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

JOSHUA HARRIS,
On behalf of Plaintiff and the class members,

Plaintiff,

v.

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

REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION BY DEFENDANTS FSST MANAGEMENT SERVICES, LLC, STEVE CHRISTENSEN AND DUSTIN DERNIER

Defendants FSST Management Services, LLC d/b/a 605 Lending, Steve Christensen, and Dustin Dernier (collectively, the "Tribal Defendants") respectfully submit this Reply in Support of Tribal Defendants' Motion to Compel Arbitration.

I. INTRODUCTION

Plaintiff filed his Complaint based upon sheer speculation that, because the lender, FSST Management Services LLC ("FSST"), is tribally owned, it must be participating in a so-called "rent-a-tribe" scheme, as described in other federal court opinions, and not a legitimate tribal business. Even after the Tribal Defendants produced substantial documents and information demonstrating that Plaintiff's theory was completely wrong, Plaintiff continues to intentionally mischaracterize and misrepresent the record in a nefarious attempt to morph FSST's legitimate

business into a "rent-a-tribe" scheme. As demonstrated below, the record clearly demonstrates that there is no "rent-a-tribe" scheme involved here.

Plaintiff's other claims fare no better. Plaintiff's claim that there is a prospective waiver of his federal statutory rights fails, as: (1) Plaintiff's claim cannot be raised at this stage of the proceedings, and (2) the Agreement does not waive Plaintiff's federal rights. In fact, the Consume Loan and Arbitration Agreement (the "Agreement") and the tribal law incorporated therein expressly apply federal law. Similarly, Plaintiff's claim that the Agreement gives the tribal court exclusive judicial review is also false – the Agreement applies the FAA, which expressly grants authority to vacate, modify or correct arbitration awards to the United States District Court in the district where the arbitration award was made. Finally, Plaintiff's claims of unconscionability are based upon misrepresentations of fact and misapplication of the law; in truth, the record and the applicable law require that Plaintiff's claims be arbitrated. For these reasons and others set forth herein, the Tribal Defendants' Motion to Compel Arbitration must be granted.

II. REPLY TO PLAINTIFF'S MISREPRESENTATIONS OF FACT

Pursuant to this Court's order (Docket #: 42), the Tribal Defendants produced documents and responded to Plaintiff's discovery requests related to the arbitration issue. The documents and responses produced by the Tribal Defendants demonstrate that Plaintiff's "rent-a-tribe" claims are baseless and frankly, defamatory. The documents and responses conclusively show FSST is wholly owned and operated by the Flandreau Santee Sioux Tribe, and that there is no "beneficial owner" of FSST or its lending business. Plaintiff still, however, has chosen to carry on with a gross mischaracterization of extensive documents and information produced in discovery and ultimately, a legitimate tribal business. Examples include:

- Plaintiff falsely claims, *ad nauseam,* that the Tribal Defendants are "non-Indian." Plaintiff's Response, Document #: 53 PageID #: 673, 685, 688. The uncontroverted evidence is that FSST is organized pursuant to the laws of the Tribe, and is 100% owned and operated by the Tribe. Document #: 18-1; PageID #: 2-5; Document #: 18-4, PageID 155-160. Dernier and Christensen are salaried officers of FSST and have no ownership interest in FSST whatsoever. Document #: 18-1; PageID #: 2-5. Plaintiff has not identified any so-called "beneficial owner" of FSST or its lending business, because none exists.

- [redacted]

- [redacted]

[redacted]

[redacted]

In light of the above, the Tribal Defendants urge the Court to critically review Plaintiff's claims and the evidence in the record in rendering its decision on this Motion, and further requests that the Motion be granted for the reasons set forth herein.

