreements because "that would not change the fact that the arbitration agreement is unenforceable as an unambiguous prospective waiver." ER017–ER018. Following through on this analytical error, the Court denied the Haynes Defendants' motion to compel arbitration. ER018.

2. The district court's refusal to compel arbitration of gateway issues of arbitrability was in error.

The district court's refusal to analyze the effect of the clear and conspicuous delegation provisions was contrary to established law, particularly *Henry Schein*. For the district court, because it jumped ahead to decide the arbitration agreements as a

whole were unenforceable under the prospective waiver doctrine, it saw no need to determine whether the parties contracted to have an arbitrator make the same decision. ER017. But the Supreme Court has been unequivocal on this point: "if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, **a court may not decide the arbitrability issue**." *Henry Schein*, 139 S. Ct. at 530 (emphasis added). This was the entire point of the decision *Henry Schein*—which overturned the use of the 'wholly groundless' exception used by lower courts to nullify delegation provisions where those courts believed (as the district court did here) that the arguments for arbitration were meritless. *Id.* at 530–31.[4] That argument was squarely rejected by the Supreme Court. The statutory text of the FAA is unequivocal and requires courts to respect the parties' decision to have an arbitrator, not the court, decide issues of arbitrability in the presence of a valid contractual delegation provision. *Id.* at 531. Numerous district courts have reached the identical (and analytically correct) conclusion post-*Henry Schein*. *See Salas v. Universal Credit Servs.*, No. 17-CV-2352 JLS (BLM), 2019 WL 1242448, at *3 (S.D. Cal. Mar. 18, 2019) (holding that "[b]ecause the Parties agreed to arbitrate arbitrability, the Court **has 'no**

[4] The Second Circuit in *Gingras v. Think Finance*, 922 F.3d 112 (2d Cir. 2019), attempted (in a footnote) to limit the holding of *Henry Schein* solely to instances where a district court expressly invokes the 'wholly groundless' exception. 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 generally. 139 S.Ct. at 529–31. Additionally, the Second Circuit's belief that "a challenge to the validity of an arbitration clause itself," 922 F.3d at 126 n.3, nullifies an otherwise enforceable delegation provision, is the same reversed analysis invoked by the district court to ignore a clear and enforceable delegation provision.

business' deciding whether the particular claims Plaintiff brings are in fact arbitrable"); *Silverman v. Move Inc.*, No. 18-CV-05919-BLF, 2019 WL 2579343, at *12 (N.D. Cal. June 24, 2019) (holding that "*Schein* makes clear that once the Court has decided that the parties clearly and unmistakably delegated issues of arbitrability to the arbitrator, the Court has no role in deciding whether the arbitration provision applies to the events at issue").[5] The district court cannot avoid the conclusions mandated by *Henry Schein* by ignoring the analysis required by that case.

Beyond *Henry Schein*, other courts have expressly rejected the district court's approach of skipping over any analysis of a delegation provision. For example, the Eleventh Circuit has found 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**." *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1264 (11th Cir.

[5] At least one district court has properly interpreted and applied *Henry Schein*'s approach in the context of a delegation provision. *See De Angelis v. Icon Entertainment Group Inc.*, 364 F. Supp. 787, 795 S.D. Ohio 2019) ("An effective vindication challenge is a challenge to the enforceability of the arbitration agreement. After *Henry Schein*,…these challenges are heard by the arbitrator where, as here, the parties' agreement includes a delegation clause. [Plaintiff's] effective vindication challenge must, therefore, be raised before the arbitrator in the first instance."). In applying *Henry Schein*, the *De Angelis* court rejected arguments identical to Plaintiffs' below that the validity of the delegation provision hinges on the validity of the arbitration clause, and that a district court may decide the validity of the arbitration clause despite the delegation provision. *Id.* ("When there is a delegation clause, challenges to the overall contract or to the arbitration agreement do not pertain to the validity of the delegation clause and must be submitted to arbitration…Ms. De Angelis's challenges based on mutual assent, lack of consideration, and unconscionability relate to the arbitration agreement, not to the delegation clause. … These challenges are all challenges to the enforceability of the arbitration clause and therefore fall within the delegation clause of the arbitration agreement.").

2017) (quoting *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331, 1335 (11th Cir. 2016)) (emphasis added). As the Eleventh Circuit explained, "**before** deciding whether the district court was correct to deny the motion to compel arbitration, we must determine whether we can address Jones's challenge to the delegation provision and, if so, whether the provision was valid and enforceable." *Id.* (emphasis added). And, in *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, the Fourth Circuit affirmed that courts must first examine whether a party challenged a delegation provision specifically and, if so, must then decide "whether the delegation provision is unenforceable 'upon such grounds as exist in law or in equity,'" before moving onto any further challenges to the arbitration agreement. 857 F.3d 449, 455 (4th Cir. 2017) (quoting 9 U.S.C. § 2).

The difference between the analytical process required in *Henry Schein*, *Minnieland*, and *Waffle House*, and the district court's approach here, is not merely semantic. Rather, these holdings safeguard the FAA's policy preference for arbitration, and confine district courts to their proper role under the FAA. The proper analysis guarantees that courts honor the parties' agreements and that arbitrators review what the parties to the contract have permitted them to review. In contrast, the district court's approach avoided the contracted-for delegation provision altogether, and allowed it to rule, improperly, on issues that the parties agreed to submit to an arbitrator. Instead of treating the delegation provision as an "**additional**, **antecedent agreement**," *Rent-A-Center*, 561 U.S. at 70–71 (emphasis

added), and giving each provision its due weight, the district court collapsed the delegation clause and the arbitration agreement into one another.

