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,
Defendants-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.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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INTRODUCTION

Plaintiffs-Appellees ("Plaintiffs") have failed to answer the key questions posed by this appeal: (1) whether the district court erred when it refused to enforce delegation provision solely because of its views on the merits of the Plaintiffs' defense to arbitrability (ER011, ER017), (2) whether the district court misallocated the relevant evidentiary burdens and forced the Haynes Defendants to disprove Plaintiffs' defenses to arbitrability (ER017), and (3) whether the district court erred in its core analysis of the prospective waiver doctrine by failing to apply controlling Ninth Circuit precedent (ER012-ER016). Instead, Plaintiffs continue with their unsound and stigmatizing argument that an arbitration agreement exclusively selecting the law of a sovereign Native American tribe must be subject to stricter scrutiny under the prospective waiver doctrine than an agreement that exclusively selects the laws of a foreign country, including the laws of "pre-revolutionary Russia." *DirecTV v. Imburgia*, 136 S. Ct. 463, 468 (2015). Plaintiffs are wrong.

Throughout their Opposition, Plaintiffs repeat the mantra that a contract that selects tribal law will **always** violate the prospective waiver doctrine. *See* Opp'n at 3-4, 14-16, 18-19, 25-27, 28-30, 33-34, 40-41, 46-48. No analysis of the particular sovereign law, or the remedies available to litigants under that law, is necessary. Such a result, Plaintiffs repeatedly argue, is required merely because Native

American laws are not identical to state and federal law. *See e.g.,* Opp'n at 30 (arguing that "what matters" for the purposes of analysis under the prospective waiver doctrine is whether a plaintiff is precluded "from pursuing the *specific* statutory rights at issue in the case, namely claims under RICO and state consumer-protection laws") (emphasis in original). What the laws provide apparently does not matter—only that they are not co-extensive with the state and federal law.

Plaintiffs' (and the district court's) view **directly conflicts** with this Court's en banc holding in *Richards v. Lloyds of London*—a case to which Plaintiffs' Opposition gives little attention. 135 F.3d 1289, 1292 (9th Cir. 1998) (en banc). In *Richards*, which remains the law of the Circuit, this Court held the prospective waiver doctrine does not apply merely because the laws of another country are selected to the exclusion of state and federal law. *Id.* at 1295-96. Rather, the relevant inquiry is whether the party opposing enforcement of the clauses has demonstrated that they "would be deprived of any reasonable recourse" under those laws. *Id.*

Plaintiffs in *Richards* made arguments *identical* to those advanced here—namely that the choice of forum and choice of law clauses agreed to *ex ante* were "invalid because they offend the strong public policy of preserving an investor's remedies under federal and state securities law and RICO" by selecting British law

to the exclusion of state and federal law. *Id.* at 1292; *see also id.* at 1295-96 (summarizing arguments to avoid having to arbitrate under British law pursuant to *Mitsubishi Motors*). The Court rejected those arguments. This Court compelled the litigants in *Richards* to arbitrate their claims under British law notwithstanding that they would be forced to give up their claims under RICO and the federal securities laws. *Id.* at 1296. Plaintiffs offer no real reason to avoid this holding—only that they believe that an agreement selecting the laws of a Native American tribe should be treated differently than one selecting the laws of Britain.

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

In short, the law requires that this Court reverse the decision of the district court, and remand with instructions to compel arbitration.

I. ARGUMENT

A. The Delegation Provision remains enforceable and requires that an arbitrator resolve arbitrability concerns, including Plaintiffs' prospective waiver challenge.

Buried 38 pages into their Opposition—after lengthy discussions of the merits of their arbitrability arguments—Plaintiffs address the very first issue the Court must confront: the delegation clause, and the requirement that an arbitrator, not the district court, decide any issues of arbitrability. In addressing the delegation provision, however, Plaintiffs fail to meaningfully engage with the implications of their agreement to arbitrate issues of arbitrability. Instead, Plaintiffs largely ignore the delegation provision, and argue that if their anti-arbitrability arguments are strong enough, this Court (like the district court) should refuse to enforce the arbitration clause regardless of the delegation provision. Opp'n at 41; *see also* ER011 (district court opinion acknowledging Plaintiffs agreed to delegation issues of arbitrability to an arbitrator, but refusing to enforce the delegation provision "if it results in enforcing an arbitration agreement that prospectively waives plaintiffs' statutory rights and remedies"). This is backwards.

