No. _____

IN THE
Supreme Court of the United States

SHERRY TREPPA, CHAIRPERSON OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, IN HER OFFICIAL CAPACITY, ET AL.,
Applicants,

v.

GEORGE HENGLE, ET AL.,
Respondents.

APPLICATION FOR STAY PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

RAKESH KILARU
KOSTA STOJILKOVIC
WILKINSON STEKLOFF LLP
2001 M Street NW, 10th Flr,
Washington, DC 20036
(202) 847-4046

Counsel for Applicants Sherry Treppa, Tracey Treppa, Kathleen Treppa, Carol Munoz, Jennifer Burnett, Aimee Jackson-Penn, and Veronica Krohn

ADAM G. UNIKOWSKY
Counsel of Record
MATTHEW E. PRICE
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000

Counsel for Applicants Scott Asner and Joshua Landy

PARTIES TO THE PROCEEDING

Applicants are Scott Asner; Joshua Landy; Sherry Treppa, Chairperson of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; Tracey Treppa, Vice-Chairperson of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; Kathleen Treppa, Treasurer of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; Carol Munoz, Secretary of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; Jennifer Burnett, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; Aimee Jackson-Penn, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; and Veronica Krohn, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity.

Respondents are George Hengle, Sherry Blackburn, Willie Rose, Elwood Bumbray, Tiffani Myers, Steven Pike, Sue Collins, and Lawrence Mwethuku, on behalf of themselves and all individuals similarly situated.

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TO THE HONORABLE JOHN ROBERTS, CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

Pursuant to 28 U.S.C. § 1651 and Supreme Court Rule 23, Applicants respectfully seek an order staying proceedings in *Hengle v. Asner*, No. 3:19-cv-00250-DJN (E.D. Va.), pending disposition of Applicants' petition for certiorari.

INTRODUCTION

This case presents an ideal vehicle to resolve a recognized and important circuit conflict regarding the enforceability of arbitration agreements.

Under the Federal Arbitration Act, "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010). "An agreement to arbitrate a gateway issue," commonly known as a delegation clause, "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Id.* at 70. Like any other type of arbitration agreement, delegation clauses must be enforced under the FAA. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract.").

This Court has carved out one narrow exception to that principle. If a litigant "challenge[s] the delegation provision specifically" as invalid, the court may entertain that challenge. *Rent-A-Center*, 561 U.S. at 72. But if an arbitration agreement contains

a delegation clause, then any other type of arbitrability challenge—including a challenge "to another provision of the contract, or to the contract as a whole"—is for the arbitrator. *Id.* at 70.

The circuits are divided on what it means for a litigant to "challenge the delegation provision specifically" within the meaning of *Rent-A-Center*. *Id.* at 72. In the opinion below, the Fourth Circuit refused to enforce a delegation clause based on its own interpretation of a separate choice-of-law provision that applies to the arbitration agreement as a whole. The Fourth Circuit held that the choice-of-law provision nullified federal law (a so-called "prospective waiver"), and thus invalidated both the delegation provision as well as the arbitration agreement. The Second and Third Circuits have followed the Fourth Circuit's approach. But the Ninth Circuit recently (and explicitly) rejected the Fourth Circuit's approach, holding that a court can invalidate a delegation clause only if it identifies a flaw specific to the delegation clause. Under the Ninth Circuit's approach, a court may not invalidate a delegation clause based on its interpretation of a choice-of-law provision that applies to the entire arbitration agreement.

As it has done in similar cases, the Court should grant a stay because it is likely to grant certiorari to resolve this circuit conflict and reverse the Fourth Circuit's opinion. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19A766; *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17A859.

This case is an ideal vehicle to resolve this important conflict. The legal issue was squarely presented and resolved. The conflict is recurring: It has prompted and will

prompt forum shopping, including by the small group of plaintiffs' attorneys that have brought this and many other suits in district courts in the Fourth Circuit, with severe adverse consequences for the Indian Nations that have become their targets. And the stakes of the Fourth Circuit's approach are high—the court transformed the parties' agreement for individual arbitration under one source of law into a pathway to class action litigation under another.

The Court is also likely to reverse the Fourth Circuit. *Henry Schein* and *Rent-A-Center* establish that delegation clauses must be enforced, unless the opponent of arbitration can show that the delegation clause *specifically* is defective. Although the Fourth Circuit nominally applied this principle, it sapped it of any real force by permitting a disputed interpretation of a general choice-of-law provision to override the delegation clause. The Fourth Circuit then went on to invalidate the arbitration agreement as a whole for the *identical* reason—confirming that, as a practical matter, Respondents were not specifically challenging the delegation clause. If allowed to stand, the Fourth Circuit's decision will provide a roadmap for lower courts to override even the clearest delegation clauses based on their own views of the merits of arbitrability, in violation of this Court's precedents.

Applicants will be irreparably harmed absent a stay. In that circumstance, Applicants would be forced to engage in costly litigation procedures—including class action discovery—that arbitration streamlines to the benefit of all parties. This Court has granted stays for this precise reason before and it should do the same here.

STATEMENT OF THE CASE

A. The Federal Arbitration Act.

The Federal Arbitration Act ("FAA") provides: "A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Disputes often arise over whether a particular case should be decided by the arbitrator or by the court. Sometimes, the parties dispute whether the arbitration agreement's scope is broad enough to cover the case at issue. Other times, the parties dispute whether the arbitration agreement is valid. This Court has held that "the question of who decides arbitrability is itself a question of contract." *Henry Schein, Inc.*, 139 S. Ct. at 527. When an arbitration agreement clearly and unmistakably states that the arbitrator decides arbitrability, that agreement must be honored. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–45 (1995).

In two recent decisions, this Court has resisted efforts to undermine delegation clauses and held that they must be enforced. The first decision, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), made clear that a court cannot invalidate a delegation clause based on a general challenge to the arbitration agreement. The plaintiff (Jackson) sought to litigate his claims, arguing that the arbitration agreement, as a whole, was unconscionable. The Court rejected that contention. The Court began with the principle that "a party's challenge to another provision of the contract, or to the contract as a whole,

does not prevent a court from enforcing a specific agreement to arbitrate." *Id.* at 70. If Jackson had "challenged the delegation provision specifically," the court could entertain that challenge. *Id.* But Jackson had not done that—instead, Jackson had challenged the arbitration agreement as a whole. *Id.* at 72–73. The parties had agreed to have the arbitrator resolve that challenge, and Jackson had provided no basis for invalidating that agreement.

The Court issued this ruling in recognition of the fact that invalidating a delegation provision would often be more difficult than invalidating an arbitration agreement as a whole. For instance, Jackson argued that the arbitration agreement was unconscionable because it limited his ability to take discovery. But to challenge the *delegation provision* as unconscionable, "Jackson would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim that the Agreement is unenforceable to be unconscionable." *Id.* at 74. "That would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of his factbound employment-discrimination claim unconscionable." *Id.*

More recently, the Court held that federal courts cannot short-circuit arbitration based on their own views of the merits of arbitrability. In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019), after granting the applicant's request for a stay pending disposition of its petition for certiorari, this Court unanimously reiterated the principle that delegation clauses are enforceable according to their terms. The Court repudiated a line of lower-court decisions holding that courts could decline to enforce delegation clauses if the courts viewed the argument that a particular dispute must be

arbitrated to be "wholly groundless." *Id.* at 529. The Court explained: "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." *Id.* "In those circumstances, a court possesses no power to decide the arbitrability issue." *Id.* As the Court stressed, an arbitrator "might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious." *Id.* at 531.

Taken together, *Rent-A-Center* and *Henry Schein* hold that delegation clauses must be enforced, regardless of the court's views on how the arbitrability dispute should come out. The Court has carved out only one narrow exception to that principle: a court can entertain a challenge that is specifically directed to the delegation clause.

B. The Tribe's E-Commerce Business.

The Habematolel Pomo of Upper Lake ("the Tribe") is a federally recognized Indian tribe. The Tribe's reservation is located in Clear Lake Basin, a rural area in Northern California. The Tribe's Executive Council enacts and administers the Tribe's laws. Applicants Sherry Treppa, Tracey Treppa, Kathleen Treppa, Carol Munoz, Jennifer Burnett, Aimee Jackson-Penn, and Veronica Krohn are the members of the Tribe's Executive Council.

Like other Indian tribes, and pursuant to federal policy, the Tribe strives for a self-sustaining economy so that it need not rely on the federal government. But the most common tribal economic development business—gaming—proved unsuccessful for the Tribe given its remote location and limited landbase. The Tribe, like many others, thus turned to e-commerce, specifically the online lending business.

As a sovereign government, the Tribe's Executive Council passed legislation (the Tribal Consumer Financial Services Regulatory Ordinance) to govern its businesses and provide comprehensive protections to consumers who choose to access services from the Tribe. Among other protections, the Ordinance incorporates the substantive standards of numerous federal consumer protection statutes, including the Dodd-Frank Act, the Truth in Lending Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts. Like some other sovereigns, including Utah, the Tribe elected not to include a usury limit in its Ordinance. As a result, non-deceptive unsecured loan agreements at high interest rates—priced to reflect the credit risk presented by the customers—are generally legal under tribal law.

Through its Executive Council, the Tribe then established multiple entities (the "tribal lenders") that allow customers to enter tribal jurisdiction through the internet to secure short-term unsecured loans. It is undisputed that these businesses are arms of the Tribe and entitled to share in its sovereign immunity.

Applicants Scott Asner and Joshua Landy are non-Tribal members who were associated with or indirectly owned, in part, certain companies that initially provided support services to the Tribe or purchased participation interests in early loans issued by the Tribal lending portfolios.

C. The Arbitration Agreement.

Borrowers who contract with the tribal lenders must electronically sign a "Consumer Loan and Arbitration Agreement." Tab B at 8. Under the agreement, the

arbitration is to be administered by either the AAA or JAMS—the nation's two most prominent arbitration organizations. Tab D at 6–7. The agreement requires arbitration not only of claims against the tribal lenders, but also against "affiliated entities" and other third parties. Tab D at 6. The agreement provides that any disputes will be subject to individualized arbitration, without class action proceedings. *Id.*

Because this application concerns the interpretation and enforceability of the arbitration agreement, the applicable version of that agreement is reproduced in its entirety in the appendix. *See* Tab D. For purposes of this application, however, two provisions are especially pertinent.

First, the agreement provides that *all* disputes—including disputes over the enforceability of the arbitration agreement and disputes over federal and state law—will be heard by the arbitrator. In particular, the agreement states: "We will follow and you agree to follow Our policy of arbitrating all disputes, *including the scope and validity of this Arbitration Provision*." Tab D at 6 (emphasis added). The arbitration agreement reiterates this point in its broad definition of "disputes":

> For purposes of this Agreement, the words "dispute" and "disputes" are given the broadest possible meaning and include, without limitation, (a) all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision, *the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision*; (b) *all tribal, federal or state law claims*, disputes or controversies, arising from or relating directly or indirectly to this Agreement, … (c) all counterclaims, cross-claims and third-party claims; (d) all common law claims, based upon contract, tort, fraud, or other intentional torts; (e) *all claims based upon a violation of any tribal, state or federal constitution, statute or regulation.*

Id. (emphasis added).

Second, the arbitration agreement includes a choice-of-law provision providing that tribal law will apply. That choice-of-law provision applies regardless of whether the arbitration occurs on tribal land. Specifically, the agreement provides in relevant part:

> The parties to such dispute will be governed by the laws of the Habematolel Pomo of Upper Lake and such rules and procedures used by the applicable arbitration organization applicable to consumer disputes, to the extent those rules and procedures do not contradict the express terms of this Arbitration Provision or the law of the Habematolel Pomo of Upper Lake, including the limitations on the arbitrator below.
>
> …
>
> You have the right to request that arbitration take place within thirty (30) miles of Your residence or some other mutually agreed upon location, provided, however, that such election to have binding arbitration occur somewhere other than on Tribal land shall in no way be construed as a waiver of sovereign immunity or allow for the application of any other law other than the laws of the Habematolel Pomo of Upper Lake.
>
> …
>
> The arbitrator shall apply applicable substantive Tribal law consistent with the Federal Arbitration Act (FAA)…
>
> …
> This Arbitration Provision is made pursuant to a transaction involving both interstate commerce and Indian commerce under the United States Constitution and other federal and tribal laws. Thus, any arbitration shall be governed by the FAA and subject to the laws of the Habematolel Pomo of Upper Lake. If a final non-appealable judgment of a court having jurisdiction over this transaction and the parties finds, for any reason, that the FAA does not apply to this transaction, then Our agreement to arbitrate shall be governed by the laws of the Habematolel Pomo of Upper Lake Tribe.

Tab D at 7. The loan agreement as a whole also has a choice-of-law provision providing that the agreement "is made and accepted in the sovereign territory of the Habematolel Pomo of Upper Lake, and shall be governed by applicable tribal law, including but not

limited to the Habematolel Tribal Consumer Financial Services Regulatory Ordinance." Tab D at 8.

D. Proceedings Below.

Respondents George Hengle, Sherry Blackburn, Willie Rose, Elwood Bumbray, Tiffani Myers, Steven Pike, Sue Collins, and Lawrence Mwethuku are individuals who borrowed money from the tribal lenders pursuant to the Consumer Loan and Arbitration Agreement quoted above. Respondents filed a putative class action against Applicants, asserting violations of RICO as well as Virginia usury and consumer finance laws. Respondents sought prospective relief against the tribal council Applicants and both prospective and monetary relief from the non-tribal council Applicants. Tab C at 8–9.

All defendants moved to compel arbitration. The district court denied the motions. The court reasoned that the delegation clause was unenforceable because the choice-of-law provision in the arbitration agreement purportedly nullified federal law and barred the arbitrator from considering federal or state law defenses to arbitrability. Tab C at 30–31. Hence, the district court held it had the authority to decide whether the arbitration agreement was enforceable. Tab C at 33. The court then held that the agreement was not enforceable based on the same reasoning—that the same choice-of-law clause purportedly barred borrowers from asserting federal statutory claims. Tab C at 37–38.

The tribal council defendants also moved to dismiss, arguing that tribal sovereign immunity bars Appellees' efforts to sue the members of a Tribal government in their official capacities for alleged violations of state law. The district court denied that motion,

holding that state-law claims for injunctive relief could proceed under *Ex Parte Young*, 209 U.S. 123 (1908). All defendants also sought to dismiss the complaints on the merits. The district court largely denied those motions, except that it dismissed the RICO claims for injunctive relief against the tribal council defendants. Tab C at 74-85, 107. Applicants appealed the denial of the motion to compel arbitration and the court's ruling on sovereign immunity. Interlocutory appeal was granted with respect to certain other issues.

The Fourth Circuit affirmed the district court on all issues. As relevant here, like the district court, the Fourth Circuit held that both the delegation clause and the arbitration agreement as a whole were unenforceable under the "so-called 'prospective waiver' doctrine, under which an agreement that prospectively waives a party's right to pursue statutory remedies is unenforceable as a violation of public policy." Tab B at 13.

The Fourth Circuit first rejected Applicants' contention that under the delegation clause, the arbitrator—not the court—should decide whether the arbitration agreement was invalid under the prospective waiver doctrine. In the Fourth Circuit's view, Respondents "specifically challenged the validity of the delegation clause" by saying they were challenging it, thus opening the door to judicial review of the delegation clause's validity. Tab B at 16.

Next, the court held that the delegation clause was invalid under the prospective waiver doctrine. The court concluded that the outcome of this case was dictated by four prior cases in which the Fourth Circuit had invalidated arbitration agreements involving tribal lending. Tab B at 21; *see Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016); *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017); *Gibbs v. Haynes Invs.*,

LLC, 967 F.3d 332 (4th Cir. 2020); *Gibbs v. Sequoia Capital Operations, LLC*, 966 F.3d 286 (4th Cir. 2020). In all of those cases, the court "assessed arbitration provisions requiring application of tribal law to the practical exclusion of other law and, in each case, has held the arbitration provision (including the delegation clause) invalid as a prospective waiver of federal rights." Tab B at 16.

The court saw "no material distinction between the case at hand" and those four prior cases. Tab B at 21. "As in those cases, the choice-of-law clauses of this arbitration provision, which mandate exclusive application of tribal law during any arbitration, operate as prospective waivers." *Id.* From this observation about the choice-of-law clause governing the arbitration agreement as a whole, the court concluded: "As a result, the delegation clause is unenforceable as a violation of public policy." *Id.*

The Fourth Circuit noted that the Second and Third Circuits had "reached the same conclusion." Tab B at 16 n.2. The court acknowledged that the Ninth Circuit had reached a conflicting conclusion when it "upheld a delegation clause in a tribal lending agreement" identical to one the Fourth Circuit had previously held to be invalid. Tab B at 16–17 n.2.

Having invalidated the delegation clause, the Fourth Circuit then turned to Respondents' challenge to the arbitration clause as a whole. The court once again concluded that "the choice-of-law clauses previously discussed operate as a prospective waiver of the borrowers' federal statutory rights and remedies." Tab B at 28. "Therefore," in the Fourth Circuit's view, "the entire arbitration provision is unenforceable." *Id.*

The court then invalidated a separate choice of law provision in the loan agreement electing tribal law. The court held that the provision was contrary to Virginia's public policy, and that Virginia law, not tribal law, applied to the dispute. Tab B at 48–49. That meant that Respondents could allege that Applicants violated Virginia's usury statute, including for purposes of their RICO claim.

The court also rejected the tribal leaders' argument that sovereign immunity barred the suit, and rejected Respondents' claim for injunctive relief under RICO. Tab B at 56–57.

Applicants filed a motion to stay the Fourth Circuit's mandate pending disposition of this petition for certiorari. The Fourth Circuit denied the motion. Tab A.

ARGUMENT

A stay is warranted when there is "(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (internal quotation marks omitted) (alteration in original).

These criteria are met in this case. There is a reasonable probability that the Court will grant certiorari to resolve the acknowledged circuit split over whether a court may refuse to enforce a delegation clause based on its own interpretation of a choice-of-law provision that applies to the arbitration agreement as a whole.[1] There is a fair

[1] Applicants have not yet determined whether to seek certiorari on other issues resolved by the Fourth Circuit, such as a challenge to its ruling that sovereign immunity does not

prospect that the Court will reverse the Fourth Circuit and hold that the delegation clause is enforceable. Finally, Applicants would be irreparably harmed if a stay is denied: they would suffer the very class action discovery burdens that the parties agreed to avoid.

I. THIS COURT IS LIKELY TO GRANT CERTIORARI TO REVIEW WHETHER A FEDERAL COURT MAY REFUSE TO ENFORCE A DELEGATION CLAUSE BASED ON ITS OWN INTERPRETATION OF A SEPARATE CHOICE-OF-LAW PROVISION.

This case satisfies the first criterion for granting a stay: there is "a reasonable probability that this Court will grant certiorari." *King*, 133 S. Ct. at 2. There is a circuit split on whether a federal court may refuse to enforce a delegation clause based on its own interpretation of a choice-of-law provision that applies to the arbitration agreement as a whole. The circuit split will cause forum-shopping and confusion. The Court is likely to grant certiorari to harmonize federal law nationwide and avoid those outcomes.

A. The Circuits Are Divided.

The Fourth Circuit's decision is consistent with decisions from the Second and Third Circuits, but directly contrary to a recent decision from the Ninth Circuit in a materially identical case.

As explained above, the **Fourth Circuit**'s decision invalidated the parties' delegation clause. The court understood Respondents to have "specifically challenged the validity of the delegation clause" based on their assertion that the choice-of-law provision rendered all of the arbitration agreement, including the delegation clause,

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bar Appellees' efforts to bind tribal government officials, in their official capacity, to the law of a co-equal sovereign.

invalid. Tab B at 16. It then proceeded to invalidate the delegation clause, and then the entire arbitration agreement as a whole, on the basis of the prospective-waiver doctrine. Tab B at 27–28, 32–33.

The court deemed itself bound by four prior Fourth Circuit cases that similarly invalidated tribal lender arbitration agreements containing delegation clauses. Tab B at 21; *see Hayes*, 811 F.3d 666; *Dillon*, 856 F.3d 330; *Haynes Invs., LLC*, 967 F.3d 332; *Sequoia Cap. Operations, LLC*, 966 F.3d 286. The analysis in each of these cases is revealing. The first of those cases—*Hayes*—focused its analysis on the arbitration agreement *as a whole*, rather than analyzing the delegation clause in particular. 811 F.3d at 675. Indeed, the court's entire analysis of the delegation clause consists of the following sentence at the end of a footnote: "We find, however, that Hayes and his co-plaintiffs have challenged the validity of that delegation with sufficient force and specificity to occasion our review." *Id.* at 671 n.1. The second case—*Dillon*—reached the same conclusion without addressing the delegation clause at all. *See* 856 F.3d 330; *see also Brice v. Haynes Invs., LLC*, 13 F.4th 823, 833 n.9 (9th Cir. 2021) (noting that the agreement in *Dillon* contained a delegation clause). Finally, *Haynes* and *Sequoia*—issued after *Henry Schein*—held that so long as plaintiffs *say* they are challenging the delegation clause, that challenge is justiciable—regardless of whether the identical challenge applies to the arbitration agreement as a whole. *See Haynes Invs.*, 967 F.3d at 338 ("Specifically, in their opposition to the motion to compel arbitration, the borrowers argued that the 'delegation clause[s] [are] unenforceable for the same reason as the underlying arbitration agreement—the ... wholesale waiver of the application of federal and state

law.'" (alterations in original)); *Sequoia*, 966 F.3d at 291-92 (similar). Those decisions likewise invalidated both the delegation clause and the arbitration agreement as a whole based on identical reasoning.

The Fourth Circuit's decisions are consistent with decisions from the Second and Third Circuits. In *Gingras v. Think Finance, Inc.*, 922 F.3d 112 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 856 (2020), the **Second Circuit** invalidated an arbitration agreement between a tribal lender and borrowers. The agreement stated that any "dispute" would be resolved by an arbitrator, while defining "[d]ispute" to include "'any issue concerning the validity, enforceability, or scope' of the loan agreement itself or the arbitration provision specifically." *Id.* at 118 (citation omitted). In addition, the agreement "provide[d] that Chippewa Cree tribal law governs the loan agreement and any dispute arising under it." *Id.* As here, the borrowers argued that the arbitration agreement was invalid under the prospective waiver doctrine.

The Second Circuit first held that it had authority to resolve the borrowers' argument, finding that the borrowers had advanced a "specific attack on the delegation provision" which was "sufficient to make the issue of arbitrability one for a federal court." *Id.* at 126. Then, following the Fourth Circuit's decision in *Hayes*, the Second Circuit held that the "arbitration agreements are unenforceable because they are designed to avoid federal and state consumer protection laws." *Id.* at 127. In the court's view, the delegation clause, as part of the arbitration agreement, was also unenforceable. *Id.*

The **Third Circuit** followed the Second Circuit in *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020). As in the Second Circuit, the case involved an

agreement between a tribal lender and a borrower stating that any "dispute" would be resolved by an arbitrator, while defining "[d]ispute" to include "'any issue concerning the validity, enforceability, or scope of this [Loan] Agreement' or arbitration agreement." *Id.* at 235 (quoting loan agreement) (first bracket added). The agreement further provided that it "shall be governed by tribal law." *Id.* at 235 (capitalization omitted).

Like the Second Circuit, the Third Circuit invalidated the arbitration agreement under the prospective-waiver doctrine. First, the court found that the borrowers had specifically challenged the delegation clause, pointing to the borrowers' statements in their district court filings that "any delegation clause here is unenforceable for the same reason the rest of the arbitration contract is unenforceable." *Id.* at 237–38 (quoting Pls.' Opp'n to Mot. to Compel). The court then concluded that "[t]he prospective waiver of statutory rights renders the entire arbitration agreement (delegation clause included) unenforceable." *Id.* at 243.

The **Ninth Circuit** has reached the opposite conclusion from the Second, Third, and Fourth Circuits. In *Brice v. Haynes Investments, LLC*, 13 F.4th 823 (9th Cir. 2021), the Ninth Circuit enforced the delegation provision of a tribal lending agreement that is substantively identical to the one invalidated by the Fourth Circuit in *Gibbs*. The court explicitly acknowledged that "[i]n reaching our decision, we diverge from the decisions reached by several of our sister circuits." *Id.* at 825.

As in every other case to address the same issue, the loan agreement required arbitration of all "disputes," while defining "[d]ispute" to encompass "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to

Arbitrate." *Id.* at 829 (quoting loan agreement). Also as in every other case, the arbitration agreements required application of tribal law. *Id.*

Unlike the other circuits, the Ninth Circuit enforced the delegation clause and concluded that the borrowers' challenge based on the prospective waiver doctrine must be resolved by the arbitrator. The court emphasized that *the delegation clause itself* did not "foreclose the arbitrator from considering enforceability disputes based on federal law." *Id.* at 830. Instead, the arbitrator was entitled to decide any disputes arising under "federal, state, or Tribal Law." *Id.* (quoting loan agreement). The court did not look beyond the delegation clause, to the choice-of-law provisions, because "the term of the arbitration agreement relevant here—the delegation provision—does not itself prevent Borrowers from raising an enforceability challenge based on federal law." *Id.* Hence, the "Borrowers' rights to pursue their federal prospective-waiver argument remains intact at this stage of the proceedings and the delegation provision is not facially a prospective waiver." *Id.*

The *Brice* court acknowledged that it had "reach[ed] a different conclusion than some of our sister circuits." *Id.* at 832. Indeed, the court noted that in the Fourth Circuit's decision in *Gibbs*, "the underlying loan agreements are identical to those in the present case." *Id.* at 833. It proceeded to "address the contrary out-of-circuit decisions and why [it] disagree[d] with them." *Id.* at 832.

The Ninth Circuit began by laying out the basic approach adopted by the other circuits: "Put simply, those decisions go like this: the arbitration agreement includes a delegation provision, but the entire arbitration agreement is unenforceable, thus, the

delegation provision is too." *Id.* at 835. The Ninth Circuit found that "[t]his approach conflicts with *Rent-A-Center*" as well as Ninth Circuit case law. *Id.* "The proper question is not whether the entire arbitration agreement constitutes prospective waiver, but whether the antecedent agreement delegating resolution of that question to the arbitrator constitutes prospective waiver." *Id.* at 836. Ultimately, the Ninth Circuit concluded, the other circuits must "view a party's 'specific challenge' to a delegation clause as a purely formal, procedural requirement." *Id.* "Perhaps in their view a party complies with *Rent-A-Center* if the party claims the delegation clause is unenforceable even if the arguments made go only to enforceability of the arbitration agreement as a whole. That is, so long as a party states the delegation clause is invalid, that is enough." *Id.* The court "disagree[d]" with that analysis, "read[ing] *Rent-A-Center* as requiring a substantive argument that the delegation provision *in and of itself* is unenforceable." *Id.*

The court acknowledged that "Borrowers have a reasonable argument" that "the arbitration agreement is likely unenforceable as a prospective waiver." *Id.* "But, when there is a clear delegation provision, that question is not for us—or anyone else wearing a black robe—to decide." *Id.* "Instead, it is for the arbitrator to decide so long as the delegation provision itself does not eliminate parties' rights to purse their federal remedies." *Id.* at 836–37.

The court finally "note[d] the practical effects of compelling arbitration." *Id.* at 837. "If Borrowers' prospective-waiver argument fails to convince the arbitrator because she concludes the agreement allows Borrowers to assert their federal claims, the obvious result is that Borrowers can bring their federal claims in arbitration and they did not

prospectively waive anything." *Id.* "And if the arbitrator concludes she cannot consider a prospective-waiver challenge to enforceability of the arbitration agreement, Borrowers can return to court and argue the arbitrator exceeded her powers." *Id.* "No matter what, Borrowers will have the opportunity to assert their federal claims or show that the arbitration agreements 'foreclosed' their ability to do so." *Id.* "In such circumstances, compelling arbitration is consistent with congressional policy—strictly enforced by the Supreme Court—of placing arbitration agreements on equal footing with other contracts and 'reversing centuries of judicial hostility to arbitration agreements.'" *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974)).