Despite its errors, the district court belatedly sought to ground its approach in Supreme Court authority, observing that a "plaintiff may challenge the general arbitration procedures '*as applied* to the delegation clause' to show that they rendered the delegation clause unenforceable." ER011 (citing *Rent-A-Center*, 561 U.S. at 63, 74). But even if a plaintiff can challenge the general provisions "as applied" to the delegation provision, the court must still find that the delegation provision itself—as a distinct contract—is unenforceable. *See Rent-A-Center*, 561 U.S. at 74 (requiring plaintiff to show that challenges to the delegation provision "rendered **that provision** unconscionable") (emphasis in original).

The district court, however, never conducted that analysis. Instead, it merely held that the arbitration agreements as a whole were unenforceable, without addressing the delegation provision separately.[6] Nor did it find any deficiency with the delegation provision **itself** as an **additional, antecedent** agreement. Rather, the court concluded only that it believed that the arbitration clause—apart from the delegation provision—would deprive Plaintiffs of their ability to pursue their statutory claims. ER011.

[6] The court confessed its own failure on this point. *See* ER017–ER018 ("I do not reach whether there is a clear and unmistakable delegation clause because that would not change the fact that the **arbitration agreement** is unenforceable…").

After improperly collapsing the delegation clause and the arbitration clause, the district court acted beyond its limited authority by invalidating the delegation provision based only on its belief that the arbitration clause was invalid. Specifically, the district court stated that the pairing of the choice-of-law provision and the delegation clause "'would place an arbitrator in the impossible position of deciding the enforceability of the agreement without authority to apply any applicable federal or state law.'" ER011 (citing *Smith v. Western Sky Fin., LLC*, 168 F. Supp. 778, 784 (E.D. Pa. 2016)). This concern was misplaced for two reasons.

First, parties are free to agree that foreign arbitrability law will govern arbitration proceedings. *See Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 921 (9th Cir. 2011) (noting that plaintiffs may contract for foreign arbitrability law). Thus, merely appointing foreign law does not invalidate an agreement to arbitrate. Even if there is ambiguity about the applicable arbitrability law, arbitrators will default to United States federal arbitration law rather than invalidating the agreement. *See id.* ("[C]ourts should apply federal arbitrability law absent clear and unmistakable evidence that the parties agreed to apply non-federal arbitrability law." (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). This is particularly true where, as here, the parties agreed "to look to the Federal Arbitration Act and judicial interpretations thereof for guidance in any arbitration that may be conducted," under the arbitration agreements. ER202.

Second, arbitrators are no less capable than judges of addressing threshold questions of arbitrability. *See Henry Schein*, 139 S. Ct. at 531. If an arbitrator analyzed the arbitration provisions and found them to be unenforceable, the arbitrator would be free to remand the case to the district court for further proceedings. *See, e.g., Kemph v. Reddam*, No. 13-CV-6785, 2015 WL 1510797, at *5 (N.D. Ill. Mar. 27, 2015) (compelling arbitration and noting that arbitrator is capable and free to "find the choice-of-law provision is unenforceable, and determine what default law should apply"); *Yaroma v. Cashcall, Inc.*, 130 F. Supp. 3d 1055, 1064–65 (E.D. Ky. 2015) (enforcing arbitration agreement in context of purported Native American lender, noting "the final decision about which law to apply would be left to the arbitrator…" and chastising litigant for providing no actual evidence of a deficiency in the arbitral forum).

C. Plaintiffs Failed to Satisfy Their Burden of Proving that the Delegation Provision Itself Was Invalid.

Throughout its decision refusing compel arbitration, the district court chided the Haynes Defendants' for failing to provide evidence that the agreements did **not** violate the prospective waiver doctrine or that the agreements were **not** unconscionable. *See, e.g.*, ER013 ("The defendants do not identify… Nor do they explain…"); ER015 ("The defendants do not explain how an arbitrator might conduct a choice of law analysis…"); ER017 ("[T]he Haynes defendants have not identified any provision…"). Taken together, these statements evince the district court's

apparent belief that Haynes Defendants—rather than the Plaintiffs seeking to invalidate the arbitration provisions—bore the burden of proving why the arbitration provisions should be enforced.

The Supreme Court and this Court, however, both disagree with the district court's allocation of burdens under the FAA. As both courts have repeatedly held, "the party **resisting** arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration…" *Munro*, 896 F.3d at 1091 (quoting *Green Tree Fin.*, 531 U.S. at 91) (emphasis added). This allocation of burdens serves a critical purpose in effectuating the FAA's "liberal federal policy favoring arbitration," *id.* (quoting *Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)), and "presumption in favor of arbitrability." *Trudeau v. Google LLC*, 349 F. Supp. 3d 869, 875 (N.D. Cal. 2018) (quoting *Wynn Resorts v. Atl.-Pac. Capital, Inc.*, 497 Fed. App'x 740, 742 (9th Cir. 2012)).