But *Henry Schein* flatly contradicts both the District Court's and Plaintiffs' analysis of the delegation clause issue. *Henry Schein* requires courts to "respect the parties' decision as embodied in the contract," and refuse to consider the merits

of any challenge to arbitrability in the presence of a delegation provision. *Henry Schein*, 139 S.Ct at 530. While the Ninth Circuit has yet to apply *Henry Schein*, other courts support Appellants' view of its import. *See, e.g., McGee v. Armstrong*, 941 F.3d 859, 866-67 (6th Cir. 2019) (noting that *Henry Schein* expressly overturned prior Sixth Circuit authority permitting arbitrators to perform an initial review of the merits of an arbitrability dispute in the presence of a delegation provision); *Silverman v. Move Inc.*, No. 18-CV-05919-BLF, 2019 WL 2579343, at *12 (N.D. Cal. June 24, 2019) (interpreting *Henry Schein* to hold "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"). Courts have been blunt in their analysis of attempts to avoid *Henry Schein*. *See, e.g., Diaz v. Nintendo of Am. Inc.*, No. C19-1116 TSZ, 2020 WL 996859, at *1 (W.D. Wash. Mar. 2, 2020) ("If an arbitration provision contains a delegation clause, the Court's inquiry ends."). The same result is required here.

* * *

Plaintiffs do not contest the presence and scope of the delegation provisions in each of their loan agreements. Similarly, there is no dispute that the delegation provisions require that an arbitrator, not a court, decide all gateway issues of arbitrability, including "any issue concerning the validity, enforceability, or

scope"of their agreement to arbitrate, *see* ER201; ER209; ER220; ER231; ER240, as well as Plaintiffs' express agreement to arbitrate pursuant to the consumer rules of arbitration for their selected arbitral forum—a sign Plaintiffs agreed to arbitrate issues of arbitrability. ER201; ER209; ER220–ER221; ER231; ER240. In short, Plaintiffs do not challenge that they agreed to delegate issues of arbitrability to an arbitrator.

Instead, Plaintiffs attempt to avoid the delegation provision by arguing that their prospective waiver defense renders the entire contract, including the delegation provision, invalid. Opp'n at 39. In other words, because the entire arbitration agreement is supposedly unenforceable pursuant to the prospective waiver doctrine, the court is free to ignore a delegation provision requiring that an arbitrator decide issues of enforceability. That is circular reasoning. (at 24-33). The point of the parties' delegation clause is to avoid protracted litigation in court about issues of arbitrability, as *Henry Schein* also confirms. Plaintiffs' position must be rejected.

B. Plaintiffs do not and cannot challenge the core holding of *Henry Schein* requiring arbitration of arbitrability in the presence of a delegation provision.

Plaintiffs assert (Opp'n at 40) that Appellants have advanced a "radical new rule of arbitrability" by asking that any prospective waiver argument be submitted to an arbitrator given the clear and conspicuous delegation clause in each of the

loan agreements. But there is nothing radical about Appellants' argument. As pointed out in Appellant's opening brief (at 23-24), *Henry Schein* requires this outcome. That is because, as other courts have recognized, "an effective vindication challenge is a challenge to the enforceability of the arbitration agreement," and such challenges, "after *Henry Schein,* . . . are heard by the arbitrator where . . . the parties' agreement includes a delegation clause." *De Angelis v. Icon Entm't Grp. Inc.*, 364 F. Supp. 3d 787, 795 (S.D. Ohio 2019).

Plaintiffs do not meaningfully engage with *Henry Schein*, or its clear command that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue." *Henry Schein*, 139 S.Ct. at 529. Instead, Plaintiffs point to a footnote in *Gingras v. Think Finance*, 922 F.3d 112 (2d Cir. 2019) to argue that *Henry Schein* was limited to instances where the 'wholly groundless' exception was invoked, and does not apply to "a challenge to the validity of an arbitration clause itself." Opp'n at 40 (quoting *Gingras*, 922 F.3d at 126 n.3). But the Second Circuit's anemic analysis of *Henry Schein* ignored the breadth of the Supreme Court's reasoning,—which goes well beyond just an examination of the 'wholly groundless' exception previously used by courts. 139 S.Ct. at 529-31; *see also McGee*, 941 F.3d at 886-87 (*Henry Schein* overturned prior Sixth Circuit authority permitting a judge to perform an evaluation of issues

of arbitrability notwithstanding the presence of a delegation provision). Rather, *Henry Schein* goes well beyond the analysis of a single, judge-made exception. It instead requires that courts honor the agreements that parties made and compel arbitration of arbitrability questions in the presence of a delegation provision, even where a court believes that there are good reasons to refuse arbitration. *Id.*

Additionally, the Second Circuit's view that "a challenge to the validity of an arbitration clause itself," 922 F.3d at 126 n.3, can nullify an otherwise enforceable delegation provision, ignores that delegation provisions are discreet **antecedent** agreements to arbitrate that must evaluated **before** evaluating a challenge to the arbitration agreement as a whole. *See Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1264 (11th Cir. 2017) (finding that that a court can review the validity of an agreement to arbitrate only after the court first "determine[s] that the **delegation clause is itself invalid or unenforceable**") (emphasis added).