B. The Court Is Likely to Grant Certiorari to Resolve the Split.

This case warrants this Court's review. The split is undeniable. Four geographic circuits have issued detailed, conflicting decisions on the identical question, and the two most recent opinions reify the division. The Ninth Circuit explicitly analyzed, and disagreed with, published opinions from three other circuits. Indeed, the Ninth Circuit observed that the arbitration agreement at issue was identical to the arbitration agreement in the Fourth Circuit's decision in *Gibbs*, yet it reached the opposite conclusion from *Gibbs*. *Brice*, 13 F.4th at 833. Then, in the decision below, the Fourth Circuit held that its binding *Gibbs* precedent was dispositive. The Fourth Circuit did not attempt to reconcile its decision with *Brice*, instead pointing to the Ninth Circuit's acknowledgment that it had rejected Fourth Circuit precedent. Tab B at 16–17 n.2. It is clear that the circuits are at an impasse, which only this Court can resolve.

This case is an ideal vehicle. The arbitrability issue was fully litigated and squarely decided, and the upshot of the Fourth Circuit's decision was to displace individual arbitration under tribal law in favor of class action litigation under Virginia law. Moreover, the Fourth Circuit ruled in favor of Respondents on two crucial and hotly disputed merits issues on which the arbitrator could go the other way—the questions of whether the tribal leaders have sovereign immunity and whether Virginia usury law should apply. Those rulings highlight the consequential nature of the Fourth Circuit's arbitrability ruling and render this case an ideal vehicle to decide whether that ruling is correct.

Moreover, while no circuit split is desirable, this split will be uniquely pernicious. It will lead to forum-shopping and wasteful litigation over the location of litigation.

Since 2016, there have been eight published appellate decisions, including five from the Fourth Circuit, on the enforceability of virtually identical arbitration agreements involving tribal lenders. The rules of law announced by the Fourth Circuit are not limited to this specific factual context, *see infra* at 24–26, but even in that context, the effects are stark. Several tribes operate online lending businesses, and thousands of consumers have chosen to obtain loans from tribal entities. While the vast majority of the Habematolel Pomo's customers have no complaints, a small group of plaintiffs' attorneys, often using the same small group of plaintiffs, has been waging a concerted litigation campaign against all participants in the industry and other related entities. Often these suits are putative class actions, or seek remedies such as treble damages, punitive damages, and attorney's fees, thus making them financially worthwhile for the

lawyers, potentially devastating for the Tribes, and ripe candidates for *in terrorem* settlements.

With favorable precedents from the Second, Third, and Fourth Circuits in place, future plaintiffs are likely to flock to those circuits. Indeed, a flood of cases have been filed over the last few years within the Fourth Circuit by litigants secure in the knowledge that federal courts will be bound to invalidate their arbitration agreements.[2] In response, a defendant will now have a powerful incentive to move to transfer to a district court in the Ninth Circuit, yielding battles over whether venue is proper or whether a different forum would be more convenient under 28 U.S.C. § 1404. Ordinarily, the parties might not waste party and court resources on litigation over where to litigate. Yet because of the circuit split, venue will be fiercely litigated in every case because the location of the lawsuit will be outcome-determinative.

Even if a defendant succeeds in getting a case transferred to the Ninth Circuit, the procedural wrangling will continue. While a motion to compel arbitration can be filed in any district court with jurisdiction over the underlying controversy, 9 U.S.C. § 4, a motion to confirm or vacate an arbitration award can be filed only in the jurisdiction in

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[2] *See, e.g.*, *Clark v. Duncan*, No. 3:21-CV-00242 (E.D. Va.); *Thompson v. Global Trust Management, LLC*, No. 3:20-CV-00844 (E.D. Va.); *Mann v. Gomez*, No. 3:20-CV-00820 (E.D. Va.); *Joyner v. Rocky Mountain Capital Management LLC*, No 3:20-CV-00167 (E.D. Va.); *Epperson v. Bordeaux*, 3;19-CV-00939 (E.D. Va.); *Blackburn v. McGeschick*, 3:19-CV-00847 (E.D. Va.); *Galloway v. Williams*, 3;19-CV-00470 (E.D. Va.); *Galloway v. Martorello*, No. 3:19-CV-00314 (E.D. Va.); *Turner v. ZestFinance*, No. 3:19-CV-00293 (E.D. Va.) *Gibbs v. Stinson*, 3:18-CV-00676 (E.D. Va.); *Galloway v. Big Picture Loans*, No. 3:18-CV-00406 (E.D. Va.); *Gibbs v. Haynes Investments, LLC*, 3:18-CV-00048 (E.D. Va.); *Gibbs v. Plain Green, LLC*, 3:17-CV-00495 (E.D. Va.); *Williams v. Big Picture Loans, LLC*, No. 3:17-CV-00461 (E.D. Va.); *Solomon v. American Web Loan*, 4:17-CV-145 (E.D. Va.).

which the arbitration occurred. *Id.* §§ 10, 11. So in the motion to compel arbitration, the parties will wrangle over the geographic location of the arbitration. And if a California court compels arbitration that occurs in Virginia, and a Virginia court then hears a motion to vacate the arbitration award, what happens then? Should the Virginia court follow a prior decision from a California court in the same case compelling arbitration? Or should the Virginia court follow Fourth Circuit precedent invalidating similar arbitration agreements?

These complex questions arise only because federal law now carries different meanings in different jurisdictions. The FAA is intended to provide a single national rule that heads off such time-wasting disputes. This Court should ensure that the FAA lives up to that billing.

Notably, the Court has previously granted certiorari in an analogous context. In *DirecTV, Inc. v. Imburgia*, 577 U.S. 47 (2015), this Court granted certiorari to resolve a circuit split between the Ninth Circuit and the California Court of Appeal over the enforceability of the arbitration provision in DirecTV's agreements with its cable customers. *Id.* at 53. The petition for certiorari in *DirecTV* emphasized that the split created the risk of forum-shopping between state and federal court.[3] The case for certiorari here is stronger than in *DirecTV*: that case involved a one-to-one split within one state involving one cable provider's form contract, while this case involves a three-

[3] *See* Petition for Certiorari at 10, *DirecTV, Inc. v. Imburgia*, 577 U.S. 47 (2015) (No. 14-462), 2014 WL 5359805.

to-one split across multiple states involving contracts issued by multiple lenders. The Court is likely to grant certiorari here as it did in *DirecTV*.

II. THIS COURT IS LIKELY TO REVERSE THE FOURTH CIRCUIT.

If this Court grants certiorari, it is likely to reverse the Fourth Circuit.

A. *Rent-A-Center* and *Henry Schein* resolve this case in Applicants' favor.

1. Under *Rent-A-Center* and *Henry Schein*, when an arbitration agreement contains a delegation clause, enforceability challenges directed to the arbitration agreement as a whole go to the arbitrator. That straightforward principle should have resolved this case in Applicants' favor. Respondents' challenge was not to the delegation clause, but to the choice-of-law provision applicable to the arbitration agreement as a whole. This case thus falls within the four corners of this Court's precedents.

In reaching a contrary conclusion, the Second, Third, and Fourth Circuits effectively nullified *Rent-A-Center*. The Ninth Circuit summed it up correctly: those circuits "view a party's 'specific challenge' to a delegation clause as a purely formal, procedural requirement." *Brice*, 13 F.4th at 836. Under the precedents of those circuits, "a party complies with *Rent-A-Center* if the party claims the delegation clause is unenforceable even if the arguments made go only to enforceability of the arbitration agreement as a whole." *Id.* "That is, so long as a party states the delegation clause is invalid, that is enough." *Id.* Indeed, in all the cases in the split, the choice-of-law provision applied to the arbitration agreement as a whole, not just the delegation clause. Yet by jumping through a procedural hoop and reciting that they were specifically targeting the delegation clause, the plaintiffs evaded *Rent-A-Center*'s rule.

The result will reduce *Rent-A-Center*'s rule to near meaninglessness. All litigants who recite that they are challenging the delegation clause will guarantee themselves the right to a court hearing, regardless of whether or not, as a matter of substance, the challenge is targeted toward the delegation clause. That result, in turn, will reduce *Henry Schein* to near meaninglessness. As long as a litigant asserts that a delegation clause is invalid, the court will be able to determine whether the arbitration agreement as a whole is invalid, nullifying *Henry Schein*'s admonition that delegation clauses are enforceable.

Indeed, this case is a perfect illustration of how the Fourth Circuit's rule saps *Rent-A-Center* and *Henry Schein* of any real force. The dispute in this case boiled down to the proper interpretation of the choice-of-law provision in the arbitration agreement. Applicants argued that it merely ensured that substantive tribal law, as opposed to substantive state law, would apply; Respondents argued that it barred the arbitrator from applying federal law in any context. This was a pure dispute of contract interpretation, and exactly the type of dispute that the parties intended to be delegated to the arbitrator.

Yet merely by announcing that they were specifically challenging the delegation clause, Respondents effectively transferred authority over contract interpretation to the court. The court then interpreted the choice-of-law provision to nullify federal law for purposes of invalidating the delegation clause, and then adopted the identical interpretation of the choice-of-law provision for purposes of nullifying the arbitration

agreement as a whole. This holding marks the path for any future litigant seeking to overturn a delegation clause in the Fourth Circuit.

2. The Second, Third, and Fourth Circuits' effort to bring their rulings within the ambit of *Rent-A-Center* and *Henry Schein* only exacerbates the conflict between their opinions and Supreme Court precedent. In the decision below, the Fourth Circuit reasoned that Respondents specifically challenged the delegation clause by arguing that the choice-of-law provision barred the arbitrator from employing "substantive federal law" in evaluating the validity of the agreement. Tab B at 23. As Judge Fletcher put it in his *Brice* dissent, the delegation clause is invalid because "the choice-of-law provisions prospectively waive the application of the FAA's prospective waiver rule." 13 F.4th at 845.

As an initial matter, this theory rests on a wholly implausible interpretation of the arbitration agreement. The delegation clause does not even hint that the arbitrator's authority to decide disputes over the validity of the arbitration agreement somehow excludes the authority to decide disputes based on federal law. *See supra* at 8–9. And the choice-of-law provision says nothing about the delegation clause.

More importantly, this reasoning runs afoul of two separate lines of this Court's cases. *First*, this Court has already rejected the idea that a party can avoid arbitration by making the same challenge to a delegation clause as to the arbitration agreement as a whole. In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), this Court held that if a contract contains an arbitration clause and one party alleges the contract's illegality, the arbitrator must decide that illegality challenge unless the illegality

challenge specifically targets the arbitration clause. The Court explained that it is "true" that requiring arbitration "permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void." *Id.* at 448. "But it is equally true that [refusing to compel arbitration] permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable." *Id.* at 448–49. Federal arbitration law "resolve[s] that conundrum … in favor of the separate enforceability of arbitration provisions." *Id.* at 449. In *Rent-A-Center*, the Court applied that rule to arbitration agreements containing delegation clauses: "In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rule does not depend on the substance of the remainder of the contract." 561 U.S. at 72.

That substantive rule resolves this case in Applicants' favor. Following the logic of *Buckeye Check Cashing*, it is true that if a federal court compels arbitration, the arbitrator might resolve the case despite the invalidity of the arbitration agreement—the outcome feared by Respondents. But it is equally true that by adjudicating the prospective-waiver challenge, the court effectively denied effect to a delegation clause in an arbitration agreement that might prove perfectly enforceable. Suppose the court had entertained the prospective-waiver challenge to the delegation clause and resolved it in Applicants' favor by construing the choice-of-law provision in the manner advocated by Applicants. In that case, the court would necessarily have resolved Respondents' challenge to the enforceability of the arbitration agreement as a whole, thus resolving a dispute that the parties intended to be resolved by the arbitrator pursuant to a valid

delegation clause. *Buckeye* and *Rent-A-Center* authoritatively establish that faced with those two outcomes, federal law requires compelling arbitration.

Second, this Court's precedents suggest it is improper to preclude initial enforcement of an arbitration agreement based on the prospective waiver doctrine. In *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court confronted an argument strikingly similar to the one made by Respondents: that "choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies." *Id.* at 637 n.19. Rather than interpreting the contract to resolve that question itself, the Court concluded that it had "no occasion to speculate on this matter at this stage in the proceedings, *when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award.*" *Id.* (emphasis added). The Court later echoed the same point in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). In the Court's view, "mere speculation" that the arbitrators would apply Japanese law to the exclusion of American law was not a basis for refusing to send the case to arbitration. *Id.* at 541. Citing *Mitsubishi Motors*, the Court suggested that it would "'condemn[] the agreement as against public policy'" and thus refuse to enforce it only "[*w*]*ere there no subsequent opportunity for review.*" *Id.* at 540 (emphasis added). The upshot of these cases is that a court should not short-circuit arbitration based on the mere possibility that the arbitrator will be unable to apply federal law, as the Fourth Circuit erroneously did here.[4]

[4] These arguments also assume the prospective waiver doctrine exists, which is a debatable proposition. In *American Express Co. v. Italian Colors Restaurant*, 570 U.S.

This approach makes good practical sense, because it preserves the possibility of arbitrating as the parties intended, while leaving no risk that Respondents will lose their opportunity to pursue federal claims. If the court compels arbitration, there are two possible outcomes. First, the arbitrator may find that, as Applicants claim, the choice-of-law provision does not bar the arbitrator from considering federal law. In that case, the arbitration agreement will be valid and the arbitrator will hear Respondents' federal claims—just as the arbitration agreement contemplates. The second possibility is that the arbitrator deems the choice-of-law provision to foreclose all consideration of federal law. This would, according to Respondents, require the arbitrator to ignore the prospective-waiver doctrine, uphold the arbitration agreement, and then dismiss Respondents' RICO claims on the ground that the arbitrator is barred from considering federal law. But if that happens, Respondents would be free to come to court and advocate for vacatur of the arbitration award. *See Brice*, 13 F.4th at 837 ("The worst-case scenario is that an arbitrator *may* prevent Borrowers from presenting their federal claims and, if so, Borrowers *will* have the opportunity to object to a court that the arbitrator exceeded her authority and ask that any award be vacated."); *Mitsubishi*

228, 235 (2013), the Court observed that the rule is a "judge-made exception to the FAA" which "originated as dictum in *Mitsubishi Motors*." And while cases after *Mitsubishi* similarly suggested that the exception exists, none has actually held that it rendered an arbitration agreement unenforceable. *See id.* at 235–36, 235 n.2; *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90–92 (2000); *Sky Reefer*, 515 U.S. at 540–41; *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 240–242 (1987); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009). Given *Henry Schein*'s admonition that courts may not "engraft … exceptions onto the statutory text" of the FAA, 139 S. Ct. at 530, there is a strong argument that the judge-made prospective waiver doctrine has no basis in the FAA.

Motors Corp., 473 U.S. at 637 n.19 (noting, without resolving this possibility). Federal claims and defenses will be vindicated either way.

For all these reasons, if the Court grants certiorari, it is likely to reverse the Fourth Circuit and hold that delegation clauses are enforceable unless the plaintiff's enforceability challenge specifically targets the delegation clause *in substance*.

B. The Fourth Circuit's decision reflects hostility toward arbitration that warrants Supreme Court reversal.

This Court regularly grants certiorari, even with shallow circuit splits, to reverse lower-court decisions invalidating arbitration agreements, especially where, as here, the plaintiff is seeking to nullify an arbitration clause for purpose of pursuing a class action. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Epic Syst. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *DirecTV*, 577 U.S. 47. Indeed, this Court has, in several cases, reversed lower-court decisions perceived as hostile to arbitration even in the absence of a circuit split. *See, e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17 (2012) (per curiam); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (per curiam); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011) (per curiam).

This case fits comfortably within both of these categories. The Fourth Circuit adopted a remarkably uncharitable interpretation of the choice-of-law provision for purposes of invalidating the arbitration agreement, allowing costly class action litigation to proceed. It is precisely to avoid this risk that parties enter into delegation clauses—yet the Fourth Circuit invalidated the delegation clause, too.

The contracts at issue here are not meaningfully different from various other form contracts entered into by consumers every day. The arbitration agreement specifically confers the arbitrator with the authority to decide *all* claims under federal law and *all* claims founded on any federal statute. Tab D at 6. Moreover, the arbitration provision specifically says that "any arbitration shall be governed by the FAA"—hardly language indicative of an intent to nullify federal law, much less federal defenses to arbitrability under the FAA. Tab D at 7. Nothing in the choice-of-law provisions contradicts these clear statements. One recites that the court will apply substantive tribal law "consistent with the [Federal Arbitration Act]." Tab C at 29. The other allows the borrower to choose the location of arbitration, and makes clear that the borrower's choice does not justify setting tribal law aside. Tab D at 7.

It would be very strange for the arbitration agreement to confer the authority to apply the FAA and resolve federal claims on the arbitrator, only to withdraw it via an oblique inference drawn from a choice-of-law provision.

What is more, after the Fourth Circuit nullified the parties' intentions by using the choice-of-law provisions as a mechanism to invalidate the arbitration agreement, the Fourth Circuit nullified the parties' intentions again by discarding the parallel choice-of-law provision that applied to the loan agreement as a whole. The court held that notwithstanding that separate choice-of-law provision electing tribal law, Virginia's usury law would apply, opening the door to class actions under Virginia law and RICO and completing the total steamrolling of the parties' agreement. The end result was that a contract providing for the individualized arbitration of contract disputes under tribal

law transformed into a contract permitting class action litigation in federal district court under Virginia law. There is something wrong with that picture.

An arbitrator would have been highly unlikely to reach these counterintuitive conclusions. Needless to say, arbitrators, unlike courts, are unlikely to approach an arbitration agreement with hostility to arbitration. Applying neutral principles of contract interpretation, an arbitrator would almost certainly have rejected Respondents' theory that the Tribe committed the fatal blunder of including a choice-of-law provision that required the entire arbitration agreement to be blown up. The arbitrator would likely have entertained federal challenges, just like in any other dispute that goes to arbitration. And if not, Respondents could have sought review of that decision in federal court.

It may be that the Fourth Circuit's counterintuitive rulings are a product of the specific factual context in which these cases have arisen. But the principles of law the Fourth Circuit has announced—that a party need only say it is challenging a delegation clause to evade *Rent-A-Center*, and that courts can reject delegation clauses based on their views of the merits of arbitrability—are not so limited. If left unchecked, they will wreak havoc not only on Indian Nations, but on all parties that rely on arbitration as an effective alternative to costly litigation. By reversing the decision below, the Court can help ensure that lower courts apply this Court's precedents faithfully and enforce arbitration agreements according to their terms.

III. ABSENT A STAY, APPLICANTS WILL INCUR IRREPARABLE HARM.

If the Court denies a stay, Applicants will incur the very expenses and burdens of litigation that arbitration is designed to prevent. As this Court has previously concluded in the same procedural posture, those expenses and burdens qualify as irreparable harm warranting a stay.

Applicants moved to compel individualized arbitration. But because Applicants' motion was denied, the parties are proceeding to class action discovery. This Court has repeatedly recognized that class proceedings are dramatically more complex and burdensome than individualized arbitration. *See, e.g.*, *Lamps Plus, Inc.*, 139 S. Ct. at 1414 ("[S]hifting from individual to class arbitration is a fundamental change that sacrifices the principal advantage of arbitration and greatly increases risks to defendants." (quotation marks and citations omitted)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (class procedures "make[] the process slower, more costly, and more likely to generate procedural morass than final judgment").

In addition to being costly, discovery "could alter the nature of the dispute significantly by requiring parties to disclose sensitive information that could have a bearing on the resolution of the matter." *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 265 (4th Cir. 2011). That risk is particularly acute in the context of class discovery, in which Respondents may seek sensitive information about Applicants' business in their effort to persuade the court to certify a class. In an individualized arbitration, that discovery would never occur.

Without a stay, these harms will be irreparable. Even if Applicants ultimately prevail, the expenses and burdens of class discovery cannot be undone. *Levin*, 634 F.3d at 265 ("[T]he parties will not be able to unring any bell rung by discovery, and they will be forced to endure the consequences of litigation discovery in the arbitration process."). Applicants will have permanently lost the benefit of what they bargained for: low-cost individualized arbitration procedures. *See, e.g.*, *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984) ("If [a] party must undergo the expense and delay of a trial before being able to appeal, the advantages of arbitration—speed and economy—are lost forever" and the resulting harm is "serious, perhaps, irreparable").

Congress has authorized interlocutory appeals of denials of motion to compel arbitration precisely because awaiting final judgment would cause irreparable harm. *See Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 214 (3d Cir. 2007) ("[T]he availability of interlocutory review under Section 16 of decisions favoring litigation avoids the possibility that a litigant seeking to invoke his arbitration rights will have to endure a full trial on the underlying controversy before he can receive a *definitive* ruling on whether he was legally obligated to participate in such a trial in the first instance." (quotation marks and alterations omitted)). For the identical reason, denying Applicants' requested stay here would cause irreparable harm: Applicants would have to endure months of class discovery while awaiting resolution of their claim that individualized arbitration is necessary.

Twice in recent years, this Court has granted stays of district court proceedings in a similar procedural posture. In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No.

19A766, as well as in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17A859, the petitioner sought review of lower-court rulings denying its motion to compel arbitration, and also filed applications in this Court to stay proceedings in the district court pending resolution of its petitions for certiorari. In the latter case, like here, the applicant sought review of a lower court decision refusing to enforce a delegation clause. In both cases, this Court granted the petitioner's stay applications and stayed district court proceedings. The Court should follow that practice and grant Applicants' stay application here.[5]

CONCLUSION

The application for stay should be granted.

Respectfully Submitted,

RAKESH KILARU
KOSTA STOJILKOVIC
WILKINSON STEKLOFF LLP
2001 M Street NW, 10th Flr,
Washington, DC 20036
(202) 847-4046

Counsel for Applicants Sherry Treppa, Tracey Treppa, Kathleen Treppa, Carol Munoz, Jennifer Burnett, Aimee Jackson-Penn, and Veronica Krohn

ADAM G. UNIKOWSKY
Counsel of Record
MATTHEW E. PRICE
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000

Counsel for Applicants Scott Asner and Joshua Landy

[5] When deciding whether to grant a stay, "in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (quotation marks omitted). Here, the balance of equities favors Applicants. As explained above, Applicants would face irreparable harm. By contrast, given the already protracted procedural history of this case, Respondents would not be substantially harmed by the temporary stay of class discovery that Applicants seek.

TAB A

FILED: December 3, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1062 (L)
(3:19-cv-00250-DJN)

GEORGE HENGLE; SHERRY BLACKBURN; WILLIE ROSE; ELWOOD BUMBRAY; TIFFANI MYERS; STEVEN PIKE; SUE COLLINS; LAWRENCE MWETHUKU, on behalf of themselves and all individuals similarly situated

Plaintiffs - Appellees

v.

SHERRY TREPPA, Chairperson of the Habematolel Pomo of Upper Lake Executive Council; in her official capacity; TRACEY TREPPA, Vice-Chairperson of the Habematolel Pomo of Upper Lake Executive Council; in her official capacity; KATHLEEN TREPPA, Treasurer of the Habematolel Pomo of Upper Lake Executive Council; in her official capacity; CAROL MUNOZ, Secretary of the Habematolel Pomo of Upper Lake Executive Council; in her official capacity; JENNIFER BURNETT, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council; in her official capacity; AIMEE JACKSON-PENN, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council; in her official capacity; VERONICA KROHN, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council; in her official capacity

Defendants - Appellants

and

SCOTT ASNER; JOSHUA LANDY

Defendants

STATE OF NEW MEXICO; HABEMATOLEL POMO OF UPPER LAKE CONSUMER FINANCIAL SERVICES REGULATORY COMMISSION; NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION; NATIONAL CONGRESS OF AMERICAN INDIANS; NATIONAL CENTER FOR AMERICAN INDIAN ECONOMIC DEVELOPMENT; NATIONAL INDIAN GAMING ASSOCIATION; ASSOCIATION ON AMERICAN INDIAN AFFAIRS

Amici Supporting Appellants

UNITED STATES OF AMERICA

Amicus Supporting Affirmance

O R D E R

Upon consideration of appellants' motion for stay of mandate pending a petition for writ of certiorari, the court denies the motion.

For the Court

/s/ Patricia S. Connor, Clerk

TAB B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1062

GEORGE HENGLE; SHERRY BLACKBURN; WILLIE ROSE; ELWOOD BUMBRAY; TIFFANI MYERS; STEVEN PIKE; SUE COLLINS; LAWRENCE MWETHUKU, on behalf of themselves and all individuals similarly situated,

Plaintiffs – Appellees,

v.

SHERRY TREPPA, Chairperson of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; TRACEY TREPPA, Vice-Chairperson of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; KATHLEEN TREPPA, Treasurer of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; CAROL MUNOZ, Secretary of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; JENNIFER BURNETT, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; AIMEE JACKSON-PENN, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; VERONICA KROHN, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity,

Defendants – Appellants,

and

SCOTT ASNER; JOSHUA LANDY,

Defendants.

STATE OF NEW MEXICO; HABEMATOLEL POMO OF UPPER LAKE CONSUMER FINANCIAL SERVICES REGULATORY COMMISSION; NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION; NATIONAL CONGRESS OF AMERICAN INDIANS; NATIONAL CENTER FOR

AMERICAN INDIAN ECONOMIC DEVELOPMENT; NATIONAL INDIAN GAMING ASSOCIATION; ASSOCIATION ON AMERICAN INDIAN AFFAIRS,

Amici Supporting Appellants,

UNITED STATES OF AMERICA,

Amicus Supporting Affirmance.

No. 20-1063

GEORGE HENGLE; SHERRY BLACKBURN; WILLIE ROSE; ELWOOD BUMBRAY; TIFFANI MYERS; STEVEN PIKE; SUE COLLINS; LAWRENCE MWETHUKU, on behalf of themselves and all individuals similarly situated,

Plaintiffs – Appellees,

v.

SCOTT ASNER; JOSHUA LANDY,

Defendants – Appellants,

and

SHERRY TREPPA, Chairperson of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; TRACEY TREPPA, Vice-Chairperson of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; KATHLEEN TREPPA, Treasurer of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; CAROL MUNOZ, Secretary of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; JENNIFER BURNETT, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; AIMEE JACKSON-PENN, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; VERONICA KROHN, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity,

Defendants.

STATE OF NEW MEXICO; HABEMATOLEL POMO OF UPPER LAKE CONSUMER FINANCIAL SERVICES REGULATORY COMMISSION; NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION; NATIONAL CONGRESS OF AMERICAN INDIANS; NATIONAL CENTER FOR AMERICAN INDIAN ECONOMIC DEVELOPMENT; NATIONAL INDIAN GAMING ASSOCIATION; ASSOCIATION ON AMERICAN INDIAN AFFAIRS,

Amici Supporting Appellants,

UNITED STATES OF AMERICA,

Amicus Supporting Affirmance.

No. 20-1358

GEORGE HENGLE; SHERRY BLACKBURN; WILLIE ROSE; ELWOOD BUMBRAY; TIFFANI MYERS; STEVEN PIKE; SUE COLLINS; LAWRENCE MWETHUKU, on behalf of themselves and all individuals similarly situated,

Plaintiffs – Appellees,

v.

SCOTT ASNER; JOSHUA LANDY,

Defendants – Appellants,

and

SHERRY TREPPA, Chairperson of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; TRACEY TREPPA, Vice-Chairperson of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; KATHLEEN TREPPA, Treasurer of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; CAROL MUNOZ, Secretary of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; JENNIFER BURNETT, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; AIMEE JACKSON-PENN, Member-At-

Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity; VERONICA KROHN, Member-At-Large of the Habematolel Pomo of Upper Lake Executive Council, in her official capacity,

Defendants.