These burdens are no different even where a plaintiff alleges that the arbitration agreements are unconscionable or otherwise unenforceable. *See Mance v. Mercedes-Benz USA*, 901 F. Supp. 2d 1147, 1157 (N.D. Cal. 2012) (stating that a party alleging unconscionability of an arbitration provision bore the burden of proof) (citing *Engalla v. Permanente Med. Grp., Inc.*, 938 P.2d 903 (Cal. 1997)). And where, as here, the arbitration clause and delegation provision are broad, this Court has stated that the "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." *Wynn Resorts*, 497 F. App'x at 743

(quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)) (emphasis in the original). Moreover, a challenger cannot satisfy its burden with mere speculation or supposition. *In re Cotton Yarn Antitrust Litig.*, 505 at 286–87 ("This burden is a substantial one and cannot be satisfied by a mere listing of ways that the arbitration proceeding will differ from a court proceeding, or by speculation about difficulties that *might* arise in arbitration.") (citing *Green Tree Fin.*, 531 U.S. at 92)). Evidence—not mere argument or analogy to other cases—is necessary to overcome the strong presumption in favor of arbitration. *See id.*

Here, the district court invalidated both the arbitration provisions and the delegation clauses despite Plaintiffs' failure to offer anything beyond the mere assertion that they would be unable to pursue statutory remedies. Indeed, Plaintiffs identified no claim raised in their Complaint for which they would not be able to obtain some relief. Nor did the district court. Instead, the court merely assumed that Plaintiffs would be unable to vindicate their rights, drawing support from other district court cases which similarly misallocated the burden of proof to the defendants seeking to compel arbitration. *See* ER017. Such an analysis is unquestionably incorrect. *See, e.g., Yaroma*, 130 F. Supp. 3d at 1065 (compelling arbitration of claims arising from Native American lending agreement where only the challenge to arbitrability was citation to other cases, which was "not an appropriate substitute for presenting […] evidence"); *Chitoff v. CashCall, Inc.,* 14-CV-60292, 2014 WL 6603987, at *2–3 (S.D.Fla. Nov. 17, 2014) (compelling arbitration due to a failure to present

evidence of defense to arbitrability beyond case citations to other Native American lending cases).

Likewise, the district court found a prospective waiver without evaluating the substance of the tribal laws at issue. The court distinguished this case from others where choice-of-law provisions selected "the laws of countries with demonstrably robust legal and court systems," implying the inferiority of tribal law generally. ER017. Further, the court never even attempted to compare—or required Plaintiffs to compare—the laws of the Chippewa Cree or Otoe-Missouria tribes with the laws of Native American tribes discussed in the other cases which the court relied on for support. ER017 (discussing *Rideout v. CashCall, Inc.*, Case No. 2:16-cv-02817-RFB-VCF, 2018 WL 1220565 (D. Nev. Mar. 8, 2018) (analyzing Cheyenne Sioux tribal law)). It merely assumed, without evidence, that the Native American laws analyzed in those cases were identical to the Native American laws applicable to this case.

But just as no court could credibly assert that what is true of Japanese law is true of Argentine law without actually comparing the laws of those two countries, the court here should not have relied on purported similarities among the laws of various Native American tribes without conducting an actual analysis of those laws. The district court's uncritical analogizing reflects an unfortunate belief that Native American laws and courts are entitled to less respect than other sovereigns.[7] This is

[7] Indeed, the district court was express when it attempted to differentiate the cases cited by the Haynes Defendants in support of their motion to compel by stating that

particularly so where the Haynes Defendants provided the district court with Chippewa Cree and Otoe-Missouria law—both of which provide consumers with real and significant remedies. *See, e.g.*, ER184, Chippewa Cree Tribal Lending and Regulatory Code §§ 10-6-201(a)(1)-(2) (permitting consumers to recover actual damages as well as "injunctive and other similar equitable relief to stop a Person from violating any provisions of this Title.").

In sum, the district court failed to impose the proper evidentiary burden on Plaintiffs to show that the specific Native American laws at issue here definitively resulted in a waiver of their ability to effectively vindicate their rights. Indeed, the only evidence of the Native American laws presented to the district court definitively showed that the Plaintiffs possess significant remedies under the Native American laws at issue here. The district court's misallocation of the appropriate evidentiary burdens was in error.

D. The Delegation Provision Must be Enforced.

Ultimately, this appeal fulfills the *Henry Schein* Court's prediction that refusing to immediately send threshold questions of arbitrability to arbitration will "spark" a

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"in the choice-of-law cases the defendants cite, the disputes were to be arbitrated under the laws of countries with **demonstrably robust legal and court systems**." ER017 (emphasis added). But district court's regrettable assessment of the legal and court systems of the Chippewa Cree and Otoe-Missouria tribes was not based upon evidence. Instead, it was based upon the same sorts of "baseless 'attacks' on the competence and fairness of the…Tribal Court," that this Court has taken great pains to reject. *See Shoshone-Bannock Tribes*, --- F.3d ----, No. 17-35840, 2019 WL 6042469, at *21.

"time-consuming sideshow" of "collateral litigation." 139 S. Ct. at 531. This Court should drop the final curtain on this needless "sideshow" by sending these threshold issues to arbitration, just as the parties intended and as the Supreme Court requires.

II. THE ARBITRATION AGREEMENTS ARE ENFORCEABLE

The valid, clear, and unmistakable delegation clause in Plaintiffs' loan agreements should be sufficient to move this matter to arbitration. The Court can and should for this reason alone reverse the district court's erroneous treatment of the delegation clause, remand the case, and instruct the district court to send the case to arbitration, at least for resolution of these preliminary issues. But even if the Court looks beyond the delegation provision, it should still reverse and enforce the valid and binding arbitration agreements according to their terms.

Plaintiffs below have never denied that they agreed to arbitrate all disputes arising out of the loan agreements, and that the claims at issue here are within the scope of their agreements to arbitrate. Instead, Plaintiffs sought to invalidate the arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Chief among these theories was the prospective waiver doctrine. Indeed, the district court relied exclusively on the prospective waiver doctrine to find the arbitration provisions invalid.[8]

[8] As discussed above, Plaintiffs argued that the Agreements were unconscionable, but the district court declined to reach this issue after invalidating the contracts on a prospective waiver theory. ER018.

