Nos. 19-17414, 19-17477

In the United States Court of Appeals for the Ninth Circuit

KIMETRA BRICE, EARL BROWNE, and JILL NOVOROT,
Plaintiffs-Appellees,

v.

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOINT BRIEF ON APPEAL OF DEFENDANTS-APPELLANTS

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(For Continuation of Appearances See Inside Cover)

MICHAEL STINSON, LINDA STINSON, THE STINSON 2009 GRANTOR RETAINED ANNUITY TRUST, 7HBF NO. 2 LTD., SEQUOIA CAPITAL OPERATIONS, LLC, SEQUOIA CAPITAL FRANCHISE PARTNERS, L.P., SEQUOIA CAPITAL IX, L.P., SEQUOIA CAPITAL GROWTH FUND III, L.P., SEQUOIA ENTREPRENEURS ANNEX FUND, L.P., SEQUOIA CAPITAL GROWTH III PRINCIPALS FUND, LLC, SEQUOIA CAPITAL FRANCHISE FUND, L.P., SEQUOIA CAPITAL GROWTH PARTNERS III, L.P., STARTUP CAPITAL VENTURES, L.P., STEPHEN J. SHAPER,

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CORPORATE DISCLOSURE STATEMENT

Defendants-Appellants Sequoia Capital Operations, LLC, Sequoia Capital Franchise Partners, L.P., Sequoia Capital IX, L.P., Sequoia Capital Growth Fund III, L.P., Sequoia Entrepreneurs Annex Fund, L.P., Sequoia Capital Growth III Principals Fund, L.P., Sequoia Capital Franchise Fund, L.P., and Sequoia Capital Growth Partners III, L.P. each have no corporate parent and no publicly held corporation owns ten percent or more of its stock.

Defendants-Appellants 7HBF No. 2, Ltd., Startup Capital Ventures, L.P., and The Stinson 2009 Grantor Retained Annuity Trust each have no parent corporation or stock, and no publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

This is an appeal of a district court order that denied the Defendants' motions to refer this dispute to arbitration. The underlying dispute concerns loans made to Plaintiffs by entities affiliated with Native American tribes—loans that Plaintiffs claim provided for unlawful rates of interest and violated RICO and certain provisions of California state law. In another case, filed in the same district court, these Plaintiffs have sued their lenders and other entities that they alleged were directly involved in the marketing and administration of their loans. The Defendants in this lawsuit were investors in an entity that provided administrative services to the lenders.

The Loan Agreements that Plaintiffs entered into contain agreements to arbitrate any dispute about the loans, including "without limitation, all federal, state or Tribal Law claims or demands." The Agreements also contain what the Supreme Court has referred to as a "Delegation Provision," which, in the case of these Agreements, reserves for the arbitrator to decide any threshold dispute concerning "the validity, enforceability, or scope" of the Arbitration Agreement. Plaintiffs contend that the Arbitration Agreements are not enforceable, because they purportedly "prospectively waive" their federal and state law claims—notwithstanding the above-quoted provision that all "federal" and "state" law "claims or demands" are to be arbitrated.

The threshold issue before the district court was who should decide—the district court or the arbitrator—if the Arbitration Agreements are unenforceable on this "prospective waiver" ground. The district court ruled that it should make that determination and proceeded to rule that Arbitration Agreements are not enforceable because they purportedly preclude Plaintiffs from pursuing their federal and state law claims in an arbitration. The Supreme Court, however, has established a different framework that governs how to decide these issues. Under that framework, a delegation provision is a discrete agreement to arbitrate "arbitrability," including a dispute about whether an arbitration agreement is enforceable. Under Section 2 of the Federal Arbitration Act and binding decisional law by this Court and the Supreme Court, a clear delegation provision must be enforced unless a court determines that there is a proper legal basis for refusing to enforce that provision, specifically; generalized complaints about the contract as a whole will not suffice. Any challenge to the validity of a delegation provision, specifically, must also be considered and decided before a court may proceed to address the next-level question of whether the arbitration agreement as a whole is enforceable. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010); *see also Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209–12 (9th Cir. 2016).

The district court here did not apply this framework. Rather, according to the district court, it "did not need to reach 'whether there is a clear and unmistakable

delegation clause because that would not change the fact that the arbitration agreement is unenforceable" on the ground of "prospective waiver." ER6. In other words, as the district court would have it, a court can bypass a contractual provision that requires an *arbitrator* to decide whether an arbitration agreement is enforceable if the *court* steps out in front and makes that enforceability determination for itself. That approach is simply wrong, under the Supreme Court's decision in *Rent-A-Center* and this Court's decision in *Uber Technologies*. Indeed, in *Uber Technologies*, this Court held that a district court may not decide a challenge to an arbitration agreement on the basis that the agreement improperly waives assertion of statutory claims when there is a clear and enforceable delegation provision. *See* 848 F.3d at 1212. That arbitrability question, there and here, is for the arbitrator to decide in light of the clear delegation provision in these arbitration agreements. On this threshold ground, the district court's order should be reversed, this dispute should be referred to arbitration, and the Court should not proceed any further with this appeal.

Not only does the district court's approach contradict settled law, it makes no sense in the procedural posture of this lawsuit. The Supreme Court has articulated a firm rule that "prospective waiver" may be applied only at the "award-enforcement" stage—i.e., after an arbitral award has been made—and not at this "interlocutory" stage, where a party is seeking to enforce an agreement to arbitrate.

See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 540 (1995) (holding that this "claim is premature" where "it is not established what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result"). This is for a good reason: it is only after the arbitration has taken place that a court can know whether a claimant will, in fact, be precluded from either asserting his or her federal or state statutory claims or effectively vindicating the substance of those rights under another sovereign's law. The district court's decision here was thus entirely premature.

Separately, the district court failed to properly analyze whether the prospective waiver doctrine should apply, even if this were the appropriate stage of the case to apply it. Not only do the Arbitration Agreements expressly provide for the arbitration of "all federal, state or Tribal Law claims or demands," but the Sequoia Defendants have made crystal clear—as have the Stinson Defendants—that they *will not seek to preclude Plaintiffs from asserting any of their federal or state law claims in an arbitration*. Plaintiffs will, therefore, be able to pursue real remedies in any arbitration. This addresses the very heart of the doctrine of prospective waiver—whether Plaintiffs will be able to pursue relief for their claims in an arbitration. But the district court made no mention of these representations in its decision, resting its order on an analysis of whether it believed state and federal law would be applied by an arbitrator.

Putting aside the governing legal principles that compel reversal here, there is no good reason not to refer this dispute to arbitration. Either the arbitrator determines that the Agreements allow Plaintiffs to pursue remedies for their federal and state law claims, in which case Plaintiffs will be permitted to arbitrate those claims and the district court's stated concerns on this issue will turn out to be entirely unfounded. (And, it is worth noting, the only way this will happen in light of the record in this case is if *Plaintiffs* are able to persuade the arbitrator that they are not permitted to arbitrate their own federal and state law claims.). Or the arbitrator will determine that the Arbitration Agreements are unenforceable on this ground, in which case the matter comes back to federal court—because, if Plaintiffs' claims are not arbitrable, they can be litigated in a civil action.