STATE OF NEW MEXICO; HABEMATOLEL POMO OF UPPER LAKE CONSUMER FINANCIAL SERVICES REGULATORY COMMISSION; NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION; NATIONAL CONGRESS OF AMERICAN INDIANS; NATIONAL CENTER FOR AMERICAN INDIAN ECONOMIC DEVELOPMENT; NATIONAL INDIAN GAMING ASSOCIATION; ASSOCIATION ON AMERICAN INDIAN AFFAIRS,

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Defendants – Appellants,

and

SCOTT ASNER; JOSHUA LANDY,

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STATE OF NEW MEXICO; HABEMATOLEL POMO OF UPPER LAKE CONSUMER FINANCIAL SERVICES REGULATORY COMMISSION; NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION; NATIONAL CONGRESS OF AMERICAN INDIANS; NATIONAL CENTER FOR AMERICAN INDIAN ECONOMIC DEVELOPMENT; NATIONAL INDIAN GAMING ASSOCIATION; ASSOCIATION ON AMERICAN INDIAN AFFAIRS,

Amici Supporting Appellants,

UNITED STATES OF AMERICA,

Amicus Supporting Affirmance.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. David J. Novak, District Judge. (3:19-cv-00250-DJN)

Argued: January 26, 2021 Decided: November 16, 2021

Before NIEMEYER, KING, AND RUSHING, Circuit Judges.

Affirmed by published opinion. Judge Rushing wrote the opinion, in which Judge Niemeyer and Judge King joined.

ARGUED: Rakesh N. Kilaru, WILKINSON STEKLOFF LLP, Washington, D.C.; Matthew E. Price, JENNER & BLOCK, LLP, Washington, D.C., for Appellants. Matthew W. H. Wessler, GUPTA WESSLER PLLC, Washington, D.C., for Appellees. **ON BRIEF:** James Rosenthal, Kosta Stojilkovic, Beth Wilkinson, Matthew Skanchy, Betsy Henthorne, Jaclyn Delligatti, WILKINSON STEKLOFF LLP, Washington, D.C., for Appellants. Leonard Anthony Bennett, CONSUMER LITIGATION ASSOCIATES, P.C., Newport News, Virginia; Kristi Cahoon Kelly, Andrew J. Guzzo, Casey Shannon Nash, KELLY GUZZO PLC, Fairfax, Virginia, for Appellees. Brian C. Rabbitt, Acting Assistant Attorney General, Teresa A. Wallbaum, Assistant Chief, Organized Crime and Gang Section, Criminal Division, Jeffrey Bossert Clark, Assistant Attorney General, Eric Grant, Deputy Assistant Attorney General, Brian C. Toth, Environment and Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus United States of America. Hector Balderas, Attorney General, Tania Maestas, Chief Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NEW MEXICO, Santa Fe, New Mexico; William H. Hurd, TROUTMAN SANDERS LLP, Richmond, Virginia, for Amicus State of New Mexico. Bruce A. Finzen, Minneapolis, Minnesota, Brendan V. Johnson, Timothy W. Billion, ROBINS KAPLAN LLP, Sioux Falls, South Dakota; Sarah J. Auchterlonie, BROWNSTEIN HYATT FARBER SCHRECK LLP, Denver, Colorado, for Amicus Habematolel Pomo of Upper Lake Consumer Financial Services Regulatory Commission. Jonodev Chaudhuri, Washington, D.C., E. King Poor, Chicago, Illinois, Nicole Simmons, QUARLES & BRADY LLP, Phoenix, Arizona, for Amici The Native American Finance Officers Association, National Congress of American Indians, National Center for American Indian Economic Development, National Indian Gaming Association, and Association on American Indian Affairs.

RUSHING, Circuit Judge:

The named plaintiffs in this case, all Virginia consumers, received short-term loans from online lenders affiliated with a federally recognized Native American tribe. Eventually the borrowers defaulted and brought a putative class action against tribal officials and two non-members affiliated with the tribal lenders to avoid repaying their debts, which they alleged violated Virginia and federal law. The defendants moved to compel arbitration under the terms of the loan agreements and to dismiss the complaint on various grounds.

The district court denied the motions to compel arbitration and, with one significant exception relevant here, denied the motions to dismiss. Four of those rulings are now before us in this interlocutory appeal. First, the district court found the arbitration provision unenforceable as a prospective waiver of the borrowers' federal rights. Second, the district court denied the tribal officials' motion to dismiss the claims against them on the ground of tribal sovereign immunity. Third, the district court held the loan agreements' choice of tribal law unenforceable as a violation of Virginia's strong public policy against unregulated lending of usurious loans. Fourth, the district court dismissed the federal claim against the tribal officials, ruling that the Racketeer Influenced and Corrupt Organizations Act (RICO) does not authorize private plaintiffs to sue for injunctive relief. For the reasons explained below, we affirm all four rulings on appeal.

I.

The Habematolel Pomo of Upper Lake (the Tribe) is a federally recognized Native American tribe in northern California. Through its Tribal Executive Council, the Tribe

started an online lending business consisting of four incorporated lending portfolios: Golden Valley Lending, Inc., Silver Cloud Financial, Inc., Mountain Summit Financial, Inc., and Majestic Lake Financial, Inc. (collectively, the Tribal Lenders). The Tribal Lenders were allegedly operated by non-tribal companies owned by non-tribal Defendants Scott Asner and Joshua Landy on non-tribal land in Overland Park, Kansas. Eventually, Upper Lake Processing Service, Inc. (ULPS)—a tribal entity—acquired the Tribal Lenders, although ULPS allegedly continues to operate out of Overland Park, Kansas, employing non-tribal employees and distributing most of its revenues to non-tribal entities and individuals.

The Tribal Lenders extend low-dollar, high-interest loans that must be repaid on a short timeline. Plaintiffs are Virginia consumers who each received an online loan from one of the Tribal Lenders while living in Virginia. Although Virginia usury law generally prohibits interest rates over 12%, the law of the Tribe contains no usury limit. The interest rates on Plaintiffs' loans—which varied in principal amounts from $300 to $1,575—ranged from 544% to 920%. For example, Plaintiff George Hengle borrowed $600 at an interest rate of 636%, with the result that he owed $2,400 over the roughly 10-month life of the loan.

To obtain their loans, Plaintiffs each electronically signed a "Consumer Loan and Arbitration Agreement," which we refer to as the "loan agreement." The "Governing Law" provision of the loan agreement stipulates that the agreement "shall be governed by applicable tribal law, including but not limited to the Habematolel Tribal Consumer Financial Services Regulatory Ordinance." J.A. 1186.

The loan agreements each also contain a materially identical "Arbitration Provision," under which borrowers waive their right to resolve disagreements in court and agree to submit "all disputes, including the scope and validity of this Arbitration Provision," to an arbitrator. J.A. 1184; *see* J.A. 1184 (defining "disputes" subject to arbitration to include "the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision"). But in addition to selecting the arbitral forum and specifying the procedures to be used therein, the arbitration provision also contains its own choice-of-law clauses. To begin, the arbitration provision states that

> dispute[s] will be governed by the laws of the Habematolel Pomo of Upper Lake and such rules and procedures used by the applicable arbitration organization applicable to consumer disputes, to the extent those rules and procedures do not contradict the express terms of this Arbitration Provision or the law of the Habematolel Pomo of Upper Lake, including the limitations on the arbitrator below.

J.A. 1185. Immediately below that paragraph, the arbitration provision explains that a borrower may request the arbitration take place close to his or her residence but

> such election to have binding arbitration occur somewhere other than on Tribal land shall in no way . . . allow for the application of any other law other than the laws of the Habematolel Pomo of Upper Lake.

J.A. 1185. Directly below that paragraph, the arbitration provision specifies:

> The arbitrator shall apply applicable substantive Tribal law consistent with the Federal Arbitration Act (FAA), and applicable statutes of limitation, and shall honor claims of privilege recognized at law. . . . If allowed by statute or applicable law, the arbitrator may award statutory damages and/or reasonable attorneys' fees and expenses.

J.A. 1185. Regarding confirmation of an award, the arbitration provision authorizes the parties "to enforce an arbitration award before the applicable governing body of the

Habematolel Pomo of Upper Lake Tribe." J.A. 1885. As for enforcement of the agreement to arbitrate, the provision states:

> This Arbitration Provision is made pursuant to a transaction involving both interstate commerce and Indian commerce under the United States Constitution and other federal and tribal laws. Thus, any arbitration shall be governed by the FAA and subject to the laws of the Habematolel Pomo of Upper Lake. If a final non-appealable judgment of a court having jurisdiction over this transaction and the parties finds, for any reason, that the FAA does not apply to this transaction, then Our agreement to arbitrate shall be governed by the laws of the Habematolel Pomo of Upper Lake Tribe.

J.A. 1185. Finally, the arbitration provision contains a severability clause, stating that "[i]f any of this Arbitration Provision is held invalid, the remainder shall remain in effect." J.A. 1185.

After receiving their loans from the Tribal Lenders, Plaintiffs, on behalf of themselves and a putative class of similarly situated individuals, brought suit in the U.S. District Court for the Eastern District of Virginia against Asner, Landy, and the members of the Tribal Executive Council in their official capacity (the Tribal Officials), alleging violations of RICO and Virginia usury and consumer finance laws. From the Tribal Officials, Plaintiffs sought only prospective declaratory and injunctive relief. From Asner and Landy, Plaintiffs sought prospective and monetary relief.

In response, all Defendants moved to compel arbitration. Alternatively, both the tribal and non-tribal Defendants moved to dismiss Plaintiffs' claims against them on numerous grounds. As relevant to this appeal, all Defendants argued that Tribal law, rather than Virginia law, applied to the loan agreements, therefore the interest rates were not usurious and the loans were not unlawful debts for purposes of RICO. The Tribal Officials

separately asserted that sovereign immunity precluded Plaintiffs' claims against them and that, in any event, RICO did not permit private plaintiffs to seek prospective injunctive relief.

The district court denied Defendants' motions to compel arbitration. *Hengle v. Asner*, 433 F. Supp. 3d 825, 845–859 (E.D. Va. 2020). The court acknowledged that the arbitration provision delegates threshold questions of arbitrability to the arbitrator, but the court found the delegation clause unenforceable because the arbitration provision prospectively waives federal and state law defenses to arbitrability. Assessing the validity of the arbitration provision as a whole, the court concluded that it similarly accomplished an impermissible waiver of otherwise available statutory claims, including RICO claims. Because it found the offending provisions inseverable, the district court held the arbitration provision unenforceable in its entirety.

Moving to the various motions to dismiss, the district court held that the loan agreement's selection of tribal law violated Virginia's compelling public policy against the unregulated lending of usurious loans. *Id.* at 864–868. Applying Virginia's choice-of-law rules, the court determined that Virginia law applies to the loan agreements, therefore Plaintiffs stated a plausible claim that the loans violate Virginia usury law and constitute an unlawful debt under RICO. The district court also rejected the Tribal Officials' assertion of sovereign immunity, holding that the Tribal Officials were subject to suits for prospective injunctive relief. *Id.* at 871–880. But the court dismissed the RICO claim against the Tribal Officials, reasoning that RICO authorizes private plaintiffs to sue only for money damages, not injunctive or declaratory relief. *Id.* at 880–886. The court certified

its RICO and choice-of-law rulings for interlocutory appeal. *Hengle v. Asner*, No. 3:19-cv-250, 2020 WL 855970 (E.D. Va. Feb. 20, 2020); *see* 28 U.S.C. § 1292(b).

II.

We now have jurisdiction to review the four rulings appealed: (1) denial of Defendants' motions to compel arbitration, (2) denial of the Tribal Officials' motion to dismiss the claims against them on sovereign-immunity grounds, (3) denial of Defendants' motions to dismiss pursuant to the governing-law clause, and (4) dismissal of Plaintiffs' RICO claim against the Tribal Officials. *See* 9 U.S.C. § 16(a)(1) (denial of motion to compel arbitration); 28 U.S.C. § 1292(b) (orders certified for interlocutory appeal); *Eckert Int'l Inc. v. Gov't of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir. 1994) (denial of sovereign immunity). We review de novo the district court's decision declining to compel arbitration and its rulings on the motions to dismiss for failure to state a claim. *Chorley Enter., Inc. v. Dickey's Barbecue Rests., Inc.*, 807 F.3d 553, 563 (4th Cir. 2015); *Buscemi v. Bell*, 964 F.3d 252, 262 (4th Cir. 2020), *cert. denied sub nom. Kopitke v. Bell*, 141 S. Ct. 1388 (2021). As for the district court's denial of the Tribal Officials' motion to dismiss for lack of subject matter jurisdiction on immunity grounds, we review "factual findings with respect to jurisdiction for clear error and the legal conclusion that flows therefrom de novo." *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176 (4th Cir. 2019) (internal quotation marks omitted).

III.

We begin with Defendants' motions to compel arbitration under the terms of the parties' agreements. "[A]rbitration is a matter of contract." *Rent-A-Center, W., Inc. v.*

Jackson, 561 U.S. 63, 67 (2010); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). In the Federal Arbitration Act (FAA), Congress provided that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Courts therefore must enforce arbitration agreements "on an equal footing with other contracts," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)), and "may invalidate an arbitration agreement based on 'generally applicable contract defenses,'" *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (quoting *Concepcion*, 563 U.S. at 339).

One such generally applicable defense is the so-called "prospective waiver" doctrine, under which an agreement that prospectively waives "a party's right to pursue statutory remedies" is unenforceable as a violation of public policy. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985); *see also Italian Colors*, 570 U.S. at 235–236; *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273–274 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Although parties possess broad latitude to specify the rules under which their arbitration will be conducted, they must preserve the ability to assert federal statutory causes of action so that "the statute[s] will continue to serve both [their] remedial and deterrent function[s]." *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors*, 473 U.S. at 637). If a "prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," then courts should enforce the parties' agreement to arbitrate. *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. *Id.*; *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*, 556 U.S. at 273 (acknowledging that "a substantive waiver of federally protected civil rights will not be upheld"). Pursuant to the prospective waiver doctrine, courts—including this one—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 v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 238 (3d Cir. 2020); *see Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 339–345 (4th Cir. 2020); *Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286, 292–294 (4th Cir. 2020); *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 333–337 (4th Cir. 2017); *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 673–676 (4th Cir. 2016); *see also Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126–128 (2d Cir. 2019).

Of course, "parties may agree to have an arbitrator decide . . . gateway questions of arbitrability," such as the validity and scope of the agreement, and the parties here have clearly done so. *Henry Schein v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (internal quotation marks omitted); *see* J.A. 1184 (agreeing to arbitrate "all disputes, including the scope and validity of this Arbitration Provision"; defining "disputes" subject to arbitration to include "the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision"). An agreement to arbitrate gateway questions—called a "delegation clause"—is "'simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.'" *Henry Schein*, 139 S. Ct. at

529 (quoting *Rent-A-Center*, 561 U.S. at 70). As with any other agreement to arbitrate, when a party challenges a delegation clause specifically, the court must evaluate the validity of the delegation "before ordering compliance" with the clause. *Rent-A-Center*, 561 U.S. at 71; *see Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449, 455 (4th Cir. 2017).[1]

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. *Sequoia Cap.*, 966 F.3d at 291. For example, in *Rent-A-Center*, the plaintiff argued that the entire arbitration agreement was unconscionable, in part because of limitations on arbitral discovery. *Rent-A-Center*, 561 U.S. at 74. Those allegedly unconscionable limits applied both during arbitration of the underlying employment dispute and during arbitration of the threshold enforceability question under the delegation clause. As the Court explained, the plaintiff could have challenged the delegation provision specifically by arguing that the discovery limitations "*as applied* to the delegation provision rendered *that provision* unconscionable." *Id.* To make such a claim, the plaintiff "would have had to argue that the limitation upon the number of depositions causes the arbitration of his

[1] Relying on *Henry Schein*, Defendants argue that if an agreement delegates arbitrability questions to an arbitrator, that ends the matter and the court may proceed no further. But while *Henry Schein* emphasized that courts may not "short-circuit" valid delegation clauses, 139 S. Ct. at 527, it did not undermine the principle that a court must consider a litigant's challenge to the validity of a delegation clause "before ordering compliance with that agreement under § 4" of the FAA, *Rent-A-Center*, 561 U.S. at 71. *Accord Haynes Invs.*, 967 F.3d at 339 n.4 (calling *Henry Schein* "inapposite"); *Williams*, 965 F.3d at 237 n.7 (noting that "[s]everal appellate courts have rejected similar arguments" and "we agree with them").

claim that the [arbitration agreement] is unenforceable to be unconscionable. That would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of his factbound employment-discrimination claim unconscionable." *Id.* Because the plaintiff did not contest the validity of the delegation clause in particular, the Court was required to enforce the delegation, leaving the plaintiff's challenges to the arbitration agreement as a whole for the arbitrator to decide. *Id.* at 72.

Plaintiffs here have specifically challenged the validity of the delegation clause—and the arbitration provision as a whole—as a prospective waiver of their right to pursue federal substantive statutory remedies. So we must assess the enforceability of the delegation clause before we may compel arbitration under its terms. *See Minnieland*, 867 F.3d at 455. Because we do not write on a clean slate, a brief examination of our relevant precedent is in order.

A.

This is not the first time this Court has encountered a prospective waiver challenge to an arbitration provision with a delegation clause in a tribal lending agreement. In four prior cases, this Court has assessed arbitration provisions requiring application of tribal law to the practical exclusion of other law and, in each case, has held the arbitration provision (including the delegation clause) invalid as a prospective waiver of federal rights.[2]

[2] Other circuits have reached the same conclusion. *See*, *e.g.*, *Williams*, 965 F.3d at 240–241, 243 n.14 (3d Cir.) (holding delegation clause and arbitration agreement unenforceable as prospective waiver); *Gingras*, 922 F.3d at 127 (2d Cir.) (holding arbitration agreement, including delegation clause, unenforceable as prospective waiver). After oral argument in this case, the Ninth Circuit upheld a delegation clause in a tribal

The inaugural case in this uniform line of precedent was *Hayes v. Delbert Services Corp.*, 811 F.3d 666 (4th Cir. 2016). The arbitration agreement there, which included a delegation clause, required the arbitrator to apply "'the laws of the [tribe] and the terms of this Agreement'" and confirmed that the arbitrator would not apply "'any law other than the law of the [tribe] to this Agreement'" no matter where the arbitration occurred. *Id.* at 675; *see id.* at 670, 671 n.1. The *Hayes* Court concluded that these "'choice of law' provision[s] . . . waive[d] all of a potential claimant's federal rights." *Id.* at 675. The Court acknowledged that a party to an arbitration agreement "may of course agree to waive certain rights," but it "may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject." *Id.* Because the arbitration agreement at issue in *Hayes* took this step "plainly forbidden" by public policy, the Court held it "invalid and unenforceable" as a whole. *Id.* The Court further refused to sever the errant provisions because contravening public policy was an animating purpose of the arbitration agreement, as illustrated by provisions in the underlying loan agreement claiming that "'no United States state or federal law applies to this Agreement.'" *Id.* at 676.

A year later, the Court in *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017), considered an arbitration agreement that "implicitly accomplish[ed] what the

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lending agreement by construing the arbitration agreement's definition of "dispute" to "not clearly foreclose[]" the arbitrator from considering the borrowers' prospective waiver argument, although it acknowledged that the arbitrator may "decide the prospective-waiver doctrine has no application to the parties' contract because it arises under federal law." *Brice v. Haynes Invs., LLC*, 13 F.4th 823, 830–831 (9th Cir. 2021). As the Ninth Circuit acknowledged, our Court reached the opposite conclusion when considering "identical" loan agreements in *Haynes Investments*. *Id.* at 833.

[*Hayes* agreement] explicitly stated, namely, that the arbitrator shall not allow for the application of any law other than tribal law." *Dillon*, 856 F.3d at 335.[3] The arbitration agreement provided that "'any dispute . . . will be resolved by arbitration in accordance with the law of the [tribe]'" and instructed the arbitrator to "'apply the laws of the [tribe] and the terms of this Agreement.'" *Id.* at 332, 335. The underlying loan agreement also stated that both it "'and the Agreement to Arbitrate are governed by [tribal law]' and '[n]either this Agreement nor the Lender is subject to the laws of any state of the United States.'" *Id.* at 335 (alterations in original). The *Dillon* Court found these provisions indistinguishable in substance from the provisions held unenforceable in *Hayes* and likewise interpreted the terms as "an unambiguous attempt to apply tribal law *to the exclusion of federal and state law*." *Id.* at 336. The Court further noted that other terms in the underlying loan agreement "evince[d] an explicit attempt to disavow the application of federal or state law to any part of the contract," such as a provision stating that "'no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation.'" *Id.* at 336. Viewing the arbitration agreement in light of the whole contract, the *Dillon* Court concluded that the arbitration agreement functioned "as a prospective waiver of federal statutory rights and, therefore, [was] unenforceable as a matter of law." *Id.* As in *Hayes*, the Court refused to sever the unenforceable choice-of-law provisions from the remainder of the arbitration agreement. *See id.* at 336–337.

[3] The *Dillon* agreement also contained a delegation clause, but the Court did not separately address it.

Most recently, this Court considered arbitration agreements in loan contracts issued by two online lenders associated with Native American tribes in *Gibbs v. Haynes Investments, LLC*, 967 F.3d 332 (4th Cir. 2020), and *Gibbs v. Sequoia Capital Operations, LLC*, 966 F.3d 286 (4th Cir. 2020). In both cases, which involved the same agreements, the Court determined that "because the choice-of-law provisions contained in both [lenders'] arbitration agreements operate as prospective waivers, the delegation clauses (and therefore the arbitration agreements) are unenforceable." *Haynes Invs.*, 967 F.3d at 341; *see also Sequoia Cap.*, 966 F.3d at 293–294. The arbitration agreements in both cases contained choice-of-law provisions stating that the agreements "'shall be governed by tribal law'"; requiring the arbitrator to "'apply Tribal law and the terms of this Agreement'"; mandating that the arbitrator's decision "'be consistent with . . . Tribal Law,'" including the "'remedies available under Tribal Law'"; and providing that any award inconsistent with tribal law may be "'set aside by a Tribal court upon judicial review.'" *Haynes Invs.*, 967 F.3d at 342 (ellipses in original); *see also Sequoia Cap.*, 966 F.3d at 293. However, the arbitration agreements were "careful to state that they [did] not explicitly disclaim federal law" and even included an agreement that the parties would "look to the [FAA] and judicial interpretation thereof for guidance" in any arbitration. *Haynes Invs.*, 967 F.3d at 342 n.6; *see also Haynes Invs.* J.A. 341 (loan agreement stating that "[t]he Agreement to Arbitrate also comprehends the application of the [FAA], as provided below"). Still the Court concluded that the choice-of-law provisions practically precluded application of federal law because they "provide[d] that tribal law preempts the

application of any contrary law—including contrary federal law." *Haynes Invs.*, 967 F.3d at 342; *see also Sequoia Cap.*, 966 F.3d at 293.

The Court noted other clauses within the arbitration agreements that "reinforce[d] this point." *Haynes Invs.*, 967 F.3d at 343. For example, the arbitration agreements provided "that arbitration may be held within thirty miles of the claimant's residence, but only to the extent that such accommodation will not be construed 'to allow for the application of any law other than Tribal Law.'" *Id.*; *see also Sequoia Cap.*, 966 F.3d at 293. The agreements limited appeal and confirmation of arbitral awards to tribal courts applying tribal law. *Haynes Invs.*, 967 F.3d at 343; *see also Sequoia Cap.*, 966 F.3d at 293. And the Court's review of tribal law indicated that "the relevant tribal codes would not permit [the borrowers] 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 defendants. *Haynes Invs.*, 967 F.3d at 343; *see also Sequoia Cap.*, 966 F.3d at 293. Because the arbitration agreements "provide[d] that tribal law shall preempt the application of any contrary law, and the effect of such provisions [was] to thereby make unavailable to the borrowers the effective vindication of federal statutory protections and remedies," the Court in both cases concluded the arbitration agreements "amount[ed] to a prospective waiver," rendering those "agreements, including the delegation clauses, . . . unenforceable." *Haynes Invs.*, 967 F.3d at 344–345; *see also Sequoia Cap.*, 966 F.3d at 294.

B.

We see no material distinction between the case at hand and the precedent set forth in *Haynes Investments*, *Sequoia Capital*, *Dillon*, and *Hayes*. As in those cases, the choice-of-law clauses of this arbitration provision, which mandate exclusive application of tribal law during any arbitration, operate as prospective waivers. In effect, those clauses would require the arbitrator to determine whether the arbitration provision impermissibly waives federal substantive rights without recourse to federal substantive law. As a result, the delegation clause is unenforceable as a violation of public policy. And as we shall see below in Part III.C, the entire arbitration provision is similarly invalid as a prospective waiver of Plaintiffs' rights to pursue federal statutory remedies.

The arbitration provision here states that any arbitration "will be governed by the laws of the [Tribe]" and the rules and procedures of the arbitration organization administering the arbitration "to the extent those rules and procedures do not contradict the express terms of this Arbitration Provision or the law of the [Tribe], including the limitations on the arbitrator below." J.A. 1185. The two immediately subsequent paragraphs dictate that "[t]he arbitrator shall apply applicable substantive Tribal law" and, regardless of where the arbitration occurs, shall "in no way . . . allow for the application of any other law other than the laws of the [Tribe]." J.A. 1185.[4] These clauses mirror those of the arbitration agreement in *Hayes*, which the Court found "almost surreptitiously

[4] The arbitrator's decision is not appealable, and the parties "retain the right to enforce an arbitration award before the applicable governing body of the [Tribe]." J.A. 1185.

waive[d] a potential claimant's federal rights through the guise of a choice of law clause." 811 F.3d at 675. Specifically, the *Hayes* Court quoted two provisions that together created an "outright prohibition" on asserting federal rights: (1) a provision stating that the arbitration agreement "'shall be governed by the law of the [tribe]'" and the arbitrator "'will apply the laws of the [tribe] and the terms of this Agreement,'" and (2) a clause stating that "no matter where the arbitration occurs, the arbitrator will not apply 'any law other than the law of the [tribe].'" *Id.* In accord with *Hayes*, we understand the clause prohibiting application of "any other law," in tandem with the clauses requiring the arbitrator to apply tribal law, to require exclusive application of tribal law in arbitration. *See id.*; *Dillon*, 856 F.3d at 336 ("Just as we did in *Hayes*, we interpret these terms in the arbitration agreement as an unambiguous attempt to apply tribal law *to the exclusion of federal and state law*.").

Like the arbitration agreements in *Haynes Investments* and *Sequoia Capital*, the terms of the arbitration provision here "do not explicitly disclaim the application of federal law," but "the practical effect is the same" because this arbitration provision demands exclusive application of tribal law, thereby preempting application of other authority. *Haynes Invs.*, 967 F.3d at 342; *see also Williams*, 965 F.3d at 240 ("Because the arbitration agreement mandates that only tribal law applies in arbitration, federal law does not."). A prospective waiver may be "implicitly accomplish[ed]" by provisions that disallow "application of any law other than tribal law." *Dillon*, 856 F.3d at 335; *see also Williams*, 965 F.3d at 241 (rejecting the argument that an agreement "must affirmatively disclaim federal law" to "be invalid under the prospective waiver doctrine"). That is the case here. By requiring the arbitrator to apply tribal law, expressly prohibiting "the application of any

other law other than the laws of the [Tribe]," and accommodating other rules and procedures only "to the extent [they] do not contradict the express terms of this Arbitration Provision or the law of the [Tribe]," J.A. 1185, the arbitration provision requires application of tribal law to the exclusion of federal (and state) law.

As a result, the choice-of-law clauses of the arbitration provision operate as a prospective waiver twice over, waiving not only a borrower's right to pursue federal statutory remedies (as we shall see below) but also the very federal and state defenses to arbitrability that preserve that right. *See Williams*, 965 F.3d at 243 n.14 (reasoning that enforcing the delegation clause in an arbitration provision that excludes reliance on federal or state law "would effectively allow [the lender] to subvert federal public policy and deny [the borrower] the effective vindication of her federal statutory rights before the arbitration of her claims even began" (alterations in original) (internal quotation marks omitted)). A delegation clause that requires an arbitrator to determine whether a valid and enforceable arbitration agreement exists without access to the substantive federal law necessary to make that determination results in the "sort of farce" we have previously refused to enforce under the FAA. *Hayes*, 811 F.3d at 674. The delegation clause is therefore unenforceable as a violation of public policy. *See Haynes Invs.*, 967 F.3d at 345 (holding delegation clause unenforceable as a violation of public policy); *Sequoia Cap.*, 966 F.3d at 294 (same); *Hayes*, 811 F.3d at 675 (same); *Williams*, 965 F.3d at 243 (same); *Gingras*, 922 F.3d at 126–127 (same).

