No. 24-2056

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSHUA HARRIS and DONITA OLDS, on behalf of plaintiffs and the class members described herein,

Plaintiffs-Appellees,

v.

W6LS, INC., d/b/a WithU and WithU Loans, and CALIBER FINANCIAL SERVICES, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:23-cv-16429.
The Honorable Lindsay C. Jenkins, Judge Presiding.

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES JOSHUA HARRIS AND DONITA OLDS

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The Court has asked the parties to file briefs addressing "whether the non-existence of the Otoe-Missouria Tribe's Tribal Contract Code, and lack of applicable federal common law . . . at the time of Plaintiff's loan agreements impacts the formation or enforceability of the delegation clause at issue."

For the reasons stated herein, the non-existence of the Tribal Contract Code and lack of applicable federal common law prevents the existence of a legally binding agreement to arbitrate any issue.

I. THE EXISTENCE AND VALIDITY OF AN ARBITRATION AGREEMENT IS A QUESTION OF STATE LAW.

Ordinarily, the existence of an arbitration agreement – of which a delegation clause is a type – is a question of state law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The Federal Arbitration Act merely prohibits state laws from discriminating against agreements to arbitrate. *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022); *Arthur Andersen L.L.P. v. Carlisle*, 556 U.S. 624, 631 (2009). As the Court points out in its order of December 12, 2025, there is no federal common law of contracts.

II. SINCE DEFENDANTS CONTRACT REJECTS APPLICATION OF ANY STATE LAW, THERE IS NO BODY OF LAW THAT AUTHORIZES THEIR ARBITRATION CLAUSE

Here, Defendants' contracts expressly reject application of state law. Defendants' loan agreements (Doc. 7-1 and 7-2) each provide that they are governed by Tribal Law and applicable federal law, but are not subject to the law of any state. (Doc. 7-1, page 3, PageID #145) "THE LOAN AND THIS

AGREEMENT ARE NOT GOVERNED BY THE LAW OF YOUR STATE OF RESIDENCE OR ANY OTHER STATE." (Doc. 7-1, page 5, PageID # 147) The law applicable in arbitration is "Applicable Law, as that term is defined in your Loan Agreement," i.e., Tribal law and federal law, but not the law of any state. (Doc. 7-1, page 18, PageID 159) "The arbitrator is bound by the terms of this Arbitration Agreement. He or she must apply Applicable Law, the terms of the Loan Agreement and this Arbitration Agreement."

However, the Tribal Contract Code did not exist at the time of contracting. The non-existence of the specified law prevents the formation of an agreement governed by it. *Hengle v. Treppa,* 19 F.4th 324, 339 (4th Cir. 2021); *MacDonald v. CashCall, Inc.*, 16cv2781, 2017 U.S.Dist. LEXIS 64761, *9, 2017 WL 1536427 (D.N.J. Apr. 28, 2017), *aff'd,* 883 F.3d 220 (3d Cir. 2018) ("[I]f the question of the enforceability of the arbitration clause were sent to an arbitrator, he or she would be categorically prohibited from applying any federal or state law to arrive at an answer."); *Smith v. Western Sky Fin., LLC*, 168 F. Supp. 3d 778, 786 (E.D. Pa. 2016) ("In practical terms, 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") (emphasis in original); *Ryan v. Delbert Servs. Corp.*, 5:15cv05044, 2016 U.S.Dist. LEXIS 121246, *13- 14 (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.").

III. THE NONEXISTENCE OF THE SPECIFIED LAW PREVENTS FORMATION OF AN AGREEMENT TO ARBITRATE UNDER THAT LAW

The issue is governed by Illinois law because a federal court must apply the law of the state in which it sits, including its choice of law rules. *Int'l Mktg., Ltd. v. Archer-Daniels-Midland Co.,* 192 F.3d 724, 729 (7th Cir. 1999) (diversity); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 681 (7th Cir. 1986) (when state law issues are presented in a federal question case under supplemental jurisdiction).

Under Illinois law, a "meeting of the minds" on all material terms is essential to formation of an agreement. *Higbee v. Sentry Ins. Co.,* 253 F.3d 994, 997 (7th Cir. 2001); *Abbott Lab. v. Alpha Therapeutic Corp.,*164 F.3d 385, 387 (7th Cir. 1999). This test ordinarily looks to what a reasonable person in the position of each party would understand the words of the other party to mean. *Id.* In addition, an "offer must be so definite as to its material terms or require such definite terms in the acceptance that the promises and performances to be rendered by each party are reasonably certain." *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 29, 578 N.E.2d 981, 983 (1991). These principles apply to agreements to arbitrate. *Gaines v. Ciox Health, LLC,* 2024 IL App (5th) 230565, ¶28, 264 N.E.3d 1027, 1038.