Finally, Plaintiffs argue (Opp'n at 41-42) that, even where a delegation provision exists, issues of arbitrability must be decided by a court when a litigant asserts a serious challenge to the delegation clause. But Plaintiffs offer nothing to show their challenge to the delegation provision is meritorious, as discussed below. *See, e.g., Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449, 455 (4th Cir. 2017). Moreover, Plaintiffs' proposed

exception would allow litigants to avoid their agreements to arbitrate arbitrability as required by *Henry Schein* at will.

Plaintiffs offer nothing as to why the delegation provision—rather than the agreement as a whole—is somehow invalid. Plaintiffs' brief below contains only the unadorned statement that "the delegation clause is void and unenforceable from the outset because it purports to waive the application of federal and state law." Pls.' Opp'n to Mot. to Dismiss, 3:18-cv-1200-WHO, ECF No. 102 at 16 (N.D. Cal. Nov. 28, 2018). And the Opposition merely cites the brief below and references cases decided before *Henry Schein*. Opp'n at 40-42. But the delegation provision merely states that an arbitrator, rather than a Court, decides issues of arbitrability—it says nothing about waiving applicable laws. Plaintiff's purported challenge on prospective waiver grounds is unsupported and untenable.

* * *

Plaintiffs fail to offer any legitimate reason to avoid the holding of *Henry Schein*. And they fail to justify why the district court diverged from the analysis required under *Henry Schein* by stating the delegation clause was "secondary" to the prospective waiver argument. ER011. Delegation clauses are not secondary. The delegation provision in each of the loan agreements requires that an arbitrator, not the district court, decide issues of arbitrability. The district court's failure to

honor the contractual agreements and compel arbitration on issues of arbitrability was in error.

C. Plaintiffs cannot avoid the delegation provision by relying on the purported strength of their arbitrability arguments.

Even if this Court were to accept that Plaintiffs sufficiently raised a challenge to the delegation provision—and they have not—Plaintiffs offer no evidence that could be used to invalidate the delegation clause "upon such grounds as exist at law or in equity for the revocation of any contract." *Minnieland*, 867 F.3d at 455 (quoting 9 U.S.C. § 2). Instead, Plaintiffs offer generalized arguments that go to the contract as a whole—not the delegation provision specifically. Opp'n at 38-42. This is not enough.

Plaintiffs' main argument to avoid application of the delegation provision is that any "contract that contains an FAA-prohibited prospective waiver is unenforceable in its entirety, delegation clause included." Opp'n at 39. But, as discussed above, that argument puts the cart before the horse insomuch as it uses a defense to the contract as a whole to invalidate an independent antecedent agreement that sets forth who gets to decide issues of enforceability. Other courts have rejected similar arguments. *Cf. Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 231 (3d Cir. 1997) (rejecting argument that a waiver of statutory rights could overcome requirement to have arbitrator decide arbitrability because "[i]t would be anomalous for a court to decide that a claim should be referred to an arbitrator

rather than a court, and then, by deciding issues unrelated to the question of forum, foreclose the arbitrator from deciding them"); *De Angelis*, 364 F. Supp. 3d at 795 (compelling arbitration of prospective waiver challenge post-*Henry Schein* in the presence of a delegation provision, and holding the court had no discretion to do otherwise).

Indeed, the Supreme Court has repeatedly stated that arguments going to the unenforceability of a contract as a whole are inapplicable to the question whether a delegation provision is enforceable. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006); *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010). Instead, as Appellants noted previously in their brief (at 29-31), the proper inquiry is whether Plaintiffs' prospective waiver arguments "*as applied* to the delegation provision rendered *that provision* unenforceable." *See Rent-A-Center*, 561 U.S. at 74 (emphasis in original). Plaintiffs present no cogent argument as to how the prospective waiver doctrine renders the delegation provision, in particular, unenforceable.