Had the district court correctly applied the prospective waiver doctrine and followed mandatory Supreme Court authority, however, it would have reached the opposite conclusion. Plaintiffs argued that they would be unable to pursue adequate remedies in arbitration because the arbitration provisions selected tribal law, and the district court took them at their word. But the mere fact that the arbitration agreements select Native American law does nothing to prove Plaintiffs would be unable to effectively vindicate their claims in arbitration. Further, by merely *alleging* that they would be unable to vindicate their claims, Plaintiffs failed to carry their burden of *proving* that they would be unable to pursue adequate remedies in arbitration under tribal law. Indeed, Plaintiffs did not identify a single claim for which they would be unable to recover. Because the district court refused to enforce the arbitration agreements based solely on unsubstantiated arguments, it erred.

A. Courts routinely enforce arbitration agreements requiring application of foreign law to the exclusion of state and federal law without running afoul of the prospective waiver doctrine.

The Supreme Court, courts in this Circuit, and numerous courts around the country have repeatedly found that arbitration agreements are enforceable even where they contain choice-of-law provisions which select the laws of a foreign jurisdiction and expressly exclude federal law. The Supreme Court has held that the FAA grants parties wide latitude to "tailor some, even many…features of arbitration by contract, including…procedure and choice of substantive law." *Hall Street Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008). Thus, combining arbitration clauses and

choice-of-law provisions does not by itself violate the prospective waiver doctrine. This is true even if the parties exclude state or federal law and instead "choose to have portions of their contract governed by the law of Tibet, [or] the law of pre-revolutionary Russia." *DirecTV, Inc.*, 136 S. Ct. at 468. Rather, the prospective waiver doctrine applies only where the arbitration clause waives "a party's right to **pursue** statutory remedies." *Mitsubisihi Motors Corp.*, 473 U.S. at 637 n.19 (emphasis added).

The Supreme Court has repeatedly upheld choice-of-law provisions selecting foreign law in arbitration clauses, even where application of foreign law would produce outcomes radically different from those obtainable under United States federal law. In *Mitsubishi Motors*, for example, the Supreme Court enforced an arbitration clause designating foreign law, even where a "contrary result would be forthcoming in a domestic context." 473 U.S. at 629–30 (honoring a contractual agreement to apply Swiss law in arbitration to the exclusion of federal antitrust law). In *Vimar Seguros*, the Supreme Court permitted arbitration to proceed under Japanese law, even though Japanese law offered complete and outcome-determinative defenses unavailable under United States federal law. 515 U.S. at 540–41. In *The Bremen*, the Supreme Court upheld clauses appointing an English forum and English law, even though English law would likely limit plaintiff's maximum recovery to approximately $80,000, rather than a potential $3.5 million award under United States law. 407 U.S. at 3–4, 7–8, 8 n.8, 13 n.15. These decisions evidence the Supreme Court's willingness

to enforce arbitration and choice-of-law provisions, even where plaintiffs identify specific disadvantages that they would suffer under foreign law.

While the Supreme Court has never articulated a clear definition of what constitutes a "prospective waiver," it has set an exceedingly high bar for meeting this exception to the enforcement of arbitration clauses. In *American Express Co. v. Italian Colors Restaurant*, the Court reaffirmed that it is not enough that the selected law will be unfavorable to a plaintiff. 570 U.S. at 236. Rather, prospective waiver can be found only when a litigant demonstrates that the arbitration and choice-of-law clauses **preemptively eliminate the right to pursue a remedy**. *See id.* The *American Express* Court provided two instructive examples of contractual terms so hostile to a party's ability to pursue its claims that the terms constituted prospective waivers: an arbitration provision that **expressly** "**forbid[s]** the assertion of certain statutory rights" altogether, and "administrative fees attached to arbitration that are so high as to make **access to the forum impracticable**." 570 U.S. at 236 (2013) (citing *Green Tree Fin. Corp.-Ala.*, 531 U.S. at 90. But even as it recognized these hypothetical situations in which the prospective waiver exception might apply, the Court also acknowledged that it has *never* "invalidated [an] arbitration agreement at issue." *Id.* at 235.[9]

[9] Bucking this trend of judicial reluctance to find prospective waiver, a number of circuit courts and district courts have recently invalidated similar arbitration provisions in cases involving Native American lenders. *See, e.g.*, *Gingras*, 922 F.3d at 125–26, *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017), *Hayes v. Delbert*

This Court has upheld the Supreme Court's high burden for prospective waiver, even where the foreign law designated in the contract did not offer the remedies plaintiffs would be able to recover under federal law. In *Richards v. Lloyd's of London* ("*Richards II*"), the en banc Ninth Circuit upheld application of English forum and choice-of-law provisions, even though English law prevented plaintiffs from bringing federal securities law and RICO claims (such as those pled here). 135 F.3d at 1295–96 (citing *Lockman Found. v. Evangelical All. Mission*, 930 F.2d 764, 768–69 (9th Cir. 1991)). The *Richards II* court honored the parties' agreement, stating that it would invalidate the choice-of-law provision only if the plaintiffs "would be deprived of *any* reasonable recourse" or if there were authority to show that English law would "bar recovery" for the plaintiffs as a result of its enforcement. *Id.* at 1296 (emphasis