Defendants counter that the arbitration provision explicitly refers to the FAA, thereby giving the arbitrator access to the only law he or she needs for deciding

enforceability. We disagree that the two clauses referencing the FAA, in context of the arbitration provision as a whole, can be construed to save the delegation clause. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 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"); *Doctors Co. v. Women's Healthcare Assocs., Inc.*, 740 S.E.2d 523, 526 (Va. 2013) ("[W]hen considering the meaning of any part of a contract, we will construe the contract as a whole." (internal quotation marks omitted)).[5]

The first clause Defendants highlight states that "[t]he arbitrator shall apply applicable substantive Tribal law consistent with the Federal Arbitration Act (FAA)." J.A. 1185. But this clause does 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. The context of the arbitration provision confirms this interpretation, as other paragraphs require the arbitrator to apply tribal law and forbid the arbitrator to apply "any other law." J.A. 1185.

The second clause on which Defendants rely appears in a paragraph about judicial enforcement of the arbitration provision. In full, it provides:

[5] Pursuant to the governing-law clause of the loan agreement, tribal law controls interpretation of the agreement. However, the parties have not provided the Court with any tribal law concerning contract interpretation. Therefore, we will apply the contract interpretation principles of the forum, Virginia. *See MacDonald v. CashCall, Inc.*, 883 F.3d 220, 228 (3d Cir. 2018).

> This Arbitration Provision is made pursuant to a transaction involving both interstate commerce and Indian commerce under the United States Constitution and other federal and tribal laws. Thus, any arbitration shall be governed by the FAA and subject to the laws of the [Tribe]. If a final non-appealable judgment of a court having jurisdiction over this transaction and the parties finds, for any reason, that the FAA does not apply to this transaction, then Our agreement to arbitrate shall be governed by the laws of the [Tribe].

J.A. 1185. The first sentence of the paragraph pertains to the FAA's jurisdictional requirement that an arbitration provision be part of a "maritime transaction or a contract evidencing a transaction involving commerce" for a court to enforce it. 9 U.S.C. § 2; *see* 9 U.S.C. § 1 (defining "commerce").[6] The second sentence confirms that, because the loan agreement falls within the FAA's jurisdictional bounds, the FAA governs enforceability of the arbitration provision. And the third sentence clarifies that, should a court find the loan agreement does not involve interstate or Indian commerce as asserted, the laws of the Tribe will determine the validity of the arbitration provision. *See Hengle*, 433 F. Supp. 3d at 854–855.

Defendants would have us take the clause stating that "any arbitration shall be governed by the FAA" out of its context and construe it as a portal through which all federal and state law defenses to arbitrability are imported into the agreement and made available for application by the arbitrator. But that interpretation would create conflict with the other terms of the arbitration provision, which require that the arbitration be "governed by the

[6] Similarly, the arbitration agreements in *Haynes Investments*, *Sequoia Capital*, *Dillon*, and *Hayes* generally stated either that they were made pursuant to "a transaction involving interstate commerce" or "a transaction involving the Indian Commerce Clause of the Constitution of the United States of America." *See*, *e.g.*, *Dillon*, 856 F.3d at 335; *Hayes*, 811 F.3d at 675; *Haynes Invs.* J.A. 343, 384.

laws of the [Tribe]" and forbid the arbitrator to apply "any other law other than the laws of the [Tribe]." J.A. 1185. We must read the arbitration provision to give effect to all its terms and "to render them consistent with each other." *Mastrobuono*, 514 U.S. at 63; *see also Babcock & Wilcox Co. v. Areva NP, Inc.*, 788 S.E.2d 237, 244 & n.8 (Va. 2016) (affirming that each part of a contract must, if possible, be given effect and interpreted in light of all the other parts). Reading these clauses together, the most harmonious construction that gives effect to each clause is to read the "governed by the FAA" clause as asserting that the arbitration provision falls within the purview of the FAA and should accordingly be enforced by a court of competent jurisdiction, but, once the court conveys the dispute to the arbitrator, he or she "must apply only the laws of the Tribe to the exclusion of Plaintiffs' potential federal and state statutory rights, including defenses to arbitrability arising under federal and state law." *Hengle*, 433 F. Supp. 3d at 855.

In response, Defendants contend that we overread the clause forbidding application of "any other law," which they say merely prevents application of the forum State's law if the arbitration occurs off tribal land. But the text of the clause proscribes "application of *any* other law other than the laws of the [Tribe]," not only the law of the forum State. J.A. 1185 (emphasis added). Defendants' interpretation is also in considerable tension with our precedent finding similar clauses indicative of a prospective waiver of federal law. For example, the *Hayes* Court construed a materially identical clause stating that, although a borrower could choose the arbitration be conducted within thirty miles of his or her residence, such accommodation "shall not be construed in any way . . . to allow for the application of any law other than the law of the [tribe]." *Hayes* J.A. 155; *see Hayes*, 811

F.3d at 675. The Court held that this clause, in conjunction with a provision requiring application of tribal law, "almost surreptitiously waive[d] a potential claimant's federal rights." *Hayes*, 811 F.3d at 675. And in *Haynes Investments* and *Sequoia Capital*, we found a similar clause "reinforce[d] th[e] point" that "tribal law preempts the application of any contrary law—including contrary federal law." *Haynes Invs.*, 967 F.3d at 342; *see id.* at 343 (describing a clause "provid[ing] that arbitration may be held within thirty miles of the claimant's residence, but only to the extent that such accommodation will not be construed 'to allow for the application of any law other than Tribal Law'"); *see also Sequoia Cap.*, 966 F.3d at 293. Absent a contrary indication in the contract, precedent constrains us to give the equivalent clause in this arbitration provision an equivalent construction.

Finally, we note that some of the arbitration agreements in *Haynes Investments* and *Sequoia Capital* provided that "the parties additionally agree to look to the [FAA] and judicial interpretations thereof for guidance in any arbitration." *Haynes Invs.* J.A. 343; *see id.* at 341 ("The Agreement to Arbitrate also comprehends the application of the [FAA], as provided below."); *Haynes Invs.*, 967 F.3d at 342 n.6 (acknowledging these provisions). Despite these explicit references to the FAA, the Court held that the "practical effect" of the arbitration agreements' terms requiring the arbitrator to apply tribal law and render a decision consistent with tribal law was to preempt the application of contrary federal law, thereby invalidating the delegation clause. *Haynes Invs.*, 967 F.3d at 342. We follow those precedents here in concluding that the arbitration provision's references to the FAA, read in context, do not mend the prospective waiver of federal law wrought by the arbitration

provision's other terms.[7] Although "we remain cognizant of the 'strong federal policy in favor of enforcing arbitration agreements,'" we must interpret the arbitration provision according to its terms and our precedent. *Hayes*, 811 F.3d at 671 (quoting *Dean Witter Reynold, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). By preventing the arbitrator from applying federal law, the arbitration provision necessarily restrains the arbitrator from considering federal law defenses to arbitrability, thereby precluding Plaintiffs from effectively vindicating their federal statutory rights. The delegation clause is therefore unenforceable as a violation of public policy.

C.

Because the delegation clause is unenforceable, we must address Plaintiffs' challenge to the validity of the arbitration provision as a whole. We agree with the district court that the choice-of-law clauses previously discussed operate as a prospective waiver of the borrowers' federal statutory rights and remedies. Therefore, the entire arbitration provision is unenforceable.

As previously discussed, by requiring the arbitrator to apply tribal law, expressly prohibiting "the application of any other law other than the laws of the [Tribe]," and

[7] Defendants' reliance on *Porter Hayden Co. v. Century Indemnification Co.*, 136 F.3d 380 (4th Cir. 1998), is unavailing. There, no party contested the validity or enforceability of the arbitration agreement, and the Court applied the "presumption of arbitrability" to construe the agreement to require arbitration of the appellant's timeliness defenses. *Id.* at 382 (internal quotation marks omitted); *see id.* at 383 (applying the "federal policy favoring arbitration" to resolve ambiguity in the scope of the arbitration clause (internal quotation marks omitted)). Here, by contrast, we are asked to determine the enforceability—not the scope—of the delegation clause, which the presumption of arbitrability does not resolve. *See Granite Rock v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 301–303 (2010).

accommodating other rules and procedures only "to the extent [they] do not contradict the express terms of this Arbitration Provision or the law of the [Tribe]," J.A. 1185, the arbitration provision unambiguously attempts to apply tribal law to the exclusion of substantive federal law. *See Hayes*, 811 F.3d at 675; *cf. Dillon*, 856 F.3d at 336. As a result, it functions as a prospective waiver of the borrowers' rights to pursue federal statutory remedies, including the remedies under RICO that Plaintiffs seek here. *See Haynes Invs.*, 967 F.3d at 344 (holding arbitration agreement prospectively waived RICO claims); *Sequoia Cap.*, 966 F.3d at 294 (same); *Williams*, 965 F.3d at 240–243 (same); *Gingras*, 922 F.3d at 127 (same).[8]

Defendants emphasize that the disputes subject to arbitration explicitly include "all tribal, *federal* or state law claims" and "all claims based upon a violation of any tribal, state or *federal* constitution, statute or regulation." J.A. 1184 (emphases added). Thus, they urge, the arbitration provision contemplates arbitration of federal claims. But as we reasoned in *Sequoia Capital*, "such language does not counteract the effect of the choice-of-law provisions." 966 F.3d at 293. Indeed, the arbitration agreements in *Hayes*, *Dillon*, *Haynes Investments*, and *Sequoia Capital* each required federal claims to be sent to arbitration, but the Court in each case nevertheless found that the agreements prevented

[8] Citing cases that involved international arbitration agreements, Defendants contend that courts cannot entertain prospective waiver challenges prior to arbitration but may do so only afterward, at the award-enforcement stage. We have previously rejected this argument in the context of tribal lending arbitration agreements because considerations about the difficulty of applying the public policy defense "'neutrally on an international scale'" at the arbitration-enforcement stage "are not at play here." *Haynes Invs.*, 967 F.3d at 344 n.10 (quoting *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 373 (4th Cir. 2012)); *see also Sequoia Cap.*, 966 F.3d at 294.

effective vindication of federal statutory claims. *See Sequoia Cap.*, 966 F.3d at 293; *see also Hayes* J.A. 155; *Dillon* J.A. 184; *Haynes Invs.* J.A. 342. If anything, 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. *See Hayes*, 811 F.3d at 673–674 ("With one hand, the arbitration agreement offers an alternative dispute resolution procedure in which aggrieved persons may bring their claims, and with the other, it proceeds to take those very claims away.").

Reading the arbitration provision as encompassing disputes it does not empower the arbitrator to resolve is far from fanciful. As another example, the provision requires that all class claims be sent to arbitration but, a few paragraphs later, explicitly forbids class arbitration. *See* J.A. 1184. We offer this example not to criticize the contractual waiver of class proceedings, which is unquestionably permissible, *see Concepcion*, 563 U.S. at 344–352, but merely to illustrate that interpreting this arbitration provision to waive claims explicitly within its scope is not contradictory but rather, in some instances, exactly what the contract intends. The difference, of course, is that waiver of a party's substantive federal rights in arbitration is forbidden. *See Italian Colors*, 570 U.S. at 235–236.

Defendants further argue that the arbitration provision's invocation of tribal law cannot be interpreted to displace federal law because the Tribe's Consumer Financial Services Ordinance incorporates federal law in many respects. But although the Ordinance requires lending businesses to comply with various federal laws, it would not permit Plaintiffs to assert their RICO claim for treble damages. First, although Section 7.1 of the Ordinance requires lenders to "comply with . . . all other applicable Tribal, and federal laws

as applicable," J.A. 267, RICO is "noticeably absent from the list [in Section 7.2] of federal consumer protection statutes with which a lender must comply," *Haynes Invs.*, 967 F.3d at 343; *see* J.A. 267–268. Second, the Ordinance does not include a private right of action for violations of its provisions or any federal laws. *Cf. Haynes Invs.*, 967 F.3d at 344. Although the Ordinance includes a consumer complaint procedure, the tribal commission tasked with reviewing a lender's handling of a complaint may "grant or deny any relief as the Commission determines appropriate," and its award "may not exceed the amount of the Consumer's debt plus reimbursement of payments." J.A. 280. The Ordinance authorizes arbitration to review the tribal commission's decision but limits the arbitrator's award to "the maximum value of the Loan at issue" and forbids the award of "punitive damages" or "equitable relief." J.A. 281.

In line with our review of materially similar tribal ordinances in *Haynes Investments* and *Sequoia Capital*, we conclude 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 Haynes Invs.*, 967 F.3d at 343–344; *Sequoia Cap.*, 966 F.3d at 293. As the district court correctly determined, the Ordinance "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." *Hengle*, 433 F. Supp. 3d at 859.

Finally, we reject Defendants' plea to compel arbitration on the premise that estoppel will prevent them from arguing to the arbitrator that federal law does not apply.

The Tribal Lenders drafted an invalid contract that strips borrowers of their substantive federal statutory rights; we cannot save that contract by revising it on appeal. We have refused similar invitations in previous cases, and we do so again here. *See Sequoia Cap.*, 966 F.3d at 293 n.4; *Dillon*, 856 F.3d at 336.

D.

The question then becomes whether we can sever the errant clauses and enforce the remainder of the arbitration provision. Like the arbitration agreements in *Hayes* and *Dillon*, this arbitration provision contains a severability clause stating that "[i]f any of this Arbitration Provision is held invalid, the remainder shall remain in effect." J.A. 1185; *see Hayes* J.A. 156; *Dillon* J.A. 185. But the existence of a severability clause cannot save an arbitration provision if the invalid terms are integral to the agreement. *See Schuiling v. Harris*, 747 S.E.2d 833, 836–837 (Va. 2013); *Eschner v. Eschner*, 131 S.E. 800, 802 (Va. 1926); *see also Williams*, 965 F.3d at 244 n.17.

In line with *Hayes*, *Dillon*, and every court of appeals to consider the question, we conclude that the choice-of-law clauses applying tribal law to the exclusion of federal law cannot be severed because they "go[] [to] the 'essence'" of the agreement to arbitrate. *Hayes*, 811 F.3d at 676 (quoting 8 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 19:73 (4th ed. 1993)); *see Dillon*, 856 F.3d at 336 (concluding "the offending provisions go to the core of the arbitration agreement" (internal quotation marks omitted)); *Williams*, 965 F.3d at 243–244 & n.17 (finding terms requiring exclusive application of tribal law to be inseverable, despite severability clause); *Gingras*, 922 F.3d at 128 (rejecting severability); *cf. MacDonald*, 883 F.3d at 230–232 (finding clause

selecting illusory tribal arbitral forum to be inseverable, despite severability clause). Read as a whole, the arbitration provision communicates an intent to require arbitration of all disputes, including those arising under federal law, while depriving borrowers of any remedy under federal law. That forbidden purpose to squelch federal claims in contravention of public policy goes to the core of the agreement to arbitrate. We accordingly cannot sever the invalid clauses and, as a result, the entire arbitration provision is unenforceable.

IV.

We move next to the question of tribal sovereign immunity. Plaintiffs sought declaratory and injunctive relief against the Tribal Officials under Virginia law and RICO, which, as relevant here, defines "unlawful debt" by reference to state law. *See* 18 U.S.C. § 1961(6). In the district court, the Tribal Officials moved to dismiss Plaintiffs' claims against them for lack of subject matter jurisdiction, contending that they enjoy the same immunity from suit as the Tribe and such immunity extends to suits seeking to enjoin violations of state law. This presents a question of first impression in our Circuit.

Indian tribes possess a unique status in our federal system. As "domestic dependent nations," they "exercise inherent sovereign authority," yet they are "subject to plenary control by Congress." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (internal quotation marks omitted). One of the "core aspects of sovereignty" afforded to tribes is "the 'common-law immunity from suit,'" not only in tribal courts but also in state and federal courts. *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Absent waiver or congressional abrogation, tribal immunity extends even to suits arising

from a Tribe's commercial activities off tribal lands. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998).

But the Supreme Court has consistently recognized that tribal immunity does not bar suits against "*individuals*, including tribal officers, responsible for unlawful conduct." *Bay Mills*, 572 U.S. at 796. For example, tribal immunity does not immunize individual tribal members from suits "to enjoin violations of state law." *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 171–172 (1977) (suit to enjoin off-reservation fishing in violation of state law); *cf. Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State."); *Lewis v. Clarke*, 137 S. Ct. 1285, 1291–1292 (2017) (denying immunity in negligence action brought against tribal employee under state law for tort committed within the scope of his employment). And, by analogy to *Ex parte Young*, 209 U.S. 123 (1908), tribal officers are "not protected by the tribe's immunity from suit" when a plaintiff seeks to enjoin a violation of federal law. *Santa Clara Pueblo*, 436 U.S. at 59 (suit for declaratory and injunctive relief alleging that tribal ordinance violated federal law).

The Tribal Officials assert that sovereign immunity bars Plaintiffs' claims against them seeking prospective relief to enjoin violations of *state* law. We agree with the district court that the Supreme Court's decision in *Bay Mills* forecloses the Tribal Officials' argument. Tribal sovereign immunity does not bar state law claims for prospective injunctive relief against tribal officials for conduct occurring off the reservation. *See*

Gingras, 922 F.3d at 120; *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015).

In *Bay Mills*, the Bay Mills Indian Community—a federally recognized Native American tribe—opened an off-reservation gaming facility in Michigan on land the tribe had purchased. Michigan sued to enjoin operation of the new casino. It alleged Bay Mills violated the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, and the compact between the parties pursuant to that law because the facility was located beyond Indian lands. Congress adopted the IGRA in response to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), "which held that States lacked any regulatory authority over gaming on Indian lands" but "left fully intact a State's regulatory power over tribal gaming outside Indian territory," *Bay Mills*, 572 U.S. at 794. Through the IGRA, Congress granted States "'some measure of authority over gaming on *Indian* lands,'" thereby abrogating tribal sovereign immunity to that extent. *Id.* (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996)). But, the Court held, a State's suit to enjoin gaming activity *off* Indian lands does not fall within the IGRA and is accordingly outside the statute's abrogation of immunity. *Id.* at 791.

Even so, the Court explained, Michigan was not without recourse for the tribe's alleged violations of state law. Though the State could not sue the *tribe* for illegal gaming, it could "resort to other mechanisms, including legal actions against the responsible individuals." *Id.* at 785. Because "Indians going beyond reservation boundaries are subject to any generally applicable state law[,] . . . Michigan could, in the first instance, deny a license to Bay Mills for an off-reservation casino." *Id.* at 795–796 (internal quotation

marks omitted). "And if Bay Mills went ahead anyway, Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license." *Id.* at 796 (citing Mich. Comp. Laws Ann. §§ 432-220, 600.3801(1)(a)). The Court explained: "As [we] ha[ve] stated before, analogizing to *Ex parte Young*, . . . tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Id.* at 796 (citing *Santa Clara Pueblo*, 436 U.S. at 59).

We agree with the Second and Eleventh Circuits that this "plain statement" by the Supreme Court "blessed *Ex parte Young*-by-analogy suits against tribal officials for violations of state law." *Gingras*, 922 F.3d at 121; *see also PCI Gaming Auth.*, 801 F.3d at 1290 ("[T]ribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands."). Though the tribe itself retains sovereign immunity, it cannot shroud its officials with immunity in federal court when those officials violate applicable state law.[9] Accordingly, sovereign immunity does not bar Plaintiffs' claims for prospective injunctive relief to restrain the Tribal Officials from off-reservation conduct that allegedly violates state law.

[9] The Tribal Officials assert that Plaintiffs' lawsuit is in substance a suit against the Tribe because Plaintiffs seek to avoid repaying money loaned from the tribal treasury and because the lawsuit aims to prevent the Tribe from enforcing its laws. Without commenting on the legality of any particular relief that may eventually be awarded in this suit, we observe that the fact some relief permissible under *Ex parte Young* will affect a sovereign's treasury or prevent an official from enforcing a duly enacted law does not transform a suit against an official into one against the sovereign itself. *See Edelman v. Jordan*, 415 U.S. 651, 667–668 (1974); *Ex parte Young*, 209 U.S. at 159–160.

The Tribal Officials assert that we should not follow *Bay Mills* because its statements about suing tribal officials to enforce state law were dicta and, if taken seriously, would "silently overrul[e]" multiple settled precedents. Opening Br. 68. We are not persuaded.

As an initial matter, we cannot ignore the Supreme Court's explicit guidance simply by labeling it "dicta." Although the Court's extended discussion of the alternative remedies available to Michigan may not have been strictly "necessary to the outcome" in *Bay Mills*, neither was it "peripheral" or so cursory as to suggest the Court gave less than "full and careful consideration" to the matter. *Payne v. Taslimi*, 998 F.3d 648, 654–655 (4th Cir. 2021) (internal quotation marks omitted). Indeed, the availability of alternative remedies featured in both of the Court's holdings. Regarding the IGRA, the Court explained that Congress abrogated tribal immunity solely with respect to gaming on Indian lands because States already had other ways to vindicate gaming-law violations outside Indian territory. *See Bay Mills*, 572 U.S. at 795–797. And regarding the Court's decision not to overrule *Kiowa*, it reasoned that "[a]dhering to *stare decisis* is particularly appropriate here given that the State . . . has many alternative remedies," but "the situation [c]ould be different if no alternative remedies were available." *Id.* at 799 n.8.

Even if the Supreme Court's discussion of alternative remedies were dicta, we are "obliged to afford 'great weight to Supreme Court dicta.'" *Fusaro v. Cogan*, 930 F.3d 241, 254 (4th Cir. 2019) (quoting *Nat'l Labor Rels. Bd. v. Bluefield Hosp. Co.*, 821 F.3d 534, 541 n.6 (4th Cir. 2016)); *see also Manning v. Caldwell*, 930 F.3d 264, 281 (4th Cir. 2019) (en banc) ("[W]e routinely afford substantial, if not controlling deference to dicta from the

Supreme Court."); *In re Bateman*, 515 F.3d 272, 282 (4th Cir. 2008) (acknowledging that Supreme Court dicta "should have considerable persuasive value in the inferior courts" (internal quotation marks omitted)). "[W]e cannot simply override a legal pronouncement endorsed . . . by a majority of the Supreme Court," particularly when the supposed dicta "'is recent and not enfeebled by later statements.'" *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 181 n.2 (4th Cir. 2012) (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996)). The lengthy discussion of alternative remedies, including a suit against tribal officers to restrain violations of state law, was important, if not essential, to the Court's analysis in *Bay Mills*. We see no ground on which we can disregard the Court's clear endorsement of such suits.

The Tribal Officials caution that following *Bay Mills* would contravene the Supreme Court's instruction that the overriding basis for the *Ex parte Young* doctrine is to vindicate the supreme authority of federal law. *See Pennhurst State Sch. v. Halderman*, 465 U.S. 89, 105–106 (1984). In *Pennhurst*, the Supreme Court refused to extend the *Ex parte Young* rationale to suits against state officials alleging violations of their own State's laws. As the Court explained, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law," a result that "conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Id.* at 106. But the sovereignty and federalism concerns underpinning *Pennhurst* are not implicated here. In suits against tribal officials like *Bay Mills* envisioned, federal courts are called upon to instruct *tribal* officials on how to conform their conduct to *state* law. The Court's recognition in *Bay Mills* that tribal officials may be

sued for violations of state law "thus stands in harmony with *Pennhurst*." *Gingras*, 922 F.3d at 123; *see also PCI Gaming Auth.*, 801 F.3d at 1290.

Bay Mills also does not upset core principles of tribal sovereign immunity as the Tribal Officials contend. *Ex parte Young*-style claims do not accomplish an extra-congressional abrogation of tribal immunity but rather present a long-recognized *exception* to sovereign immunity. *Cf. Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002) (describing *Ex parte Young* as an "exception to sovereign immunity" based on the "fiction" that a state officer acting in violation of federal law "loses the cloak of [s]tate immunity" (internal quotation marks omitted)); *Santa Clara Pueblo*, 436 U.S. at 59 ("[A]n officer of the [tribe] . . . is not protected by the tribe's immunity from suit."); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 30 (1st Cir. 2006) ("Whatever the scope of a tribal officer's official capacity, it does not encompass activities that range beyond the authority that a tribe may bestow."). And though the Supreme Court has applied the same "general rules" to States and tribes when it comes to individual- and official-capacity suits, *Lewis*, 137 S. Ct. at 1292, it has acknowledged that tribal immunity is not identical to the immunity the States enjoy, *see Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

Alternatively, accepting that the Supreme Court meant what it said in *Bay Mills*, the Tribal Officials attempt to distinguish the case on two primary grounds. First, the Tribal Officials argue that *Bay Mills* addressed only a *State's* ability to sue tribal officials for violations of state law, whereas Plaintiffs here are private individuals. But "there is no warrant in [precedent] for making the validity of an *Ex parte Young* action turn on the

identity of the plaintiff." *Va. Off. of Prot. & Advoc. v. Stewart*, 563 U.S. 247, 256 (2011). Indeed, the principle that a tribe cannot authorize its officials to violate applicable state law applies equally regardless of who sues to enforce state law. *Cf. Gingras*, 922 F.3d at 124 (noting that States often authorize private parties to "act as 'private attorneys general' to enforce state law"). That the Supreme Court spoke in terms of a State's ability to sue tribal officials—because that was the posture of the case before it—does not limit the principle it recognized in *Bay Mills* to those facts. As the Court explained elsewhere in its opinion, "tribal immunity applies no less to suits brought by States . . . than to those by individuals." *Bay Mills*, 572 U.S. at 789.

Second, the Tribal Officials assert that the conduct at issue here occurred on the reservation, unlike the off-reservation gaming in *Bay Mills*. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–149 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."). They note in particular that each loan agreement states it was "made and accepted in the sovereign territory of the Habematolel Pomo of Upper Lake." J.A. 1186. But as the district court aptly observed, the conduct alleged is not limited to where the parties "made and accepted" the agreements. *See Hengle*, 433 F. Supp. 3d at 875–876 & n.13. For example, Defendants allegedly marketed their lending businesses throughout the country, including in Virginia, and Plaintiffs resided on non-Indian lands when they applied for their loans online. Defendants allegedly collected loan payments from Plaintiffs while they resided in Virginia from bank accounts maintained there, and the effects of Defendants' allegedly illegal

activities were felt by Plaintiffs in Virginia. These activities are "directly analogous to the lending activity that other courts have found to clearly constitute off-reservation conduct subject to nondiscriminatory state regulation." *Id.* at 876; *see*, *e.g.*, *Gingras*, 922 F.3d at 121; *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 360–361 (S.D.N.Y. 2013); *Colorado v. W. Sky Fin., LLC*, 845 F. Supp. 2d 1178, 1181 (D. Colo. 2011); *United States v. Hallinan*, No. 16-cr-130, 2016 WL 7477767, at *1 n.2 (E.D. Pa. Dec. 29, 2016). Indeed, the Tribal Officials have not brought to our attention any court reaching a contrary conclusion. Plaintiffs seek to enjoin off-reservation conduct, bringing their suit within *Bay Mills*' ambit.

In sum, substantive state law applies to off-reservation conduct, and although the Tribe itself cannot be sued for its commercial activities, its members and officers can be. *Cf. Kiowa*, 523 U.S. at 755 ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."). The Supreme Court has explicitly blessed suits against tribal officials to enjoin violations of federal and state law. *See Bay Mills*, 572 U.S. at 795–796. We therefore affirm the district court's ruling that tribal sovereign immunity does not bar Plaintiffs' claims for injunctive and declaratory relief against the Tribal Officials.

V.