On this point, Plaintiffs muster (at 35-36) only that litigation in the courts is always superior to arbitration because, they contend, judges are free to decline to enforce choice-of-law clauses, while arbitrators purportedly have no ability to do so. This is wrong. Arbitrators possess the ability to decide choice of law issues—as numerous other courts have already held *in the context of tribal choice of law*

agreements. *See, e.g.*, *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…"); *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").

Indeed, as other circuits and the Supreme Court have noted, arbitrators are free to apply choice-of-law principles, and may ultimately apply Plaintiffs' preferred law notwithstanding the choice of foreign law. *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 373 n.16 (4th Cir. 2012) (refusing prospective waiver challenge because "[i]t is possible that the [foreign] arbitrator(s) **will apply United States law**") (emphasis added); *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (refusing to consider a prospective waiver argument because, in part, "it is not established what law the arbitrators will apply to petitioner's claims" and that "the arbitrators may conclude that [a federal statute] applies of its own force or that Japanese law does not apply"). And Plaintiffs have no response to this Court's holding that parties are free to contract for foreign law on issues of arbitrability. *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 921 (9th Cir. 2011).

Arbitrators (just like a court) are free to apply federal arbitration law when evaluating a delegation provision, even where a general choice of law provision selecting foreign law exists. To this end, Plaintiffs are free to press their prospective waiver argument to an arbitrator who, if they are successful, will be forced to send the case back to the district court. *Peacock*, 110 F.3d at 231 (holding that "[a]ny argument that the provisions of the Arbitration Agreement involve a waiver of substantive rights afforded by the state statute may be presented in the arbitral forum"); *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1085–86 (8th Cir. 2001) (same, but federal statute); *De Angelis*, 364 F. Supp. 3d at 795 (same). Plaintiffs offer no legitimate reason why having an arbitrator (rather than a court) decide their prospective waiver challenge is grounds upon which to set aside the delegation provisions.

* * *

Delegation provisions do nothing more than decide, *ex ante*, who gets to decide issues of arbitrability—a court or an arbitrator. *Rent–A–Center*, 561 U.S. at 70. Here it is uncontested that the parties contracted for an arbitrator to decide all issues of arbitrability. The district court erred in deciding issues of arbitrability notwithstanding its recognition of the presence of the delegation provision in each loan agreement. As such, the Court should, at a minimum, reverse and remand with instructions to compel arbitration on threshold issues of arbitrability.

II. PLAINTIFFS' PROSPECTIVE WAIVER ARGUMENTS REMAIN FUNDAMENTALLY FLAWED.

The vast majority of Plaintiffs' Opposition Brief focuses on their general challenge to the arbitration agreements as a whole. Plaintiffs make clear that they believe that the contract's choice of Native American law, standing alone, renders their agreement to arbitrate void. This is because Native American law does not contain the specific state and federal statutes under which Plaintiffs make their claims. Leaving aside that such arguments are for an arbitrator given the presence of the delegation provision, the merits of Plaintiffs' prospective waiver arguments are directly contrary to mandatory authority from this Court. Specifically, the core holding of this Court's en banc decision in *Richards* rejected identical prospective waiver arguments. Indeed, in *Richards* the Court went to great lengths to explain that the prospective waiver doctrine does not apply merely because the law selected results in the loss of state and federal statutory claims. The plaintiffs in *Richards* were forced to give up their RICO claims, as well as their claims under state and federal antitrust statutes. As such, *Richards* stands directly opposed to Plaintiff's position. Plaintiffs' attempt to avoid this conclusion rests on the troubling and unsupportable argument that Native American laws are entitled to less respect (and comity) than the laws and courts of an international sovereign.

This Court has never recognized two different standards under the prospective waiver doctrine—one that upholds choice-of-law clauses selecting the

laws of other states and foreign governments, and another that treats Native American law as substandard and under which contracts that select those laws are not enforced. The Court must reject Plaintiffs' attempts to. Such an argument is without merit and would enshrine in law the idea that Native American laws are entitled to less respect and deference than the laws of other sovereigns under the prospective waiver doctrine.

A. Plaintiffs' formulation of the prospective waiver doctrine ignores this Court's authority.

Plaintiffs' Opposition advances a flawed and incorrect theory as to the proper analysis applicable to prospective waiver challenges. They repeatedly conflate a right to pursue a remedy with the right to bring a specific statutory claim. For example, Plaintiffs argue that "[w]hat matters" in the prospective waiver analysis is whether the choice-of-law clause "precludes a plaintiff from pursuing the specific statutory rights at issue in the case, **namely the claims under RICO and state consumer-protection laws**." Opp'n at 30 (emphasis added); *see also id* at 16 (arguing that the prospective waiver doctrine applies when choice- of-law and choice-of-forum clauses "forbid[] the consumer from pursuing the specific statutory remedies afforded by federal and state law," rather than merely "the right to pursue some remedy"). Plaintiffs are wrong. The right to pursue a *remedy* is not co-extensive with the right to pursue a specific *statutory claim*. Courts have roundly rejected attempts by litigants to confuse the two.