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Servs. Corp., 811 F.3d 666 (4th Cir. 2016); *see also Rideout*, 2018 WL 1220565, at *6–7, *Western Sky Fin., LLC*, 168 F. Supp. 778, 784 (E.D. Pa. 2016). The courts in these cases seemingly sought to punish tribal lenders and related defendants for using time-honored legal mechanisms to facilitate efficient resolution of disputes, including arbitration agreements and choice-of-law clauses. *See, e.g. Gingras*, 922 F.3d at 126 (scolding defendants for their "transparent attempts to…skirt state and federal consumer protection laws"). None of these courts, however, explained how the contracts at issue differed in kind or degree from arbitration clauses and choice-of-law provisions that select the laws of any other foreign sovereign to the exclusion of domestic federal or state law. Like the district court here, the courts in these cases proceeded on conjecture rather than evidence, *see, e.g., id.* at 127 ("The arbitration mechanism in these agreements…**appears** to disallow claims brought under federal and state law…[The arbitration provisions] **appear** to foreclose…"), and substituted their own judgment for legal and contractual authority. *See id.* (describing the use of choice-of-law and arbitration provisions as a "farce") (quoting *Hayes*, 811 F.3d at 674)). But in proceeding this way, these courts exceed their well-defined role. *See, e.g.*, *Dean Witter*, 470 U.S. at 218 ("By its terms, the [FAA] **leaves no place for the exercise of discretion** by a district court.").

added) (citations omitted); *see also Simula, Inc.*, 175 F.3d at 722–23 (enforcing choice clauses electing Switzerland and Swiss law, and reaffirming that foreign law need not offer identical remedies to United States antitrust laws). The *Richards II* court reached its conclusion notwithstanding its recognition that English law provided partial immunity to the defendants, and substantially limited plaintiffs' claims. 135 F.3d at 1296.[10]

In refusing to compel arbitration, the district court below failed to apply the onerous standard for prospective waiver that imposed by this Court in *Richards II*. This omission is significant. Indeed, the *Richards II* court reversed reasoning and conclusions analogous to those of the district court here. In the first *Richards* decision, a Ninth Circuit panel discussed numerous remedies available under laws of the United States that English law would not provide. *Richards v. Lloyd's of London*, 107 F.3d 1422, 1429–30 (9th Cir. 1997) ("*Richards I*"). The panel acknowledged significant

[10] Other circuits have reached identical conclusions where plaintiffs have sought to avoid choice of law and choice of forum clauses by reference to the prospective waiver doctrine. The Fourth Circuit, in *Aggarao v. MOL Ship Management Company, Ltd.*, compelled arbitration of claims containing a choice of Philippines law, even where the defendants argued "that Unites States law should not apply" under the choice clause, and where it was uncertain whether the plaintiff could "obtain an adequate remedy" under Philippines law. 675 F.3d 355, 373 n.16 (4th Cir. 2012). The Second circuit in *Roby v. Corp. of Lloyd's*, also noted that "[i]t defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement." 996 F.2d 1353, 1360 (2d Cir. 1993). Similarly, the Tenth Circuit has recognized that "[t]he fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement" of a forum selection clause. *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992). The same is true here.

gaps in substantive English law and procedural hurdles that litigation in England would entail. *Id.* at 1429–30. Comparing the plaintiffs' ability to recover under the laws of the United States and those of England, the panel stated that "[t]he available English remedies are not adequate substitutes for the firm shields and finely honed swords provided by American securities law." *Id.* at 1430. Solely because English Courts would not apply the Securities and Exchange Act, the panel in *Richards I* concluded that "there is no question that the Choice Clauses operate in tandem as a prospective waiver of the plaintiffs' remedies under" the Securities and Exchange Act. *Id.* at 1427–28. While the applicable federal and domestic laws are different in the case before this Court, the district court's reasoning here mirrors that of the *Richards I* panel.

The en banc Court explicitly rejected the panel's conclusion and the insufficiently-rigorous standard for prospective waiver that it applied. For the *Richards II* court, it was not enough that English law would **immunize** defendants "from many actions possible under our securities laws." *Richards II*, 135 F.3d at 1296. Rather, plaintiffs had to show that the "partial immunity" provided by foreign law "**would bar recovery**" entirely. *Id.*

The district court here believed, without any evidence, that the purportedly inferior laws of the Chippewa Cree and the Otoe-Missouria tribes "practically guaranteed" that Plaintiffs would not be able to vindicate their claims. ER015; ER017. But the district court did *not* say—nor did the plaintiffs prove—that the

application of tribal law "would bar recovery." *Richards II*, 135 F.3d at 1296. The district court thus erred in concluding that the arbitration and choice-of-law clauses caused Plaintiffs to prospectively waive their ability to recover.

The high standards for prospective waiver that the Supreme Court and this Court have imposed demonstrate that the arbitration provisions here are valid. The choice-of-law provisions at issue select the laws of two Native American tribes to govern disputes arising out of consumer loan agreements. ER202; ER209; ER219; ER230; ER239. Because this Court must enforce a choice-of-law provision that selects foreign law to the exclusion of domestic law (absent a showing that the law "bar[s] recovery" for plaintiffs), the choice-of-law provision in Plaintiffs' loan agreements does not run afoul of the prospective waiver doctrine. *See Richards II*, 135 F.3d at 1296. Even if the tribal law selected here proves less favorable to plaintiffs, it does not "expressly forbid" any claims against the Haynes Defendants, make "access to the forum impracticable," or deprive plaintiffs of **all** remedies. *See Am. Express*, 570 U.S. at 236, *Richards II,* 135 F.3d at 1296. Moreover, Plaintiffs have failed to show anything more than a mere risk that they will be barred from pursuing legally adequate remedies.

