IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSHUA HARRIS, on behalf of Plaintiff and the class members described below, Plaintiff, vs. FSST MANAGEMENT SERVICES, LLC d/b/a 605 Lending, FIRST DIRECT MEDIATION, INC., STEVE CHRISTENSEN, DUSTIN DERNIER, and JOHN DOES 1-20, Defendants.	)	Case No. 1:22-cv-01063 Honorable Harry D. Leinenweber

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

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I. INTRODUCTION

This case concerns an illegal and predatory lending enterprise—operating through the website www.605lending.com—that makes loans to Illinois consumers at interest rates exceeding 700%. In an attempt to evade state usury and consumer protection laws, non-Indian Defendants FSST Management Services ("FSST"), Dustin Dernier ("Dernier"), and Steve Christensen ("Christensen") (collectively, "Defendants") operate what is commonly referred to as a "rent-a-tribe" lending scheme. As part of the scheme, non-tribal payday lenders create an elaborate charade claiming that their non-tribal high-interest lending businesses are owned and operated by Indian tribes.

Discovery has revealed that loans are nominally made in the name of FSST [redacted]

Over the last decade, "[c]ourts across the country have confronted" these "transparent attempts to deploy tribal sovereign immunity to skirt state and federal consumer protection laws." *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 (2d Cir. 2019).

The illegal loans are made in the name of an entity—here, 605 Lending—which purports to be shielded from state and federal laws prohibiting usury due to tribal sovereign immunity. However, the "tribal" lending entity is simply a facade for the illegal lending scheme; all substantive aspects of the payday lending operation—funding, marketing, loan origination, underwriting, loan servicing, electronic funds transfers, and collections—are performed by individuals and entities that are unaffiliated with the tribe.

II. BACKGROUND

The underlying arbitration provision provides for the application of tribal law—to the exclusion of state and federal law—in an effort to prevent consumers from bringing claims for egregious violations of state and federal law. The *sine qua non* of the underlying illegal lending operation is the "arbitration" provision that Defendants seek to enforce—designed to prevent the vindication of all federal and state statutory rights and remedies.

"[C]ourts will not enforce[,]" however, whether "in an arbitration agreement or any other contract[,]" a set of provisions "forbidding the assertion of certain statutory rights." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236, 241 (2013). Here, Defendants seek to enforce an arbitration provision drafted "in a calculated attempt to avoid the application of state and federal law." *Dillon v. BMO Harris Bank*, 856 F.3d 330, 337 (4th Cir. 2017).

This renders the "entire arbitration agreement unenforceable"—it "contravene[s] public policy" and is "forbidden" by the Federal Arbitration Act. *Id.* Defendants cannot cloak themselves in the protections of tribal law, for "a tribe has no legitimate interest in selling an opportunity to evade state law." *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 114 (2d Cir. 2014). Defendants' motion to compel arbitration should be denied.

III. LEGAL STANDARD

Courts review motions to compel arbitration under a summary judgment standard. *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735 (7th Cir. 2002). Accordingly, "the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor." *Id.*

IV. THE ARBITRATION PROVISION IS UNENFORCEABLE AS IT PROSPECTIVELY WAIVES PLAINTIFF'S FEDERAL AND STATE STATUTORY RIGHTS AND REMEDIES

The arbitration agreement Defendants seek to enforce waives all federal and state law, including Plaintiff's statutory rights and remedies under both federal and Illinois law. While the Federal Arbitration Act has broad reach, "courts will not enforce a prospective waiver" of statutory rights in *any* contract. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 241 (2013).

An arbitration agreement is unenforceable, pursuant to the "prospective waiver" doctrine, if it "prospective[ly] waived" a "party's right to pursue statutory remedies." *Mitsubishi Motors Corp. v. Soler Chrystler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19; *Am. Express Co.*, 570 U.S. at 235 (noting that the prospective waiver/ effective vindication exception "serves to harmonize competing federal policies" by allowing courts to invalidate arbitration agreements that "operate as a waiver of a party's right to pursue statutory remedies."); *14 Penn Plaza L.L.C. V. Pyett*, 556 U.S. 247, 273-74; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

While parties possess broad latitude to shape the terms under which an agreement may be conducted, they must preserve their respective ability to assert federal statutory causes of action so that "the statute[s] will continue to serve both [their] remedial and deterrent function[s]." *Hengle v. Treppa*, 19 F.4th 324, 334 (4th Cir. 2021) (citing *Gilmer*, 500 U.S. at 28) (quoting *Mitsubishi Motors*, 473 U.S. at 637).