III. LEGAL STANDARD

"The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). To avoid "undermin[ing] the 'liberal federal policy favoring arbitration agreements,'" the party seeking to avoid arbitration bears the burden of establishing that the

agreement in question should not be enforced. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92 (2000) (citing *Mercury Constr. Corp*., 460 U.S. at 24 (1983)). The resisting party's evidentiary burden is like that of a party opposing summary judgment. *Id*. "[A] party cannot avoid compelled arbitration by generally denying the facts upon which the right to arbitration rests; the party must identify specific evidence in the record demonstrating a material factual dispute for trial." *Id*. As with a party opposing summary judgment, a party opposing a Motion to Compel Arbitration, "may not rest upon mere allegations or denials...instead it is incumbent upon them to introduce affidavits or other evidence setting forth specific facts showing a genuine issue for trial." *Anders v. Waste Mgmt. of Wis., Inc*., 463 F.3d 670, 675 (7th Cir. 2006). At the summary judgment stage, "saying so doesn't make it so; summary judgment may only be defeated by pointing to admissible evidence in the summary judgment record that creates a genuine issue of material fact[.]" *United States v. 5443 Suffield Terrace, Skokie, Ill*., 607 F.3d 504, 510 (7th Cir. 2010). Here, Plaintiff has failed to meet this standard, relying on unsupported allegations, innuendo, and false statements of fact in his opposition to the Tribal Defendants' Motion.

IV. ARGUMENT

A. Plaintiff's "Prospective Waiver of Statutory Rights" Claim Can Only Be Raised at the Arbitration Award Stage of the Proceedings, not the Arbitration-Enforcement Stage.

The burden of showing that a federal statutory claim is incapable of vindication lies with the litigant seeking to avoid arbitration. *Alghanim v. Alghanim*, 828 F. Supp. 2d 636, 660 (S.D.N.Y. 2011) (citing *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) and *Guyden v. Aetna, Inc*., 544 F.3d 376, 386-87 (2d Cir.2008). As set forth below, Plaintiff has failed to establish any waiver of federal statutory rights, and has not satisfied his burden here.

Plaintiff does not challenge the existence of an agreement to arbitrate. Instead, Plaintiff argues that the arbitration agreement is unenforceable because it allegedly waives Plaintiff's statutory rights, citing *dicta* from a footnote in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 n. 19 (1985), and *Am. Express Co. v Italian Colors Rest*., 570 U.S. 228, 236 (2013). It should be noted that the Supreme Court has never invalidated an arbitration clause based upon the so-called "prospective waiver doctrine" that emanated from the *dicta* in these cases.[1] Furthermore, the Court in *Mitsubishi Motors* stated that it was premature to consider a prospective waiver claim at the arbitration enforcement (i.e., motion to compel arbitration) stage of the proceedings; such claim must instead be raised at the arbitration award-enforcement stage of the proceedings. *Mitsubishi Motors*, 473 U.S. at 637 n. 19. The Supreme Court reinforced its reasoning a subsequent decision, holding that "[a]t [the arbitration-enforcement] stage it is not established what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result," and that "*the choice-of-law question . . . must be decided in the first instance by the arbitrator.*" *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995) (emphasis added) (citing *Mitsubishi Motors,* 473 U.S. at 637 n. 19). Likewise, it is premature for this Court to consider Plaintiff's prospective waiver claim here, as Plaintiff can present this claim to the arbitrator, who "must" decide the choice of law issue in the first instance. *Id*.

B. The Agreement Does Not Waive Plaintiff's Federal Statutory Rights

Plaintiff's claim that the Agreement waives his federal statutory rights is simply false. While the Governing Law section of the Agreement applies the substantive law of the Tribe, *the*

[1] Moreover, these cases address alleged prospective waivers of *federal* statutory rights (which does not exist here, as set forth below), not alleged waivers of state statutory rights.

Tribe's substantive laws requires FSST to comply with federal law. Section 28-3-2 of the Tribe's Lending and Consumer Protection Act provides:

Section 28-3-2 COMPLIANCE WITH FEDERAL LAW.