B. The district court improperly resolved the prospective waiver doctrine question rather than wait for the award enforcement stage.

Leaving all of the above aside—i.e., even if the district court had the authority to decide whether the Plaintiffs' agreements to arbitrate are enforceable—the

prospective waiver doctrine would still not apply to prevent arbitration of Plaintiffs' claims.

Numerous courts, including the Supreme Court, have made clear that the prospective waiver doctrine *cannot* be invoked to invalidate an agreement to arbitrate where there is a subsequent opportunity for federal court review. The Supreme Court has noted that it is "premature" to decide whether an agreement prospectively waives statutory claims when a party "seek[s] only to enforce the arbitration agreement." *Vimar Seguros y Reaseguros, S.A.*, 515 U.S. at 540.

That is because, as the Supreme Court recently reaffirmed, the prospective waiver doctrine will apply only when a litigant demonstrates that the arbitration and choice-of-law clauses *eliminate the right to pursue a remedy*—not merely select the law of another sovereign to the exclusion of state and federal law. *See Italian Colors*, 570 U.S. at 236; *accord Richards II*, 135 F.3d at 1296 (noting that the prospective waiver doctrine applies only where plaintiffs "would be deprived of any reasonable recourse" or if foreign law "bar[s] recovery"). Such cases are the extreme exception, and the Supreme Court has never invalidated an arbitration agreement on the basis that a consumer has been unable to effectively vindicate her rights. *Italian Colors*, 570 U.S. at 235 (confirming the Supreme Court's repeated recognition of the effective vindication rule, but noting that the Court has always "declined to apply [the effective vindication doctrine] to invalidate the arbitration agreement at issue").

The proper question for the Court, therefore, "is whether the application of the foreign law presents a danger that the [plaintiff] 'will be deprived of any remedy or treated unfairly.'" *Roby*, 996 F.2d at 1363 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254–55 (1981)); *accord Lindo*, 652 F.3d at 1269 (summarizing Supreme Court precedent to hold that "choice-of-law clauses may be enforced even if the substantive law applied in arbitration potentially provides reduced remedies (or fewer defenses) than those available under U.S. law").

As recognized by the Supreme Court, when a court retains jurisdiction over a case pending resolution of arbitration, applying the prospective waiver doctrine is "particularly inappropriate" where there is any uncertainty as to whether a litigant will be able to effectively vindicate their claims in the arbitral forum. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273–74 (2009).

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

jurisdiction for the purpose of ordering arbitration, it properly could retain jurisdiction to resolve any issues stemming from its order, including the enforcement of the award").

This "back-end judicial review" clearly undercuts the district court's rationale to consider the prospective waiver issues at the outset. Instead, the fact that the district court will retain jurisdiction over the case pending completion of arbitration places this case squarely within the Fourth Circuit's earlier holding in *Aggarao*, as well as the Supreme Court's decision in *14 Penn Plaza*.

The proper course of action was therefore to send Plaintiffs' claims to arbitration—just as the parties' arbitration agreements contemplated—and definitively determine whether Plaintiffs were able to effectively vindicate their claims in arbitration. It was for the arbitrator to decide, at least in the first instance, whether the doctrine of prospective waiver makes the Arbitration Agreements unenforceable. The district court will have a chance to review any award pursuant to the FAA after the arbitral proceedings have concluded. The district court's decision to advance immediately to application of the prospective waiver doctrine was inappropriate, premature, and in error.

For this reason as well, the Court should reverse.

CONCLUSION

The district court's denial of Appellants' Motion to Compel arbitration was flawed in myriad ways. It avoided a clear and unmistakable delegation clause that required the parties to submit threshold issues of arbitrability, including enforceability, to arbitration conducted by a third-party neutral at AAA, JAMS, or CPR. Yet the district court neither analyzed, nor enforced, the delegation clause. *Henry Schein* counsels that such a failure is reversible error.

Compounding this error, the district court refused to enforce the arbitration agreements based on an unsound and overly constrained interpretation of the prospective waiver doctrine. In so holding, the district court failed to properly apply, or even look to, mandatory Supreme Court case law that compels a different result. That too was in error.

These errors require this Court to reverse the district court and remand with instruction to stay the case and send Plaintiffs' claims to arbitration.

Respectfully submitted,

Dated: December 2, 2019

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REQUEST FOR ORAL ARGUMENT

Appellants respectfully request that this Court hear oral argument in this appeal.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned attorney is aware of the following related case currently pending in this Court:

Brice v. Sequoia Capital Operations, LLC, No. 19-17414: The related case arises out of second complaint filed by the same Plaintiff-Appellees as the instant appeal. The case was determined to be a related case by the district court. A second appeal has also been filed arising out of the same case and same motion in the district court as the *Brice v. Sequoia Capital Operations, LLC* case, but has not yet been docketed by the Ninth Circuit.

Dated: December 2, 2019

s/ David F. Herman
David F. Herman

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Opening Brief Of Defendants-Appellants and the accompanying Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 2, 2019

s/ David F. Herman
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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s): No. 19-15707

I am the attorney or self-represented party.

This brief contains 12,298 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Dated: December 2, 2019

s/ David F. Herman
David F. Herman

No. 19-15707

In the United States Court of Appeals for the Ninth Circuit

KIMETRA BRICE, EARL BROWNE, AND JILL NOVOROT, on behalf of themselves and all individuals similarly situated,
Plaintiffs-Appellees,

v.