And so, where a prospective litigant may "effectively may vindicate its statutory cause of action in the arbitral forum," an arbitration agreement should be enforced. *Mitsubishi Motors*, 473 U.S. at 637. "But where an arbitration agreement prevents a litigant from vindicating federal substantive statutory rights, courts will not enforce the agreement." *Hengle*, 19 F.4th at 335 (citing *Mitsubishi Motors*, 473 U.S. at 637.); *see also Italian Colors*, 570 U.S. at 236 (recognizing that federal courts would invalidate an agreement "forbidding the assertion of certain statutory rights"); *14 Penn Plaza L.L.C.*, 556 U.S. at 273 (acknowledging that "a substantive waiver of federally protected civil rights will not be upheld").

While parties may delegate gateway questions of arbitrability, a "party may contest the enforceability of the delegation clause with the same arguments it employs to contest the enforceability of the overall arbitration agreement. *Hengle*, 19 F.4th at 335 (citing *Gibbs v. Sequoia Capital Operations, LLC*, 966 F.3d 286, 291-92 (4th Cir. 2020).

The overwhelming majority of federal district courts, as well as the Second, Third, and Fourth Circuit Courts of Appeals, have refused to enforce "arbitration agreements that limit a party's substantive claims to those under tribal law, and hence forbid federal claims from being brought." *Williams*, 965 F.3d at 238 (Schwartz, Scirica, Cowen, JJ. (unanimous)); *see also Hengle*, 19 F.4th at 335; *Gibbs*, 967 F.3d at 339-45 (Agee, Gregory, Motz, JJ. (unanimous)) 339-345 (4th Cir. 2020); *Gibbs*, 966 F.3d at 292-94 (unanimous); *Dillon*, 856 F.3d at 333-37 (Keenan, Duncan, Thacker, JJ. (unanimous)); *Hayes*, 811 F.3d at 673-76 (Wilkinson, Keenan, Harris, JJ., (unanimous)); *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 126-128 (2d Cir. 2019) (Hall, Leval, Chin, JJ. (unanimous)); see also *Smith*, 168 F. Supp. 3d 778; *Hengle v. Asner*, 433 F. Supp. 3d 825 (E.D. Va. 2020); *Titus v. ZestFinance, Inc.*, 2018 WL 5084844, at *5 (W.D. Wash. Oct. 18, 2018), *vacated on other grounds by Titus v. BlueChip Fin.*, 786 F. App'x 694

(9th Cir. 2019); *Ryan v. Delbert Servs. Corp.*, No. 5:15-cv-05044, 2016 WL 4702352, at *4 (E.D. Pa. Sept. 8, 2016); *Rideout v. CashCall, Inc.*, No. 2:16-cv-02817-RFB-VCF, 2018 WL 1220565, at *6 (D. Nev. Mar. 7, 2018); *cf. Swiger v. Rosette*, 989 F.3d 501 (6th Cir. 2021) (enforcing delegation provision because plaintiff failed to challenge it); *Brice v. Plain Green, L.L.C.*, No. 19-15707, 2021 WL 4203337, at *5 (9th Cir. Sept. 16, 2021).

Plaintiff specifically challenges the enforceability of the delegation provision—as well as the arbitration agreement as a whole—as a prospective waiver of his right to vindicate his federal and state statutory rights and remedies. The agreement is unenforceable, and Defendants' motion to compel arbitration should be denied.