The arbitrator should decide this threshold issue. Settled law requires it, and, regardless of how the arbitrator decides this issue, Plaintiffs will be permitted to pursue remedies for their federal and state law claims. Indeed, by following the law and enforcing the delegation provision, the Plaintiffs will be able to pursue their claims either in an arbitration, as they agreed, or in a civil action, if they succeed in getting an arbitrator to determine that they cannot pursue their claims in arbitration on the ground of "prospective waiver." The district court's ruling that it, and not the arbitrator, should decide whether Plaintiffs' claims are arbitrable contravenes the Delegation Provisions and binding Supreme Court and Ninth Circuit precedent. It

also makes no sense in the posture of this case, and reflects the old judicial hostility to arbitration that this Court and the Supreme Court have been at pains to displace. That order should be reversed, and this dispute should be referred to arbitration in accordance with Plaintiffs' Arbitration Agreements.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1367 (supplemental jurisdiction over state law claims). This Court has jurisdiction over this appeal pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 16(a)(1)(A) & (C), allowing for an appeal from an order denying motions for a stay pending arbitration and to compel arbitration. On November 1, 2019, the district court issued its order denying the Sequoia Defendants'[1] motion for a stay pending arbitration, and denying the Stinson Defendants'[2] motion to compel arbitration. ER1–2. The Sequoia Defendants and the Stinson Defendants timely filed their notices of appeal from this order on November 27, 2019 and December 2, 2019, respectively. ER13; ER15.

[1] The "Sequoia Defendants" refers to Defendants-Appellants Sequoia Capital Operations, LLC, Sequoia Capital Franchise Partners, L.P., Sequoia Capital IX, L.P., Sequoia Capital Growth Fund III, L.P., Sequoia Entrepreneurs Annex Fund, L.P., Sequoia Capital Growth III Principals Fund, LLC, Sequoia Capital Franchise Fund, L.P., and Sequoia Capital Growth Partners III, L.P.

[2] The "Stinson Defendants" refers to Defendants-Appellants Michael Stinson, Linda Stinson, The Stinson 2009 Grantor Retained Annuity Trust, 7HBF No. 2, Ltd., Startup Capital Ventures, L.P., and Stephen J. Shaper.

ISSUES PRESENTED

This appeal presents two issues, both reviewed *de novo*. The district court's order denying Defendants' motions to refer this dispute to arbitration should be reversed if the Court answers either of the following questions affirmatively:

1. The first question on this appeal is whether the district court erred by refusing to enforce the "Delegation Provisions" in Plaintiffs' Loan Agreements. Under *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), an agreement to allow an arbitrator to resolve any dispute concerning the enforceability of an agreement to arbitrate—a so-called "delegation provision"—must be enforced, separate and apart from the agreement to arbitrate of which it is a part, "save upon such grounds as exist at law or in equity for the revocation of any contract." *Rent-A-Center*, 561 U.S. at 70 (quoting 9 U.S.C. § 2); *see also Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209–12 (9th Cir. 2016). The district court bypassed the Delegation Provisions here—which in pertinent part provide for arbitration of any dispute "concerning the validity, enforceability, or scope" of the Arbitration Agreements—and ruled that it "did not need to" address their enforceability "because that would not change the fact that the arbitration agreement is unenforceable as an unambiguous prospective waiver." ER6.

2. The second question on this appeal is whether the district court erred when it ruled that the Arbitration Agreements as a whole are not enforceable under

the doctrine of "prospective waiver"—that is, that they operate to prevent Plaintiffs from pursuing remedies for their claims under federal and state law. Under binding Supreme Court precedent, a federal court may not apply the doctrine of prospective waiver at the "interlocutory" stage—i.e., in determining whether to refer a dispute to arbitration—but only at the "award-enforcement" stage, i.e., after the arbitration has concluded and when the court will have an opportunity to review the award. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995). A court must also refer a dispute to arbitration on a proper motion unless the court can determine with "positive assurance" that "the arbitration clause is not susceptible of an interpretation" that allows for arbitration of the claims asserted in the action. *AT&T Techs. Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 650 (1986). The Arbitration Agreements here define an arbitrable "Dispute" in pertinent part as including "all federal, state or Tribal law claims." The Sequoia Defendants and the Stinson Defendants have also repeatedly made plain in this action that they will *not* seek to preclude Plaintiffs from arbitrating their federal and state law claims. The district court nevertheless ruled that the doctrine of prospective waiver makes the Arbitration Agreements that Plaintiffs executed unenforceable.

STATEMENT OF THE CASE

This appeal arises from one of two separate lawsuits brought by a group of individuals who assert claims arising from Loan Agreements that they executed with two sovereign Native American lenders.[3]

A. Background

Plaintiffs are individuals residing in California who borrowed money from one of two lenders that are owned by a Native American tribe.[4] ER2; ER70 ¶¶ 2–3; ER72 ¶¶ 10–12. The first, Plain Green, LLC, is a company owned by the Chippewa Cree Tribe. ER2; ER82 ¶ 73–75. The second, Great Plains Lending, LLC, is a company owned by the Otoe-Missouria Tribe of Indians. ER2; ER80–82 ¶¶ 57–72.

[3] The same group of Plaintiffs filed a prior lawsuit in the Northern District of California, against different defendants, seeking damages predicated on the same loans and assigned to the same district court judge (Orrick, J.). *See Brice v. Plain Green, LLC*, No. 3:18-cv-1200 (N.D. Cal). The district court issued a decision denying a motion to compel arbitration in *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955 (N.D. Cal. 2019). That order is now on a separate appeal in this Court, No. 19-15707, and this Court has calendared that appeal and the instant consolidated appeal before the same merits panel. ECF No. 12 at 2, No. 19-17414.

[4] As the district court recognized, "[w]hile the Complaint in this case references Mobiloans contracts as part of the tribal lending scheme, none of the plaintiffs in this case apparently took out a Mobiloan. The Mobiloan contracts [were] not discussed in either the defendants' motions to stay or compel or plaintiffs' oppositions thereto" and are not at issue on this appeal. ER8 n.4 (citation omitted).

B. Plaintiffs' Agreements to Arbitrate

Plaintiffs' Loan Agreements each contain a detailed and conspicuously disclosed Agreement to Arbitrate (the "Arbitration Agreements"). *See* ER25–ER26; ER35–38; ER65–67. Plaintiffs agreed to arbitrate any "claim or controversy of any kind." ER25; ER36; ER66. Plaintiffs also agreed that this provision "is to be given its broadest possible meaning and includes . . . all federal, state or Tribal Law claims or demands (whether past, present, or future)." *See* ER25; ER36; ER66. In addition, Plaintiffs agreed to arbitrate any dispute "concerning the validity, enforceability, or scope" of the Agreement or the Agreement to Arbitrate. *See* ER25; ER36; ER66. Specifically, the Arbitration Agreements with Great Plains and Plain Green provide:

> **AGREEMENT TO ARBITRATE:** You and we (defined below) agree that any Dispute (defined below) will be resolved by Arbitration.
>
> **WHAT ARBITRATION IS:** "Arbitration" is having an independent third-party resolve a Dispute. A "Dispute" is any claim or controversy of any kind between you and us or otherwise involving this Agreement or the Loan. The term Dispute is to be given its broadest possible meaning and includes, without limitation, all federal, state or Tribal Law claims or demands (whether past, present, or future), based on any legal or equitable theory and regardless of the type of relief sought (i.e., money, injunctive relief, or declaratory relief). A Dispute includes any issue concerning the validity,

> enforceability, or scope of this Agreement or this Agreement to Arbitrate.

ER25; ER36; *see also* ER66 (Plain Green agreement, to similar effect). The Agreements also provide: "This Agreement and the Agreement to Arbitrate are governed by Tribal Law and such federal law as is applicable under the Indian Commerce Clause of the Constitution of the United States of America."[5] ER25; ER35; *see also* ER65.