> Lenders shall at all times comply with the provisions of this title, rules and regulations promulgated pursuant to this title, *and all other applicable Tribal and federal laws including, without limitation,* the Federal Consumer Protection Laws.[2]

Doc. 18-1, Reider Decl. ¶ 10; Doc 18-5, Ex. D to Reider Decl., at PageID #: 164 (emphasis added). Section 28-7-2 of the Tribe's Lending and Consumer Protection Act further provides that, in the event of any conflict between tribal law and federal law, "*[t]he terms of federal law and regulation shall apply*." Doc. 18-5, Ex. D to Reider Decl., at PageID #: 171 (emphasis added). Therefore, the arbitrator is not precluded from applying federal law, and such assertion is further supported by the fact that the Agreement requires the arbitrator to apply "applicable substantive law," and also provides, "if allowed by *applicable statute or applicable law*, the arbitrator may award you statutory damages and/or your reasonable attorneys' fees and expenses." Complaint, Ex. A, Consumer Loan and Arbitration Agreement, Doc. 1-2 at ¶ 10(g), PageID #: 31 (emphasis added). When viewed with the express terms of the tribal law that is incorporated into the Agreement, federal law applies. In sum, there is no prospective waiver of federal law.

[2] The Lending and Consumer Protection Act defines "Federal Consumer Protection Laws" as "Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5491-5493; Electronic Fund Transfer Act, 15 U.S.C. §§1693-1693f and related regulations at 12 C.F.R. Part 205 and 12 C.F.R. Part 1005; Equal Credit Opportunity Act, 15 U.S.C. §§1691-1691f and related regulations at 12 C.F.R. Part 202 and 12 C.F.R. Part 1002; Fair Credit Billing Act, 15 U.S.C. §1666a; Fair Credit Reporting Act, 15 U.S.C. §§1681-1681x and related regulations at 12 C.F.R. Part 222; 12 C.F.R. Part 1022; 16 C.F.R. Parts 600-698; Fair Debt Collection Practices Act, 15 U.S.C. §§1692-1692p and related regulations at 12 C.F.R. Part 1006; Federal Trade Commission Act, 15 U.S.C. §§41-58 and related regulations at 16 C.F.R. Parts 1-4; Gramm-Leach-Bliley Act, 15 U.S.C. §§6801-6809 and related regulations at 16 C.F.R. Part 313; Servicemembers Civil Relief Act: 50 App. U.S.C. § §501-597 and related regulations at 38 C.F.R. Part 7; and, Truth in Lending Act, 15 U.S.C. §§1601-1667 and related regulations at 12 C.F.R. Part 226; 12 C.F.R. Part 1026."

This case is thus vastly different than the so-called "rent-a-tribe" cases that Plaintiff cites from the second, third and fourth federal circuits, wherein the agreements at issue expressly foreclosed the application of federal law. For example:

- In *Dillion v. BMO Harris Bank, N.A.*, 856 F.3d 330, 332-33 (4th Cir. 2017), the agreement at issue provided that it was, "subject solely to the exclusive laws and jurisdiction of the Otoe-Missouria Tribe of Indians" and that "no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation."

- In *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 669-670 (4th Cir. 2016), the agreement at issue provided that it, "is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe," that, "no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation," that, "this Agreement shall be subject to and construed in accordance only with the provisions of the laws of the Cheyenne River Sioux Tribe," and that "no United States state or federal law applies to this Agreement."

- In *Hengle v. Treppa*, 19 F.4th 324, 332 (4th Cir. 2021), the arbitration provision in the agreement at issue provided that it, "shall in no way . . . allow for the application of any law other than the laws of the Habematolel Pomo of Upper Lake."

- In *Williams v. Martorello*, 59 F. 4th 68, 75 (4th Cir. 2023), the agreement at issue provided that it was, "subject solely and exclusively to the Tribal law and jurisdiction of the [Tribe]."

- In *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 118 (3rd Cir. 2019), the agreement provided that it was, "subject solely to the exclusive laws and jurisdiction of the [Tribe]" and that, "no other state or federal law or regulation shall apply."