To be enforceable, a contract must show a manifestation of agreement between the parties and be definite and certain in its terms. *Academy Chicago*

Publishers v. Cheever, supra, 144 Ill. 2d at 30, 578 N.E.2d at 984; accord, *Paper Source LLC v. Sugar Beets, Inc.,* 2025 IL App (1st) 231878, ¶21, 263 N.E.3d 46, 54. Where the material terms and conditions are not ascertainable, there is no enforceable contract. *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d at 29, 578 N.E.2d at 983. *See Vassell v. Presence Saint Francis Hospital*, 2018 IL App (1st) 163102, ¶51, 106 N.E.3d 398 (stating that a "legally binding contract requires terms that are reasonably definite and certain").

Cases involving errors as to a material term are instructive. Illinois courts hold that the existence of an error as to the price or subject matter of a proposed contract precludes the requisite "meeting of the minds." *Burkhart v. Wolf Motors of Naperville, Inc.*, 2016 IL App (2d) 151053, ¶18, 61 N.E.3d 1155, 1160; *O'Keefe v. Lee Calan Imports, Inc.*, 128 Ill. App. 2d 410, 413, 262 N.E.2d 758 (1st Dist. 1970); *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 872, 885 N.E.2d 350, 357 (1st Dist. 2008).

In *Burkhart, supra*, a $36,991 vehicle was advertised on the Internet for $19,991 due to an error. Plaintiff "accepted" the $19,991 "offer." The vehicle was in fact worth about $36,991. The court held that even if an advertisement constituted an "offer," "there was never a meeting of the minds as to the price the plaintiff was willing to pay for the car and the price the defendant was willing to accept," and "no contract between the parties." (2016 IL App (2d) 151053, ¶18, 61 N.E.3d at 1160)

A similar situation was presented in *O'Keefe v. Lee Calan Imports, Inc., supra,* where a vehicle was erroneously advertised for $1,795 instead of $1,095. The court concluded that "there was no meeting of the minds nor the required mutual assent by the two parties to a precise proposition." (128 Ill.App.2d at 413, 262 N.E.2d at 760)

In *Wheeler-Dealer, Ltd. v. Christ*, *supra*, the defendant attended a real estate auction and bid on what he believed to be all of the land and buildings at 12531 S. Vincennes, Blue Island, Illinois. The plaintiff thought he was selling property a 50 x 165 foot portion of the property at 12531 S. Vincennes, not all of it. The plaintiff's attorney had inserted an incorrect legal description. The court affirmed a judgment for defendant on the ground that "there was no meeting of the minds when the parties signed the real estate contract . . . ." (379 Ill.App.3d at 872, 885 N.E.2d at 357)

Similarly, a lack of definiteness as to the subject of a proposed contract precludes a finding that a contract has been formed. For example, in *Academy Chicago Publishers v. Cheever, supra*, 144 Ill. 2d at 29-31, 578 N.E.2d at 983-84 (1991), an agreement for the publication of a collection of short stories failed to state the minimum or maximum number of stories or pages or who will decide which stories will be included in the collection. The Illinois Supreme Court held that the agreement was not an enforceable contract. "A contract is sufficiently definite and certain to be enforceable if the court is enabled from

the terms and provisions thereof, under proper rules of construction and applicable principles of equity, to ascertain what the parties have agreed to do." (144 Ill.2d at 29, 578 N.E.2d at 983)

The applicable law is a material term in this case, since W6LS specifically addressed it. However, it addressed it by specifying law which did not exist. The result is that the "delegation clause" is not an enforceable agreement under basic contract law principles.

IV. EVEN IF THE TRIBAL CONTRACT CODE EXISTED, IT WAS NOT ENFORCEABLE

Even if the Tribal Contract Code had existed, it was not enforceable. Under *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782 (7th Cir. 2014), an Indian tribe lacked "civil authority" to prescribe rules of contract law governing transactions with non-members of the tribe carried out over the Internet. *Accord, Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 115 (2d Cir. 2014); *Gingras v. Think Finance, Inc.*, 922 F.3d at 121, 127 (2d Cir. 2019) ("The Tribal Defendants here engaged in conduct outside of Indian lands when they extended loans to the Plaintiffs in Vermont" via the Internet . . . "Tribal law is generally unavailable outside of the reservation"); *Smith v. Western Sky Financial, LLC,* 168 F.Supp.3d 778, 784 (E.D.Pa. 2016) (recital that borrower agrees to be treated "as if he is physically present within the boundaries of the Cheyenne River Indian Reservation" does not validate Internet contract); and *Harris v. FSST Mgmt. Servs., LLC*, 686 F.Supp.3d 734,

744 (N.D.Ill. 2023) ("the Seventh Circuit in *Jackson v. Payday* held that disputes regarding a tribal lending arrangement did not arise from actions on reservation land and thus the tribe lacked subject matter jurisdiction over plaintiff borrowers. 764 F.3d at 785-86. Here, Defendants have not established a colorable claim of tribal jurisdiction.").

V. CONCLUSION

The delegation clause is not enforceable.

Respectfully submitted,

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Daniel A. Edelman certifies that on January 12, 2026 this document was filed via ECF, causing a copy to be served on all counsel of record.

/s/ Daniel A. Edelman
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