To reach their flawed conclusions, Plaintiffs largely ignore the holding of *Richards*. As noted above, the plaintiffs in *Richards* pressed an argument **identical** to the one advanced by Plaintiffs here—that the prospective waver doctrine applied because they would not be permitted to pursue their RICO claims (as well as claims under state and federal securities laws) if forced to litigate in a British forum under British law. 135 F.3d at 1292 (summarizing litigants' argument that "the choice clauses are invalid because they offend the strong public policy of preserving an investor's remedies under federal and state securities law and RICO"). The en banc Ninth Circuit, however, squarely rejected Plaintiffs' argument, and enforced the clauses notwithstanding the plaintiffs' inability to assert claims under the state and federal securities law as well as under RICO. *Id.* at 1296.

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

securities laws. . . ." *Id.* Given this holding, Plaintiffs' prospective waiver arguments are unsupportable. *Richards* rejected the idea that the inability to assert a federal statutory claim (specifically RICO) is grounds to invalidate choice-of-law and choice-of-forum clauses.

Richards is also significant because it is an en banc decision of this Court that arguably conflicts with *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994). Throughout their brief (Opp'n at 23-24, 30, 32 n.6), Plaintiffs assert that *Graham Oil* stands for the proposition that a court can "invalidat[e] an arbitration contract even though it authorized a party to bring a federal statutory claim because it foreclosed the right to seek certain remedies afforded under the statute." Opp'n at 30, 32 n.6. Indeed, Plaintiffs claim that "*Graham Oil*, not *Richards*…supplies this Court's governing rule of decision." Opp'n at 24. That is not so. Richards is an en banc decision of this Court, post-dating *Graham Oil*, and interpreting the Supreme Court's prospective waiver case law. To the extent *Graham Oil* conflicts with *Richards*, the latter must control.

Richards does not stand alone. The Fourth Circuit, for example, reached an identical conclusion in *Allen v. Lloyd's of London*, when it, too, enforced a choice of British law clause and stated that "the fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement," of the choice clause. 94 F.3d 923,

929 (4th Cir. 1996) (quoting *Riley v. Kingsley Underwriting Agencies, Ltd.*, 929 F.2d 953, 958 (10th Cir. 1992)). Similarly, in *In re Cotton Yarn Antitrust Litig.*, the Fourth Circuit noted that the "'crucial inquiry' when considering a claim that an arbitration agreement prevents a plaintiff from vindicating his statutory rights 'is whether the particular claimant has an adequate and accessible substitute forum in which to resolve his statutory rights.'" 505 F.3d 274, 290 (4th Cir. 2007) (rejecting argument that prospective wavier doctrine applied unless the governing arbitration agreement permitted recovery of identical damages available under Clayton Act).

Similar conclusions have been reached in almost all other circuits. *See, e.g., Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360–61 (2d Cir. 1993) (rejecting prospective waiver argument because "the agreement to submit to arbitration or the jurisdiction of the English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum"); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1297 (11th Cir. 1998) (holding that choice clauses are not invalid "simply because the remedies available in the contractually chosen forum are less favorable than those available in the courts of the United States"); *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1017 (5th Cir. 2015) (noting that "[t]he Supreme Court has rejected the 'concept that all disputes must

be resolved under our laws and in our courts,' even when remedies under foreign law do not comport with American standards of justice"). Given these cases, there is wide acceptance—across multiple courts, deciding different types of cases, involving numerous different laws—that a successful prospective waiver challenge cannot be based on the mere inability to pursue specific federal claims in the forum and laws selected the parties.

Accordingly, Plaintiffs' formulation of the prospective waiver doctrine is incorrect. Whether Plaintiffs can pursue their chosen claims under RICO and state consumer-protection laws is irrelevant to the 'crucial inquiry' the court must conduct. What *actually* matters—as Appellants noted in their opening brief (at 33-37, 41-42)—is whether Plaintiffs have presented evidence that enforcement of the choice-of-law and choice-of-forum clauses will deprive Plaintiffs of any *remedy*. *See Aggarao*, 675 F.3d at 373 n.16 (refusing to apply the prospective waiver doctrine where it was possible that the plaintiff could "obtain an adequate remedy" under foreign law notwithstanding that it was unclear whether federal law would apply in arbitration). And, if there is even the smallest doubt as to how an arbitrator might resolve a prospective waiver challenge, or the effect of choice clauses on the ability of Plaintiffs to pursue some remedies, arbitration must be compelled. *See Vimar Seguros*, 515 U.S. at 540-41.