All Defendants moved to dismiss the complaint because Plaintiffs' claims depend on Virginia usury law, while the governing-law clause of the loan agreements elects tribal law to govern the loans. The district court held the governing-law clause unenforceable as a violation of "Virginia's compelling public policy against the unregulated lending of

usurious loans." *Hengle*, 433 F. Supp. 3d at 867. Because the complaint stated a plausible claim that the loans violate Virginia's usury statute and are an "unlawful debt" under RICO, the court denied Defendants' motions to dismiss on this ground. *See* 18 U.S.C. § 1961(6) (defining "unlawful debt" as a debt incurred in connection with the business of lending money "at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate"); Va. Code Ann. § 6.2-303. The district court certified for interlocutory review the question of law whether enforcement of the governing-law clause would violate Virginia's compelling public policy.

The parties agree that Virginia's choice-of-law rules direct our inquiry. *See ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 49 n.11 (4th Cir. 1983). Under Virginia law, parties to a contract are free to specify the law that governs their agreement. *See Union Cent. Life Ins. Co. v. Pollard*, 26 S.E. 421, 422 (Va. 1896). Virginia courts accordingly give contractual choice-of-law clauses "full effect except in unusual circumstances." *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 624 (4th Cir. 1999) (citing *Tate v. Hain*, 25 S.E.2d 321, 324 (Va. 1943)); *see also Paul Bus. Sys., Inc. v. Canon USA, Inc.*, 397 S.E.2d 804, 807 (Va. 1990). One such circumstance occurs when a foreign law not only differs from Virginia law but is contrary to compelling public policy of the Commonwealth; in that case, Virginia courts will not lend their aid to enforce the obligation under foreign law. *See Willard v. Aetna Cas. & Sur. Co.*, 193 S.E.2d 776, 778 (Va. 1973) ("Comity does not require the application of another state's substantive law if it is contrary to the public policy of the forum state."); *Tate*, 25 S.E.2d at 325 (recognizing that the

parties' choice of law is controlling "unless it be so much in conflict with the public policy of Virginia that it would not be given recognition in its courts").

The loan agreements here obligate Plaintiffs to pay interest at rates between 544% and 920% on principal amounts ranging from $300 to $1,575 over the course of ten months. The governing-law clause in the loan agreements selects tribal law, which contains no usury cap or limits of any kind on the interest a lender can charge. Virginia law caps general interest rates at 12%. Va. Code Ann. § 6.2-303(A). The Supreme Court of Virginia has not addressed whether unregulated usurious lending of low-dollar loans with triple-digit interest rates violates compelling Virginia public policy so as to overcome a contractual choice of foreign law. We therefore must apply Virginia law to predict how that court would rule. *See Wells v. Liddy*, 186 F.3d 505, 527–528 (4th Cir. 1999).

Defendants assert that the Supreme Court of Virginia's decision in *Settlement Funding, LLC v. Von Neumann-Lillie*, 645 S.E.2d 436 (Va. 2007), forecloses Plaintiffs' argument at the outset but, like other courts, we conclude that *Settlement Funding* does not answer the public policy question presented here. *See Hengle*, 433 F. Supp. 3d at 865–866; *Gibbs v. Haynes Invs., LLC*, 368 F. Supp. 3d 901, 929 n.49 (E.D. Va. 2019); *Commonwealth v. NC Fin. Sols. of Utah, LLC*, 100 Va. Cir. 232, 2018 WL 9372461, at *12 (Va. Cir. Ct. 2018). In *Settlement Funding*, a bank extended a $29,000 loan to the borrower at an effective annual interest rate of 22.531%, to be repaid over a period of 178 months. 645 S.E.2d at 437; *see Commonwealth v. Settlement Funding, LLC*, 70 Va. Cir. 203, 2006 WL 727873, at *1 (Va. Cir. Ct. 2006). The loan agreement contained a Utah choice-of-law clause. The borrower eventually defaulted on the loan and raised several

affirmative defenses to the bank's collection action, including a usury defense based on Virginia law. *Settlement Funding*, 645 S.E.2d at 438. The bank responded that the usury defense was improper because the loan agreement designated Utah law as controlling and Utah law did not contain a usury cap but instead provided that the unconscionability of consumer loan interest rates "be determined by the market conditions." *Id.* at 438–439 (internal quotation marks omitted). The trial court declined to apply Utah law. Though it acknowledged that Utah law would apply pursuant to the choice-of-law clause, the trial court found the bank produced no proper proof of Utah law at trial and, without proof of Utah law, the court applied a presumption that Utah law was identical to Virginia law. The Supreme Court of Virginia reversed. The court held that the bank had "provided the circuit court with sufficient information regarding the substance of Utah law[,] . . . [t]herefore, the circuit court erred in refusing to apply Utah law in the construction of the loan agreement." *Id.* at 439.

From this, Defendants contend that the Supreme Court of Virginia has concluded that a choice-of-law clause selecting foreign law that permits interest rates above Virginia's usury cap never violates public policy. We cannot agree. The *Settlement Funding* court said nothing about public policy but addressed only the evidentiary question whether the bank had met its burden to prove the substance of Utah law. Although the borrower asserted public policy as an alternative argument on appeal, the bank replied that the trial court did not address this issue. Br. of Appellee at 2–5, *Settlement Funding*, 645 S.E.2d 436, 2006 WL 4701777; Reply Br. of Appellant at 2, *Settlement Funding*, 645 S.E.2d 436, 2007 WL 2296007. The Supreme Court of Virginia likewise did not address the public

policy point but ruled solely on the issue raised and decided below. Moreover, the interest charged under Utah law in *Settlement Funding* was roughly 10 percentage points greater than Virginia's 12% cap. In stark contrast, the interest charged here under tribal law exceeds Virginia's cap by roughly *500 to 900* percentage points. We can infer no directive on the question before us from the decision in *Settlement Funding*.

We therefore must discern Virginia public policy by reference to its statutes and caselaw. *See Paul Bus. Sys.*, 397 S.E.2d at 808. Of course, in one sense every statutory enactment expresses the public policy of the Commonwealth. But "[m]erely because one state's law differs from Virginia's does not, *ipso facto*, justify refusal to adhere to comity principles," or choice-of-law clauses would rarely be enforced. *Chesapeake Supply & Equip. Co. v. J.I. Case Co.*, 700 F. Supp. 1415, 1421 (E.D. Va. 1988). Virginia public policy must be "compelling" to override the parties' selection of a different State's laws, *Willard*, 193 S.E.2d at 779, such that enforcement of the foreign law would be "shocking to one's sense of right," *Tate*, 25 S.E.2d at 325; *see Chesapeake Supply*, 700 F. Supp. at 1421.

Since as early as 1734, the Virginia legislature has regulated usurious loans based upon "considerations of public policy." *See Town of Danville v. Pace*, 66 Va. 1, 19–20 (1874). "The usury statutes represent a clarification of the public policy of the state that usury is not to be tolerated, and [a] court should therefore be chary in permitting this policy to be thwarted." *Radford v. Cmty. Mortg. & Inv. Corp.*, 312 S.E.2d 282, 285 (Va. 1984) (brackets omitted) (quoting *Heubusch v. Boone*, 192 S.E.2d 783, 789 (Va. 1972)). Current Virginia law prohibits loans with interest rates greater than 12%. *See* Va. Code Ann. § 6.2-

303(A). The General Assembly exempts certain entities from the general usury cap but subjects those entities to specific licensure and regulatory requirements, including separate interest-rate limits. *See id.* § 6.2-303(B); *see*, *e.g.*, *id.* § 6.2-1500 *et seq*. (licensure and regulation of consumer finance companies); *id.* § 6.2-1800 *et seq.* (licensure and regulation of short-term lenders); *id.* § 6.2-2200 *et seq.* (licensure and regulation of motor vehicle title lenders). Any contract violating the usury limit is "void," meaning the lender cannot collect "any principal, interest, fees, or other charges in connection with the contract." *Id.* § 6.2-303(F) (effective Jan. 1, 2021). And a borrower who paid usurious interest may sue to recover not only the excess interest paid but also "[t]wice the total amount of interest paid" during the two years preceding the lawsuit, in addition to court costs and attorney's fees. *Id.* § 6.2-305(A).

Virginia's legislature has signaled the importance it attaches to the usury laws by enacting an anti-waiver provision, which states that "[a]ny agreement or contract in which the borrower waives the benefits of [Virginia's usury laws] or releases any rights he may have acquired under [those laws] shall be deemed to be against public policy and void." *Id.* § 6.2-306(A).[10] An anti-waiver provision can be evidence that a state usury statute represents a fundamental policy of the State that overcomes a contractual choice-of-law

[10] Defendants argue that the anti-waiver provision does not apply to their loan agreements because they were not made under Virginia law. But the question currently before us is the strength and import of Virginia's public policy against unregulated usurious lending, not the proper application of Virginia law to these loan agreements. For similar reasons, the parties' dispute about whether Virginia's licensure requirement for consumer finance companies applied to the Tribal Lenders before the recent amendment to the statute is inapposite to the question before this Court. *See* Va. Code Ann. § 6.2-1501(A) (effective Jan. 1, 2021).

clause. *See*, *e.g.*, *Kaneff v. Del. Title Loans*, 587 F.3d 616, 622–624 (3d Cir. 2009) (concluding that Pennsylvania's "antipathy to high interest rates such as the 300.01 percent interest charged in the contract at issue, represents such a fundamental policy that we must apply Pennsylvania law" after assessing, *inter alia*, the Pennsylvania usury statute's anti-waiver provision and enforcement mechanisms); *Clerk v. First Bank of Del.*, 735 F. Supp. 2d 170, 178 (E.D. Pa. 2010) (applying *Kaneff* to conclude that Pennsylvania's fundamental public policy against usury overcame the parties' selection of Delaware law in the contract). Importantly, Virginia's anti-waiver provision does more than prohibit waivers of Virginia's usury laws: it specifically instructs that contracts in derogation of those laws are "against public policy and void." Va. Code Ann. § 6.2-306(A). We have previously found a similar statement by the legislature, combined with an anti-waiver provision, to evince a State's fundamental public policy. *See Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 609–610 (4th Cir. 2004) (analyzing the Arkansas Franchise Act). As we observed in that case, "a legislature simplifies the task of determining whether a state statute embodies fundamental policy when it expressly states" as much. *Id.* at 609 (discussing a Maine law providing that a contract "in violation of this chapter is deemed against public policy and is void and unenforceable" (internal quotation marks omitted)).

Considering the foregoing evidence of Virginia policy, at least one Virginia court has held that Virginia's "long-recognized . . . public policy against allowing usury by unregulated lenders" rendered a Utah choice-of-law provision unenforceable. *NC Fin. Sols.*, 2018 WL 9372461, at *11–*12. In that case, a Chicago-based internet lender allegedly provided closed-end installment loans to Virginia consumers at annual interest

rates ranging from 35% to 155%. *Id.* at *1. Virginia sued the lender, alleging violations of the Virginia Consumer Protection Act, and in defense the lender relied on a Utah choice-of-law clause in its loan agreements. The court acknowledged that the parties' contractual choice of law should generally be enforced but found that two independent special circumstances compelled rejection of Utah law: first, Utah law was not reasonably related to the purpose of the agreement and, second, application of Utah law was "barred by the strong public policy of the forum state, Virginia." *Id.* at *10. The court discerned Virginia's strong policy against unregulated usurious lending from the Commonwealth's statutory usury cap, extensive regulation of entities entitled to charge higher rates, anti-waiver statute, caselaw expounding the importance of the usury laws, and broader statutory scheme regulating "deceptive trade practices connected to a usurious loan transaction." *Id.* at *11–*12. In view of this strong public policy, the Virginia court declined to enforce the Utah choice-of-law clause.

Our review likewise leads us to conclude that the Supreme Court of Virginia would not enforce the governing-law clause because it violates Virginia's compelling public policy against unregulated usurious lending. We acknowledge that contractual choice-of-law clauses should be enforced absent unusual circumstances, but the circumstances here—unregulated usurious lending of low-dollar short-term loans at triple-digit interest rates to Virginia borrowers—unquestionably "shock[s] . . . one's sense of right" in view of

Virginia law. *Tate*, 25 S.E.2d at 325. We accordingly affirm the district court's judgment declining to enforce the governing-law clause.[11]

VI.

Plaintiffs also seek prospective injunctive relief against the Tribal Officials pursuant to RICO. The district court granted the Tribal Officials' motion to dismiss the RICO claims against them, ruling that RICO does not give private plaintiffs a right to injunctive relief. Our sister circuits are evenly divided on this question, which presents an issue of first impression for our Court. *See Chevron Corp. v. Donziger*, 833 F.3d 74, 138–139 (2d Cir. 2016) (holding that equitable relief is available); *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 697 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003) (same); *Dixie Carriers, Inc. v. Channel Fueling Serv., Inc.*, 843 F.2d 821, 829–830 (5th Cir. 1988) (holding that equitable relief is not available); *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1084 (9th Cir. 1986) (same).

As Plaintiffs do not contest, they may not seek equitable remedies under RICO unless Congress has authorized them to do so. *See Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."); *cf. Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) ("The power of federal courts of equity to enjoin unlawful executive action is

[11] The district court also ruled that the governing-law clause does not violate the prospective waiver doctrine—a conclusion Plaintiffs resist on appeal. Because we hold the governing-law clause unenforceable on other grounds, we need not address Plaintiffs' alternative argument.

subject to express and implied statutory limitations."). We thus begin with "a careful consideration" of the statutory text. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337 (2021).

RICO's civil remedies section provides, in pertinent part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in . . . ; or ordering dissolution or reorganization of any enterprise . . . .
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

18 U.S.C. § 1964(a)–(c).

Section 1964(a) authorizes district courts to employ a broad range of equitable remedies to prevent and restrain violations of RICO's substantive provisions. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (explaining that a similarly worded provision "specif[ies] the remedial *powers* of the court"). But this provision, by itself, says nothing about who may invoke the court's remedial powers.

Subsections (b) and (c) create the causes of action specifying who may sue for which forms of relief. Section 1964(b) provides that the Attorney General "may institute

proceedings under this section"—a clear cross-reference to the broad remedial powers authorized in Section 1964(a). It also specifies that district courts may order interim forms of equitable relief while the Attorney General's "proceedings under this section" are pending.

In contrast, Section 1964(c), which applies to private litigants, does not refer to the remedial powers authorized in Section 1964(a). *See Wollersheim*, 796 F.2d at 1082 ("In contrast to part (b), there is no express authority [in part (c)] to *private plaintiffs* to seek the equitable relief available under part (a)."). It instead creates a cause of action for private parties injured by violations of Section 1962 to "sue therefor" and "recover . . . damages." 18 U.S.C. § 1964(c). By authorizing the government to "institute proceedings under" Section 1964 and not giving private plaintiffs the same authority, Congress expressed its intent to withhold from private plaintiffs the ability to invoke the injunctive power granted to the courts in Section 1964(a). We accordingly cannot agree with the Seventh Circuit that the opening sentence of Section 1964(b), authorizing the Attorney General to "institute proceedings under this section," and the opening clause of Section 1964(c), authorizing plaintiffs injured by RICO violations to "sue therefor," are "equivalent." *Scheidler*, 267 F.3d at 697. We refuse to read such material differences out of the statutory text.

As this Court has previously observed, Section 1964(c) "makes no mention whatever of injunctive or declaratory relief." *Johnson v. Collins Ent. Co.*, 199 F.3d 710, 726 (4th Cir. 1999); *see also Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) (observing that Section 1964(c) "has nothing to say about injunctive relief," in "sharp contradistinction to" Section 1964(b)). Of course, that subsection also does not expressly

limit private plaintiffs to the treble damages and costs authorized there. But Congress's use of significantly different language to create the governmental right of action in Section 1964(b) and the private right of action in Section 1964(c) compels us to conclude by negative implication that, although the government may sue for prospective relief, private plaintiffs may sue only for treble damages and costs.

For similar reasons, we cannot agree with the Seventh and Second Circuits that Section 1964(a) by itself authorizes private parties to seek equitable relief. Those courts reason that Section 1964(b) "mentions only *interim* remedies," *Scheidler*, 267 F.3d at 696, so the government's authority to seek permanent injunctions must proceed from Section 1964(a) alone and, "[b]y parity of reasoning," Section 1964(a) must also authorize private parties to seek equitable relief, *Donziger*, 833 F.3d at 138–139. But a flawed premise leads to a flawed conclusion. It is Section 1964(b)'s cross-reference to Section 1964(a) that authorizes the government to seek permanent injunctions. *See* 18 U.S.C. § 1964(b) ("The Attorney General may institute *proceedings under this section*." (emphasis added)). Section 1964(c) tellingly contains no similar language or any other reference to equitable relief. Because we reject the Seventh and Second Circuits' restrictive reading of Section 1964(b), we also necessarily reject their conclusion that Section 1964(a) by itself authorizes private parties to seek injunctive relief.

Our reading of the statute does not reduce Section 1964(a) to a merely jurisdictional provision. *See Donziger*, 833 F.3d at 138; *Scheidler*, 267 F.3d at 697. Instead, it honors the distinct text Congress used in each subsection—describing courts' remedial powers under RICO in (a) and creating two different causes of action with corresponding remedies

for two different categories of plaintiffs in (b) and (c). Further, while we recognize that RICO's "terms are to be 'liberally construed to effectuate its remedial purposes,'" *Boyle v. United States*, 556 U.S. 938, 944 (2009) (quoting Section 904(a), 84 Stat. 947, note following 18 U.S.C. § 1961), even a liberal construction of Section 1964 cannot import into the statute a remedy that Congress has chosen not to provide.

Plaintiffs urge us to consider by analogy the antitrust statutes. Indeed, the Supreme Court has acknowledged that Congress "modeled" Section 1964(c) on Section 4 of the Clayton Act, 15 U.S.C. § 15, which borrowed its language from Section 7 of the Sherman Act. *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 267 (1992). But a comparison to the antitrust statutes does not help Plaintiffs' cause.

Like Section 1964(a), the introductory clause of Section 4 of the Sherman Act (currently codified at 15 U.S.C. § 4) grants district courts authority to "prevent and restrain" violations of the Act. *See also* Ch. 647, 26 Stat. 209, 209–210 (1890) (Section 4 of the Sherman Act as originally enacted). Subsequent clauses of 15 U.S.C. § 4 vest the Attorney General with the duty to "institute proceedings in equity" and authorize interim relief, paralleling RICO's Section 1964(b). *See also* 26 Stat. at 209–210. By contrast, under 15 U.S.C. § 15—the analogue to Section 1964(c)—any person injured in his business or property by a violation of the antitrust laws "may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *See also* 26 Stat. at 210 (Section 7 of the Sherman Act as originally enacted).

The Supreme Court has recognized that neither of these provisions authorize private parties to sue for injunctive relief. *See Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co.*, 260 U.S. 261, 286 (1922) (explaining that a "suit for an injunction, brought by a private corporation," could not be maintained under the Sherman Act because its civil remedies were "exclusive" and "consisted only of [] suits for injunctions brought by the United States in the public interest under section 4" and "private actions to recover damages brought under section 7"); *Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917) (holding that "a private person cannot maintain a suit for an injunction under" Section 4 of the Sherman Act). Congress's use of parallel language in Section 1964(a), (b), and (c) suggests that these provisions similarly do not authorize private RICO plaintiffs to sue for injunctive relief. *See Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (reasoning that "similarity of language" between two statutes is "a strong indication that the two statutes should be interpreted pari passu"); *see also Holmes*, 503 U.S. at 268 ("We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4.").

Plaintiffs would have us look to 15 U.S.C. § 26, wherein the Clayton Act explicitly provides that private parties "shall be entitled to sue for and have injunctive relief" against loss or damage threatened by a violation of the antitrust laws. But this provision has no analogue in the RICO statute. Notably, this provision was not part of the Sherman Act but was added to the Clayton Act to "fill[] a gap in the Sherman Act by authorizing equitable relief in private actions." *California v. Am. Stores Co.*, 495 U.S. 271, 287 (1990); *see also*

Gen. Inv. Co., 260 U.S. at 287. The problem for Plaintiffs is that this gap remains unfilled in RICO. Unlike 15 U.S.C. §§ 4 and 15, this provision of the Clayton Act has no RICO counterpart; nowhere in the RICO statute has Congress explicitly authorized private actions for injunctive relief as it has done in 15 U.S.C. § 26. That provision of the Clayton Act, and the absence of a parallel provision in RICO, cuts against Plaintiffs' interpretation of Section 1964(a). Were the text in Section 1964(a) and (c) sufficient to create a right for private parties to seek injunctive relief, as Plaintiffs urge, Congress would not have needed to enact 15 U.S.C. § 26.

We may accept as true that "the Supreme Court regularly treats the remedial sections of RICO and the Clayton Act identically, regardless of superficial differences in language." *Scheidler*, 267 F.3d at 700. But the differences between RICO and the Clayton Act in this instance are not superficial. That Congress provided private antitrust plaintiffs a separate right to prospective injunctive relief under a materially similar remedial structure confirms that RICO, by lacking that separate provision, also lacks the separate right. *See Wollersheim*, 796 F.2d at 1087.

Because the text of Section 1964 is unambiguous and the statutory scheme is coherent and consistent, "[o]ur inquiry must cease." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *see also Alexander v. Sandoval*, 532 U.S. 275, 288 n.7 (2001) ("[T]he interpretive inquiry begins with the text and structure of the statute and ends once it has become clear that Congress did not provide a cause of action." (internal citation omitted)). The Tribal Officials and the United States as amicus curiae point out that, on at least two occasions, Congress declined to pass legislation that would have added to RICO an explicit

right for private plaintiffs to seek injunctive relief, and the Fifth and Ninth Circuits have found this history persuasive. *See Dixie Carriers, Inc.*, 843 F.2d at 829–830; *Wollersheim*, 796 F.2d at 1084–1086. Although we agree with those courts that Congress has not authorized private RICO plaintiffs to seek injunctive relief, *see Dixie Carriers*, 843 F.2d at 830; *Wollersheim*, 796 F.2d at 1084, we do so based on the text of the statute and without considering these failed legislative proposals, which "are 'a particularly dangerous ground on which to rest'" statutory interpretation, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169–170 (2001) (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)). Congress's intention is revealed in the text of the statute it enacted, and for the reasons explained here, Section 1964 does not authorize private RICO plaintiffs to sue for prospective injunctive relief.

VII.

For the foregoing reasons, we affirm the district court's judgment on each of the four issues raised in this interlocutory appeal. The arbitration provision's delegation clause and the provision as a whole are unenforceable under our precedent because they prospectively waive Plaintiffs' substantive federal statutory rights. Tribal sovereign immunity does not shield the Tribal Officials from Plaintiffs' claims to enjoin violations of state law. Under Virginia law, the district court cannot enforce the loan agreement's choice of tribal law to govern these loans because tribal law's authorization of triple-digit interest rates on low-dollar, short-term loans violates Virginia's compelling public policy against unregulated usurious lending. And the district court correctly dismissed Plaintiffs'

RICO claim against the Tribal Officials because RICO does not authorize private plaintiffs to sue for injunctive relief.

AFFIRMED

TAB C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

GEORGE HENGLE, *et al.*,
on behalf of themselves and
all individuals similarly situated,
Plaintiffs,

v. Civil No. 3:19cv250 (DJN)

SCOTT ASNER, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs George Hengle ("Hengle"), Sharon Blackburn ("Blackburn"), Willie Rose ("Rose"), Elwood Bumbray ("Bumbray"), Tiffani Myers ("Myers"), Steven Pike ("Pike"), Sue Collins ("Collins") and Lawrence Mwethuku ("Mwethuku") (collectively, "Plaintiffs") bring this action on behalf of themselves and all individuals similarly situated against Scott Asner ("Asner"), Joshua Landy ("Landy"), Sherry Treppa, Tracey Treppa, Kathleen Treppa, Iris Picton, Sam Icay, Aimee Jackson-Penn and Amber Jackson (collectively, "Defendants"), alleging that Defendants issued usurious loans to Plaintiffs in the name of Golden Valley Lending, Inc. ("Golden Valley"), Silver Cloud Financial, Inc. ("Silver Cloud"), Mountain Summit Financial, Inc. ("Mountain Summit"), and Majestic Lake Financial, Inc. ("Majestic Lake") (collectively, the "Tribal Lending Entities") — four entities formed under the laws of the Habematolel Pomo of Upper Lake (the "Tribe"), a federally recognized Native American tribe. Plaintiffs seek to enjoin Sherry Treppa, Tracey Treppa, Kathleen Treppa, Iris Picton, Sam Icay, Aimee Jackson-Penn and Amber Jackson (collectively, the "Tribal Officials") from collecting on the allegedly usurious loans issued by the Tribal Lending Entities and to prevent the Tribal

Lending Entities from issuing usurious loans to Virginia consumers in the future. Plaintiffs also seek monetary relief against Asner and Landy for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, Virginia's usury and consumer finance statutes and Virginia common law. This matter comes before the Court on Asner and Landy's Renewed Motion to Compel Arbitration (ECF No. 57) and Renewed Motion to Dismiss (ECF No. 59) and the Tribal Officials' Motion to Compel Arbitration (ECF No. 62) and Motion to Dismiss (ECF No. 64).[1]

For the reasons set forth below, the Court DENIES Defendants' Motions to Compel Arbitration (ECF Nos. 57, 62), GRANTS IN PART and DENIES IN PART the Tribal Officials' Motion to Dismiss (ECF No. 64) and DENIES Asner and Landy's Renewed Motion to Dismiss (ECF No. 59). The Court DISMISSES WITHOUT PREJUDICE Count Five of Plaintiffs' Amended Complaint and Count Seven to the extent that it seeks to enjoin future lending activities by the Tribal Lending Entities and to the extent that Bumbray, Blackburn and Collins seek to enjoin future collection of any outstanding loans.[2]

I. BACKGROUND

In considering Defendants' Motions to Compel Arbitration, the Court may consider materials outside of the pleadings, including all relevant, admissible evidence submitted by the parties. *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016) (citations omitted). "In

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[1] Also before the Court is the Motion to Compel Arbitration (ECF No. 46) filed by the Tribal Lending Entities and Upper Lake Processing Services, Inc. Because the Amended Complaint (ECF No. 54) no longer raises claims against the Tribal Lending Entities or Upper Lake Processing Services, Inc., and because those parties have been terminated, the Court DENIES AS MOOT their Motion to Compel Arbitration (ECF No. 46).

[2] The Court finds that the materials before it adequately present the issues such that oral argument will not materially aid in the decisional process and therefore will dispense with a hearing on Defendants' Motions.

doing so, the court must draw all reasonable inferences in favor of the non-moving party." *Id.* (citations omitted). To the extent that Defendants challenge the plausibility of Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court will accept Plaintiffs' well-pleaded factual allegations as true, though the Court need not accept Plaintiffs' legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Similarly, to the extent that Defendants challenge the Court's personal jurisdiction over them "on the basis only of motion papers[,] . . . the court must construe all relevant pleading allegations in the light most favorable to [Plaintiffs], assume credibility, and draw the most favorable inferences for the existence of jurisdiction," *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989), though the Court need not consider only Plaintiffs' proof of personal jurisdiction to decide which inferences it will make, *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 62 (4th Cir. 1993). And to the extent that Defendants raise substantive challenges to the Court's jurisdiction over the subject matter of Plaintiff's Amended Complaint, the Court may consider facts outside of the Amended Complaint and need not accept the allegations in the Amended Complaint as true. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). Based on these standards, the Court accepts the following facts.

A. Origins of the Tribe's Lending Businesses

Plaintiffs are consumers residing in either this Division or District. (Am. Compl. (ECF No. 54) ¶¶ 11-18.) Asner resides in Kansas City, Missouri, and served as the owner and manager of National Performance Agency, LLC ("NPA"), Nagus Enterprises and Edison Creek. (Am. Compl. ¶ 20.) Landy resides in Kansas and served as an owner of NPA. (Am. Compl. ¶ 19.) Sherry Treppa, Tracey Treppa, Kathleen Treppa and Iris Picton serve respectively as the chairperson, vice chairperson, treasurer and secretary of the Tribe's Executive Council. (Am.

Compl. ¶¶ 21-24.) Sam Icay, Aimee Jackson-Penn and Amber Jackson serve as members-at-large on the same Council. (Am. Compl. ¶¶ 25-27.)