A. The Arbitration Provision Waives all Federal and State Law.

The agreement's "Governing Law" provision provides for the application of tribal law, to the exclusion of all state and federal law. The "Governing Law" provision provides:

> This agreement is made and accepted in the sovereign territory of the Lender in the Flandreau Santee Sioux Tribe and **shall be governed by the applicable tribal and substantive law of the Flandreau Santee Sioux Tribe**, including, but not limited to the Tribal Financial Services Regulatory Act, without regard to conflicts of law principles, except that the arbitration provisions will be governed by the United States Federal Arbitration Act. This governing law provision applies no matter where you reside at the time you request your loan from Flandreau Santee Sioux Tribe. For the avoidance of doubt, it is not intended and shall not be interpreted that the State of South Dakota has lawful authority to regulate the Business or any activities of the Lender or its officers, employees, or agents, or this Agreement. The parties agree that this Agreement's acceptance and performance is entered into on the Flandreau Santee Sioux Tribe Reservation (the "Reservation") and within the jurisdiction of the Flandreau Santee Sioux Tribe, and that all signatures are equally effective when actually signed on the Reservation, or electronically or physically sent to the Reservation. The parties further agree that all negotiations, verifications, and communications between the parties have occurred on the Reservation, although they may be been completed using technological aids. The lender has accepted the Note and this agreement on the Flandreau Santee Sioux Reservation. (Document #: 1-2, Page 8 of 22, PageID #:32) (emphasis added).

The arbitration provision incorporates the above "Governing Law" provision. It states that "[t]he arbitrator shall apply applicable substantive law consistent with the FAA and

applicable statutes of limitation, and shall honor claims of privilege recognized at law." (Document #: 1-2, Page 7 of 22, PageID #:31). "[A]pplicable substantive law" is that of the Flandreau Santee Sioux Tribe (the "Tribe"). These provisions operate to prevent a consumer from vindicating federal and state statutory rights and remedies and are therefore unenforceable.

A section titled "Usury," confirms that the agreement and arbitration provision is purportedly governed by the law of the Tribe: "This transaction evidenced by this Agreement does not violate any Law of the Flandreau Santee Sioux Tribe pertaining to usury of the payment of interest on loans." (Document #: 1-2, Page 8 of 22, PageID #:32). The underlying agreement also expressly disclaims the laws of any state: "The Lenders' inclusion of these disclosures does not mean that the lender or any subsequent holder of the Agreement consents to application of ***any state or federal law*** to the lender, the Loan, or this agreement." (Document #: 1-2, Page 2 of 22, PageID #:26) (emphasis added). Similarly, Defendants' website states that "[a]ll loans are subject exclusively to the laws and jurisdiction of the Flandreau Santee Sioux Tribe." (https://www.605lending.com/Faq.aspx) (Exhibit B).

B. An Arbitration Agreement that Prospectively Waives Federal Rights is Unenforceable.

The underlying contract cannot be enforced. Doing so would require finding that an arbitration provision requiring Illinois residents to prospectively waive their statutory rights must be enforced. An arbitration agreement that "attempt[s] to apply tribal law to the exclusion of federal and state law" is "unenforceable as a matter of law." *Dillon*, 856 F.3d at 336; see also *Sequoia*, 966 F.3d at 293.

Defendants concede the documents state that tribal law governs the loan agreement and arbitration provision but argue that the arbitration provision is enforceable nonetheless as it does not explicitly disclaim federal law. Specifically, Defendants claim that the arbitration agreement

does not operate as an impermissible prospective waiver because (i) it references the Federal Arbitration Act, and (ii) a document Defendants produced titled "Lending and Consumer Protection Act" states that a lender is governed by certain federal laws. Defendants are wrong.

First, Defendants argue that the underlying agreement does not disclaim federal law because the agreement references the FAA. The suggestion is fatuous. Courts have repeatedly held that where an agreement disclaims the application of federal and state law mere reference to the FAA does not operate as a portal through which federal law flows. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 63 (1995) (applying the "cardinal principle of contract construction" that "a document should be read to give effect to all its provisions and to render them consistent with each other"); see also *Gibbs*, 966 F.3d at 293 (finding "such language does not counteract the effect of the choice-of-law provisions" and collecting authority); *Gingras*, 922 F.3d at 127 n.4; *Martorello*, 59 F.4th at 85.