B. Plaintiffs fail to resolve the fundamental conflict between *Richards* and cases from other jurisdictions, such as *Hayes* and *Dillon*.

Throughout their Opposition, Plaintiffs advance the idea that various tribal lending cases from other circuits must supplant this Court's formulation of the prospective waiver doctrine in *Richards*. But the decisions in *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016), and *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017)—among others—are in direct conflict with *Richards*. Indeed, Plaintiffs cite *Hayes* and *Dillon* repeatedly for the proposition that the Court should invalidate any choice clause that selects the laws of any jurisdiction to the exclusion of state and federal law. *See* Opp'n at 3-4, 14-16, 18-19, 25-27, 28-30, 33-34, 40-41, 46-48.

Rather than acknowledge and attempt to reconcile the inherent conflict between *Richards* and the later decisions in *Hayes* and *Dillon*, Plaintiffs take a different tack. They practically ignore *Richards*—citing it just three times in their Opposition—and assert *Richards* does not apply because it concerned an international transaction, while *Hayes* and *Dillon* do not.[1] Opp'n at 23. Elsewhere, Plaintiffs press (at 36-38) the idea that international agreements to arbitrate are fundamentally different from all other such agreements because international agreements are subject to Chapter 2 of the FAA rather than Chapter 1

[1] Of course, the litigants in *Richards* argued (as Plaintiffs do) that their claims are domestic in nature because that is where they reside and were solicited. 135 F.3d at 1294. The Court rejected such arguments. *Id.*

of the FAA. That is nonsense. The Supreme Court regularly cites prospective waiver cases arising under Section 2 of the FAA interchangeably with those that arise under Section 1. *See, e.g.*, *Pacific Health Systems, Inc. v. Book*, 538 U.S. 401, 404-05, 407 (2003) (utilizing the rationale from *Vimar Seguros* to analyze a prospective waiver argument involving remedies under RICO in a domestic-law situation). Plaintiffs, too, routinely cite prospective waiver cases arising under Section 2 throughout their briefing whenever it suits them. Indeed, the first sentence of the Court's opinion in *Mitsubishi Motors*—the case Plaintiffs' admit first formulated the prospective waiver doctrine and which they cite no less than seven times throughout their brief—was a case that sought to determine issues of "arbitrability, pursuant to the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, **and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention)**. . . ." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 616 (1985) (emphasis added). That, alone, should demonstrate that Plaintiffs' purported distinction is without merit and nothing more than an invention to avoid the holding of *Richards*.

Given the interchangeability of cases and holdings interpreting the prospective waiver doctrine under Section 1 of the FAA and Section 2 of the FAA, Plaintiffs' purported grounds for refusing to apply controlling authority fade away. Indeed, a simple question reveals the irreconcilable conflict between *Richards*,

Hayes and *Dillon*: if the Court were to apply Plaintiffs' prospective waiver standard (based upon their interpretation of *Hayes* and *Dillon*) to the facts of *Richards*, would a different result be forthcoming? The answer is, undoubtedly, yes. The Court in *Richards* reached its conclusion by doing what Plaintiffs allege is forbidden: enforcing choice clauses that resulted in Plaintiffs' loss of RICO claims as well as claims under state and federal securities laws. *Richards*, 135 F.3d at 1295-96.

If Plaintiffs' formulation of the prospective waiver doctrine were adopted, it would create an unjustified split in the law and cause deleterious effects for Native American businesses. As one court examining a related issue in the context of an FTC enforcement action noted, "[i]t would be paradoxical if courts would be more inclined to enforce a forum selection clause specifying a foreign nation's courts than to enforce a forum selection clause specifying tribal court jurisdiction," because "Congress has 'consistently encouraged' the development of tribal courts as part of its efforts to foster tribal self-governance." *F.T.C. v. Payday Fin., LLC*, 935 F.Supp.2d 926, 942 (D. S.D. 2013). The Court should not create a paradox in its prospective waiver case law, and it should not treat Native American law differently than the laws of any other sovereign nation. It should reject Plaintiffs' attempts to undermine the holding in *Richards*, and should apply the same standards to transactions involving Native American law as it does to all other

prospective waiver cases.[2]