As early as 2008, the Tribe retained Rosette, LLP, a law firm that advertises itself as a majority-Native-American firm that represents tribal governments and entities, including tribes interested in starting payday lending operations. (Am. Compl. ¶¶ 38-41, 47.) The Tribe's Executive Council engaged Rosette, LLP, in its capacity as the Tribe's governing body, "'responsible for acting in all matters that concern the general welfare of the Tribe.'" (Am. Compl. ¶ 51 (quoting Aff. of Sherry Treppa in Supp. of Tribal Defs.' Mot. to Dismiss & Mot. to Compel Arbitration ("Treppa Aff.") (ECF No. 44) ¶ 44).)

Out of this engagement, in August 2012, the Tribe established Golden Valley, which provided short-term loans of up to $1,000.00 to approved consumers. (Am. Compl. ¶¶ 55-56.) Soon thereafter, in June 2013, Defendants began issuing identical loans through Silver Cloud, a separate lending entity. (Am. Compl. ¶ 59.) And, in January 2014, Defendants began offering loans through Mountain Summit. (Am. Compl. ¶ 61.) All three entities advertised that they were wholly owned by the Tribe and based out of the Tribe's reservation in Upper Lake, California. (Am. Compl. ¶¶ 57-58, 60, 62.)

Despite the Tribal Lending Entities' representations regarding their ownership and operations, "nearly all activities performed on behalf of Golden Valley, Silver Cloud, and Mountain Summit were performed by owners and employees of non-tribal companies, primarily [NPA] and its affiliated companies, including National Processing of America and Nagus Enterprises." (Am. Compl. ¶ 67.) These non-tribal businesses operated out of Overland Park, Kansas, at the same address now used by Upper Lake Processing Services, Inc. ("ULPS"), a

tribal entity created after the merger between NPA and Clear Lake TAC G (a tribal entity) and Nagus Enterprises and Clear Lake TAC S (a tribal entity). (Am. Compl. ¶¶ 3, 5, 68.)

The Tribal Lending Entities distributed the vast majority of the revenues received from their operations to NPA, Edison Creek, Nagus Enterprises and Cobalt Hills (the "Non-Tribal Entities"), companies owned and operated by Asner, Landy and other unknown individuals. (Am. Compl. ¶¶ 71-74.) In his capacity as an owner and operator of the Non-Tribal Entities, Landy supervised dozens of employees and had signatory authority on bank accounts opened by each entity. (Am. Compl. ¶¶ 75-76.) Similarly, Asner signed multiple documents on behalf of NPA and Nagus Enterprises, including the documents effectuating the merger between those companies and Clear Lake TAC G and Clear Lake TAC S. (Am. Compl. ¶¶ 77-78.)

B. Events Leading to the Merger of the Non-Tribal and Tribal Entities

Soon after the Tribal Lending Entities began operating, in August 2013, the New York State Department of Financial Services ("NYDFS") issued a cease and desist letter to thirty-five online lending companies, including Golden Valley, after discovering that those companies offered payday loans to New York consumers with annual interest rates as high as 1,095 percent, in violation of New York law. (Am. Compl. ¶¶ 80-81.) In response, several other tribal lending entities and the respective tribes that formed them sued NYDFS, seeking declaratory and injunctive relief to prevent the enforcement of New York law against them as sovereign tribes. (Am. Compl. ¶ 85 (citing *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 361 (S.D.N.Y. 2013), *aff'd*, 769 F.3d 105 (2d Cir. 2014)).) The Southern District of New York denied the tribal plaintiffs' request for relief, finding that the tribes' loans were not exempt from New York's nondiscriminatory usury laws. (Am. Compl. ¶¶ 87-88 (citing *Otoe-Missouria Tribe of Indians*, 974 F. Supp. 2d at 361).)

Soon after losing their lawsuit in the Southern District of New York, two tribal lending enterprises, Western Sky Financial, LLC, and CashCall, Inc., entered into a settlement with the New York Attorney General, agreeing to refund borrowers who paid more than the legal rate of interest and to pay $1.5 million in penalties. (Am. Compl. ¶¶ 89-90.) The federal government also intervened, with the Department of Justice launching "Operation Choke Point" in 2013 and the Consumer Financial Protection Bureau ("CFPB") filing a lawsuit against CashCall, Inc., in December 2013. (Am. Compl. ¶ 91 (citing *CFPB v. CashCall, Inc.*, No. 1:13cv13167, ECF No. 1 (D. Mass. Dec. 16, 2013)).)

Following these actions by state and federal regulators, Defendants, Rosette, LLP, and other industry members decided to sell the Non-Tribal Entities to newly created tribal entities, Clear Lake TAC G and Clear Lake TAC S. (Am. Compl. ¶¶ 94-96.) Defendants effectuated these mergers in August 2014. (Am. Compl. ¶ 97.) Hours before NPA merged with Clear Lake TAC G, NPA acquired several other companies involved in the Tribe's lending practices, including Cobalt Hills, American Consumer Credit, Community Credit Services, Dynamic Marketing and National Opportunities Unlimited. (Am. Compl. ¶ 98.) Similarly, before merging with Clear Lake TAC S, Nagus Enterprises acquired several other companies, including Darden Creek and Rockstar Wagamama. (Am. Compl. ¶ 99.) Soon after merging with NPA and Nagus Enterprises, Clear Lake TAC G and Clear Lake TAC S dissolved and ULPS acquired the entities' assets. (Am. Compl. ¶ 100.) ULPS employs many of the same employees from before the merger, none of whom are members of the Tribe, and operates out of Overland Park, Kansas. (Am. Compl. ¶¶ 69, 101-03.) Plaintiffs allege that non-tribal entities and individuals continue to receive most of the revenue from the Tribe's lending practices. (Am. Compl. ¶ 104.)

C. Plaintiffs' Loans from the Tribal Lending Entities

The Tribal Lending Entities market, issue and collect on loans throughout the United States, including Virginia. (Am. Compl. ¶ 105.) The loans issued by the Tribal Lending Entities charge interest rates that exceeded the usury cap in many of the states in which the Entities operate. (Am. Compl. ¶ 107.) For example, Hengle obtained three loans from Majestic Lake with an annual percentage rate ("APR") of 636, 722 and 763 percent, respectively, which exceed Virginia's 12-percent usury cap. (Am. Comp. ¶ 108 (citing Va. Code § 6.2-303(A)).) Similarly, Rose obtained a loan from Silver Cloud with an APR of 727 percent; Pike obtained a loan from Golden Valley with an APR of 744 percent; Mwethuku obtained a loan from Golden Valley with an APR of 919 percent; Bumbray obtained a loan from Majestic Lake with an APR of 543 percent; and, Myers obtained a loan from Mountain Summit with an APR of 565 percent. (Am. Compl. ¶ 109.) Plaintiffs obtained their loans while residing in Virginia and used their Virginia addresses to apply for the loans. (Am. Compl. ¶¶ 110-11.) The Tribal Lending Entities have not obtained a consumer finance license to issue loans in excess of Virginia's 12-percent usury cap. (Am. Compl. ¶ 113.)

In total, Hengle paid at least $1,127.65 in connection with his loans, while Blackburn paid at least $4,161.75, Rose paid at least $1,439.00, Bumbray paid at least $1,561.00, Pike paid at least $1,725.00, Myers paid at least $635.50, Collins paid at least $1,032.50 and Mwethuku paid at least $499.50. (Am. Compl. ¶¶ 116-23.) Plaintiffs paid these amounts while residing in Virginia using money withdrawn from bank accounts maintained in Virginia. (Am. Compl. ¶ 124.) Asner and Landy received part of the revenue from these payments through their ownership interest and participation in the Tribe's lending practices. (Am. Compl. ¶ 125.)

D. Plaintiffs' Amended Complaint

On July 12, 2019, Plaintiffs filed their First Amended Class Action Complaint (ECF No. 54), raising seven counts for relief based on the above allegations.[3] In Count One, Plaintiffs allege that Asner and Landy violated § 1962(c) of RICO by participating in the affairs of an enterprise engaged in the collection of unlawful debts. (Am. Compl. ¶¶ 139-43.) Plaintiffs assert Count One on behalf of themselves and a class of "[a]ll Virginia residents who entered into a loan agreement with Golden Valley, Silver Cloud, Mountain Summit and/or Majestic Lake" (the "§ 1962(c) Class"). (Am. Compl. ¶ 132.) Relatedly, in Count Two, Plaintiffs assert a claim on behalf of themselves and a class of "[a]ll Virginia residents who entered into a loan agreement with Golden Valley, Silver Cloud, Mountain Summit and/or Majestic Lake" (the "§ 1962(d) Class"), alleging that Asner and Landy violated § 1962(d) of RICO by conspiring to violate § 1962(c). (Am. Compl. ¶¶ 146, 153.)

In Count Three, Plaintiffs assert a claim on behalf of the same class, alleging that Asner and Landy violated Virginia's usury statute, Va. Code § 6.2-303(A), through their role in the alleged RICO enterprise. (Am. Compl. ¶¶ 162-63.) In Count Four, Plaintiffs assert a claim on behalf of the "Unjust Enrichment Class," which they define the same as in the preceding counts, alleging that the Class's payments on the usurious loans issued by the Tribal Lending Entities unjustly enriched Asner and Landy. (Am. Compl. ¶¶ 156, 173.)

In Count Five, Plaintiffs allege that the Tribal Officials violated and continue to violate § 1962(c) by participating in the affairs of an enterprise engaged in the collection of unlawful debts and violated and continue to violate § 1962(d) by conspiring to participate in such an

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[3] In their Amended Complaint, Plaintiffs mislabel Count Six as Count Seven and Count Seven as Count Eight. (Am. Compl. at 40, 43.) The Court will refer to the Counts according to their sequential order.

enterprise. (Am. Compl. ¶¶ 182-94.) Plaintiffs further allege that the Tribal Officials violated and continue to violate § 1962(a) by using and reinvesting income derived from their collection of unlawful debts and violated and continue to violate § 1962(b) by acquiring and maintaining interests in an enterprise engaged in the collection of unlawful debts. (Am. Compl. ¶¶ 195, 199.) Plaintiffs bring Count Five on behalf of the "Tribal Council RICO Class," which they define in the same manner as in the preceding counts. (Am. Compl. ¶ 176.) Plaintiffs limit the relief requested in Count Five to only prospective, injunctive relief against the Tribal Officials. (Am. Compl. ¶ 203.)

In Count Six, Plaintiffs seek a declaratory judgment against the Tribal Officials, declaring the loans issued to the "Declaratory Judgment Class" null and void. (Am. Compl. ¶¶ 205-16.) Plaintiffs define the "Declaratory Judgment Class" as "[a]ll Virginia residents who entered into a loan agreement with [the Tribal Lending Entities] and who have outstanding balances on the loans." (Am. Compl. ¶ 205.) Finally, in Count Seven, Plaintiffs seek to enjoin the Tribal Officials from continuing to collect on the loans issued to Plaintiffs and a class of similarly situated Virginia residents, because those loans violate Virginia law. (Am. Compl. ¶¶ 225, 232-35.) Plaintiffs also seek to enjoin the Tribal Officials from "making any loans in Virginia in excess of 12% interest (or 36% if the Tribal Lending Entities obtain a consumer finance license)." (Am. Compl. ¶ 235.)

E. Asner and Landy's Motions

In response to Plaintiffs' Amended Complaint, on August 9, 2019, Asner and Landy filed their renewed Motion to Compel Arbitration (ECF No. 57) and Motion to Dismiss (ECF No. 59). In support of their Motion to Compel Arbitration, Asner and Landy argue that all Plaintiffs

except Mwethuku[4] are bound by the arbitration language (the "Arbitration Provision") in the Consumer Loan and Arbitration Agreement that each of them signed in connection with the loans that they obtained from the Tribal Lending Entities. (Mem. in Supp. of Defs. Scott Asner & Joshua Landy's Renewed Mot. to Compel Arbitration ("A/L Arb. Mem.") (ECF No. 58) at 1.) Pursuant to the Federal Arbitration Act, 9 U.S.C. § 2, Asner and Landy contend that the Court must enforce the Arbitration Provision and compel arbitration of Plaintiffs' claims, dismissing Mwethuku's claims for other reasons. (A/L Arb. Mem. at 1 n.1.) Asner and Landy assert that the Arbitration Provision unequivocally requires an arbitrator to determine arbitrability issues, so the Court should compel arbitration regardless of Plaintiffs' challenges to the Provision. (A/L Arb. Mem. at 2-3, 10-14.) And Asner and Landy argue that the Arbitration Provision requires arbitration of the claims against them, even though they are not signatories to the loan agreements, because the agreements apply to "related third parties." (A/L Arb. Mem. at 3, 15-17.)

Alternatively, Asner and Landy move to dismiss Plaintiffs' claims against them for lack of personal jurisdiction, untimeliness, failure to join indispensable parties and failure to state a claim. (Mem. in Supp. of Defs. Scott Asner & Joshua Landy's Renewed Mot. to Dismiss ("A/L MTD Mem.") (ECF No. 60) at 6-30.) First, Asner and Landy argue that the Court should dismiss Plaintiffs' claims against them as untimely for either falling outside of the statute of limitations or the time period during which Asner and Landy were involved in the alleged RICO enterprise. (A/L MTD Mem. at 6-9.) Indeed, Asner and Landy note that one of the Tribal Lending Entities, Majestic Lake, did not begin operating until after they sold their businesses to

[4] For ease of reference, when discussing the Arbitration Provision, "Plaintiffs" means all Plaintiffs except Mwethuku.

the Tribe. (A/L MTD Mem. at 28.) Asner and Landy contend that Plaintiffs' allegation regarding their continued involvement as executives of the Tribal Lending Entities fails to mend the timeliness problem, because such an allegation lacks factual support, conflicts with the assertions in the affidavit of Sherry Treppa that the Tribe's Executive Council controls the Tribal Lending Entities and cannot be pled based on "information and belief." (A/L MTD Mem. at 9-13.)

Asner and Landy also contend that the choice-of-law provisions in Plaintiffs' loan agreements render their loans lawful under the Tribe's laws. (A/L MTD Mem. at 14-15.) And Asner and Landy argue that the Tribal Lending Entities constitute indispensable parties, requiring dismissal of Plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(7) and 19. (A/L MTD Mem. at 15-16.)

As for Plaintiffs' state-law claims, Asner and Landy contend that they cannot be held liable for their alleged violations of Virginia law, because corporate liability principles protect them. (A/L MTD Mem. at 16-18.) Asner and Landy further contend that they do not constitute "lenders" within the meaning of Virginia's consumer finance statutes, nor did they receive the payments on Plaintiffs' loans, precluding Plaintiffs' claims against them. (A/L MTD Mem. at 18-20.) And Asner and Landy assert that Plaintiffs' unjust enrichment claim must fail, because Plaintiffs fail to sufficiently allege that Asner and Landy received and accepted any direct benefit from Plaintiffs. (A/L MTD Mem. at 20-22.)

Asner and Landy further argue that the Court should dismiss Plaintiffs' RICO claims, because: (1) the loans at issue do not constitute unlawful debts; (2) Plaintiffs fail to allege any involvement by Asner and Landy in the issuing or collection of loans after August 2014; (3) Plaintiffs fail to allege that Asner and Landy had sufficient involvement in the alleged RICO

enterprise; and, (4) Plaintiffs fail to allege that Asner and Landy agreed to violate RICO with knowledge of the alleged conspiracy's criminal objective. (A/L MTD Mem. at 23-28.)

Asner and Landy also challenge the Court's personal jurisdiction over them, arguing that because their RICO claims fail, Plaintiffs cannot rely on RICO's nationwide service of process provision and must therefore fall back on Virginia's long-arm statute and the Due Process Clause of the Fourteenth Amendment, under which Plaintiffs fail to allege sufficient contacts between Asner and Landy and Virginia. (A/L MTD Mem. at 28-29.) Based on these arguments, Asner and Landy contend that the Court should dismiss Plaintiffs' claims with prejudice, because Plaintiffs have already taken advantage of the opportunity to amend with sufficient notice of the deficiencies pointed out in Asner and Landy's first motion to dismiss, rendering futile any further amendments to Plaintiffs' allegations. (A/L MTD Mem. at 29-30.)

On September 16, 2019, Plaintiffs filed their Memoranda in Opposition to Asner and Landy's Motions, (Pls.' Opp. to Scott Asner & Joshua Landy's Renewed Mot. to Compel Arbitration ("Pls.' A/L Arb. Resp.") (ECF No. 97); Mem. in Opp. to Defs. Scott Asner & Joshua Landy's Renewed Mot. to Dismiss ("Pls.' A/L MTD Resp.") (ECF No. 99)), and, on October 4, 2019, Asner and Landy filed their Replies to Plaintiffs' Memoranda, (Reply in Supp. of Defs. Scott Asner & Joshua Landy's Renewed Mot. to Compel Arbitration ("A/L Arb. Reply") (ECF No. 103); Reply in Supp. of Defs. Scott Asner & Joshua Landy's Renewed Mot. to Dismiss ("A/L MTD Reply") (ECF No. 104)), rendering both Motions now ripe for review.

F. Tribal Officials' Motions

Separately from Asner and Landy, on August 9, 2019, the Tribal Officials filed a Motion to Compel Arbitration (ECF No. 62) and a Motion to Dismiss (ECF No. 64). In support of their Motion to Compel Arbitration, like Asner and Landy, the Tribal Officials argue that the

Arbitration Provision binds all Plaintiffs except Mwethuku, requiring those Plaintiffs to arbitrate their claims against the Tribal Officials. (Mem. in Supp. of Tribal Defs.' Mot. to Compel Arbitration ("Tribe Arb. Mem.") (ECF No. 63) at 1, 4-8.) Like Asner and Landy, the Tribal Officials maintain that the validity and scope of the Arbitration Provision should be determined by an arbitrator pursuant to the terms of the Provision. (Tribe Arb. Mem. at 2, 14-18.) Should the Court decide to resolve questions of arbitrability, the Tribal Officials assert that the Arbitration Provision proves enforceable even though the Provision precludes Plaintiffs' class claims. (Tribe Arb. Mem. at 2-3, 19-25.) And the Tribal Officials move to dismiss Mwethuku's claims, because Mwethuku's decision to opt out of the Arbitration Provision invoked language requiring that he bring any claims through a prescribed administrative process, with appeals to the American Arbitration Association (the "AAA"). (Tribe Arb. Mem. at 3, 25-26.)

Alternatively, the Tribal Officials move to dismiss Plaintiffs' claims against them, arguing that the loans are lawful, because the Tribe's laws govern the validity of the loans pursuant to the loan agreements' choice-of-law provision. (Mem. in Supp. of Tribal Defs.' Mot. to Dismiss ("Tribe MTD Mem.") (ECF No. 65) at 5-10.) The Tribal Officials also assert that sovereign immunity precludes the Court from exercising jurisdiction over Plaintiffs' claims, because those claims are really against the Tribe and because Plaintiffs' decision to seek only prospective, injunctive relief against the Tribal Officials does not overcome the Officials' sovereign immunity. (Tribe MTD Mem. at 11-24.) And, like Asner and Landy, the Tribal Officials move for dismissal pursuant to Rules 12(b)(7) and 19 for Plaintiffs' failure to join the Tribal Lending Entities as indispensable parties. (Tribe MTD Mem. at 25-27.) Finally, the Tribal Officials contend that Plaintiffs lack standing to seek an injunction against future lending

and that Bumbray, Blackburn and Collins lack standing to enjoin the collection of outstanding debts, because they have already paid off their loans. (Tribe MTD Mem. at 28-30.)

On September 16, 2019, Plaintiffs filed their Memoranda in Opposition to the Tribal Officials' Motions, (Pls.' Opp. to Tribal Officials' Mot. to Compel Arbitration ("Pls.' Tribe Arb. Resp.") (ECF No. 96); Pls.' Opp. to Tribal Officials' Mot. to Dismiss ("Pls.' Tribe MTD Resp.") (ECF No. 98)), and the Tribal Officials filed their Replies to Plaintiffs' Memoranda on October 4, 2019, (Reply in Supp. of Tribal Defs.' Mot. to Compel Arbitration ("Tribe Arb. Reply") (ECF No. 105); Reply in Supp. of Tribal Defs.' Mot. to Dismiss ("Tribe MTD Reply") (ECF No. 106)), rendering the Tribal Officials' Motions now ripe for review.

Because Defendants' Motions to Compel Arbitration determine the proper forum to consider the merits of Plaintiffs' claims, the Court will first address those Motions. *See Docs Billing Sols., LLC v. GENETWORx LLC*, 2018 WL 4390786, at *2 (E.D. Va. Aug. 30, 2018) (noting that jurisdictional challenges — in that case, a motion to remand pursuant to a forum selection clause — should take precedence over other motions (citing *Bartels v. Saber Healthcare Grp., LLC*, 880 F.3d 668, 680 (4th Cir. 2018)). Only if Plaintiffs' claims survive Defendants' Motions to Compel Arbitration will the Court address Defendants' Motions to Dismiss.

II. MOTIONS TO COMPEL ARBITRATION

Because both Motions to Compel Arbitration rely on the same Arbitration Provision, the Court will consider the Motions together.

A. Standard of Review

Section 2 of the Federal Arbitration Act ("FAA") provides that "a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable,

and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted). Thus, there exists a "strong federal policy in favor of enforcing arbitration agreements." *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 671 (4th Cir. 2016) (citations omitted).

Relevant here, as well as agreeing to arbitrate the merits of a dispute, parties to an arbitration agreement may also agree to arbitrate certain "'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (citations omitted). However, "whether the parties have submitted a particular dispute to arbitration, i.e. the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (emphasis supplied) (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). And the additional agreement to delegate gateway issues to an arbitrator must survive § 2 of the FAA, which subjects such agreements to legal and equitable defenses. *Rent-A-Center*, 561 U.S. at 70. If a delegation provision both clearly and unmistakably delegates gateway issues to an arbitrator and proves valid under § 2, a court may not decide the merits of any arbitrability issues and must submit such questions to the arbitrator consistent with the parties' agreement, even if the argument for arbitration proves "wholly groundless." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529-30 (2019).

In deciding the validity of arbitration agreements, including delegation provisions, courts apply federal law. *Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 860-61 (4th Cir. 2000). The FAA also "preserves state law contract defenses unless such defenses 'rely on the uniqueness of an agreement to arbitrate' and are applied 'in a fashion that disfavors arbitration.'" *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 334 (4th Cir. 2017) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341-42 (2011)). "Consistent with these contract principles, the Supreme Court has recognized that arbitration agreements that operate 'as a prospective waiver of a party's right to pursue statutory remedies' are not enforceable because they are in violation of public policy." *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

B. The Arbitration Provision

Relevant here, the Tribal Lending Entities issued each loan to Plaintiffs pursuant to a contract titled "Consumer Loan and Arbitration Agreement." (Ex. 1 to A/L Arb. Mem. ("Agreement") (ECF No. 58-1) at 1.) Each Agreement included an Arbitration Provision.[5] (Agreement at 5-6.) The Arbitration Provision explained the general concept of arbitration in a section titled "Resolving Disputes; Waiver of Jury Trial and Arbitration Provision." (Agreement at 5.) The Arbitration Provision then explained that the relevant Tribal Lending Entity issued each loan as an "economic arm, instrumentality, and corporation owned by the Tribe," claiming the same sovereign immunity as the Tribe. (Agreement at 5.) Based on these representations, the Provision asked each consumer to acknowledge and agree that:

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[5] For a copy of each loan agreement, see (Exs. 83-100 to Treppa Aff. (ECF Nos. 45-33 to 45-50).) Plaintiffs do not dispute that they signed these agreements. Because the Arbitration Provision proves substantively the same in each agreement, the Court will cite to the loan agreement attached in support of Asner and Landy's Motion to Compel Arbitration.

1. For purposes of this Agreement, the words "dispute" and "disputes" are given the broadest possible meaning and include, without limitation, (a) all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision, the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision; (b) all tribal, federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to this Agreement, the information You gave Us before entering into this Agreement, including the customer information application, and/or any past agreement or agreements between You and Us; (c) all counterclaims, cross-claims and third-party claims; (d) all common law claims, based upon contract, tort, fraud, or other intentional torts; (e) all claims based upon a violation of any tribal, state or federal constitution, statute or regulation; (f) all claims asserted by Us against You, including claims for money damages to collect any sum We claim You owe Us; (g) all claims asserted by You individually against Us and/or any of Our employees, agents, directors, officers, shareholders, governors, managers, members, parent company or affiliated entities (hereinafter collectively referred to as "related third parties"), including claims for money damages and/or equitable or injunctive relief; (h) all claims asserted on Your behalf by another person; (i) all claims asserted by You as a private attorney general, as a representative and member of a class of persons, or in any other representative capacity, against Us and/or related third parties (hereinafter referred to as "Representative Claims"); and/or (j) all claims from or relating directly or indirectly to the disclosure by Us or related third parties of any non-public personal information about You.

2. You acknowledge and agree that by entering into this Arbitration Provision: (a) YOU ARE GIVING UP YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; (b) YOU ARE GIVING UP YOUR RIGHT TO HAVE A COURT RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; and (c) YOU ARE GIVING UP YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.

3. All disputes including any Representative Claims against Us and/or related third parties shall be resolved by binding arbitration only on an individual basis with You. THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION.

4. Any party to a dispute, including related third parties, may send the other party written notice by certified mail return receipt requested of their intent to arbitrate

and setting forth the subject of the dispute along with the relief requested, even if a lawsuit has been filed. Regardless of who demands arbitration, You shall have the right to select any of the following arbitration organizations to administer the arbitration: the American Arbitration Association . . . or JAMS . . . . The parties to such dispute will be governed by the laws of the [Tribe] and such rules and procedures used by the applicable arbitration organization applicable to consumer disputes, to the extent those rules and procedures do not contradict the express terms of this Arbitration Provision or the law of the [Tribe], including the limitations on the arbitrator below. You may obtain a copy of the rules and procedures by contacting the arbitration organization listed above.

You have the right to request that the arbitration take place within thirty (30) miles of Your residence or some other mutually agreed upon location, provided, however, that such election to have binding arbitration occur somewhere other than on Tribal land shall in no way be construed as a waiver of sovereign immunity or allow for the application of any other law other than the laws of the [Tribe].

5. Regardless of who demands arbitration, We will advance Your portion of the arbitration expenses . . . at Your request. Throughout the arbitration, each party shall bear his or her own attorneys' fees and expenses, such as witness and expert witness fees . . . . The arbitrator may decide, with or without a hearing, any motion that is substantially similar to a motion to dismiss for failure to state a claim or a motion for summary judgment. If allowed by statute or applicable law, the arbitrator may award statutory damages and/or reasonable attorneys' fees and expenses. If the arbitrator does not render a decision or an award in Your favor resolving the dispute, then the arbitrator shall require You to reimburse Us for the Arbitration Fees We have advanced less any Arbitration Fees You have previously paid . . . . The arbitrator's award is binding and not appealable.

6. All parties, including related third parties, shall retain the right to enforce an arbitration award before the applicable governing body of the [Tribe] ("Tribal Forum"). Both You and We expressly consent to the jurisdiction of the Tribal Forum for the sole purposes of enforcing the arbitration award. The Tribe does not waive sovereign immunity.

7. This Arbitration Provision is made pursuant to a transaction involving both interstate commerce and Indian commerce under the United States Constitution and other federal and tribal laws. Thus, any arbitration shall be governed by the FAA and subject to the laws of the [Tribe]. If a final non-appealable judgment of a court having jurisdiction over this transaction and the parties finds, for any reason, that the FAA does not apply to this transaction, then Our agreement to arbitrate shall be governed by the laws of the [Tribe].

> 8. This Arbitration provision is binding upon and benefits You, Your respective heirs, successors and assigns . . . If any of this Arbitration Provision is held invalid, the remainder shall remain in effect.

(Agreement at 5-6.)