- In *Williams v Medley Opportunity Fund II, LP*, 965 F.3d 229, 235-37 (3rd Cir. 2020), the loan agreement provided that it, "shall not be construed in any way . . . to allow for the application of any law other than Tribal law;" limited the arbitrator's award to "remedies available under Tribal Law;" provided that the agreement is, "governed only by Tribal Law and such federal law as is applicable under the Indian Commerce Clause of the United States Constitution;" provided that, "[N]either we nor this [Loan] Agreement are subject to any other federal or state law or regulation, nor to the jurisdiction of any court unless so stated in this [Loan] Agreement ;" and that "The Lender may choose to voluntarily use certain federal laws as guidelines for the provision of services. Such voluntary use does not represent acquiescence of the Tribe to any federal law unless found expressly applicable to the operations of the Tribe." *See also, Gibbs v. Sequoia Capital Operations*, LLC 966 F.3d 286, 289-90 (4th Cir. 2020) (construing agreements with identical language).

In the above cases, the agreements at issue contain language that *expressly precludes* the application of federal law, and/or provide that the agreements are subject "solely" or "exclusively" to tribal law, to the exclusion of federal law. The Agreement at issue in this case does neither, [3] and the prospective waiver doctrine does not apply when the agreement does not expressly disavow the application of federal law. *Gibbs v. Stinson*, 421 F. Supp. 3d 267, 303 (E.D. Va. 2019), *aff'd*, 966 F.3d 286 (4th Cir. 2020). Furthermore, an arbitration agreement that applies the law of one state does not preclude the arbitrator from applying federal law. *Green v. Kline Chevrolet Sales Corp*., No. 2:19CV127, 2019 WL 3728266, at *8 (E.D. Va. Aug. 7, 2019) (citing *World Fuel*

[3] That the Agreement contains no express waiver of federal law is reflected by the fact that Plaintiff can point to no waiver in the agreement itself. Instead, Plaintiff cites a non-binding statement from FSST's website that is not part of the parties' agreement. Plaintiff's Response, at 6, Document #: 53, PageID #: 678.

Services Trading, DMCC v. Hebei Prince Shipping Co., Ltd., 783 F.3d 507, 521 (4th Cir. 2015). This same rationale applies to an agreement applying tribal law, particularly here, where the tribal law itself incorporates federal law.

Pursuant to the Agreement and applicable tribal law incorporated therein, the arbitrator clearly has the authority – indeed the duty – to apply federal law, and therefore Plaintiff's claim that the Agreement prospectively waives federal law must be rejected.[4]

Plaintiff also argues that, "the contract's explicit waiver of state law renders the arbitration agreement unenforceable," citing *Viking River Cruises v. Moriana*, 142 S.Ct. 1906, 213 L.Ed.2d. 179 (2022) and *Preston v. Ferrer*, 552 U.S. 346, 359 (2008). Document #: 53, PageID #: 9-10. Plaintiff's reliance on *Viking River Cruises* and *Preston* is misplaced. These cases discuss the FAA's preemption of state law, not presumptive waivers of state statutory rights in an arbitration agreement. In *Viking River Cruises*, the Supreme Court held the FAA preempted a rule of California law that invalidated contractual waivers of the right to assert representative claims under California's Labor Code Private Attorneys General Act of 2004. Plaintiff cites footnote 5 in *Viking River Cruises* to stand for the argument that a contract that waives state statutory rights is unenforceable. However, that was not the Court's holding. Instead, the Court held that, in upholding the enforceability of the arbitration clause, an arbitration agreement does not alter or abridge substantive rights; it only provides for how those rights will be processed. *Viking River Cruises*, 142 S.Ct. at 1919. Citing its opinion in *Preston*, the Court states it has explained "[b]y

[4] The Supreme Court has repeatedly upheld arbitration agreements that give an arbitrator authority to arbitrate federal statutory rights. *See, e.g*., *CompuCredit Corp. v Greenwood*, 565 U.S. 95, 104-05, (2012)(CROA claims arbitrable); *Gilmer v Interstate/Johnson Lane Corp*., 500 U.S. 20, 35 (1991)(ADEA claims arbitrable); *Mitsubishi*, 473 U.S. at 640 (federal antitrust claims arbitrable).

agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral ... forum." *Preston*, 552 U.S. at 359.