The Arbitration Agreements include many provisions for Plaintiffs' benefit. For example, the Agreements provide Plaintiffs with their choice of conducting arbitration before one of two nationally recognized and well-respected arbitration service providers: the International Institute for Conflict Prevention and Resolution ("CPR") or JAMS, The Resolution Experts ("JAMS") in the Great Plains Agreements and, in the Plain Green Agreements, the American Arbitration Association ("AAA") or JAMS, ER25; ER36; ER66. The Agreements further call for the arbitration to proceed pursuant to the policies and procedures of the selected organization and provide Plaintiffs with contact information, including websites, for the arbitration providers. *See* ER25; ER35–36; ER66. Regardless of which

[5] The Arbitration Agreements in the Plain Green Loan Agreements "comprehends the application of the Federal Arbitration Act" and notes that "THE PARTIES ADDITIONALLY AGREE TO LOOK TO THE FEDERAL ARBITRATION ACT AND JUDICIAL INTERPRETATIONS THEREOF FOR GUIDANCE IN ANY ARBITRATION THAT MAY BE CONDUCTED[.]" *See* ER65; ER67.

organization is selected, the Arbitration Agreements provide Plaintiffs with a choice to have the arbitration conducted "either on Tribal land or within thirty (30) miles of [Plaintiffs'] residence." ER25; ER37; ER66. The Agreements also require the respondent to pay all filing fees and any other arbitration costs regardless of who initiates the arbitration. ER25; ER37; ER66.

The Arbitration Agreements contain a conspicuous opt-out provision—set off from other text and in all caps—that allowed Plaintiffs to opt-out of their Arbitration Agreement within sixty days of executing their Loan Agreement simply by "advis[ing] [the Lender] in writing … that [they] reject arbitration," and providing their names and either their account or social security numbers. *See* ER25; ER35–36; ER66. Opting out would have had no impact on the other terms of Plaintiffs' loans, and they could have opted out with a simple e-mail or letter. *See* ER25; ER35–36; ER66.

Not only were the opt-out provisions laid out in plain language, but Plaintiffs were also presented with the following prominent disclosure—and instructed to read it **"CAREFULLY"**—before they signed their Loan Agreements. For example, the following language appears in all caps and bold lettering in the Agreements to Arbitrate for Great Plains and Plain Green:

> **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, TO ENGAGE IN DISCOVERY (EXCEPT AS MAY BE PROVIDED IN THE ARBITRATION RULES), AND TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS ….**

See ER25; ER36; ER66 (similar). Further still, Plaintiffs were provided with the following notice, also in bold lettering and all caps, concerning the rights they would be waiving by entering into the Arbitration Agreements:

> **WAIVER OF RIGHTS: BY ENTERING INTO THIS AGREEMENT, YOU ACKNOWLEDGE AND AGREE THAT YOU ARE WAIVING YOUR RIGHT TO (A) HAVE A JURY TRIAL TO RESOLVE DISPUTES, (B) HAVE A COURT RESOLVE DISPUTES, (C) PARTICIPATE IN A CLASS ACTION LAWSUIT, AND (D) HAVE ACCESS TO DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT.**

ER26; ER37; ER66–67.

In sum, before agreeing to the terms of their loans and obtaining the loan proceeds, Plaintiffs consented to the Arbitration Agreements and affirmed that:

- the arbitrator, not a court, will make gateway determinations about the arbitrability of any dispute and the enforceability of their arbitration agreement;

- any dispute, including past disputes, concerning their loans or their loan agreements will be arbitrated, unless they exercised their right to opt-out from the arbitration procedure within sixty days;

- any arbitration will be administered, at Plaintiffs' election, by either AAA, JAMS, or the International Institute for Conflict Prevention and Resolution;
- any arbitration will take place, at Plaintiffs' choice, on tribal land or within 30 miles of their residence;
- the respondent will pay the costs of arbitration; and
- each of the Plaintiffs waives their rights to participate in a class action and serve as a class representative.

ER25–26; ER35–38; ER65–67.

These terms of the Arbitration Agreements were conspicuously disclosed to Plaintiffs in their Loan Agreements. Plaintiffs had no barriers to access arbitration to resolve any dispute regarding the Loan Agreements and could have avoided arbitration entirely by opting out. Plaintiffs neither opted out of their Arbitration Agreements nor pursued their claims in arbitration. Instead, in violation of their Arbitration Agreements, Plaintiffs commenced this and another putative class action in federal court.

C. Procedural History

Notwithstanding their clear agreements to arbitrate disputes arising out of their loans or their Loan Agreements, Plaintiffs filed two separate complaints between 2018 and 2019 in the Northern District of California against more than twenty defendants, all of which are grounded in disputes over the legality of their loans.

Plaintiffs' suit against the Defendants here was filed in March 2019. ER110 at Docket Entry ("DE") No. 1. Like their other complaint, Plaintiffs' alleged that their loans with Plain Green and Great Plains were unlawful under California's usury laws and that Defendants participated in the collection of loans principally through their having been shareholders of Think Finance, LLC or by appointing a member to the Board of Directors for Think Finance. ER70–71 ¶ 4.

The Sequoia Defendants moved the district court for a stay pending arbitration, and the Stinson Defendants moved for an order compelling arbitration. ER113 at DE Nos. 24, 25. All Defendants also moved to transfer this action to the Northern District of Texas pursuant to 28 U.S.C. § 1412, where Think Finance filed a petition pursuant to Chapter 11 of the Bankruptcy Code and where several other adversary actions filed by consumer plaintiffs, including an action filed by these Plaintiffs, are pending. ER113 at DE No. 27.

The district court issued a memorandum opinion denying all of Defendants' motions. ER1. The district court's memorandum, which expressly adopts and follows its opinion in Plaintiffs' first lawsuit, *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955 (N.D. Cal. 2019), focused all of its analysis of the arbitration issue on a single topic: the prospective waiver doctrine. ER5–8; *see also Brice*, 372 F. Supp. 3d at 967–73. The entirety of the district court's analysis of the prospective waiver doctrine turned on whether the Arbitration Agreements "act[] as a prospective

waiver of statutory rights and remedies." ER 5. Because, according to the district court, the Arbitration Agreements are "unenforceable as an unambiguous prospective waiver," the court determined that it "did not need to reach" whether there is a "clear and unmistakable delegation clause." ER6. The court, accordingly, ruled that the Arbitration Agreements are unenforceable without identifying any specific ground for refusing to enforce the Delegation Provisions—or even addressing this threshold issue.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's order denying a motion to refer a dispute to arbitration pursuant to the Federal Arbitration Act. *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)).

SUMMARY OF THE ARGUMENT

This dispute should be referred to arbitration—and the district court's order on appeal should be reversed—on the threshold ground that the Arbitration Agreements reserve for the arbitrator to determine whether they are enforceable and there is no basis for refusing to enforce this antecedent Delegation Provision. The district court's determination that it, and not an arbitrator, should decide whether the Arbitration Agreements are enforceable ignores the plain language of those Agreements stating that an arbitrator is to resolve "any dispute" regarding their

validity, enforceability, or scope. Under *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), this delegation provision must be enforced, "leaving any challenge to the validity of the Agreement as a whole for the arbitrator," unless "a party challenges the validity" of the delegation provision, *id.* at 71–72, in which case a court must then decide whether this specific provision is unenforceable, *see Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209–12 (9th Cir. 2016).

The district court refused to enforce the Delegation Provision here, but not because there is any proper legal basis for refusing to enforce it. Rather, the court reasoned that it did not need to address the enforceability of the Delegation Provision at all because "that would not change the fact that the arbitration agreement is unenforceable as an unambiguous prospective waiver" of Plaintiffs' asserted claims under federal and California law. ER6. But the district court did not address, nor did Plaintiffs demonstrate, any ground for invalidating that Delegation Provision "specifically," as was required under binding Supreme Court precedent. *Rent-A-Center*, 561 U.S. at 72. The district court's stated concern that the Arbitration Agreements prospectively waive claims asserted under federal and state law is not a proper or even coherent basis for refusing to enforce the separate Delegation Provision, which simply and straightforwardly provides that an arbitrator shall decide any dispute concerning the "validity, enforceability, or scope" of the Arbitration Agreements. In an analogous circumstance, in *Uber Technologies*, this

Court held that a district court may not reach whether an arbitration agreement is unenforceable on the ground that it improperly waives a statutory claim—there in violation of California law—in the face of a delegation provision that reserves this issue for the arbitrator to decide. *See* 848 F.3d at 1210–12.