C. Delegation of Arbitrability Issues

Defendants first argue that the Arbitration Provision clearly and unmistakably reflects the parties' intent to delegate disputes regarding arbitrability to an arbitrator, requiring the Court to compel arbitration of Plaintiffs' challenges to the validity and scope of the Arbitration Provision. (A/L Arb. Mem. at 12-13; Tribe Arb. Mem. at 15-18.) Plaintiffs respond that the language in the Arbitration Provision that delegates arbitrability issues to an arbitrator (the "Delegation Clause") proves unenforceable, because the choice-of-law and forum selection clauses in the Provision and the loan agreements prospectively waive the application of federal and state law and therefore preclude defenses to arbitrability that arise under federal and state law, making delegation an exercise in futility. (Pls.' Tribe Arb. Resp. at 24-25; Pls.' A/L Arb. Resp. at 24-25.) Plaintiffs add that the Arbitration Provision's prospective waiver of their right to seek statutory remedies while simultaneously requiring arbitration of gateway issues renders the Delegation Clause unconscionable. (Pls.' Tribe Arb. Resp. at 25; Pls.' A/L Arb. Resp. at 25.) Plaintiffs also argue that the Court should void the Arbitration Provision, because the loan agreements themselves are void under Virginia's usury statute. (Pls.' Tribe Arb. Resp. at 25-26; Pls.' A/L Arb. Resp. at 26.)

Should the Court find the Delegation Clause enforceable, Plaintiffs argue that the Court should nonetheless avoid delegation, because the issue of whether the Arbitration Provision violates the prospective waiver doctrine can be easily determined without referral to an arbitrator. (Pls.' Tribe Arb. Resp. at 26-27; Pls.' A/L Arb. Resp. at 27-28.) And Plaintiffs argue

that the Court cannot enforce the Arbitration Provision without the offending clauses, because those clauses go to the essence of the Provision. (Pls.' Tribe Arb. Resp. at 27-28; Pls.' A/L Arb. Resp. at 28-29.)

1. The Arbitration Provision Clearly and Unmistakably Delegates to an Arbitrator Arbitrability Disputes.

As mentioned, "whether the parties have submitted a particular dispute to arbitration, i.e. the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam*, 537 U.S. at 83 (emphasis supplied) (quoting *AT&T Techs., Inc.*, 475 U.S. at 649). "[W]hen the parties disagree whether they have delegated [the authority to determine arbitrability issues] to an arbitrator, that question of arbitrability must be answered by the court." *Novic v. Credit One Bank, N.A.*, 757 F. App'x 263, 265 (4th Cir. 2019) (citations omitted). To that end, whether a delegation clause "clearly and unmistakably" delegates arbitrability issues is an "exacting" standard, "and . . . a general agreement to arbitrate disputes . . . will not suffice to establish the parties' intent concerning questions of arbitrability." *Id.* Rather, "to meet the 'clear and unmistakable' standard, an agreement must contain language specifically and plainly reflecting the parties' intent to delegate disputes regarding arbitrability to an arbitrator." *Id.* at 265-66 (citing *Peabody Holding Co. v. United Mine Workers of Am.*, 665 F.3d 96, 103 (4th Cir. 2012) and *Carson v. Giant Food, Inc.*, 175 F.3d 325, 329 (4th Cir. 1999)). A party may challenge the validity of a delegation clause, including whether its terms are clear and unmistakable; "[h]owever, absent a challenge to the validity of such delegation, courts will not intervene in interpreting the parties' agreement . . . [and] a party's challenge to a different contract provision, or to the contract as a whole, will not prevent a court from submitting to the arbitrator the question of arbitrability." *Id.* at 266 (citations omitted).

Here, the Delegation Clause provides that the disputes subject to arbitration under the Arbitration Provision include "all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision, the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision." (Agreement at 5.) This language clearly and unmistakably delegates arbitrability issues to an arbitrator by requiring that any challenge to the validity or scope of the Arbitration Provision — and not merely the loan agreement generally — be determined by an arbitrator. This precise language proves distinguishable from more general language that the Fourth Circuit has rejected under the "clear and unmistakable" standard, *see, e.g.*, *Peabody*, 665 F.3d at 103 (rejecting clause requiring arbitration of "[a]ny dispute alleging a breach of this" contract); *Carson*, 175 F.3d at 329 (rejecting clause requiring arbitration of "'any grievance or dispute aris[ing] between the parties regarding the terms of this Agreement' and any 'controversy, dispute or disagreement . . . concerning the interpretation of the provisions of this Agreement'"), and resembles delegation language that the Fourth Circuit has enforced, *see, e.g.*, *Novic*, 757 F. App'x at 266 (upholding clause that required arbitration of claims regarding "*the application, enforceability or interpretation of* [the cardholder agreement], *including this arbitration provision*" (emphasis supplied)). Accordingly, unless the Delegation Clause proves unenforceable under § 2 of the FAA, the Court must compel arbitration of Plaintiffs' challenges to the arbitrability of their claims.

2. The Delegation Clause is Unenforceable.

Plaintiffs argue that the Delegation Clause is unenforceable, in part, because it delegates questions of arbitrability to an arbitrator who cannot apply federal or state law pursuant to the Arbitration Provision's choice-of-law clauses, meaning the arbitrator could not apply the

prospective waiver doctrine or other federal and state defenses to arbitrability. (Pls.' Tribe Arb. Resp. at 24-25; Pls.' A/L Arb. Resp. at 24-25.) Plaintiffs also argue that the Court should avoid delegation of arbitrability issues, because the Arbitration Provision unambiguously waives Plaintiffs' rights under federal and state law. (Pls.' A/L Arb. Resp. at 27-29.) Specifically, because no doubt remains as to whether the Arbitration Provision's choice-of-law and forum-selection clauses prospectively waive their federal statutory rights, Plaintiffs contend that the Court can refuse to enforce the Delegation Clause and find the Arbitration Provision wholly unenforceable under the prospective waiver doctrine. (Pls.' A/L Arb. Resp. at 27.) Plaintiffs assert that the Court should especially avoid delegation in cases such as this, in which enforcement of the Arbitration Provision would effectively preclude federal judicial review of an arbitrability decision, because the Provision reserves jurisdiction to enforce an arbitrator's award in an ill-defined "Tribal Forum." (Pls.' A/L Arb. Resp. at 28; Agreement at 6 ¶ 6.) Plaintiffs maintain that the choice-of-law and tribal review clauses prove inseverable from the Arbitration Provision such that the Court cannot cure the prospective waiver problem. (Pls.' A/L Arb. Resp. at 28-29.)

Defendants respond that the choice-of-law language in the Arbitration Provision does not prevent an arbitrator from considering federal or state defenses to arbitrability, because "'[t]he Supreme Court has . . . squarely rejected the argument that a federal court should read a contract's general choice of law provision . . . as displacing federal arbitration law.'" (Tribe Arb. Reply at 6 (quoting *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 382 (4th Cir. 1998) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995))).) Defendants contend that the Arbitration Provision expressly provides that the FAA governs any arbitration in addition to the Tribe's laws. (Tribe Arb. Reply at 7; Agreement at 6 ¶¶ 5, 7.)

In support of their argument, Plaintiffs rely primarily on the Fourth Circuit's holdings in *Hayes v. Delbert Services Corporation*, 811 F.3d 666 (4th Cir. 2016), and *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017). In *Hayes*, the Fourth Circuit considered an arbitration provision contained in a payday loan obtained by the plaintiffs from Western Sky, a lender operated by the Cheyenne River Sioux Tribe. 811 F.3d at 668. The plaintiffs' loan agreements included a forum selection clause that subjected the agreement "solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe," further providing that "no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation." *Id.* at 669 (emphasis removed) (internal quotations and citations omitted). The agreements also contained a section titled "GOVERNING LAW," which further disavowed the application of federal or state law. *Id.* at 669-70. The agreements required arbitration of any disputes — including disputes concerning the validity and enforceability of the arbitration provision — before an authorized representative of the Cheyenne River Sioux Tribe, with the arbitrator limited to applying only the tribe's laws. *Id.* at 670. However, the agreements later allowed consumers to select from two, well-regarded arbitration organizations (the AAA or JAMS) to "administer the arbitration." *Id.* The district court found that the non-tribal servicer of the plaintiffs' loans could enforce the arbitration provision, and the plaintiffs appealed. *Id.* at 670-71.

On appeal, the plaintiffs argued that the arbitration provision provided a "hollow arbitral mechanism," because, despite the tribe's representations in the loan agreements, the Cheyenne River Sioux Tribe had no authorized representative to conduct arbitrations, no method for selecting an authorized arbitrator and no established arbitration procedures. *Id.* at 672. The plaintiffs further maintained that the additional option to select the AAA or JAMS to

"administer" arbitrations under the loan agreements failed to improve the tribe's arbitration process, noting that the language of the arbitration provision still required an authorized representative of the tribe to conduct the arbitration. *Id.* at 673.

The Fourth Circuit avoided answering the plaintiffs' arguments, finding instead that the arbitration provision failed "for the fundamental reason that it purports to renounce wholesale the application of any federal law to the plaintiffs' federal claims." *Id.* The Fourth Circuit noted that "[w]ith one hand, the arbitration agreement offers an alternative dispute resolution procedure in which aggrieved persons may bring their claims, and with the other, it proceeds to take those very claims away." *Id.* at 673-74. The Fourth Circuit took particular issue with the loan agreements' choice-of-law clause, which "[i]nstead of selecting the law of a certain jurisdiction to govern the agreement, as is normally done with a choice of law clause," was used by the tribe to "waive all of a potential claimant's federal rights," rendering the clause a "choice of no law clause [that] . . . flatly and categorically renounce[d] the authority of the federal statutes to which [the loan agreement] is and must remain subject." *Id.* at 675. Because the choice-of-law and forum selection clauses went to the "essence" of the arbitration provision, the Fourth Circuit found the provision inseverable from the offending clauses and thus voided the provision, reversing the district court. *Id.* at 675-76.

A year later, in *Dillon*, the Fourth Circuit considered a similar arbitration provision in a payday loan issued to the plaintiff James Dillon by Great Plains, a lender owned by the Otoe-Missouria Tribe of Indians. 856 F.3d at 332. As with the agreement in *Hayes*, the loan agreement signed by Dillon included choice-of-law provisions in both the underlying agreement and the accompanying arbitration agreement that disclaimed the application of state and federal law, subjecting the loan agreement and any arbitration solely to the laws of the Otoe-Missouria

Tribe. *Id.* If a borrower opted out of the arbitration provision, the loan agreement provided that the tribe's laws would still govern the loan and that the borrower had to bring any disputes within the tribe's court system. *Id.* Further, in a third provision, the loan agreement explicitly prohibited the application of federal or state law to both the agreement and the tribe. *Id.* at 333. The district court denied the defendant BMO Harris Bank's motion to compel arbitration, likening the Great Plains loan agreements to the Western Sky agreements at issue in *Hayes*, and BMO Harris appealed. *Id.*

On appeal, the Fourth Circuit held that a choice-of-law provision will not automatically void an arbitration provision under the prospective waiver doctrine and that "[w]hen there is uncertainty whether the foreign choice of law would preclude otherwise applicable federal substantive statutory remedies, the arbitrator should determine in the first instance whether the choice of law provision would deprive a party of those remedies." *Id.* at 334 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995) and *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 371-73 (4th Cir. 2012)). "In such a case, the prospective wavier issue would not become ripe for final determination until the federal court is asked to enforce the arbitrator's decision." *Id.* (citations omitted). BMO Harris argued that the Great Plains loan agreement presented such an uncertain situation, requiring the district court to postpone the prospective-waiver determination until it was asked to enforce the arbitrator's decision. *Id.* at 335.

The Fourth Circuit disagreed with BMO Harris's position, finding that the Great Plains agreement included many of the same provisions that proved unenforceable in *Hayes*. *Id.* Because the arbitration provision in the context of the entire loan agreement unambiguously functioned to prospectively waive Dillon's federal statutory rights, the Fourth Circuit found the

arbitration provision "unenforceable as a matter of law." *Id.* at 335-36. The Fourth Circuit further refused to sever the offending choice-of-law provisions from the arbitration agreement, finding that Great Plains did not act in good faith when it "drafted the choice of law provisions in the arbitration agreement to avoid the application of state and federal consumer protection laws." *Id.* at 336. Accordingly, the Fourth Circuit affirmed the district court's order denying BMO Harris's motion to compel arbitration. *Id.* at 337.

In response to Plaintiffs' arguments, Defendants contend that the Supreme Court's recent decision in *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019), overturns the holdings in *Hayes* and *Dillon* to the extent that they permit district courts to decide the prospective waiver issue before enforcing a valid delegation clause. (Tribe Arb. Reply at 8-9 n.4.) In *Schein*, the Supreme Court addressed a frequent practice among some federal courts of deciding arbitrability questions despite the enforceability of a delegation clause when the argument for arbitration of a dispute proved to be "wholly groundless." 139 S. Ct. at 527-28. The Court held that the so-called "wholly groundless" exception ran counter to the FAA's mandate, which, based on Supreme Court precedent, treats delegation clauses as "additional, antecedent agreement[s]" that should be enforced like any other contract. *Id.* at 529. Thus, "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 530. That said, the Supreme Court reiterated that, "[t]o be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Id.* (citing 9 U.S.C. § 2).

Although the Fourth Circuit has yet to revisit its holdings in *Hayes* and *Dillon* since the Supreme Court handed down its opinion in *Schein*, a court in this District has interpreted *Schein*

as preserving within the purview of the federal courts questions concerning the validity of a delegation clause, including under the prospective waiver doctrine. *Gibbs v. Stinson* (*Gibbs II*), 2019 WL 4752792, at *12 (E.D. Va. Sept. 30, 2019) (Lauck, J.), *appeal filed*, No. 19-2113 (4th Cir. Oct. 10, 2019). The Court agrees with Judge Lauck's reasoning in *Gibbs II* and will likewise proceed to consider whether the Delegation Clause proves unenforceable under the prospective waiver doctrine.

Indeed, a delegation clause that "require[s] an arbitrator to determine whether a valid and enforceable arbitration agreement exists absent the federal and state law tools necessary to do so" results in the "'sort of farce'" that Congress did not intend to create in enacting the FAA. *Id.* (quoting *Hayes*, 811 F.3d at 674). Of course, following the same logic, if a delegation clause provides an arbitrator with the federal and state law tools necessary to determine whether a valid and enforceable arbitration agreement exists, absent other cognizable challenges to the validity of the delegation clause, the Court should delegate prospective waiver challenges applicable only to the arbitration provision generally.

As mentioned, Defendants first argue that the choice of the Tribe's laws to govern arbitration disputes does not prospectively waive federal and state defenses to arbitrability, because Supreme Court precedent rejects "'the argument that a federal court should read a contract's general choice of law provision as . . . displacing federal arbitration law.'" (Tribe Arb. Reply at 6 (quoting *Porter Hayden Co.*, 136 F.3d at 382 (citing *Mastrobuono*, 514 U.S. at 52)).) However, the language at issue in *Mastrobuono* proves distinguishable from the choice-of-law language at issue here.

In *Mastrobuono*, the Supreme Court considered a contract specifying that the "entire agreement" would "be governed by the laws of the State of New York." 514 U.S. at 58-59. The

contract also provided for arbitration of any disputes arising out of the transaction between the parties. *Id.* at 59. Under New York law, only courts — not arbitrators — could award punitive damages, so the lower courts ruled that New York law, as incorporated by the choice-of-law provision, prohibited the arbitrator from awarding punitive damages. *Id.* The Supreme Court disagreed, finding that the general choice-of-law provision "[a]t most, . . . introduce[d] an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards." *Id.* at 62. Because the FAA expresses a strong federal policy favoring arbitration, the Court held that the ambiguity created by the general choice-of-law provision should be "'resolved in favor of arbitration.'" *Id.* (quoting *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 476 (1989)).

By comparison, the Arbitration Provision at issue here includes no such ambiguities as to the exclusive application of tribal law. For one, the Provision provides that "[t]he parties to such dispute [in arbitration] shall be governed by the laws of the [Tribe] and such rules and procedures used by the applicable arbitration organization applicable to consumer disputes, *to the extent those rules and procedures do not contradict the express terms of this Arbitration Provision or the law of the [Tribe], including the limitations on the arbitrator below.*" (Agreement at 6 (emphasis added).) The Provision then clarifies that even if a consumer elects to hold an arbitration within thirty miles of his or her residence, "such election . . . shall in no way be construed as a waiver of Tribal sovereign immunity *or allow the application of any other law other than the laws of the [Tribe].*" (Agreement at 6 (emphasis added).) Although the first clause could be read to, at most, create ambiguity that should be resolved in favor of arbitration, the first clause read in tandem with the second clearly evinces the Tribal Lending Entities' intent to disclaim the application of federal or state defenses to arbitrability, thereby prospectively waiving Plaintiffs' federal statutory remedies under § 2 of the FAA in violation of public policy.

Specifically, because the first clause allows the application of rules promulgated by the AAA or JAMS so long as those rules do not contradict "the limitations on the arbitrator below" and then — in the second clause written "below" — clarifies that only the laws of the Tribe shall apply to arbitrations to the exclusion "of any other law," the two provisions function to limit the application of defenses provided under "any other law," including the FAA. Thus, if compelled to arbitrate their arbitrability challenges, Plaintiffs could not raise any federal or state law defenses to arbitration provided under the FAA.

Defendants also contend that the Arbitration Provision "eliminate[s] any doubt" as to the applicability of federal arbitration law by "expressly providing for the application of the [FAA]." (Tribe Arb. Reply at 7 (citing Agreement at 6 ¶¶ 5, 7).) Indeed, below the first and second clauses described above, the Arbitration Provision includes two additional clauses stating that: (1) "the arbitrator shall apply applicable substantive Tribal law consistent with the [FAA];" and, (2) "any arbitration shall be governed by the FAA and subject to the laws of the [Tribe]." (Agreement at 6 ¶¶ 5, 7.) However, these clauses do not mend the prospective waiver issue as Defendants hope. For one, the clause providing that the arbitrator shall apply "applicable substantive Tribal law consistent with the [FAA]," interpreted by its plain language, simply allows for the application of the Tribe's laws. The words "consistent with the [FAA]" merely assert that the application of substantive Tribal law proves consistent with the FAA's requirements; they do not require that the Tribe's laws *be* consistent with the FAA or that the FAA should be applied in lieu of the Tribe's laws.

As for the clause stating that "any arbitration shall be governed by the FAA and subject to the laws of the [Tribe]," the Court again finds nothing in the language of the clause that reverses the prospective waiver of Plaintiffs' arbitrability defenses. In the context of the

paragraph in which the clause resides, the clause merely affirms that the FAA governs the enforceability of the Arbitration Provision, because the transaction giving rise to the Provision falls within the jurisdictional bounds of the Act. Specifically, the paragraph reads:

> This Arbitration Provision is made pursuant to a transaction involving both interstate commerce and Indian commerce under the United States Constitution and other federal and tribal laws. *Thus, any arbitration shall be governed by the FAA and subject to the laws of the [Tribe].* If a final non-appealable judgment of a court having jurisdiction over this transaction and the parties finds, for any reason, that the FAA does not apply to this transaction, then Our agreement to arbitrate shall be governed by the laws of the [Tribe].

(Agreement at 6 ¶ 7 (emphasis added).) The use of the word "thus" to introduce the clause in question clearly serves to confirm the assertion in the preceding sentence that the Arbitration Provision falls under the FAA's jurisdictional requirement that an arbitration provision be part of "any maritime transaction or a contract evidencing a transaction involving commerce" for a court to enforce it. 9 U.S.C. § 2. Indeed, the sentence following the clause in question clarifies that should the loan transaction giving rise to the Provision not involve interstate or Indian commerce as asserted, the laws of the Tribe will determine the validity of the Arbitration Provision, including the Delegation Clause.

Ultimately, the Court must read the Arbitration Provision to give effect to all of its terms and render them consistent with each other. *Mastrobuono*, 514 U.S. at 63. The most harmonious reading of the "governed by the FAA" clause and the preceding clauses that require any arbitrated disputes to be "governed by the laws of the [Tribe]" and disclaim "the application of any other law other than the laws of the [Tribe]" would be to read the "governed by the FAA" clause as asserting that the Arbitration Provision falls within the purview of the FAA and should be enforced by a court pursuant to that Act, while, following enforcement of the Provision by a court of competent jurisdiction, an arbitrator must apply only the laws of the Tribe to the

exclusion of Plaintiffs' potential federal and state statutory rights, including defenses to arbitrability arising under federal and state law. To read the clauses otherwise would create an impermissible and illogical conflict between the terms of the Arbitration Provision by, on the one hand, excluding the application of "any other law" during arbitration and, on the other, permitting the application of federal and state law to arbitrability disputes. Clearly, the Delegation Clause in tandem with the choice-of-law and forum selection clauses in the Arbitration Provision serves to prospectively waive Plaintiffs' right to pursue statutory remedies.

The question then becomes whether the Court can sever the offending clauses from the Delegation Clause such that the Court can enforce the Delegation Clause without contravening public policy. To that end, the Fourth Circuit in *Hayes* instructed that "[i]t is a basic principle of contract law that an unenforceable provision cannot be severed when it goes to the 'essence' of the contract." 811 F.3d at 675-76 (internal quotations and citations omitted). In *Dillon*, the Fourth Circuit clarified that "[u]nlawful portions of a contract may be severed *only* if: (1) the unlawful provision is not central or essential to the parties' agreement; and (2) the party seeking to enforce the remainder negotiated the agreement in good faith." 856 F.3d at 336 (emphasis supplied). Applying these principles, in *Hayes*, the Fourth Circuit found that the offending terms of the arbitration agreement at issue went to the "essence" of the agreement, because "the animating purpose of the arbitration agreement was to ensure that Western Sky and its allies could engage in lending and collection practices free from the strictures of any federal law." 811 F.3d at 676. Likewise, in *Dillon*, the Fourth Circuit found that "Great Plains purposefully drafted the choice of law provisions in the arbitration agreement to avoid the application of state and federal consumer protection laws," adding that "[b]ecause these choice of law provisions were essential to the purpose of the arbitration agreement, BMO Harris'[s] consent to the

application of federal law would defeat the purpose of the arbitration agreement in its entirety." 856 F.3d at 336. The Fourth Circuit also faulted BMO Harris for relying on terms that Great Plains extracted using its "superior bargaining power . . . in a calculated attempt to avoid the application of state and federal law," which demonstrated an absence of good faith. 856 F.3d at 337.

Defendants argue that the Arbitration Provision "display[s] a clear intent to require arbitration regardless of which substantive law may ultimately apply" and thus the Provision proves distinguishable from the agreements at issue in *Hayes* and *Dillon*. (Tribe Arb. Mem. at 25.) Defendants highlight language providing that "[i]f any of th[e] Arbitration Provision is held invalid, the remainder shall remain in effect" as evidencing the Tribe's desire to arbitrate disputes even with the concession that federal and state statutory rights should be available to Plaintiffs. (Tribe Arb. Mem. at 24-25 (citing Agreement at 6 ¶ 8).) However, even assuming that the severability language establishes an intent to arbitrate without the restrictions of the offending clauses — a dubious contention — Defendants ignore the requirement of good faith. *Dillon*, 856 F.3d at 336. Clearly, the Tribal Lending Entities possessed superior bargaining power over Plaintiffs, who resorted to the triple-digit, high-interest payday loans that the Entities offered. The Tribal Lending Entities took advantage of their superior bargaining power to extract Plaintiffs' assent to terms couched in an Arbitration Provision that plainly functioned to violate public policy by depriving Plaintiffs of statutory remedies otherwise available to them. Accordingly, the Delegation Clause proves inseverable from the offending provisions and, therefore, unenforceable as a matter of law.

D. The Arbitration Provision Prospectively Waives Plaintiffs' Statutory Rights in Violation of Public Policy.

Because the Delegation Clause proves invalid and unenforceable pursuant to § 2 of the FAA, the Court will not delegate arbitrability disputes to an arbitrator and may address the validity of the Arbitration Provision as a whole. Plaintiffs argue that the Arbitration Provision fails for the same reason as the Delegation Clause: the Provision prospectively waives Plaintiffs' rights under federal and state law. (Pls.' Tribe Arb. Resp. at 9-17.) The Tribal Officials contend that to the extent that the Arbitration Provision prospectively waives the applicability of federal and state statutes, it does so only to the extent that tribal sovereign immunity protects the Tribal Officials. (Tribe Arb. Mem. at 23-24.) Asner and Landy add that the Arbitration Provision does not waive federal causes of action as to them, because the Provision clearly limits the claims of sovereign immunity to the Tribe and the Tribal Lending Entities. (A/L Arb. Mem. at 20-21.) Defendants jointly assert that the Arbitration Provision otherwise provides a fair arbitral forum before respected arbitration organizations, and they argue that the general choice-of-law provision in the loan agreements differs from the terms at issue in *Hayes* and *Dillon*, because it does not expressly disclaim the application of federal or state law. (A/L Arb. Mem. at 21-22; Tribe Arb. Reply at 11-12.) Defendants also point to language in the loan agreements that invokes federal and state law, including language in the Arbitration Provision that requires consumers to arbitrate "all tribal, federal or state law claims, disputes or controversies" and "all claims based upon a violation of any tribal, state or federal constitution, statute or regulation." (A/L Arb. Mem. at 22-23 (internal quotations and citations omitted); Tribe Arb. Reply at 12.)

The Court disagrees with Defendants that the Arbitration Provision prospectively waives Plaintiffs' federal and state statutory rights only to the extent that the Tribe, the Tribal Lending Entities and the Tribal Officials enjoy sovereign immunity. Although the Arbitration Provision

repeatedly affirms that the Tribe and the Tribal Lending Entities enjoy and preserve their claim to sovereign immunity, such a claim proves distinct from the offending language highlighted in the Court's analysis above. (Agreement at 5-6.) Indeed, the Arbitration Provision explains that if a consumer elects to hold an arbitration somewhere other than on the Tribe's land, "such election . . . shall in no way be construed as a waiver of sovereign immunity *or* allow for the application of any other law other than the laws of the [Tribe]." (Agreement at 6 ¶ 4 (emphasis added).) The use of the disjunctive "or" clearly expresses the Tribal Lending Entities' intent to categorically disclaim the application of federal and state law during arbitration regardless of the extent to which tribal sovereign immunity might protect them from suit under those laws. To read the language otherwise would give no meaning or effect to the words following "or," which the Court must avoid. *See* Restatement (Second) of Contracts § 203 cmt. b (Am. Law Inst. 2019) ("Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous.").

Neither do the other provisions in the loan agreements mend the prospective waiver problem. Defendants contend that the loan agreements' general choice-of-law provision does not prospectively waive federal and state statutory remedies, because it provides only that the agreements will be governed by "applicable tribal law" and does not expressly reject federal or state law like the provisions at issue in *Hayes* and *Dillon*. (A/L Arb. Mem. at 22; Tribe Arb. Reply at 11-12; Agreement at 7.) However, Defendants ignore the more specific choice-of-law language in the Arbitration Provision, which clearly disclaims the application of "any other law other than the laws of the [Tribe]." (Agreement at 6 ¶ 4.) The Court will not ignore the language of specific terms within the Arbitration Provision in favor of general terms contained in an entirely separate provision. *See* Restatement (Second) of Contracts § 203 cmt. e (Am. Law Inst.

2019) ("[I]n case of conflict [between general and specific or exact terms,] the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language.").

Defendants also highlight invocations of federal and state law in the loan agreements that supposedly imply Plaintiffs' ability to effectively pursue federal and state causes of action through arbitration, namely: (1) language in the Arbitration Provision affirming that the Provision "is made pursuant to a transaction involving both interstate commerce and Indian commerce under the United States Constitution and other federal and tribal laws," (Agreement at 6 ¶ 7); (2) language in the agreement acknowledging that certain notices required by federal statutes may be delivered electronically, providing information "in a manner consistent with principles under United States federal law," and requiring consumers to indemnify the Tribal Lending Entities for the consumer's violation "of applicable federal, state or local law, regulation or ordinance," (Agreement at 6-7, 9, 11); and, (3) language in the Arbitration Provision requiring the arbitration of claims arising under federal or state constitutions, laws and regulations, (Agreement at 5 ¶ 1(b), (e)). (A/L Arb. Mem. at 22-23; Tribe Arb. Reply at 12.) The Court remains unconvinced.