In *Hengle*, 19 F.4th 324, the Fourth Circuit considered similar arguments and rejected them. There, as here, the arbitration provision provided that the arbitrator shall apply tribal law: "the arbitrator shall apply applicable substantive law consistent with the FAA…" (Document #: 1-2, Page 7 of 22, PageID #:31) The Fourth Circuit held that such clauses do "not require the content of tribal law *to be* consistent with the FAA or limit its application in the arbitration *to the extent* it is consistent with the FAA. Rather, the clause merely asserts that applying tribal law is consistent with the FAA's requirements." *Id*. at 340 (emphasis in original). The Fourth Circuit went on to note that such "language highlights the arbitration provision's impermissible tactic of compelling arbitration of federal claims only to then nullify those claims by precluding application of federal law." *Id*. at 343.

The Second and Third Circuits have invalidated arbitration agreements in tribal lending contracts for similar reasons. *Gingras*, 922 F.3d at 117; *MacDonald*, 883 F.3d at 227; *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 244 (3d Cir. 2020).

Second, Defendants argue that arbitration provision's invocation of tribal law cannot be read to displace federal law because the Tribe's Lending and Consumer Protection Act (the "Lending Act") includes a section titled "COMPLIANCE WITH FEDERAL LAW." (Document #: 18-5, Page 4 of 11, PageID #:164). As a threshold matter, Plaintiff contests the designation of that act as a "law"—it operates solely to evade state and federal laws in furtherance of an illegal enterprise.

The Lending Act purports to require a lender to comply with applicable tribal and federal laws. It says *nothing* about a consumer's ability to vindicate their federal and state statutory rights in a proceeding against a lender in an arbitration proceeding. Indeed, the Lending Act does not mention arbitration, and, in any case, Defendants concede that the Tribe has no arbitration law. *See* Defendants' Responses to Plaintiff's First Discovery Requests, attached hereto as Exhibit A, p. 9 of 22.

Section 28-6-1 of the Lending Act, titled "Consumer Remedies," prevents a consumer from obtaining relief in any forum other than tribal court against anyone other than the lender: "Any Consumer who suffers any damage as a result of a violation of this title may bring a civil action pursuant to title 4 of the Flandreau Santee Sioux Tribal Law and Order Code in Tribal Court against the Lender to recover…" (Document #: 18-5, Page 10 of 11, PageID #:170). This constitutes an impermissible waiver rendering the arbitration and delegation provisions unenforceable. *Gibbs v. Haynes Investments, LLC,* 967 F.3d 332, 338-40 (4th Cir. 2020) ("As the borrowers correctly point out, the relevant tribal codes would not permit them to effectively

vindicate the federal protections and remedies they seek—that is, the borrowers could not assert a RICO claim seeking treble damages against the entities and individuals who comprise the Haynes Defendants.").

Here, RICO is noticeably absent from the list of statutes to which a lender is supposedly subject. In considering a similar provision, the Fourth Circuit in *Hengle*, 19 F.4th at 343, concluded that a "claimant proceeding under tribal law would be unable to assert a RICO claim against individuals associated with a tribal lender and certainly could not pursue RICO's treble damages remedy." See also *Gingras*, 922 F.3d at 127 (invalidating tribal lending arbitration clause which "purports to offer neutral dispute resolution but appears to disallow claims brought under federal and state law").

As in *Hengle* and *Gibbs*, the Tribe's Lending Act "precludes consumers from vindicating their federal statutory rights by replacing the remedial and deterrent remedies selected by Congress with the Tribe's own remedial scheme—the exact concern that gave rise to the prospective waiver doctrine." *Id.*; *Williams v. Martorello,* 59 F.4th 68, 84.

At bottom, the only reasonable way to interpret the contract is that Tribal law applies to the exclusion of federal and state law. *Smith v. W. Sky Fin., LLC*, 168 F. Supp. 3d 778, 785 (E.D. Pa. 2016) (categorically refusing to enforce tribal-arbitration clause in case alleging federal and state-law claims).

C. An Arbitration Agreement that Prospectively Waives Statutory Rights is Unenforceable.

The Supreme Court has made clear that an arbitration clause depends on state law for its validity and that the only effect of the FAA is to prohibit states from discriminating against arbitration. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022); see also *Arthur Andersen L.L.P. v. Carlisle*, 556 U.S. 624, 631 (2009) (state law is applicable to determine which

contracts are binding under § 2 and enforceable under § 3 if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally).