A second and independent basis for referring this dispute to arbitration is that, even assuming for the sake of argument that the district court had properly determined that it, and not the arbitrator, has the authority to decide whether Plaintiffs' claims are arbitrable, the district court improperly applied "prospective waiver" here at the "arbitration enforcement" stage—i.e., where a party is seeking to enforce an agreement to arbitrate. The Supreme Court has articulated a clear rule that "prospective waiver" may be applied only at the "award-enforcement" stage—i.e., after an arbitral award has been made. *Sky Reefer*, 515 U.S. at 540. This doctrine may not be applied at the "arbitration-enforcement stage" to preclude arbitration. *See id.* (holding that it is "premature" to decide whether an agreement prospectively waives statutory claims when a party "seek[s] only to enforce the arbitration agreement").

This case is at the "arbitration-enforcement stage." Prospective waiver is therefore not a ground for refusing to refer this dispute to arbitration. Moreover, not only do the Arbitration Agreements expressly provide for the arbitration of "all federal, state or Tribal Law claims or demands," and thus Plaintiffs cannot be said

to have "waived" assertion of their federal and state claims in an arbitration, but Defendants have also made clear that they will not seek to preclude Plaintiffs from pursuing remedies for their federal and state statutory claims in arbitration. That, alone, mandates that this dispute be referred to arbitration pursuant to binding Supreme Court precedent.

The district court did not address, or even reference, this express contractual language. Nor did the court mention Defendants' clear and repeated statements that they will *not* seek to preclude Plaintiffs from asserting their federal and state claims in arbitration. But, under the Supreme Court's decision in *Sky Reefer*, in light of the pre-award posture of this dispute, and in light of Defendants' clear representations concerning the arbitrability of Plaintiffs' federal and state claims, the prospective waiver doctrine is not a proper ground for refusing to send this dispute to arbitration in accordance with Plaintiffs' Agreements.

ARGUMENT

I. THE DISTRICT COURT ERRED BY REFUSING TO ENFORCE THE DELEGATION PROVISION IN THE LOAN AGREEMENTS

The language of the parties' Arbitration Agreements is clear that an arbitrator—not a court—is to resolve any "dispute" regarding the validity, enforceability, or scope of the Arbitration Agreements at issue. *See* ER25; ER36; ER66. Plaintiffs did not challenge the Delegation Provision specifically or articulate any distinct reason why this Provision—apart from the Arbitration Agreements more

generally—is unenforceable. Contrary to the district court's reasoning, the "prospective waiver" doctrine is not a ground to refuse to address whether the Delegation Provision is enforceable. That doctrine applies, if at all, only to an agreement to arbitrate *claims*—and, specifically, when a party is effectively prevented from pursuing statutory *claims* in arbitration. It has no applicability to a separate, and separately enforceable, agreement to arbitrate the threshold issue of arbitrability. The district court erred in holding that it, and not an arbitrator, should decide whether the Arbitration Agreements are unenforceable. On this threshold ground, the Court should reverse the order on appeal and refer this dispute to arbitration.

A. Under the Delegation Provision, It Is For the Arbitrator to Determine Whether the Arbitration Agreement Is Enforceable

The Arbitration Agreements entered into by Plaintiffs have a plain Delegation Provision, stating that an arbitrator is to resolve any "dispute" regarding the "validity, enforceability, or scope" of the Arbitration Agreements. ER25; ER36; ER66. In *Rent-A-Center v. Jackson*, the Supreme Court held that "parties can agree to arbitrate 'gateway' questions of 'arbitrability,'" including the validity, enforceability, and scope of an arbitration agreement. 561 U.S. 63, 68–69 (2010); *see also First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (noting that parties can agree for arbitrators to decide arbitrability). Courts regularly 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). The Supreme Court has made clear that, when an arbitration agreement contains a valid delegation provision like the one at issue here, it is for the arbitrator, not a court, to determine whether the arbitration agreement is enforceable and the claims are arbitrable. *See Rent-A-Center*, 561 U.S. at 71–72; *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46, (2006) ("[U]nless the challenge is to the … clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."). A court then has no further role other than to refer the dispute to arbitration. *See Henry Schein, Inc., v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

Here, Plaintiffs' "clearly and unmistakably" agreed that an arbitrator would determine the arbitrability of any claims relating to their loans or loan agreements. Functionally identical language has repeatedly been recognized as an enforceable delegation provision. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986); *Rent-A-Center*, 561 U.S. at 68–69 (noting that similar delegation provision was clear and unmistakable). In *Uber Technologies*, for example, this Court held that a provision that "delegated to the arbitrators the authority to decide issues relating to the 'enforceabilty, revocability, or validity of the Arbitration Provision or any portion of the Arbitration Provision'" "'clearly and unmistakably indicates [the parties'] intent for the arbitrators to decide the threshold question of

arbitrability.'" 848 F.3d at 1209 (alteration in original; quoting the arbitration agreement at issue and then *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011)).

The Delegation Provision here, stating that an arbitrator is to resolve any "dispute" regarding the "validity, enforceability, or scope" of the Arbitration Agreements (ER25; ER36; ER66), is similarly clear and unambiguous. This provision requires that an arbitrator, not a court, determine whether Plaintiffs' dispute regarding their loan agreements is arbitrable.

B. The Doctrine of "Prospective Waiver" Is Not a Ground to Refuse to Enforce the Delegation Provision

1. The Issue Here Is Whether the Delegation Provision Should Be Enforced

The remaining question, then, is whether this Delegation Provision should be enforced. The Supreme Court has made clear how that inquiry must proceed.

A delegation provision is a separate "'agreement to arbitrate a gateway issue'" concerning arbitrability. *See Schein*, 139 S. Ct. at 529 (quoting *Rent-A-Center*, 561 U.S. at 70). A delegation provision is deemed a separate "written provision" "to settle by arbitration a controversy" under § 2 of the FAA. *Rent-A-Center*, 561 U.S. at 71. Just as a party may not challenge the validity of an arbitration agreement by challenging the validity as a whole of the contract, a party also may not challenge the validity of a delegation provision by challenging the validity of the more general agreement to arbitrate. *See Schein*, 139 S. Ct. at 530; *Rent-A-Center*, 561 U.S. at

70–71. The district court failed to address or apply this "severability rule," which is mandated by § 2 of the FAA and the Supreme Court. *See id*. A delegation provision is, as a binding matter of federal law, severable from an agreement to arbitrate a dispute on the merits. *See Rent-A-Center*, 561 U.S. at 70–71; *see generally Buckeye*, 546 U.S. at 449 (challenge to "validity of the contract as a whole" "must go to the arbitrator" under this rule).

A delegation provision therefore must be enforced, separate and apart from the agreement to arbitrate of which it is a part, "save upon such grounds as exist at law or in equity for the revocation of any contract." *Rent-A-Center*, 561 U.S. at 70 (quoting 9 U.S.C. § 2). That is, a delegation provision must be enforced pursuant to the FAA unless there is a specific ground for refusing to enforce that "precise" delegation provision, such as, for example, that the delegation provision, in particular, was procured by fraud or is unconscionable as a matter of state contract law. *See Rent-A-Center*, 561 U.S. at 71 (any claim of "fraud in the inducement" must be directed to the "precise agreement to arbitrate at issue"); *id.* at 73–74 (unconscionability challenge under state law must be "specific to the delegation provision"); *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1210–12 (9th Cir. 2016). Any doubts on this issue, as with arbitrability generally, must be "resolved in favor of arbitration." *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999)

(quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

2. "Prospective Waiver" Concerns the Enforceability of the Arbitration Agreements As a Whole, Not the Delegation Provision, But That Is for the Arbitrator to Decide In the First Instance

Plaintiffs did not assert a specific challenge to the enforceability of the Delegation Provision. Nor could they. The Delegation Provision simply and straightforwardly states that any dispute concerning "the validity, enforceability, or scope" of "this Agreement to Arbitrate" "will be resolved by arbitration." *See* ER25; ER36; ER66. Plaintiffs did not provide any basis—and there is none—for refusing to enforce this severable, antecedent agreement to arbitrate all disputes concerning the validity and enforceability of the Arbitration Agreements.