Furthermore, if there is any uncertainty as to whether the choice of law clause in the Agreement would preclude statutory remedies, the Supreme Court has mandated that such issue must be decided by the arbitrator, not the courts, at the arbitration-enforcement stage. *Vimar Seguras Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995).

C. The Arbitration Agreement Does not Grant the Tribal Court "Exclusive Judicial Review" of Arbitration Awards

1. The Arbitration Agreement Applies the FAA, Which Expressly Grants Federal Courts the Exclusive Authority to Vacate, Modify or Correct Arbitration Awards

Plaintiff's claim that the Agreement grants the tribal court exclusive judicial review of an arbitration award is flatly contradicted by the Agreement and the FAA. As noted above, the Arbitration Agreement expressly states that it "shall be governed by the United States Federal Arbitration Act ('FAA')." Complaint, Ex. A, Consumer Loan and Arbitration Agreement, Doc. 1-2 at ¶ 10(g), PageID #: 31. Section 9 of the FAA provides, in relevant part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon *the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title*.

9 U.S.C.A. § 9 (emphasis added).

There is nothing in Section 9 of the FAA that requires that arbitration awards be confirmed by a state or federal court, or that prohibits the parties to an agreement from choosing a tribal court to confirm an arbitration award. Instead, Section 9 expressly permits the parties to "specify the court" to confirm the arbitration award. Notably, the FAA does not permit the court specified by

the parties to vacate, modify or correct the award – instead Section 9 limits such court's authority to entering an order confirming the award – in fact, Section 9 provides that the Court "*must* grant such an order unless the award is vacated, modified or corrected as prescribed by Sections 10 and 11 of this title." By contrast, the authority to vacate, modify, or correct an arbitration award is governed by Sections 10 and 11 of the FAA, which grant the United States District Courts the *exclusive authority* to vacate, modify or correct an arbitration award. Section 10 of the FAA provides, in relevant part:

> (a) In any of the following cases *the United States court in and for the district wherein the award was made* may make an order vacating the award upon the application of any party to the arbitration—
>
> > (1) where the award was procured by corruption, fraud, or undue means;
> >
> > (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> >
> > (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> >
> > (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.A. § 10 (emphasis added). Section 11 of the FAA provides, in relevant part:

> In either of the following cases *the United States court in and for the district wherein the award was made* may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> > (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
> >
> > (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C.A. § 11 (emphasis added).

Accordingly, Plaintiff's claim that the Agreement grants the tribal court "exclusive judicial review" of the arbitration award is false. Pursuant to the FAA, the tribal court's authority is strictly limited to confirming the arbitration award, while the exclusive authority to vacate, modify or correct an arbitration award is granted exclusively to the United States District Court in and for the district wherein the award was made. This fact eviscerates Plaintiff's prospective waiver argument because the Supreme Court has made it clear that *there is no prospective waiver of substantive federal rights where, as here, a federal court has jurisdiction to review the arbitration award*. *Sky Reefer*, 515 U.S. at 540-41 (1995) (citing *Mitsubishi*, 472 U.S. at 638).

The Agreement at issue here is thus vastly distinct from the agreements at issue in the tribal lending cases cited by Plaintiff, which (contrary to Section 9 of the FAA) authorized the tribal court to set aside the arbitrator's award if it did not comply with tribal law. *See, e.g.*, *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 342 (4th Cir. 2020); *Sequoia Capital Operations, LLC*, 966 F.3d 286 at 293; *Gingras*, 922 F.3d at 118; *Williams,* 965 F.3d at 235. The Agreement at issue here does not grant the tribal court the exclusive right of judicial review, and preserves the federal district court's authority to vacate, modify or correct any arbitration award. Plaintiff's claims must be arbitrated.