The contract's explicit waiver of state law renders the arbitration agreement unenforceable. In *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1919 n.5 (2022), the Supreme Court rejected the argument that the prospective waiver doctrine is limited to a provision waiving substantive rights under federal law. The Supreme Court held that there "is not anything unique about federal statutes" for the application of the prospective waiver doctrine. *Id.* "That is why," the Court added, it had previously considered the application of the doctrine in a case concerning "claims arising under state law." *Id*. (citing *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (enforcing an arbitration agreement because it relinquished "no substantive rights the TAA or other California law may accord him")).

Here, the agreement explicitly disclaims the application of any state law: "[t]he Lenders' inclusion" of certain disclosures "does not mean that the lender or any subsequent holder of the Agreement consents to the application of any state or federal law to the lender, the Loan, or this agreement." (Document #: 1-2, Page 2 of 22, PageID #:26). A subsequent recital states that, "[f]or the avoidance of doubt, it is not intended and shall not be interpreted that the State of South Dakota has lawful authority to regulate the Business or any activities of the Lender or its officers, employees, or agents, or this Agreement" (Document #: 1-2, Page 8 of 22, PageID #:26). Defendants' contract unambiguously disclaims all state law.

V. THE ARBITRATION AGREEMENT IS UNENFORCEABLE AS IT IS UNCONSCIONABLE

Under Illinois law, a contractual provision may be unconscionable on either procedural or substantive grounds, or a combination of both. *Razor v. Hyundai Motor Am.*, 222 Ill. 2d 75, 854 N.E.2d 607, 622 (2006); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 777-78 (7th Cir. 2014).

A. The Arbitration Agreement is Substantively Unconscionable.

The arbitration agreement is substantively unconscionable under Illinois law because it disclaims all rights under state and federal law and provides that an arbitration award is reviewable *only* in a tribal court. Additionally, the selection of tribal law to Plaintiff's claims is unenforceable as it undermines fundamental consumer protection laws of Plaintiff's home state, Illinois—the state with the strongest connection to the agreement.

"[P]arties are free within bounds to use a choice of law clause in an arbitration agreement to select which local law will govern the arbitration," the Fourth Circuit explained in *Hayes*, "[b]ut a party may not underhandedly convert a choice of law clause into a choice of no law clause—it may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject." *Hayes*, 811 F.3d at 675.

Count III of Plaintiff's complaint seeks damages under the Predatory Loan Prevention Act ("PLPA") (violations of which are violations of the Illinois Consumer Fraud Act). The PLPA *expressly* negates the ability of consumers to waive its protections. 815 ILCS 123/15-10-25, "No waivers," states that "[t]here shall be no waiver of any provision of this Act." In addition, 815 ILCS 123/15-10-5 provides that "(b) Any violation of this Act, including the commission of an act prohibited under Article 5, constitutes a violation of the Consumer Fraud and Deceptive Business Practices Act." The Consumer Fraud Act also prohibits waiver: "[a]ny waiver or modification of the rights, provisions, or remedies of this Act shall be void and unenforceable." 815 ILCS 505/10c.

The PLPA expressly states that it was intended to protect consumers against their own improvidence. 815 ILCS 123/15-1-5 states that "Illinois families pay over $500,000,000 per year in consumer installment, payday, and title loan fees," "nearly half of Illinois payday loan borrowers earn less than $30,000 per year, and [that] the average annual percentage rate of a

payday loan is 297%." *Id*. The Illinois General Assembly responded to this situation by effectively disabling Illinois consumers from entering into agreements to pay more than 36% interest.