Plaintiffs attempted to challenge the Delegation Provisions on the basis of the "prospective waiver" doctrine. DE No. 40 at 8–18; DE No. 41 at 2–8. But that doctrine is addressed to the enforceability of the Arbitration Agreements or even the Lending Agreements as a whole. Under *Rent-A-Center* and *Schein*, this challenge to the enforceability of the Arbitration Agreements as a whole is not a proper basis for refusing to enforce an antecedent delegation provision.

The district court invoked the Supreme Court's rule from *Rent-A-Center* in its discussion of the governing legal standard and then proceeded to ignore that rule in analyzing whether to enforce the Delegation Provision. ER5–8. As to *Schein*, the

district court dismissed it as having "'no bearing'" on this case (ER7 (quoting *Gingras*, 922 F.3d at 126 n.3)), because the Supreme Court there enforced a delegation provision in the face of a different challenge to arbitrability—the judge-made "wholly groundless" exception (i.e., if it is "wholly groundless" to argue that a dispute is arbitrable, a court may bypass a delegation clause and decide the issue for itself), rather than the judge-made "prospective waiver" doctrine that is at issue here. That wooden distinction does not hold up. *Schein* made clear that the fundamental *reason* a court may not invoke the "wholly groundless" doctrine to refuse to enforce a delegation provision is that "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitration, a court may not decide an arbitrability question that the parties have delegated to an arbitration." 139 S. Ct. at 530.

That same reason applies here, where Plaintiffs challenge the arbitrability of their claims on the ground of "prospective waiver." Both the "wholly groundless" and the "prospective waiver" doctrines are *arbitrability* challenges. Indeed, other courts have sensibly recognized in this specific context that, after *Schein*, it is now clear that a party may not rely on the doctrine of prospective waiver (also called "effective vindication") as a putative basis for overriding a delegation provision. As they point out, "an effective vindication challenge is a challenge to the enforceability of the arbitration agreement," which "[a]fter *Henry Schein*, [ ] are heard by the

arbitrator where [ ] the parties' agreement includes a delegation clause." *De Angelis v. Icon Entm't Grp. Inc.*, 364 F. Supp. 3d 787, 795 (S.D. Ohio 2019); *Davis v. TMC Rest. of Charlotte, LLC*, No. 3:18-cv-313, 2019 WL 4491529, at *2 (W.D.N.C. Sept. 18, 2019), *appeal filed*, No. 19-2167 (4th Cir. Oct. 23, 2019) (noting that after *Schein* "when the parties' agreement delegates arbitrability issues to the arbitrator, the Court is without power to decide arbitrability issues—the arbitrator must determine issues regarding the validity, enforceability, or scope of the arbitration agreement, including its delegation provision").[6]

Whether the doctrine of prospective waiver makes the Arbitration Agreements unenforceable here, as Plaintiffs contend, is an "arbitrability question that the parties have delegated to an arbitrator," *Schein*, 139 S. Ct. at 529, because the Arbitration Agreements clearly and expressly state that disputes concerning their enforceability or scope "will be resolved by arbitration," *see* ER25; ER36; ER66. Defendants are seeking to enforce this *Delegation Provision*, so that the arbitrator can decide, in accordance with the plain terms of this provision, Plaintiffs' contention that the

[6] The Sixth Circuit has also recognized that, under *Schein*, a court may not look ahead of a delegation provision and determine for itself that certain claims are "'clearly outside the scope of the arbitration clause.'" *McGee v. Armstrong*, 941 F.3d 859, 866–67 (6th Cir. 2019) (quoting *Turi v. Main St. Adoption Servs., LLP*, 633 F.3d 496, 507 (6th Cir. 2011)). That is effectively what the district court did here: determine for itself that the Arbitration Agreements "prospectively waive" federal and state statutory claims and they are therefore not arbitrable. But, when an arbitration agreement has a delegation provision, *Schein* makes clear a court has "no power to decide [this] arbitrability issue." 139 S. Ct. at 529.

Arbitration Agreements are not enforceable, on the ground that they will putatively deprive them of effective relief on their claims under federal and California law.

3. 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 Delegation Provisions in the Arbitration Agreements were "clear and unmistakable." Instead, the court declared that it "did not need to reach" this question and that it was a "secondary" question to the enforceability of the Arbitration Agreements. *Brice*, 372 F. Supp. 3d at 969.[7] Respectfully, that has the analysis completely backwards.

A court must address whether a delegation provision is enforceable before reaching the issue of whether the arbitration agreement as a whole is enforceable.

[7] *Gingras v. Think Finance, Inc.*, 922 F.3d 112 (2d Cir. 2019), does not support the district court's analysis. In *Gingras*, the Second Circuit similarly ruled that it could decide whether an agreement to arbitrate in a lending agreement with Plain Green was enforceable, notwithstanding a clear delegation provision in the arbitration agreement. But the plaintiffs in *Gingras* at least "allege[d]" that the delegation provision was "fraudulent," *id.* at 126, unlike Plaintiffs here who only asserted that the delegation provision is unenforceable based on the "prospective waiver" doctrine. *See* DE No. 40 at 8–18; DE No. 41 at 2–8. Regardless, the *Gingras* court never actually *ruled on* the enforceability of the delegation provision before proceeding to rule on the enforceability of the agreement to arbitrate. That approach contravenes the Supreme Court's jurisprudence in *Rent-A-Center* and *Schein* and Ninth Circuit precedent, which requires a party seeking to avoid a delegation provision to persuasively show, not merely allege, that it is unenforceable. *See Rent-A-Center*, 561 U.S. at 72; *Schein*, 139 S. Ct. at 530; *Uber Techs.*, 848 F.3d at 1210–12.

The Supreme Court in *Rent-A-Center* established that a court "must enforce" a delegation provision and leave for the arbitrator "any challenge to the validity of the Agreement [to arbitrate] as a whole." *Rent-A-Center*, 561 U.S. at 72. Likewise, in *Schein*, the Supreme Court reiterated: "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue." 139 S. Ct. at 529. That, however, is what the district court did when it decided the arbitrability issue notwithstanding the Delegation Provision.

The district court's reliance on the Fourth Circuit's decisions in *Hayes* and *Dillon* (ER6; *Brice*, 372 F. Supp. 3d at 967–73) does not alter this binding framework. Both cases acknowledged that the doctrine of prospective waiver looks to whether an arbitration agreement is unenforceable—on the ground that it operates to waive "federal substantive statutory rights." *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 334 (4th Cir. 2017); *see also Hayes v. Delbert Serv. Corp.*, 811 F.3d 666, 674 (4th Cir. 2016). The Fourth Circuit's decisions make plain throughout that they are addressing the *enforceability of the agreements to arbitrate as a whole*, not the delegation provision in those agreements, in particular.[8]

[8] *See, e.g.*, *Hayes*, 811 F.3d at 672 (addressing "several related challenges to the arbitration agreement"); *id.* at 673 (holding that "[t]his arbitration agreement fails for the fundamental reason that it purports to renounce the wholesale application of any federal law"); *id.* at 675 (holding that "the arbitration agreement in this case" is "invalid and unenforceable"); *Dillon*, 856 F.3d at 336 (holding that "the arbitration

Under the Delegation Provision here, however, it is for the *arbitrator* to decide whether the Arbitration Agreements are enforceable. The Defendants are seeking to enforce this provision—to have the arbitrator decide Plaintiffs' challenge to the enforceability of the Arbitration Agreements. The "prospective waiver" doctrine is *not* a ground for refusing to enforce the Delegation Provision. For example, as this Court held, in an analogous circumstance in *Uber Technologies*, a challenge to the enforceability of an arbitration agreement on the ground that it improperly waived the assertion of a statutory claims—purportedly in violation of California law—was for the *arbitrator* to decide in light of a clear delegation provision. *See* 848 F.3d at 1212 ("Because we conclude that the district court should not have reached the question of whether the arbitration agreements were enforceable in the first place, it is not necessary to address this argument ….").