D. Plaintiff's Claim that the Arbitration Agreement is Unconscionable Relies on Misrepresentations of Fact and Inapplicable Law

1. A Choice of Law Clause Does not Render the Agreement Unconscionable.

Plaintiff argues that because the Agreement's choice of law provision applies tribal law instead of Illinois law, the Agreement is substantively unconscionable. This argument is wrong for several reasons, and represents an improper application of legal precedent combined with transposed facts.

First, Plaintiff relies on the Fourth Circuit's decision in *Hayes* support his argument, but *Hayes* did not invalidate the arbitration agreement based upon a choice of law clause that "waived" state law claims. Rather, the language from *Hayes* quoted by Plaintiff discusses waivers of *federal* statutory rights, not state statutory rights. Plaintiff's Response, at 11 (quoting *Hayes*, 811 F.3d at 675). An alleged "waiver" of state statutory rights was not addressed by the Court, and was not the basis for its decision. Further, as noted above, *Hayes* involved an agreement that expressly provided that *no* federal law applied; by contrast, the Agreement at issue here does not preclude the application of federal law, but in fact incorporates all applicable federal laws.

Second, Plaintiff's argument that the Agreement is unconscionable because it does not comply with Illinois usury and consumer protection laws is contrary to well-established law on the enforceability of choice of law clauses. In fact, the Court in *Hayes* acknowledged that "A party to an arbitration agreement may of course waive certain rights as part of that agreement. . . . Moreover, parties are free within bounds to use a choice of law clause in an arbitration agreement to select which local law will govern the arbitration. These provisions often bring a welcome measure of predictability and thus efficiency to the dispute resolution process." *Hayes*, 811 F.3d at 675 (citations omitted).

Plaintiff's arguments have also been considered and rejected by a judge of this Court in *Mori v. E. Side Lenders, LLC*, No. 11 C 01324, 2015 WL 13654184 (N.D. Ill. Mar. 24, 2015) (Blakely, J.) In *Mori*, plaintiff had taken out a "payday" loan from a Delaware lender pursuant to

a loan agreement that contained a choice of law clause that applied Delaware law, which allowed higher interest rates than Illinois. *Id*. at *6. The plaintiff claimed that the choice of law clause was unlawful as against Illinois law and public policy because the lender was not licensed in Illinois and the loan violated the Illinois Interest Act and Illinois Payday Loan Reform Act. *Id*. at *4. The plaintiff also claimed (as does Plaintiff in this case) that the protection of Illinois law and policy may not be contractually waived pursuant to the Illinois Consumer Fraud Act. *Id*. at *7. The Court rejected such arguments, holding that the plaintiff, "is putting the cart before the horse. Before waiver may be considered, [plaintiff] must first show that he is entitled to the protections of Illinois law and public policy. He has not. . . . [T]he agreed upon law is Delaware, the arbitral forum is without any independent public policy, and [plaintiff's] Illinois residence alone is insufficient to entitle him to the application of Illinois law."[5] *Id*. The same result applies here.

Further, as noted above, the Supreme Court has mandated that "the choice-of-law question, . . . must be decided in the first instance by the arbitrator." *Sky Reefer*, 515 U.S. at 540-41; *Accord, Kemph v. Reddam*, No. 13 CV 6785, 2015 WL 1510797, at *4 (N.D. Ill. Mar. 27, 2015). In *Kemph*, as here, "Plaintiffs' contentions that the contracts are against public policy and illegal under Illinois' civil and criminal laws against usury challenge the legality of the loan agreements in their entirety. In other words, these arguments exist separate and apart from any