PLAIN GREEN, LLC,
Defendant,

AND

HAYNES INVESTMENTS, LLC, AND L. STEPHEN HAYNES,
Defendant-Appellants.

On Appeal From the United States District Court for the Northern District of California
The Honorable William H. Orrick, Presiding
No. 3:18-cv-01200-WHO.

ADDENDUM

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I. 9 U.S.C. § 2. VALIDITY, IRREVOCABILITY, AND ENFORCEMENT OF AGREEMENTS TO ARBITRATE.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

II. 9 U.S.C. § 3. STAY OF PROCEEDINGS WHERE ISSUE THEREIN REFERABLE TO ARBITRATION.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

III. 9 U.S.C. § 4. FAILURE TO ARBITRATE UNDER AGREEMENT; PETITION TO UNITED STATES COURT HAVING JURISDICTION FOR ORDER TO COMPEL ARBITRATION; NOTICE AND SERVICE THEREOF; HEARING AND DETERMINATION.

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, in a civil action or in admiralty 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. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. 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, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and

determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. 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.

IV. 9 U.S.C. § 10. SAME; VACATION; GROUNDS; REHEARING.

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(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.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

V. 9 U.S.C. § 16. APPEALS.

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

VI. 28 U.S.C. § 1331. FEDERAL QUESTION

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

VII. 28 U.S.C. § 1367. SUPPLEMENTAL JURISDICTION

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

VIII. CHIPPEWA CREE TRIBAL LENDING AND REGULATORY CODE § 10-3-201. RATE OF INTEREST SET BY WRITTEN AGREEMENT — NO MAXIMUM OR USURY RESTRICTION; FEES AND CHARGES AS AGREED UPON BY THE CREDITOR AND THE CONSUMER.

Unless a maximum Interest rate or charge is specifically established elsewhere in this Title or the other laws of the Tribe, there is no maximum Interest rate or charge, or usury rate restriction between or among Persons if they establish the Interest rate or charge by written agreement. The Creditor and the Consumer can agree upon what fees and charges may be assessed as set forth in any written agreement between the Creditor and the Consumer.

IX. CHIPPEWA CREE TRIBAL LENDING AND REGULATORY CODE, § 10-3-602. ARBITRATION.

a. A Loan Agreement may not contain a mandatory arbitration clause that is oppressive, unconscionable, unfair, or in substantial derogation of a Consumer's rights.

b. A mandatory arbitration clause that complies with the applicable standards of the American Arbitration Association must be presumed to not violate the provisions of § 10-3-602 (a).

X. CHIPPEWA CREE TRIBAL LENDING AND REGULATORY CODE § 10-4-108. POWERS OF THE TCPB.

The TCPB has the authority and responsibility for the discharge of all duties imposed by law and this Code on the TCPB. The TCPB is authorized to exercise the following powers and responsibilities in addition to all powers conferred by this Title:

a. To enforce rules furthering the purpose and provisions of this Title; provided that such rules were legally authorized by the Commissioner.

b. To examine or inspect or cause to be examined or inspected each Licensee annually and more frequently if the TCPB considers it necessary.

c. To make or cause to be made reasonable investigations of any Licensee or Person as it deems necessary to ensure compliance with this Title or any lawful order of the TCPB, to determine whether any Licensee or Person has engaged, is engaging or is about to engage in any act, practice or transaction that constitutes an unsafe or unsound practice or violation of this Title, any applicable Federal Consumer Protection Laws or any order of the TCPB.

d. To establish procedures designed to permit detection of any irregularities such as fraud.

XI. CHIPPEWA CREE TRIBAL LENDING AND REGULATORY CODE § 10-6-101. CONSUMER RIGHTS.

a. The Consumer, at any time before/during/after the Loan process, may file a complaint with the TCPB.

b. The Consumer has the legal right to file a complaint that alleges any/all violations of this Title and any/all applicable Federal laws relating to their Loan.

c. The Consumer has the legal right to request all Loan documents related to their Loan activity, including, but not limited to copies of the original Loan documents, history of payment processing, and any/all authorizations provided by the Consumer directly related to Loan and payment authorization.

XII. CHIPPEWA CREE TRIBAL LENDING AND REGULATORY CODE §§ 10-6-201. REMEDIES.

a. The remedies provided in this section are exclusive and cumulative and apply to Consumers, Licensees and unlicensed Persons to whom this

Title applies. Except with respect to any arbitration provision set forth in the Loan Agreement, the courts of the Chippewa Cree Tribe have exclusive jurisdiction to apply and enforce the provisions of this Title, including this part.

1. Any Person found to have intentionally violated this part is liable to the Consumer for actual damages. Costs and attorney's fees shall not be awarded unless specifically provided for in the Loan Agreement.
2. A Consumer may sue for injunctive and other similar equitable relief to stop a Person from violating any provisions of this Title.
3. The Consumer may not bring a class action suit for any violation of this Title, acts in furtherance of this Title, or to enforce this Title.90

b. The Consumer and the Licensee or unlicensed Person may agree to arbitration in accordance with the terms of the Loan Agreement.

c. The remedies provided in this section are intended to be the exclusive remedies available to a Consumer for a violation of this Title.