Further, while the Supreme Court has never applied the prospective waiver doctrine to refuse to enforce any agreement to arbitrate—and has referred to the doctrine most recently as "dicta," *see Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 n.2 (2013)—neither the Supreme Court nor the Ninth Circuit (or any federal court of appeals, for that matter) has ever suggested that prospective waiver would be a basis for not enforcing an antecedent *delegation provision*. Nor would

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agreement functions as a prospective waiver of federal statutory rights and is, therefore, unenforceable as a matter of federal law").

that make any sense, because prospective waiver addresses whether an agreement to arbitrate as a whole is unenforceable. So while, as the district court notes, *Rent-A-Center* recognizes that a "plaintiff may challenge the general arbitration procedures '*as applied* to the delegation clause' to show that they render the delegation clause unenforceable," (*Brice*, 372 F. Supp. 3d at 969, quoting *Rent-A-Center*, 561 U.S. at 74 (emphasis in original)), Plaintiffs cannot properly challenge the enforceability of the delegation provision on the basis of prospective waiver. *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).

In the absence of a delegation provision, such disputes would indeed be for a court to decide. *See First Options of Chicago*, 514 U.S. at 943 ("If … the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently."). But, under binding Supreme Court and Ninth Circuit authority, a delegation provision is an antecedent agreement to arbitrate any dispute about, *inter alia*, the enforceability of an agreement to arbitrate and a court must enforce that antecedent agreement absent a basis "at law or in equity," 9 U.S.C. § 2, not to enforce that separate agreement, specifically. *See Schein*, 139 S. Ct. at 529; *Rent-A-Center*, 561 U.S. at 70, 73; *Uber Techs.*, 848 F.3d

at 1209 (court must enforce "delegation provisions" "in the absence of some other generally applicable contract defense, such as fraud, duress, or unconscionability").

The doctrine of "prospective waiver" is not a basis for either refusing to enforce a delegation provision or, as the district court stated, a basis for refusing to address the enforceability of a delegation provision. It is, at most, a basis for refusing to enforce an agreement to arbitrate as a whole.[9] Defendants, however, seek to enforce the antecedent Delegation Provision in the Arbitration Agreements, and the doctrine of prospective waiver is not a proper or even coherent basis for refusing to enforce that provision.

[9] Defendants recognize that several courts of appeals have applied the doctrine of prospective waiver to invalidate arbitration agreements. Respectfully, though, prospective waiver is not a proper basis for invalidating an agreement to arbitrate under the Federal Arbitration Act. This court-made concept stems from arbitration-specific "public policy" concerns. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). It is therefore not a proper basis "at law or in equity" for invalidating contracts under Section 2 of the FAA. As the Supreme Court has made clear: "Courts may not" "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (citations omitted, emphasis in original); *see also Rent-A-Center*, 561 U.S. at 67–68 (noting that the FAA "places arbitration agreements on an equal footing with other contracts" and "[l]ike other contracts" they may be invalidated only by "'generally applicable contract defenses'") (quoting *Doctor's Assocs. Inc.*, 517 U.S. at 687). Further, just as the judge-made "wholly meritless" ground for refusing to enforce a delegation provision has been abrogated by *Schein*, the judge-made "prospective waiver" doctrine is also no longer a proper basis for refusing to enforce an agreement to arbitrate, if it ever was. (As the Supreme Court has noted, it has never applied "prospective waiver" to actually invalidate an arbitration agreement. *See Am. Express*, 570 U.S. at 235.)

4. The District Court's Attempt to Bypass the Delegation Provision Fails Under Supreme Court Case Law and Returns to the Old Judicial Hostility to Arbitration

The Supreme Court has recognized repeatedly that the FAA "was designed to allow parties to avoid the 'costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts,'" thereby "reversing centuries of judicial hostility to arbitration agreements." *E.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–11 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 2 (1924)); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (same); *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287, 302 (2010) (same); *Hall St. Assocs. L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (same); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (same). To ensure that Congress's policy choice is respected, the Supreme Court has not hesitated to step in when lower courts fail to enforce parties' arbitration agreements in accordance with longstanding contract law, including agreements to submit disputes regarding arbitrability to an arbitrator. *E.g.*, *Schein*, 139 S. Ct. at 531 (vacating lower court's order that refused to enforce delegation provision); *Rent-A-Center*, 561 U.S. at 76 (reversing order declining to enforce delegation provision); *see also Am. Express Co.*, 570 U.S. at 233; *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012); *AT&T Mobility*, 563 U.S. at 339 (each

reiterating that lower courts should enforce arbitration agreements according to their terms).

To bypass a delegation provision absent a specific ground for refusing to enforce it—as happened here—harkens back to the old judicial antipathy to arbitration that Congress overrode in enacting the Federal Arbitration Act and that the Supreme Court has been at pains to eradicate in its contemporary jurisprudence. The Delegation Provisions here are straightforward, simple, and enforceable; and there was no proper basis—nor did the district court provide one—for refusing to enforce these separate agreements to arbitrate Plaintiffs' challenge to the enforceability of the Arbitration Agreements. This is for an arbitrator, not a court, to decide, and this dispute should be referred to arbitration for that purpose.

II. THE DISTRICT COURT ERRED BY REFUSING TO ENFORCE THE AGREEMENTS TO ARBITRATE PURSUANT TO THE DOCTRINE OF PROSPECTIVE WAIVER

The threshold question on this appeal is whether the Delegation Provision should be enforced. The answer to that question, as shown above, is unquestionably yes. The doctrine of "prospective waiver" is not applicable to the antecedent question concerning the validity of the Delegation Provision and is not a ground for refusing to enforce it. The Delegation Provision should be enforced and the action against Defendants should be stayed pending arbitration. The Court should go no further on this appeal under binding Supreme Court and Ninth Circuit case law. But,

even assuming for the sake of argument that the district court had the authority to decide whether the doctrine of "prospective waiver" was a ground for refusing to enforce the Arbitration Agreements as a whole, that doctrine would still not apply.

A. The District Court Does Not Address That the Arbitration Agreements Provide, and Defendants Acknowledge, That Federal and State Claims Are To Be Resolved in Arbitration

Most fundamentally, the Arbitration Agreements do *not* provide that any federal or state statutory claims may not be pursued in arbitration. That is the entire predicate of the district court's order, but it is simply not true. Each of the Arbitration Agreements at issue here plainly provides that "any Dispute (as defined below) will be resolved by arbitration," and they each expressly define a Dispute as including "all federal, state or Tribal law claims or demands." *See* ER25; ER36; ER66. With this plain language, it certainly cannot be said with the requisite "'positive assurance'" that "'the arbitration clause is not susceptible of an interpretation'" that allows for Plaintiffs to assert their federal and state law claims; and, under federal arbitration law, all "'[d]oubts should be resolved in favor of coverage.'" *AT&T Techs. Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)).