[5] The Court noted that Illinois had no greater interest in the dispute than Delaware, because the lender was a Delaware corporation, was licensed in Delaware and regulated by Delaware law. Here, Illinois has no greater interest in this dispute than does the Tribe, as FSST is a tribally-chartered LLC, and is licensed and regulated under tribal law. In fact, the Tribe has a greater interest here because all profits earned by FSST are utilized by the Tribe for its governmental operations, expenditures, and social welfare programs. Document #: 18-1, Page ID #:90, at ¶ 15. The Court in *Mori* also noted that "nothing that happened here was a surprise to [plaintiff], as he was previously a plaintiff in a payday loan case . . .." The same applies here, as Plaintiff Harris has been the plaintiff in other suits against online lenders. See, e.g., *Harris v Credit Cube*, Case No. 1:23-cv-01153 (N.D. Ill.); *Harris v. Eagle Valley Ventures*, Case No. 1:23-cv-01114 (N.D. Ill.).

challenges to the arbitration agreement. Their arguments that the arbitration agreements are procedurally and substantively unconscionable fair no better. Plaintiffs' challenges to the choice-of-law and choice-of-forum provisions seek rejection of "the arbitration clause in its entirety[.]" *Id*., at 4. The Court in *Kemph* held that such challenges – identical to the challenges brought by Plaintiff here – were to be decided by the arbitrator. Plaintiff's claims must meet the same fate. [6]

2. Plaintiff's Substantive Unconscionability Claims Based on Tribal Court Review are Based on Misrepresentations of Fact Intertwined with Misapplication of Law.

Plaintiff claims that the Agreement's provision regarding tribal court "review" of the award are based on outright misrepresentations, the first being that the Agreement is between "non-Indians." The parties to the Agreement are FSST and Plaintiff. FSST is a tribally-chartered corporation that is wholly owned and controlled by the Tribe, and Christensen and Dernier are employees of FSST. Document #: 18-1, pages 2-3 of 6, Page ID #: 87-88; Document #: 18-4, PageID #: 155-160. Plaintiff has provided absolutely no evidence that FSST is not a tribal entity. By contrast, the cases Plaintiffs relies on, the so-called "rent-a-tribe" cases, all involved claims against non-tribally-owned lending institutions and principals of such non-tribal entities – the so-called "beneficial owners" that Plaintiff refers to in describing "rent-a-tribe" schemes. *See, e.g*., *Dillon*, *supra*; *Hayes*, *supra*; *Hengle*, *supra*; *Martorello*, *supra*; *Gingras*, *supra*. Plaintiff has neither identified any so-called "beneficial owner" of FSST or its lending business in this case, nor has Plaintiff sued any "beneficial owner" as did plaintiffs in the above cases upon which Plaintiff relies. The reason? Because none exists.

[6] Plaintiff attempts to avoid *Kemph* by claiming that his arguments here, which are identical to the arguments made in *Kemph*, constitute a challenge to the so-called delegation clause in the Arbitration Agreement. This argument fails, as the challenged terms are unrelated to the delegation clause.

Plaintiff also misrepresents that the conduct at issue occurs "off reservation." Plaintiff's Response, at 13, Document #: 53, PageID #: 685. To the contrary, FSST is located on the Tribe's reservation, Document #: 18-1, pages 2 of 6, Page ID #: 87, [redacted]

Plaintiff further misrepresents that the tribal court has "exclusive judicial review of an arbitration award." Plaintiff's Response, at 14, Document #: 53, PageID #: 686. As set forth in detail above (and in contrast to the cases upon which Plaintiff relies), the Agreement applies the FAA, which grants the exclusive authority to vacate, modify or correct an arbitration award to the United States District Court in and for the district wherein the award was made.

Plaintiff's claim that the Agreement is enforceable, "because it requires the application of the law of an Indian tribe that has no substantive jurisdiction over the matter" also relies on his unfounded claim that the Agreement is between, "non-Indians off the reservation." Plaintiff's Response, at 14, Document #: 53, PageID #: 686. As noted above and supported by the record, the Agreement is between Plaintiff and FSST, a wholly-owned and controlled entity of the Tribe. It is not an agreement "between non-Indians." Furthermore, it is well-established that Indian tribes, "may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts,

leases or other arrangements." *Montana v. U.S.*, 450 U.S. 544, 565 (1981). Accordingly, Plaintiff's claims that the Agreement is substantively unconscionable are based upon misrepresentations of fact intertwined with misapplications of law, and must be rejected.