C. Plaintiffs remain able to effectively vindicate their claims under Native American law.

Perhaps recognizing that Appellants may be correct in their analysis of the prospective waiver doctrine, Plaintiffs (at 31-32) argue that those laws fail to provide them with remedies equal to what they could receive under state and federal law. But, as described above, the remedies available to a litigant need not be identical or equal to those available under state and federal law—they need only be available and not so limited so as to be unfair. Plaintiffs have not explained how the remedies available to them under Chippewa Cree and Otoe Missouria laws would be unfair—only that they are not co-extensive with state and federal law. Furthermore, it is Plaintiffs (as the parties resisting arbitration) who must prove they are prevented from vindicating their claims under Native American law. They failed to do so below, and their Opposition, again, fails to meet this burden.

First, Plaintiffs are forced to admit (albeit in a footnote, at 32 n.6), Chippewa

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

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

It bears repeating, however, that Plaintiffs, as the party resisting arbitration, bear the substantial burden of conclusively demonstrating that they will be unable to effectively vindicate their rights. *In re Cotton Yarn*, 505 F.3d at 286-87. Appellants need not prove the existence of remedies under Native American laws to avoid the prospective waiver doctrine. That is Plaintiffs' burden.

Plaintiffs almost completely ignore this additional ground for error in the district court's opinion—stating only that their prospective waiver challenge can be "resolved by looking to the contract itself." Opp'n at 41, see also 24 n.5). But reference to the contracts does nothing to show that Plaintiffs are unable to vindicate their claims under the laws of the tribes. All the contracts show is that

they contain a choice of law provision selecting Native American law. That is no different from the choice of law provision selecting British law in *Richards*, and is insufficient to carry Plaintiffs' burden.

D. Plaintiffs' remaining arguments also fail.

Apart from these primary arguments, Plaintiffs offer several backup arguments in their effort to avoid arbitration. First, Plaintiffs argue (at 26, 44-46) that the district court will not be able to perform any 'back end' review of the arbitrator's decision pursuant to 9 U.S.C. § 10. Second, Plaintiffs ask (at 46-48) the Court to consider the policy implications of enforcing any part of the arbitration agreements, stating that to do so would "invite a race to the bottom." Neither argument has merit.

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

Plaintiffs erect a strawman (at 43-44) that the district court is somehow deprived of a back-end review of the arbitral process because the parties have agreed to the tribal court review process. That is incorrect. While the Supreme Court has held that an arbitration contract cannot alter the scope of a *federal court*'s review under Section 10 of the F.A.A., *see Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585-86 (2008), parties remain free to craft the procedures and rules under which that *arbitration* will proceed. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

Arbitral associations, such as the AAA and JAMS, have created options for litigants to engage in de novo appellate review of an arbitrator's decision. Federal courts have not hesitated to review and confirm the decisions of these panels pursuant to Section 10 of the FAA. *See, e.g., Hamilton v. Navient Sols., LLC*, No. 18 CIV. 5432 (PAC), 2019 WL 633066, at *3, *5-*6 (S.D.N.Y. Feb. 14, 2019) (confirming award rendered by appellate arbitration panel, while also engaging in 'back-end' review pursuant to 9 U.S.C. § 10). The tribal court review process is no different than the appellate options offered by these arbitral associations. Tribal court review does not run afoul of the Supreme Court's decision in *Hall St.*, and any decision rendered by the tribal court is still ultimately reviewable by the district court under Section 10 of the FAA.

Courts also possess the ability to retain jurisdiction over a case sent to arbitration. For example, district courts can stay any case (thus retaining jurisdiction over the case) pending completion of the arbitral process. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999); see also 9 U.S.C. § 3. The proposition is not controversial. *See LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 903 (D.C. Cir. 1998) (enforcing stay and noting that the court's "jurisdiction over the original suit, and the Arbitration Act did not divest it of jurisdiction to ensure that the parties adhered to its previous order under the Arbitration Act"); *U-Save Auto Rental of Am. Inc. v. Furlo*, 368 Fed. App'x 601,

602 (5th Cir. 2010) (noting that "[o]nce the district court determined its jurisdiction for the purpose of ordering arbitration, it properly could retain jurisdiction to resolve any issues stemming from its order, including the enforcement of the award").

Given the directive to stay the case, and the district court's concomitant retention of jurisdiction, Plaintiffs' argument that there will be no 'back end' relief rings entirely hollow. The parties are free to return to the court to seek enforcement of the ultimate award or, if appropriate, vacatur pursuant to Section 10 of the FAA. Plaintiffs can raise any difficulties in effectively vindicating their claims **at that time**.