The district court quoted this mandatory presumption (ER5) but then ignored it and also ignored this above-referenced contractual provision entirely—the court

does not quote it or even refer to it anywhere in its opinion—even though Defendants highlighted that the Agreements plainly provide for the arbitration of all disputes asserted under federal or state law.[10] The district court likewise simply ignored Defendants' repeated, express representations that they will *not* take the position in an arbitration that Plaintiffs have prospectively waived or otherwise may not pursue remedies for their RICO claims and their claims under California law.[11]

The doctrine of prospective waiver is solely addressed to whether a party may pursue remedies for their statutory claims in an arbitration. Yet there is no discussion in the district court's decision that Defendants have provided clear assurances that Plaintiffs may arbitrate their RICO claims and their claims under California law. Defendants' representation should make plain that Plaintiffs will *not* face any

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[10] *See, e.g.*, DE No. 24 at 13 ("This quite clearly provides for arbitration of Plaintiffs' federal claims."); *id.* at 16 ("Plaintiffs thus cannot resist arbitration on the ground that the Agreements to Arbitrate purportedly operate as a 'prospective waiver' of their RICO claims or their claims under California law. They do not operate that way . . . ."); *id.* at 29 ("[T]he defendant has acknowledged that plaintiffs' claims should be referred to arbitration."); DE No. 25 at 1 ("In individual arbitration, Plaintiffs have the ability to pursue any and all relevant claims against the Shareholder Defendants, and the arbitrator can resolve these claims[.]"); *id.* at 7 ("Plaintiffs had no barriers to access arbitration to resolve any dispute.").

[11] *See, e.g.*, DE No. 24 at 16 n.7 ("Sequoia is not going to assert in arbitration proceedings that Plaintiffs may not pursue or have waived their RICO claims or their claims under California law."); *see also id*. at 20 ("Sequoia has made clear—and states again—that it will not assert that Plaintiffs are barred from pursuing their claims under RICO and California law in arbitration.); *id.* at 22 ("Sequoia reiterates for a third time" that "it will not assert that these Agreements" "waiv[e] federal substantive rights.").

defense in the arbitration proceedings that they have "prospectively waived" their right to pursue these remedies. In any event, this Court has squarely held that "the loss of RICO claims," through the application of choice-of-forum and choice-of-law provisions in a contract, does not invalidate a dispute-resolution provision—including under the "prospective waiver" doctrine. *Richards v. Lloyd's of London*, 135 F.3d 1289, 1295–96 (9th Cir. 1998) (en banc).

In light of this record and case law, it does not suffice for the district court to quote choice-of-law and other provisions in the Lending Agreements. *Brice*, 372 F. Supp. 3d at 969–73. As an initial matter, it is well-established that a provision in contract that a state or foreign jurisdiction's law will apply to a contract does *not* displace federal arbitration law "absent 'clear and unmistakable evidence' that the parties agreed to apply non-federal arbitrability law"—and there is no such clear and unmistakeable evidence here. *See Cape Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, 921 (9th Cir. 2011) (quoting *First Options of Chicago*, 514 U.S. at 944); *see also Bitstamp Ltd. v. Ripple Labs Inc.*, No. 15-cv-2504, 2015 WL 4692418, at *3 (N.D. Cal. Aug. 6, 2015) ("A boilerplate choice-of-law clause does not overcome the presumption that federal arbitration law applies."). Nor does such a choice-of-law provision operate to foreclose a contracting party from pursuing claims under another state's law or federal law. A choice-of-law provision states what law will apply to the interpretation of the contract; it does not have the sweeping effect that

Plaintiffs and the district court claim to automatically foreclose Plaintiffs from pursuing any relief for their claims in an arbitration, *Brice*, 372 F. Supp. 3d at 969–73; DE No. 40 at 13; DE No. 41 at 8. *See Webb v. Alpha & Omega Servs., Inc.*, No. 5:16-cv-1609, 2016 WL 9175363, at *2 (C.D. Cal. Nov. 14, 2016) (contractual provision stating that Texas law "will govern" any disputes "pertaining to the agreement" does not bar claims under California statutory law because "statutory claims . . . exist independent of the agreement").

The district court also mischaracterized the Arbitration Agreements. Not only did the district court fail altogether to mention the plainly applicable provision directly addressing what claims are subject to arbitration—providing that all "claims or demands" arising under "federal" and "state" law "will be resolved by Arbitration"—but it elided other provisions that show the Arbitration Agreements do not exclude the application of federal law to arbitration proceedings. For example, the Plain Green Agreement provides: "The Agreement to Arbitrate also comprehends the application of the Federal Arbitration Act." ER65. And the Great Plains Agreement provides that the arbitrator shall apply tribal law "*and the terms and conditions of this Agreement*"; and the "terms of this Agreement" include that "all federal, state, or Tribal law claims or demands" are arbitrable. ER25; ER35–36 (emphasis added).

In these circumstances, there is, at an absolute bare minimum, at least some "doubt" concerning whether Plaintiffs will be able to pursue their claims under federal and state law in arbitration. And, as the district court recognized (ER5), "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25. Plaintiffs, as the parties seeking to avoid their agreement to arbitrate, also have the burden to establish that they cannot effectively vindicate their rights. "Mere speculation about how the terms of the arbitration agreement might be construed by the arbitrator or how the agreement might affect the prospective litigant is insufficient to carry that burden." *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 283 (4th Cir. 2007) (citing *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90–91 (2000)). This burden is "a substantial one" and it cannot be satisfied by "speculation about difficulties that *might* arise in arbitration." *In re Cotton Yarn Antitrust Litig.*, 505 F.3d at 286–87 (emphasis in original); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

The district court, however, insisted that Plaintiffs *will definitely* be deprived of their ability to pursue their federal and state claims in arbitration (ER6; *Brice*, 372 F. Supp. 3d at 973), notwithstanding an Arbitration Agreement providing that their federal and state statutory claims "will be resolved by arbitration" and Defendants'

unambiguous representations that Plaintiffs may pursue remedies for their claims under federal and state law in arbitration. *See supra* nn.10 & 11.

At best for Plaintiffs, their arguments about how the doctrine of prospective waiver will be applied in the arbitration amount to speculation about how the arbitration may turn out. Apparently, in light of Defendants' representations, Plaintiffs intend to be the party to argue in the arbitration proceeding that they may not pursue their federal and state law claims. It is quite obvious why Plaintiffs are trying to do this—to avoid their Arbitration Agreements. But the law does not permit them to manufacture a basis for making an agreement to arbitrate unenforceable by ignoring parts of the record that show they are *not* at risk of prospective waiver.

B. Binding Supreme Court Case Law Provides That Prospective Waiver May Not Be Invoked in the Posture of This Action

Even assuming all of the above away—i.e., even assuming that the district court had the authority to decide whether the Arbitration Agreements are enforceable and disregarding both that those Agreements provide for resolution of Plaintiffs' federal and state claims in arbitration and Defendants' representations that Plaintiffs may pursue these claims in the arbitration—prospective waiver would still not apply to prevent arbitration of Plaintiffs' claims here.

Under Supreme Court precedent, a federal court may not apply the doctrine of prospective waiver at this "interlocutory" stage—before an arbitration has taken place—but only at the "award-enforcement" stage, i.e., after the arbitration has

concluded and when the court will have an opportunity to review the award. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *see also Yang v. Majestic Blue Fisheries, LLC*, No. 13-00015, 2015 WL 5003606, at *7 (D. Guam Aug. 24, 2015), *aff'd*, 876 F.3d 996 (9th Cir. 2017). That precedent applies directly here and disposes of this appeal on an independent ground.[12] The Supreme Court has, as the Fourth Circuit explained, "qualified the doctrine, recognizing that a prospective waiver would contravene public policy only where there is 'no subsequent opportunity for review' in federal court." *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 371 (4th Cir. 2012) (quoting *Sky Reefer*, 515 U.S. at 540); *see also Sky Reefer*, 515 U.S. at 540 (noting that it is "premature" to decide whether an agreement prospectively waives statutory claims when a party "seek[s] only to enforce the arbitration agreement"; "[w]ere there no subsequent opportunity for review *and* were we persuaded [of prospective waiver] 'we would have little hesitation in condemning the agreement as against public policy'")

[12] In *Gingras*, the Second Circuit held that plaintiffs' arbitration agreements with Plain Green, LLC were not enforceable on the ground that they "appear[] to disallow claims brought under federal and state law." 922 F.3d at 127. The court invoked a Supreme Court decision suggesting, *in dicta*, that there is a prospective waiver doctrine and relied on this Court's decision in *Hayes* that applied it. *See id.* (citing *Am. Express Co.*, 570 U.S. at 235–36; *Hayes*, 811 F.3d at 674). But neither *Gingras* nor *Hayes* discussed or even cited the rule from the Supreme Court that the doctrine of prospective waiver has no application at the arbitration-enforcement stage.