The Predatory Loan Prevention Act could not be clearer that a lender cannot have an Illinois consumer contract out of it. A choice of law clause by which an Illinois consumer purports to agree that a loan which is covered by and violates the PLPA shall be governed by the law of a less protective jurisdiction is on its face:

> (1) a prohibited "waiver," 815 ILCS 123/15-10-25,
>
> (2) a "waiver or modification of the rights, provisions or remedies of this Act," 815 ILCS 505/10c, and
>
> (3) a "device, subterfuge, or pretense to evade the requirements of this Act, including, . . . making, offering, assisting, or arranging a debtor to obtain a loan with a greater rate or interest, consideration, or charge than is permitted by this Act through any method including mail, telephone, internet, or any electronic means regardless of whether the person or entity has a physical location in the State." 815 ILCS 123/15-5-15(a).

If a non-Illinois lender that conducts business over the internet could immunize itself from the PLPA by simply inserting a choice of law clause specifying the law of some jurisdiction that does not protect consumers, the PLPA would be a dead letter.

Even without an express statutory prohibition of waiver, Illinois courts applied § 187 of the *Restatement 2d, Conflict of Laws* to invalidate a choice-of-law clause if the contract containing it was invalid or the clause contravened Illinois' fundamental public policy. *Medline Industries Inc. v. Maersk Medical Ltd.*, 230 F.Supp.2d 857 (N.D. Ill. 2002); *WTM, Inc. v. Hennek*, 125 F. Supp. 2d 864, 867 (N.D. Ill. 2000); *Maher & Assocs., Inc. v. Quality Cabinets,* 267 Ill.App.3d 69, 640 N.E.2d 1000 (1994).

The Predatory Loan Prevention Act clearly states a fundamental public policy of Illinois when it specifies what contracts it applies to, declares contracts for interest in excess of 36%

void, and goes to great lengths to outlaw any waiver or evasion of its provisions. Furthermore, it expressly states that it is intended to protect consumers from themselves in undertaking to pay usurious loans. A "choice of law" clause that has the effect of making the PLPA inapplicable is both a prohibited waiver or evasion of the PLPA and invalid as contrary to public policy.

i. A Contract Granting a Tribal Court Exclusive Judicial Review of an Arbitration Award is Unconscionable.

The Seventh Circuit has held that Indian tribe cannot regulate conduct between non-Indians off the reservation. *Jackson*, 764 F.3d at 777-78. This is a matter of subject matter jurisdiction and thus not subject to consent. *Id*. at 783. Accordingly, it cannot be evaded by a representation that conduct is deemed to occur on the reservation when that is not in fact true. The underlying agreement provides:

> "YOU ARE WAIVING YOUR RIGHT TO HAVE A COURT, OTHER THAN THE COURTS OF THE FLANDREAU SANTEE SIOUX TRIBE, TO WHOSE JURISDICTION YOU EXPLICITLY CONSENT DURING THE TERM OF THE AGREEMENT, RESOLVE ANY DISPUTE ALLEGED AGAINST THE LENDER OR RELATED THIRD PARTIES." (Document #: 1-2, Page 6 of 22. PageID #:30) (emphasis in original).

The agreement further provides that "[t]he arbitrator's award may be filed ONLY with the courts of the Flandreau Santee Sioux Tribe..." (Document #: 1-2, Page 7 of 22, PageID #:31). The second declaration of Anthony Reider confirms that only a tribal court can review an arbitration decision, Declaration of Anthony Reider (Document #:18-2, Page 11 of 15, PageID #:102), in contrast to normal arbitration awards which are reviewable by state or federal courts. Consumers thus have no post judgement remedies.

A tribal court has no jurisdiction over disputes between non-Indians concerning off reservation conduct, even with their express consent. *Jackson*, 764 F.3d at 783 ("a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court"). The

selection of tribal courts and exclusion of all others means that the agreement effectively provides that no court may exercise jurisdiction. This makes the arbitration provision a sham and unconscionable.

The Second Circuit addressed the effect of a provision for exclusive judicial review of an arbitration award by a tribal court in *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 127-28 (2d Cir. 2019):

> …we conclude that the arbitration agreements are substantively unconscionable under Vermont law because the arbitral forum for which they provide is illusory. While the agreements provide for arbitration to be conducted by an AAA or JAMS arbitrator at a location convenient for the borrower, the mechanism of tribal court review hollows out those protections. Rather than the sharply limited federal court review of the arbitrators' decisions as constrained by the FAA, the review by tribal courts under these agreements hands those courts unfettered discretion to overturn an arbitrator's award. See id. 116 (any arbitral award "may be set aside by the tribal court upon judicial review"). Ultimately, the tribal court is directed to interpret its own law—alleged to be completely one-sided in favor of the tribe—which effectively insulates the tribe from any adverse award and leaves prospective litigants without a fair chance of prevailing in arbitration. *See Jackson*, 764 F.3d at 778-79 (applying Illinois law).