XIII. OTOE MISSOURIA TRIBAL CONSUMER FINANCIAL SERVICES ORDINANCE, §5.2. FEDERAL CONSUMER PROTECTION LAWS.

(a) A Licensee shall conduct business in a manner that complies with Section 5.1 above and with all applicable federal and Tribal consumer

protection law, including, but not limited to: The Dodd-Frank Wall Street Reform and Consumer Protection Act, 12, U.S.C. § 5301 *et seq.*, including the Consumer Financial Protection Act, 12 U.S.C. § 5481 *et seq.*, and, the restrictions on Unfair, Deceptive, or Abusive Acts or practices, 12 U.S.C. § 5531, *et seq.*;the Consumer Credit Protection Act, 15 U.S.C. Chapter 41, including the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, 12 C.F.R. § 226; the Fair Credit Billing Act, 15 U.S.C. § 1666a; the Consumer Leasing Act, 15 U.S.C. § 1667 *et seq.*; 12 CFR § 213 *et seq.*; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, 12 C.F.R. § 222; the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, 15 C.F.R. § 202; the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, 16 C.F.R. § 901; and, the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*, 12 C.F.R. § 205. Also, the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*, 16 C.F.R. §§313 and 314; the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq.*; the Controlling the Assault of Non-Solicited Pornography and Marketing Act, 15 U.S.C. § 7701, *et seq.*; the Military Lending Act, 10 U.S.0 § 987, 32 C.F.R. § 232; the Servicemembers' Civil Relief Act, 50 U.S.C. App. § 501 *et seq.*; the Telephone Consumer Protection Act, 47 U.S.C. § 227, 47 CFR § 64.1200 *et seq.*; the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*, 12 U.S.C.

§§ 1829b, 1951-1959; the Anti-Money Laundering Act, 18 U.S.C. § 1960; and, the Telemarketing Sales Rule, 16 C.F.R. § 310.

(b) This Ordinance does not waive any Licensee defenses, legal position, or serve as consent by any Licensee related to the applicability of federal laws to the Tribe, the Commission any Licensee, or any Consumer Financial Services

XIV. OTOE MISSOURIA TRIBAL CONSUMER FINANCIAL SERVICES ORDINANCE, §6.4. AUTHORIZED CONSUMER FINANCIAL SERVICES AND PRODUCTS.

(a) Fully Amortizing Installment Loans. As applicable, a Loan Agreement shall require that the Consumer pay periodic payments of an amount that the Lender and Consumer predetermine and memorialize in their Loan agreement. Lender may apportion those payments to account for principal and interest according to the terms of the Loan Agreement. In no event shall a Loan include a balloon payment at maturity.

(b) Fees and charges. Except as otherwise specified in this Ordinance, the following fees and charges shall apply:

(1) Interest Rate and Fees. Except as otherwise specified in this Ordinance, a Loan Agreement may provide for the interest rate or the fee equivalent as agreed upon by the parties.

(2) Late Charges. A Loan Agreement may provide for a late payment charge not in excess of an amount established by the Commission for each late payment. Only one late payment fee may be collected for each late payment.

(3) Dishonor Item Fees. A Loan Agreement may provide that upon return of a payment device to the Lender, the Lender may charge a fee not in excess of an amount established by the Commission for each return item. Only one fee may be collected for each returned payment notwithstanding multiple presentations of payment.

(c) No oral agreements. A Loan Agreement shall provide that it represents the entire agreement of the parties and may not be contradicted by evidence of prior or contemporaneous oral agreements of the parties. Such provisions are enforceable and disallow evidence of prior or contemporaneous oral agreements.

(d) Enforcement of rights and remedies. The Loan Agreement shall provide that in any proceeding in which a Lender is a party and with respect to any transactions with a Consumer under this Ordinance, the proceeding is governed by this Ordinance, promulgated regulations, and applicable federal law. Any claims or defenses whatsoever asserted by or on behalf of a Consumer shall

be subject to the dispute resolution process and jurisdiction agreed upon by the parties in their Loan Agreement.

(e) The Commission may promulgate regulations to authorize and control additional Consumer Financial Services and products.

XV. 25 CFR § 11.500. LAW APPLICABLE TO CIVIL ACTIONS.

(a) In all civil cases, the Magistrate of a Court of Indian Offenses shall have discretion to apply:

(1) Any laws of the United States that may be applicable;

(2) Any authorized regulations contained in the Code of Federal Regulations; and

(3) Any laws or customs of the tribe occupying the area of Indian country over which the court has jurisdiction that are not prohibited by Federal laws.

(b) The delineation in paragraph (a) of this section does not establish a hierarchy relative to the applicability of specific law in specific cases.

(c) Where any doubt arises as to the customs of the tribe, the court may request the advice of counselors familiar with those customs.

(d) Any matters that are not covered by the laws or customs of the tribe, or by applicable Federal laws and regulations, may be decided by the Court of Indian Offenses according to the laws of the State in which the matter in dispute lies.

XVI. UTAH CODE § 15-1-1. INTEREST RATES -- CONTRACTED RATE -- LEGAL RATE.

(1) The parties to a lawful written, verbal, or implied contract may agree upon any rate of interest for the contract, including a contract for services, a loan or forbearance of any money, goods, or services, or a claim for breach of contract.

(2) Unless the parties to a lawful written, verbal, or implied contract expressly specify a different rate of interest, the legal rate of interest for the contract, including a contract for services, a loan or forbearance of any money, goods, or services, or a claim for breach of contract is 10% per annum.

(3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

XVII. NEV. REV. STAT. § 99.050. AGREED INTEREST RATES; COMPOUNDING; CHARGES OR FEES.

Except as otherwise provided in section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, or any regulation adopted pursuant thereto, parties may agree for the payment of any rate of interest on money due or to become due on any contract, for the compounding of interest if they choose, and for any other charges or fees. The parties shall specify in writing the rate upon which they agree, that interest is to

be compounded if so agreed, and any other charges or fees to which they have agreed.