3. Plaintiff's Claim that the Agreement is Procedurally Unconscionable is also Based on Misrepresentations of Fact

As with Plaintiff's arguments regarding substantive unconscionability, Plaintiff's argument that the Arbitration Agreement is procedurally unconscionable are based upon outright misrepresentations, namely that, "[t]he lending operation is run exclusively by non-tribal persons off the reservation," and that, "[w]e are dealing with entirely off reservation conduct." Plaintiff's Response, at 16, Document #: 53, PageID #: 688. Plaintiff also falsely states, "[t]he agreement is replete with false representations which arguably raise to the level of fraud" without citing to a single provision of the agreement to support his baseless argument. *Id.*

Plaintiff's other claims are irrelevant to the pending Motion to Compel Arbitration. Plaintiff's claims that, "the underlying arbitration clause is not registered with the AAA[;]" that Defendants have never communicated with any arbitral organization[;]" and "Defendants have never been a party to a consumer arbitration" have no bearing on the issues at hand, and prove nothing. Similarly, Plaintiff's claim 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 the Flandreau Santee Sioux Tribe" and that "the Tribe does not have an arbitration law," are irrelevant. The Agreement at issue here unquestionably applies the FAA; and therefore, the arbitration law of the Tribe is not an issue.

V. CONCLUSION

As set forth above, Plaintiff has resorted to obscuring the evidence produced in discovery in a desperate attempt to grossly mischaracterize FSST's business as a "rent-a-tribe" scheme –

when the evidence clearly proves that the Tribe is the sole owner and operator of FSST. Unlike the cases upon which Plaintiff relies, there is no non-Indian "beneficial owner" involved.

Plaintiff's claim that the parties' Agreement contains a prospective waiver of federal statutory rights, and that the arbitrator's award is reviewable only in tribal court, is belied by the Agreement itself. The Agreement applies federal law, and applies the FAA, which grants federal district courts the sole authority to confirm, vacate or modify arbitration awards.

Plaintiff's claims of unconscionability based upon the Agreement's choice of law provision rely on false statements of fact and, under applicable law, must be decided by the arbitrator. For these reasons and the other reasons set forth herein and in the Tribal Defendants' Motion and supporting documents, the Tribal Defendants respectfully request that the Court grant Tribal Defendants' Motion to Compel Arbitration.

Dated: May 17, 2023

Respectfully submitted,

FSST MANAGEMENT SERVICES, LLC
d/b/a 605 LENDING; STEVE CHRISTENSEN;
and DUSTIN DERNIER

By: /s/ Conly J. Schulte

Conly J. Schulte

Conly J. Schulte (*Pro Hac Vice*)
Peebles Kidder Bergin & Robinson LLP
945 Front Street
Louisville, Colorado 80027
Phone: (402) 541-4590
Fax: (916) 441-2067
Email: cschulte@ndnlaw.com
Lead Counsel for Defendants,
FSST MANAGEMENT SERVICES, LLC
d/b/a 605 LENDING; STEVE CHRISTENSEN;
and DUSTIN DERNIER

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of May, 2023, I electronically filed the foregoing REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION BY DEFENDANTS FSST MANAGEMENT SERVICES, LLC, STEVE CHRISTENSEN AND DUSTIN DERNIER with the Clerk of the Court using the CM/ECF System, and thereby served upon the following attorneys of record:

Daniel A. Edelman
Matthew J. Goldstein
Tara Leigh Goodwin
Counsel of Record for Plaintiff
Edelman, Combs, Latturner & Goodwin LLC
20 South Clark Street
Suite 1500
Chicago, IL 60603
courtecl@edcombs.com
mgoldstein@edcombs.com
tgoodwin@edcombs.com

By: /s/ Conly J. Schulte