By its terms, Defendants' contract forecloses any federal or state court from reviewing an arbitration award. Defendants are too clever by half. Limiting the enforcement of an arbitral award to a tribal court, where the tribe has no arbitration law and no legislative or adjudicative authority to regulate the transaction, is unconscionable and renders unenforceable both the arbitration clause and delegation provision, both of which Plaintiff challenges.

ii. The Agreement is Unenforceable as it Applies the Law of a Tribe with No Substantive Jurisdiction over the Transaction.

The agreement Defendants seek to enforce requires the application of the law of an Indian tribe that has no substantive jurisdiction over the matter. A tribe's substantive jurisdiction to enact laws is essentially coterminous with its adjudicative jurisdiction, and does not extend to dealings between non-Indians off the reservation. *Plains Commerce Bank v. Long Family Land*

& Cattle Co., 554 U.S. 316, 329 (2008); *Montana v. United States*, 450 U.S. 544 (1981); *Jackson*, 764 F.3d at 777-78.

The Restatement 2d, Conflict of Laws provides (§4):

> (1) As used in the Restatement of this Subject, the "local law" of a state is the body of standards, principles and rules, exclusive of its rules of Conflict of Laws, which the courts of that state apply in the decision of controversies brought before them.
>
> (2) As used in the Restatement of this Subject, the "law" of a state is that state's local law, together with its rules of Conflict of Laws.

"State" is defined so as to include a tribe. Restatement 2d of Conflict of Laws, § 3.

§ 28-5-2 of the Lending Act titled "Loans to Tribal Members," states that "[n]otwithstanding section 28-5-1, the Executive Committee [of the Flandreau Santee Sioux Tribe] shall have the authority to prohibit a Lender from making a consumer loan or extending credit to any member of the Flandreau Santee Sioux Tribe or to any person seeking a consumer loan or credit on behalf of the member. Such act by the Executive Committee shall exempt the Lender from the provisions of chapter 6 of this title," providing for civil remedies. (Document #: 18-5, Page 9 of 11 PageID #:169).

Discovery has revealed that Defendants have not made a loan to a member of the Tribe nor anyone living on the reservation: "FSST has no record of lending to Tribal members or residents of tribal owned land. Tribal members who may otherwise have a need for a loan have access to the Tribe's governmental programs and funding for needs- based assistance." *See* Defendants' Second Supplemental Responses to Plaintiff's First Discovery Requests, Exhibit C, p. 8 of 14. The requirement that "local law" be applied in the decision of controversies brought before local courts ensures that its rules are such that residents of the "state" are willing to live with. Here the "tribal law" never applied to persons on the reservation. The Tribe has purported

to authorize non-Indians to engage in criminal and civil usury against other non-Indians residing off the reservation.

B. The Arbitration Agreement is Procedurally Unconscionable.

The entire purpose of the arbitration agreement is to prevent any remedy from being exercised and to evade federal and state law. The agreement is replete with false representations which arguably rise to the level of fraud. For example, there is no basis for the application of tribal law to the underlying transaction, nor is there jurisdiction for a tribal court to enforce an arbitration award. The lending operation is run exclusively by non-tribal persons off the reservation. *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 115 (2d Cir. 2014). We are dealing with entirely off reservation conduct.