(emphasis added; quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

This is because the proper question in applying the doctrine of prospective waiver is whether a claimant's rights will be "effectively vindicate[d]." *Aggarao*, 675 F.3d at 373 n.16; *accord Richards v. Lloyd's of London*, 135 F.3d 1289, 1295–96 (9th Cir. 1998) (en banc) (holding that the prospective waiver doctrine applies only where plaintiffs "would be deprived of any reasonable recourse" or if foreign law "bar[s] recovery"). The substance of a party's rights under U.S. federal law may be effectively vindicated in an arbitration under another sovereign's laws—in *Aggarao*, the law of the Philippines—even where an arbitrator ultimately determines that U.S. federal law should *not* be applied to the merits of the dispute. *See Aggarao*, 675 F.3d at 373 (holding that it is premature to apply the doctrine of prospective waiver at the "arbitration-enforcement stage" because "[i]t is possible that the Philippine arbitrator(s) will apply United States law … or that Aggarao will be able to effectively vindicate the substance of those claims under Philippine law and obtain an adequate remedy").

A court must therefore wait until *after* an arbitral award has been rendered to evaluate whether a party's federal rights have been "effectively vindicate[d]" through an arbitration. The Agreements here expressly provide for arbitration of federal and state claims, but, even assuming there were any doubt on this point, a

court cannot properly determine whether claimants will be able to effectively vindicate their statutory rights in an arbitration proceeding before that proceeding has taken place. "At this interlocutory stage it is not established what law the arbitrators will apply or that petitioner will received diminished protection as a result." *Sky Reefer*, 515 U.S. at 540; *see also Aggarao*, 675 F.3d at 372 & n.15.

Prospective waiver may not, accordingly, be invoked as this stage of the proceedings to refuse enforcement of either the Delegation Provision or the Arbitration Agreements as a whole. *See Sky Reefer*, 515 U.S. at 531, 540 (holding it was "premature" to apply prospective waiver, on claimants' argument that application of Japanese law by arbitrators would operate to override a federal statute, before the award-enforcement stage notwithstanding that the agreement provided it "'shall be governed by the Japanese law'"). Rather, a court may apply that doctrine only *after* the arbitration has been conducted, upon review of the award. That approach is not only mandated by the Supreme Court, but eminently sensible because a court cannot be certain whether Plaintiffs' will be able to seek effective vindication of their statutory rights until the arbitration has actually taken place and the arbitrator has had a chance to consider their claims. That is even more so here, in light of Defendants' representations that Plaintiffs may pursue their federal and state statutory claims in arbitration and the clause in the Arbitration Agreement providing for resolution of claims asserted under federal and state law, ER25; ER36;

ER66; *supra* nn.10 & 11. *See Majestic Blue Fisheries*, 2015 WL at 5003606 at *6–*7 (declining to apply "prospective waiver" at "arbitration enforcement stage" because, *inter alia*, defendants represented they would not raise an express contractual limitations period as a defense in the arbitration).

In any event, Supreme Court case law mandates that prospective waiver may not be invoked in the posture of this case to refuse to enforce the Arbitration Agreements. The district court failed to address this ground, too, for why the prospective waiver doctrine cannot apply at this stage of the proceedings. Plaintiffs, for their part, asserted that "a federal court will not have an opportunity to review the arbitration award." DE No. 40 at 17; DE No. 41 at 5. That is not true. The district court will retain jurisdiction over this action to review any final award in arbitration, because the Defendants sought a stay of this action pending arbitration pursuant to Section 3 of the FAA, 9 U.S.C. § 3, DE No. 24 at 1, 23; DE No. 25 at 21. *See Aggarao*, 675 F.3d at 374.

The doctrine of prospective waiver cannot, in these circumstances, be applied at this stage as a ground for refusing to enforce either the Delegation Provision or the Arbitration Agreements. As the district court held in *Majestic Blue Fisheries*, 2015 WL 5003606, at *7, in addressing the same argument made by Plaintiffs here and after reviewing Supreme Court and Ninth Circuit decisions on public policy defenses to arbitrability such as prospective waiver: "Plaintiffs' public policy

defense [based on the doctrine of 'prospective waiver'] is premature as the court is able to retain jurisdiction over this case to ensure review at the award enforcement stage."[13]

It is for the arbitrator to decide whether, as Plaintiffs contend, the doctrine of prospective waiver makes the Arbitration Agreements unenforceable. The district court will have a chance to review the award pursuant to the FAA after the arbitral proceedings have concluded. Defendants fully expect that the arbitrator will allow Plaintiffs to pursue their claims under federal and state law, in light of Defendants' representations in connection with these motions and the clear language of the Arbitration Agreements providing that claims under federal and state law "will be resolved by arbitration." If, for some reason, the arbitrator determines that Plaintiffs

[13] It is no answer to the correct analysis in *Majestic Blue Fisheries* to contend that there is "no uncertainty" as to whether the Arbitration Agreements here waive assertion of federal and state statutory claims. *See* DE No. 40 at 17; DE No. 41 at 4. First, the Agreements do not do that—as shown above—and, under binding Supreme Court authority, it is premature to rule on this issue before an award has been issued. Second, Defendants have been clear that they will not seek to preclude Plaintiffs from pursuing their federal and state law claims in arbitration. In *Majestic Blue Fisheries*, the plaintiffs tried to avoid an arbitration agreement by asserting that a foreshortened contractual limitations period operated as a prospective waiver of their federal claims. The pertinent contractual provision was quite express—"[a]ny and all claims … shall be brought within six (6) months' time"—but the court held it was "premature" to decide whether "prospective waiver" was a ground for invalidating the agreement to arbitrate at the "arbitration enforcement stage" in light of Supreme Court authority and also defendants' representation that "they will not raise the six-month limitation period as a defense in arbitration." 2015 WL 5003606, at *4, *7. That analysis is correct and precludes application of the doctrine of prospective waiver at this stage.

may not pursue their claims, they may return to court to assert them. But at this stage of this case, under binding Supreme Court law, the Court must enforce the Delegation Provision and refer Plaintiffs' claims against Defendants to arbitration.

CONCLUSION

The district court's denial of Defendants' motions to refer this dispute to arbitration should be reversed. The district court should be directed to enter an order staying the case and referring Plaintiffs' claims against Defendants to arbitration, including any dispute as to the enforceability or scope of Plaintiffs' Arbitration Agreements.

Dated: February 26, 2020

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Oral argument is warranted and respectfully requested in this appeal. The Court may benefit from the opportunity to pose questions to counsel regarding the issues presented by this appeal, which raises significant questions arising under the Federal Arbitration Act concerning the enforcement of a delegation provision in an arbitration agreement and the application of the doctrine of "prospective waiver" in deciding whether to enforce an arbitration agreement.

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. Plain Green, LLC, No. 19-15707: The related case arises out of a complaint filed by the same Plaintiffs-Appellees in the same district court as this appeal. The case was determined to be a related case by the district court. This Court has also calendared *Brice v. Haynes Investments, LLC* and this appeal before the same merits panel.

/ s / Stephen D. Hibbard
Stephen D. Hibbard

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s): Nos. 19-17414, 19-17477

I am the attorney or self-represented party.

This brief contains 11,212 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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/ s / Stephen D. Hibbard
Stephen D. Hibbard

CERTIFICATE OF SERVICE

On February 26, 2020, I caused the foregoing brief and the accompanying Excerpts of Record to be filed using the Court's appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served with the brief and Excerpts of Record through that system.

/ s / Stephen D. Hibbard
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