2. Policy arguments cannot overcome precedent.

Plaintiffs' final argument (at 46-48) is that public policy requires the Court (and indeed all courts) to invalidate all choice of Native American law provisions because to do otherwise would be to "invite a race to the bottom." Elsewhere Plaintiffs have grounded their prospective waiver arguments in the idea that it is the mere choice of Native American law requires application of the prospective waiver doctrine. Here, however, Plaintiffs make clear that it is actually the business operated by the Native American lenders, or the industry in which they operate, which (they contend) should determine whether to enforce the arbitration agreements and delegation provisions. In short, Plaintiffs invite judicial

nullification of legitimate business operations. This argument gives up the ghost.

Plaintiffs' real argument to avoid their arbitration agreements is that the type of lending involved here is inherently wrong, and denying arbitration to those lenders is a policy the Court should continue to enforce *regardless of precedent*. But that is just wrong. *Cf. Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 185 (4th Cir. 2019) (rejecting policy arguments for abridging Native American sovereignty and immunity because "an entity's entitlement to tribal immunity cannot and does not depend on *a court's evaluation of the respectability of the business in which a tribe has chosen to engage*") (emphasis added).

Yet if Plaintiffs' prospective waiver arguments were to be accepted, this Court would be required to invalidate **all** choice of Native American law clauses and arbitration agreements, regardless of the underlying business. This is because, as Plaintiffs repeatedly argue, they believe the prospective waiver doctrine would always apply to defeat a choice-of-law and choice-of-forum clause selecting Native American laws **because** those laws are not co-extensive with state and federal law and any "attempt[] to apply tribal law to the exclusion of federal and state law is unenforceable as a matter of law regardless of any alternative remedies available under tribal law." Opp'n at 31 (internal quotation marks omitted) (quoting *Dillon*, 856 F.3d at 336, 334). In other words, a Native American choice-of-law provision **always** violates the prospective waiver doctrine to the extent such

laws do not fully and completely incorporate all state and federal laws. Indeed, Plaintiffs do not attempt to hide this result, they are explicit: "Tribal-arbitration contracts **may not be enforced under the FAA**. . . ." Opp'n at 47. Plaintiffs do not offer any qualification on their suggested outcome—tribal law can never apply regardless of its content. Such an outcome cannot stand.

For example, if Plaintiffs' argument were to be accepted, Native American contractors would not be able to arbitrate a construction dispute pursuant to the laws applicable the Tribal construction company. Similarly Native American businesses would not be able to arbitrate claims against their vendors (or customers) pursuant to their sovereign laws. Doing so would defeat the strong federal policy in favor of tribal self-determination, economic development, and cultural autonomy. *See Id.* (citing *Breakthrough Mgmt. v. Chukchansi Gold Cas.*, 629 F.3d 1173, 1187-88 (10th Cir. 2010)). Plaintiffs' proposed outcome would also cause a "paradoxical" result that comes with refusing to enforce Native American choice of law clauses notwithstanding the strong federal policy favoring development of tribal laws and courts, based upon nothing more than the argument that Native American law is not co-extensive with state and federal law. *Payday Fin., LLC*, 935 F.Supp.2d at 942. The Court should not countenance such "baseless attacks on the competence and fairness of the…Tribal Court" and the laws of

sovereign Native American tribes. *See FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 943 (9th Cir. Nov. 15, 2019).

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

CONCLUSION

For these reasons, as well as those in Appellants' Opening Brief, the district court's order denying defendants' motion compel arbitration should be reversed, and the case remanded with instructions to compel arbitration.

Respectfully submitted,

Dated: May 26, 2020

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REQUEST FOR ORAL ARGUMENT

Appellants respectfully renew their 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. By Order of the Clerk of Court dated February 14, 2020, the appeal in *Brice v. Sequoia Capital Operations, LLC*, was consolidated before the same merits panel as this appeal.

Brice v. 7HBF No. 2, Ltd., No. 19-17477: The related case arises out of second complaint filed by the same Plaintiff-Appellees as the instant appeal. By Order of the Clerk of Court dated February 14, 2020, the appeal in *Brice v. 7HBF No. 2, Ltd.*, was consolidated before the same merits panel as this appeal.

Dated: May 26, 2020

/s/ David F. Herman
David F. Herman

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Reply Brief of Defendants-Appellants 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: May 26, 2020

/s/ David F. Herman
David F. Herman

CERTIFICATE OF COMPLIANCE

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

I am the attorney or self-represented party.

This brief contains 6,947 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).

I certify that this brief *(select only one)*:

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