Discovery has revealed the underlying arbitration clause is not registered with the AAA, that Defendants have never communicated with any arbitral organization, and that Defendants have never been a party to a consumer arbitration. *See* Defendants' Responses to Plaintiff's First Discovery Requests, Exhibit A, p. 5 of 22. The agreement Defendants seek to enforce provides that to the extent the Federal Arbitration Act is inapplicable, "then the lender's agreement to arbitrate shall be governed by the arbitration law of Flandreau Santee Sioux Tribe." (Document #: 1-2, Page 7 of 22, PageID #:31). The Tribe does not have an arbitration law. *See* Defendants' Responses to Plaintiff's First Discovery Requests, attached hereto as Exhibit A, p. 9 of 22. Defendants' contract disclaims state and federal law, and there is no basis for the application tribal law, so what law authorizes the arbitration provision? This underscores the fact that the provision simply strings together legal concepts for the improper purpose of depriving the borrower of all rights.

VI. THE DELEGATION PROVISION IS UNENFORCABLE

It is axiomatic that "[a] federal court has a duty to determine whether a contract violates

federal law before enforcing it." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982); see also *Dillon*, 856 F.3d at 334 ("a court first must examine whether, as a matter of law, the 'choice-of-forum and choice-of-law clauses operate in tandem as a prospective waiver of a party's right to pursue statutory remedies.'") (quoting *Mitsubishi Motors*, 105 S. Ct. at 3359 n. 19); *Titus v. ZestFinance, Inc.*, No. 18-5373 RJB, 2018 U.S. Dist. LEXIS 179380, at *6 (W.D. Wash. Oct. 18, 2018).

"[I]f a party challenges the validity under [9 U.S.C.] § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4." *Gingras*, 922 F.3d at 126 (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010)). Plaintiff has specifically challenged the validity of the arbitration provision as well as the delegation provision. In specifically challenging a delegation provision, a party may rely on the same arguments used to challenge the arbitration provision generally. *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 226-27 (3d Cir. 2018); *Gibbs*, 966 F.3d at 291-92.

The arbitration agreement's "delegation clause is unenforceable for virtually the same reason as the underlying arbitration agreement—the Loan Agreement's wholesale waiver of the application of federal and state law makes [the delegation] clause invalid." *MacDonald v. CashCall, Inc.*, No. CV 16-2781, 2017 WL 1536427, at *13 (D.N.J. Apr. 28, 2017). The logic is simple: "enforcing the delegation provision would place an arbitrator in the impossible position of deciding the enforceability of the agreement without authority to apply any applicable federal or state law." *Smith*, 168 F. Supp. 3d at 786; *Ryan v. Delbert Servs. Corp.*, 5:15 cv 05044, 2016 WL 4702352, at *5 (E.D. Pa. Sept. 8, 2016) ("The wholesale waiver of federal and state law thus dooms both the delegation provision and the arbitration clause, but for different reasons.").

Defendants' reliance on *Kemph v. Reddam*, No. 13 CV 6785, 2015 WL 1510797, at *5 (N.D. Ill. Mar. 27, 2015), is unavailing. In *Kemph*, the district court held that the plaintiff's failure to specifically challenge the delegation provision was "sufficient ground for us to grant Defendants' motion." *Id.* at *10. Here, unlike in *Kemph*, Plaintiff specifically challenges the delegation clause. "A delegation clause that requires an arbitrator to determine whether a valid and enforceable arbitration agreement exists" without access to federal or state laws "necessary to make that determination," is "unenforceable as a violation of public policy." *Hengle*, 19 F.4th at 339.[1]

The prospective waiver of federal and state law prevents an arbitrator from marshaling the law necessary to determine the validity of the arbitration and delegation provisions. The delegation provision, like the arbitration clause, is unenforceable.

VII. CONCLUSION

For the reasons stated above, Defendants' motion to compel arbitration should be denied.

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[1] Defendants do not ask the Court to sever the offending provisions, and for good reason. A tribal arbitration contract's "errant provisions" are not severable as they go to the core of the arbitration agreement—the animating purpose is to "ensure that [the Tribal lender] and its allies could engage in lending and collection practices free from the strictures of any federal law." *Hayes*, 811 F.3d at 666; see also *Dillon*, 856 F.3d at 336; *Rideout*, 2018 WL 1220565, at *7.

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CERTIFICATE OF SERVICE

I, Matthew J. Goldstein, hereby certify that on Wednesday, April 26, 2023, I caused a true and accurate copy of the foregoing document to be filed via the court's CM/ECF online system, which sent notice via email to all counsel of record.

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