For one, the language regarding the provision of notices and information required by federal law again requires the Court to ignore the specific disclaimer of non-tribal law in the Arbitration Provision in favor of highly general language contained in provisions with no relation to the arbitration of disputes. Similarly, the language requiring consumers to indemnify the Tribal Lending Entities for the consumers' violations of federal, state or local laws has no relation to Plaintiffs' ability to invoke federal law before an arbitrator and, if anything, reinforces

Plaintiffs' argument that the loan agreements establish an unfair and one-sided relationship between them and the Entities.

As for the language affirming that the Arbitration Provision "is made pursuant to a transaction involving both interstate commerce and Indian commerce under the United States Constitution and other federal and tribal laws," such an affirmation merely follows the definition of "commerce" under the FAA and, as discussed above, does so in order to invoke the FAA to the extent that it favors enforcement of arbitration provisions. 9 U.S.C. §§ 1-2. That the loan transactions between the Tribal Lending Entities and Plaintiffs qualify as transactions covered by the FAA says nothing of the arbitrator's ability to apply federal and state law, especially considering the specific repudiation of "any other law" in the Arbitration Provision. And that the disputes covered by the Arbitration Provision include those arising under federal and state law merely serves the Tribal Lending Entities' apparent purpose in crafting the Provision to compel arbitration of all possible disputes only to nullify the disputes by precluding the application of federal and state law — the precise problem highlighted by the Fourth Circuit in *Hayes*. 811 F.3d at 673-74.

Finally, Defendants assert that the Tribe's Consumer Financial Services Regulatory Ordinance (the "Ordinance") requires the Tribal Lending Entities to comply with all applicable federal laws. (Tribe Arb. Reply at 13-14.) Because the loan agreements explicitly provide that the Ordinance governs the agreements and the Ordinance by incorporation subjects the Tribal Lending Entities to "applicable" federal statutes, Defendants contend that the Arbitration Provision does not prospectively waive Plaintiffs' right to pursue statutory remedies. (Tribe Arb. Reply at 13-14.) The Court agrees that the exclusion of inapplicable federal statutory rights does not constitute a prospective waiver in violation of public policy. *See Gibbs II*, 2019 WL

4752792, at *24 (explaining that "'applicable federal law' is redundant," because an adjudicator, "by definition, would never rely on 'inapplicable federal law,'" meaning the preservation of claims under "applicable federal law" applies federal law, "seemingly without qualification"). However, the Ordinance's requirement that the Tribal Lending Entities comply with applicable federal laws does not allow Plaintiffs to effectively vindicate their rights under those laws.

Indeed, although the Ordinance requires "Licensees of any type" to comply with "federal laws as applicable," the Ordinance does not provide that consumers may seek remedies under those laws. (Ex. 2 to Pls.' Tribe Arb. Resp. ("Ordinance") (ECF No. 96-2) § 7.1.) Instead, the Ordinance provides specific remedies for violations of its terms, none of which are tied to the remedies provided under federal law. (*See* Ordinance § 11.4(e) (providing that the Tribe's consumer finance commission may award no more than the total amount of a consumer's outstanding debt plus reimbursement of payments).) Thus, the Ordinance still 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. *See Am. Ex. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) ("[The prospective waiver] exception finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue statutory remedies*.'" (emphasis partly added) (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19)). Accordingly, the incorporation of the Ordinance does not save the Arbitration Provision.

Because the Arbitration Provision prospectively waives statutory remedies otherwise available to Plaintiffs, the question then becomes whether the Court can sever the remainder of the Provision from its offending terms such that the Court could enforce the Provision without violating public policy. The Court finds the offending terms inseverable. For one, the offending

terms go to the "essence" of the Arbitration Provision, because the Provision read as a whole clearly demonstrates an intent to arbitrate all disputes, including those arising under federal and state law, while depriving Plaintiffs of any remedy under those laws. Moreover, as explained above, the Court will not enforce the remainder of the Arbitration Provision without the offending terms, because the Tribal Lending Entities clearly used their superior bargaining power to extract Plaintiffs' assent to terms that blatantly deprived them of remedies granted to them by Congress and their state legislators. Accordingly, the Arbitration Provision proves unenforceable in its entirety and the Court will deny Defendants' Motions to Compel Arbitration (ECF Nos. 57, 62) to the extent that Defendants ask the Court to enforce the Arbitration Provisions in Plaintiffs' loan agreements.

E. The Court Will Not Compel Tribal Exhaustion of Mwethuku's Claims.

Separate from their request to enforce the Arbitration Provision to which all Plaintiffs except Mwethuku agreed, Defendants ask the Court to enforce the terms in Mwethuku's loan agreement that require him to bring any disputes arising from his loan before the "Tribal Forum." (A/L Arb. Mem. at 1 n.1; Tribe Arb. Mem. at 25-26.) Because Mwethuku has not exhausted the remedies available to him in the Tribal Forum, Defendants ask the Court to stay the proceedings as to Mwethuku's claims until he has exhausted his available remedies in that Forum. (Tribe Arb. Mem. at 26.)

Plaintiffs respond that Mwethuku's loan agreement (the "Mwethuku Agreement") defines the "Tribal Forum" as "the applicable governing body of the [Tribe]," which proves insufficiently vague. (Pls.' Tribe Arb. Resp. at 29; Ex. 5 to Pls.' Tribe Arb. Resp. ("Mwethuku Agreement") (ECF No. 96-5) at 4 ¶¶ 6, 9.) Plaintiffs also contend that the tribal exhaustion doctrine does not apply here, because the Supreme Court developed the doctrine to ensure

comity between federal and tribal courts when litigants ask federal courts to intervene in ongoing litigation before a tribal court. (Pls.' Tribe Arb. Resp. at 30.) Because no such ongoing tribal litigation exists here, Plaintiffs maintain that the tribal exhaustion doctrine does not prevent Mwethuku's claims from proceeding in this Court. (Pls.' Tribe Arb. Resp. at 30.) And should the Court find that the tribal exhaustion doctrine does apply to the circumstances of this case, Plaintiffs argue that the Court should avoid referral to the Tribal Forum, because the process and structure of the Forum lack indicia of neutrality and validity. (Pls.' Tribe Arb. Resp. at 30.)

"The tribal exhaustion doctrine directs that a federal court should 'give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims' when a 'colorable claim of tribal court jurisdiction has been asserted.'" *Brown v. W. Sky Fin., LLC*, 84 F. Supp. 3d 467, 476 (M.D.N.C. 2015) (quoting *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000)). The tribal exhaustion doctrine advances three specific interests: (1) supporting tribal self-government and self-determination; (2) promoting the "orderly administration of justice in the federal court by allowing a full record to be developed in the Tribal Court;" and, (3) providing other courts with the benefit of the tribal courts' expertise in their own jurisdiction. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). "Where applicable, this prudential doctrine has force whether or not an action actually is pending in a tribal court. Moreover, the doctrine applies even though the contested claims are to be defined substantively by state or federal law." *Ninigret Dev. Corp.*, 207 F.3d at 31.

That said, courts recognize four exceptions to the tribal exhaustion requirement, namely where:

> (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule.

Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1065 (9th Cir. 1999) (citations omitted). As to the fourth exception, in *Montana v. United States*, the Supreme Court established the boundaries of tribal sovereignty over nonmembers, opining that, as to nonmembers, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. 544, 564 (1981) (citations omitted). At the same time, the Court recognized that tribes could exercise "some forms of civil jurisdiction over non-Indians . . . even on non-Indian fee lands," including, in relevant part, regulation "through taxation, licensing, or other means" of "the activities of nonmembers who enter consensual relationship with the tribe or its members, through commercial dealing, contracts . . . or other arrangements." *Id.* at 565.[6] Within these parameters, "activities of non-Indians on reservation lands almost always require exhaustion if they involve the tribe," whereas "off-the-reservation" conduct by non-Indians "must at a bare minimum impact *directly* upon tribal affairs" to trigger the exhaustion requirement. *Ninigret Dev. Corp.*, 207 F.3d at 32 (emphasis added).

Here, the Court finds that several factors militate against staying or dismissing Mwethuku's claims until he has exhausted potential tribal remedies. First, Defendants fail to

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[6] The Court finds the other *Montana* exception — concerning the power of tribes to exercise civil authority over nonmembers within their reservations "when that conduct has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe," 450 U.S. at 565 — inapplicable to this case. *See Heldt v. Payday Fin., LLC*, 12 F. Supp. 3d 1170, 1182-83 (D.S.D. 2014) (finding the same exception inapplicable in a similar tribal payday lending case).

state a colorable claim of tribal jurisdiction. In *Jackson v. Payday Financial, LLC*, the Seventh Circuit directly addressed a tribal exhaustion argument in the context of tribal payday loans. 764 F.3d 765 (7th Cir. 2014). In *Jackson*, the plaintiffs obtained high-interest loans from lenders associated with the Cheyenne River Sioux Tribe. *Id.* at 768-69. The plaintiffs brought suit under Illinois's usury and consumer fraud statutes, and the district court dismissed the case for improper venue, finding that the arbitration provision in the loan agreements required the plaintiffs to bring their claims in the tribal forum. *Id.* at 769-70.

On appeal, after finding the arbitration provision unenforceable, the Seventh Circuit considered the defendants' argument that the arbitration provision constituted a forum selection clause that required any litigation under the agreements to be conducted in the courts of the Cheyenne River Sioux Tribe. *Id.* at 781-82. Based on the Supreme Court's ruling in *Montana*, the Seventh Circuit determined that the plaintiffs had not engaged in any activities inside the tribe's reservation, because they applied for their loans, negotiated their loans and executed loan documents online from their homes in Illinois. *Id.* at 782. The Seventh Circuit further found that the plaintiffs had not consented to tribal jurisdiction by entering into the loan agreements, because "tribal courts are not courts of general jurisdiction" and any claim to jurisdiction over nonmembers must implicate "'the tribe's inherent sovereign authority.'" *Id.* at 783 (first citing *Nevada v. Hicks*, 533 U.S. 353, 367 (2001) and then quoting *Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 337 (2008)). Because the plaintiffs' claims did "not arise from the actions of nonmembers on reservation land and d[id] not otherwise raise issues of tribal integrity, sovereignty, self-government, or allocation of resources," the Seventh Circuit concluded that "[t]here simply is no colorable claim that the courts of the Cheyenne River Sioux Tribe can exercise jurisdiction over the Plaintiffs." *Id.* at 786. *But see Heldt v. Payday Fin.,*

LLC, 12 F. Supp. 3d 1170, 1186 (D.S.D. 2014) (finding that "in today's modern world of business transactions through internet or telephone, requiring physical entry on the reservation particularly in a case of a business transaction with a consent to jurisdiction clause, seems to be requiring too much" and enforcing the tribal exhaustion doctrine (citations omitted)).[7]

The Court finds the reasoning in *Jackson* persuasive and likewise finds that the Tribe has not asserted a colorable claim of jurisdiction over Mwethuku's claims, or the claims of Plaintiffs generally. Like in *Jackson*, Plaintiffs obtained, negotiated and executed their loans from their residences in Virginia through websites maintained by companies in Kansas, far from the Tribe's reservation in California. (Am. Compl. ¶¶ 67-68; Treppa Aff. ¶¶ 117-18, 121, 128, 221-26, 247, 249.) Plaintiffs also made loan payments from Virginia to payment processors operating out of Kansas. And although Mwethuku signed a loan agreement purporting to subject him to the jurisdiction of the "Tribal Forum," as the Seventh Circuit noted in *Jackson*, "a tribal court's authority to adjudicate claims involving nonmembers concerns its subject matter jurisdiction, not personal jurisdiction," so "a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court." 764 F.3d at 783 (citing *Hicks*, 533 U.S. at 367 n.8); *see also Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (reiterating that *Montana*'s main rule limits a tribe's inherent power to "'what is necessary to protect tribal self-government or to control internal relations,'" a relatively high bar (quoting *Montana*, 450 U.S. at 564)).

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[7] The Court finds the reasoning in *Jackson* more persuasive than the reasoning in *Heldt*, because, unlike in *Heldt*, the Tribal Lending Entities here do not operate out of the Tribe's reservation, creating an extra layer of separation between the Tribe's sovereign authority and Plaintiffs. Indeed, the Fourth Circuit in *Hayes* favorably cited similar reasoning to the Seventh Circuit in *Jackson*. 811 F.3d at 676 n.3 (reciting district court's reasoning that tribal exhaustion doctrine did not apply, because "the conduct at issue in this action did not involve an Indian-owned entity, did not occur on the [Tribe's] reservation, and did not threaten the integrity of the [T]ribe" and finding "no fault with the court's ruling on these points," further adopting them as the opinion of the Fourth Circuit (internal quotations and citations omitted)).

Moreover, to the extent that Defendants have asserted a colorable claim of tribal jurisdiction, the Mwethuku Agreement fails to indicate any forum to hear that colorable claim. Although the Mwethuku Agreement requires Mwethuku to bring any disputes arising from the Agreement before "the Tribal Forum," the Agreement defines "Tribal Forum" as "the applicable governing body of the [Tribe]," a vague definition that appears to reference the Tribe's Executive Council. (Mwethuku Agreement at 4 ¶¶ 6, 9.) Defendants aver that the "Tribal Forum" refers to the Tribe's Consumer Financial Services Regulatory Commission (the "Commission") "and possibly an independent arbitrator," (Tribe Arb. Mem. at 26; Tribe Arb. Reply at 19-20), but the definition provided in the Mwethuku Agreement does not reference that Commission, (Mwethuku Agreement at 4 ¶ 6).[8] Indeed, *Black's Law Dictionary* defines "governing body" as "[a] group of officers or persons having *ultimate* control," which in this instance would be the Tribe's Executive Council, not the Commission. (11th ed. 2019) (emphasis added). Defendants fail to establish that Mwethuku, or any Plaintiff for that matter, knew or had reason to know of the meaning that the Tribal Lending Entities had attached to the term "governing body," so there was no meeting of the minds as to that term. *See* Restatement (Second) of Contracts § 201 cmt. d (Am. Law Inst. 2019) (describing rules of interpretation when one party does not know or have reason to know of the meaning ascribed to ambiguous terms by the other, including that courts should enforce the contract without the ambiguous and

[8] On August 30, 2019, the Commission submitted an amicus brief in support of Defendants' Motions. (Mem. for Habematolel Pomo of Upper Lake Consumer Fin. Servs. Regulatory Comm'n, as Amicus Curiae Supp. Defs. ("Comm'n Amicus Br.") (ECF No. 76).) In its brief, the Commission argues that it applies greater protections than federal law "in some cases." (Comm'n Amicus Br. at 18-19.) However true this may be, the Commission's ability to fairly and effectively enforce the Tribe's laws says little about the Commission's jurisdiction over Mwethuku's claims, or whether the Commission in fact serves as the "Tribal Forum" under the Mwethuku Agreement, especially in light of the contrary meaning provided by the Agreement itself.

undefined terms if possible). Notably, the Seventh Circuit in *Jackson* similarly found unreasonable "an illusory forum" such as the "Tribal Forum" at issue here. 764 F.3d at 776.

The vaguely defined "Tribal Forum" also prevents the Court from determining whether Mwethuku could adequately challenge the Tribe's jurisdiction, further militating against tribal exhaustion. With no clear answer under the terms of the contract as to what the Tribal Forum would be, the Court cannot readily determine the rules and substantive laws that govern the Forum. Thus, by enforcing the forum selection clause in the Mwethuku Agreement, the Court could compel Mwethuku — and potentially other Plaintiffs — to resort to a tribal adjudicative structure that lacks any meaningful procedures for challenging its jurisdiction or, worse yet, does not exist at all. And if the Tribal Forum in fact refers to the Tribe's Executive Council as the plain meaning of "governing body" suggests, the Tribal Officers who compose that Council could hardly be considered unbiased adjudicators of Mwethuku's claims against them.

For these reasons, the Court denies Defendants' Motions to Compel Arbitration (ECF Nos. 57, 62) to the extent that they ask the Court to compel tribal exhaustion of Mwethuku's or any other Plaintiff's claims.

III. MOTIONS TO DISMISS

Having denied Defendants' Motions to Compel Arbitration, the Court will now consider the merits of Defendants' Motions to Dismiss (ECF Nos. 59, 64). As discussed above, Defendants move for dismissal of Plaintiffs' claims as to both Asner and Landy and the Tribal Officials, because: (1) Plaintiffs' loans are legal under the loan agreements' choice-of-law provision, (A/L MTD Mem. at 14-15; Tribe MTD Mem. at 5-11); and, (2) Plaintiffs fail to join the Tribal Lending Entities as indispensable parties, (A/L MTD Mem. at 15-16; Tribe MTD Mem. at 25-27). Separately, the Tribal Officials move to dismiss Plaintiffs' claims as to them,

because: (1) the Officials enjoy tribal sovereign immunity and Plaintiffs cannot overcome that immunity by requesting only injunctive relief, (Tribe MTD Mem. at 11-25); and, (2) Plaintiffs, either in whole or in part, lack standing to seek their desired relief as to future or ongoing collection of loans issued by the Tribal Lending Entities, (Tribe MTD Mem. at 28-30). Asner and Landy move separately for dismissal of Plaintiffs' claims as to them, because: (1) Plaintiffs' claims fall either outside of the applicable statute of limitations or outside of the time that they claim Asner and Landy were involved with the Tribal Lending Entities, (A/L MTD Mem. at 6-14); (2) Plaintiffs fail to state plausible claims against Asner and Landy, (A/L MTD Mem. at 16-28); and, (3) the Court lacks personal jurisdiction over Asner and Landy, because Plaintiffs fail to state a plausible RICO claim against them and therefore cannot rely on RICO's nationwide service of process provision, (A/L MTD Mem. at 28-29). The Court will first consider Defendants' joint grounds for dismissal and then proceed, if necessary, to consider the separate grounds for dismissal presented by the Tribal Officials and Asner and Landy, respectively.

A. The Choice-of-Law Provision in Plaintiffs' Loan Agreements Proves Unenforceable.

Defendants first argue that Plaintiffs' claims must fail, because they rely on the usury cap established under Virginia law when, in fact, the Tribe's laws govern Plaintiffs' loans pursuant to the loan agreements' choice-of-law provision (the "Choice-of-Law Provision"). (Tribe MTD Mem. at 5-6.)[9] Because the interest rates on Plaintiffs' loans do not violate the Tribe's laws, Defendants contend that the loans do not constitute unlawful debts under RICO. (Tribe MTD Mem. at 6-11.) Plaintiffs respond that the Court should not enforce the Choice-of-Law

[9] Because Asner and Landy refer to the Tribal Officials' argument concerning the enforceability of the Choice-of-Law Provision, the Court will rely on the Tribal Officials' arguments in its analysis. (A/L MTD Mem. at 14-15.)

Provision, because the Provision prospectively waives Plaintiffs' rights under federal law, violates Virginia's public policy against usurious lending and proves both procedurally and substantively unconscionable. (Pls.' Tribe MTD Resp. at 6-20.)

Because Plaintiffs invoke the Court's supplemental jurisdiction over their Virginia usury claims, in considering those claims, the Court will apply the choice of law rules applicable in Virginia. *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 49 n.11 (4th Cir. 1983). In Virginia, courts considering contract-related claims will give a choice-of-law provision in a contract the fullest effect intended by the parties absent unusual circumstances. *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 624 (4th Cir. 1999) (citing *Tate v. Hain*, 25 S.E.2d 321, 324 (Va. 1943)). Such unusual circumstances exist when enforcement of a choice-of-law provision would violate public policy, meaning enforcement shocks "one's sense of right." *Tate*, 25 S.E.2d at 325. Virginia courts will also avoid enforcement of choice-of-law provisions when "the party challenging enforcement establishes that such provisions are unfair or unreasonable, or are affected by fraud or unequal bargaining power." *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 397 S.E.2d 804, 807 (Va. 1990).

Relevant here, the Choice-of-Law Provision provides that:

> This Agreement is made and accepted in the sovereign territory of the [Tribe], and shall be governed by applicable tribal law, including but not limited to the [Ordinance]. You hereby agree that this governing law provision applies no matter where You reside at the time You request Your loan from [the relevant Tribal Lending Entity]. [The relevant Tribal Lending Entity] is regulated by the [Commission]. You may contact the Commission by mail at P.O. Box 516 Upper Lake CA 95485.

(Agreement at 7.)

1. The Choice-of-Law Provision Does Not Violate the Prospective Waiver Doctrine.

Plaintiffs first argue that the Choice-of-Law Provision proves unenforceable under the prospective waiver doctrine. (Pls.' Tribe MTD Resp. at 6-11.) Specifically, Plaintiffs contend that the Provision "works in tandem with the arbitration provision and forum selection provision to waive all of a consumer[']s federal and state rights." (Pls.' Tribe MTD Resp. at 7.) Plaintiffs rely on the language in the Arbitration Provision that explicitly excludes the application of any other law by an arbitrator, arguing that such language likewise voids the Choice-of-Law Provision. (Pls.' Tribe MTD Resp. at 8-9.) Plaintiffs add that the Tribe's laws — namely, the Ordinance — also prospectively waive the remedies otherwise available to Plaintiffs. (Pls.' Tribe MTD Resp. at 10-11.)

The Court disagrees that the offending language in the Arbitration Provision renders the loan agreements' general Choice-of-Law Provision unenforceable. Although Plaintiffs cite to the language in the Arbitration Provision that precludes an arbitrator from applying "any other law other than the laws of the Tribe," such language does not affect the application of federal law to the loan agreements outside of arbitration. (Agreement at 6 ¶ 4.) Indeed, "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). Thus, although the Arbitration Provision must fail, because its terms prospectively waive Plaintiffs' statutory remedies in violation of public policy, the prospective waiver of Plaintiffs' available remedies before an arbitrator does not translate into a prospective waiver under the terms of the generally applicable Choice-of-Law Provision at issue here. Accordingly, the Court may enforce the Choice-of-Law Provision unless its own terms prospectively waive the application of federal law to the loan agreements.

To that end, the Court finds that the Choice-of-Law Provision does not waive the application of federal law to Plaintiffs' loans. The Provision provides that the loan agreements "shall be governed by applicable tribal law," but the Provision does not expressly disavow the application of federal law. (Agreement at 7.) Such language proves analogous to other choice-of-law provisions that select the law of another state to govern the interpretation and enforcement of a contract while implicitly allowing for the application of relevant federal statutes. Such language also proves distinguishable from choice-of-law provisions that courts have found unenforceable under the prospective waiver doctrine. *See, e.g.*, *Dillon*, 856 F.3d at 332 (refusing to enforce choice-of-law provision providing that "no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation" (internal quotations omitted)); *Hayes*, 811 F.3d at 670 (refusing to enforce choice-of-law provision providing "that no United States state or federal law applies to this Agreement" (internal quotations and citations omitted)); *Gibbs v. Haynes Invs., LLC* (*Gibbs I*), 368 F. Supp. 3d 901, 929 (E.D. Va. 2019) (refusing to enforce choice-of-law provision providing that the lender "may choose to voluntarily use certain federal laws as guidelines for the provision of services" but that such voluntary use did not "represent acquiescence of the [Tribe] to any federal law"). Moreover, although the Choice-of-Law Provision states that the Ordinance shall also govern the loan agreements, the Provision does not select the Ordinance to govern to the exclusion of federal law. Therefore, the Choice-of-Law Provision does not prove unenforceable under the prospective waiver doctrine.

2. The Choice-of-Law Provision Violates Virginia Public Policy.

Plaintiffs argue that the Court should also avoid enforcement of the Choice-of-Law Provision, because enforcing the Provision would violate Virginia's public policy against usurious loans. (Pls.' Tribe MTD Resp. at 11.) Anticipating Plaintiffs' argument, Defendants

cite to the Virginia Supreme Court's opinion in *Settlement Funding, LLC v. Von Neumann-Lillie*, 645 S.E.2d 436 (Va. 2007), contending that the Court clearly rejected the argument that choice-of-law provisions violate public policy when they permit the enforcement of interest rates exceeding Virginia's usury cap. (Tribe MTD Mem. at 9.) Defendants add that the Tribe's interest in self-sufficiency and self-government favors enforcement of the Choice-of-Law Provision despite the resulting violation of Virginia's usury statute. (Tribe MTD Mem. at 9-10.)

In *Settlement Funding*, the Virginia Supreme Court considered a loan agreement between Carla Von Neumann-Lillie ("Lillie") and WebBank Corporation ("WebBank") that contained a choice-of-law provision selecting the laws of Utah to govern the agreement. 645 S.E.2d at 437. WebBank thereafter assigned its right, title and interest in the loan to Settlement Funding, LLC. *Id.* Pursuant to the loan agreement, Lillie assigned to Settlement Funding her interest in payments that she won through the Virginia Lottery. *Id.*

After Lillie defaulted on her loan, Settlement Funding claimed an interest in Lillie's lottery winnings and the Virginia Lottery filed an interpleader action in state court, asserting that lottery prizes are non-assignable. *Id.* Settlement Funding filed a crossclaim against Lillie, requesting a declaratory judgment that its interest in Lillie's lottery winnings could be enforced. *Id.* In response, Lillie asserted four affirmative defenses, one of which argued that Virginia's usury statute voided the loan agreement. *Id.*

Following a hearing on Settlement Funding's claims, the state circuit court declined to apply Utah law, because "Settlement Funding produced no proper proof as to Utah law at trial." *Id.* at 438. "Without proof of Utah law, the circuit court reasoned it must presume Utah law to be identical to Virginia law and, under Virginia Code § 6.01-330.55, a loan with an interest rate in excess of twelve percent is usurious. Accordingly, the circuit court held Settlement Funding

could collect only the principal sum of Lillie's loan, less credit for payments received, but could not recover interest or fees." *Id.* On appeal, the Virginia Supreme Court held that Settlement Funding had "provided the circuit court with sufficient information regarding the substance of Utah law," and, "[t]herefore, the circuit court erred in refusing to apply Utah law in the construction of the loan agreement." *Id.* at 439.

Despite Defendants' contention, the Court finds that *Settlement Funding* does not squarely reject the argument that a choice-of-law provision violates public policy when the chosen law permits interest rates above Virginia's usury cap. Rather, *Settlement Funding* addressed only the evidentiary issue of whether Settlement Funding had met its burden to prove the substance of Utah law. Indeed, the Virginia Supreme Court explicitly noted that its opinion did not address Settlement Funding's second assignment of error — that "the circuit court erred in . . . applying Virginia usury statutes and concluding that the interest rate for the subject loan was usurious," 645 S.E.2d at 438-39 n.2 — thereby leaving open the possibility that the choice-of-law provision nonetheless violated public policy. As Plaintiffs note, other courts, including a court in this Division, have also narrowly interpreted the *Settlement Funding* decision. (Pls.' Tribe MTD Resp. at 13-14 (citing *Gibbs I*, 368 F. Supp. 3d at 929 (Lauck, J.) and *Commonwealth v. NC Fin. Sols. of Utah, LLC*, 2018 WL 9372461 (Va. Cir. Ct. Oct. 28, 2018)).) Accordingly, the Court will consider whether enforcement of the Choice-of-Law Provision violates Virginia public policy.

As mentioned, to violate Virginia's public policy, enforcement of a choice-of-law provision must result in "something immoral, shocking one's sense of right." *Tate*, 25 S.E.2d at 325. "Merely because one [forum's] law differs from Virginia's does not, ipso facto, justify refusal to adhere to comity principles." *Chesapeake Supply & Equip. Co. v. J.I. Case Co.*, 700 F.

Supp. 1415, 1421 (E.D. Va. 1988). Ultimately, "[t]he public policy of [Virginia] . . . [must be] so compelling as to override the application of the [chosen forum's laws]." *Willard v. Aetna Cas. & Sur. Co.*, 193 S.E.2d 776, 779 (Va. 1973).

Plaintiffs contend that Virginia has established a compelling public policy against usurious loans. (Pls.' Tribe MTD Resp. at 11-12.) Indeed, at least one Virginia circuit court has avoided enforcement of a choice-of-law provision when the chosen forum provides no usury cap. *See NC Fin. Sols. of Utah*, 2018 WL 9372461, at *11-13 (finding unenforceable choice-of-law provision selecting Utah law, because the provision allowed the lender to avoid Virginia's "long-recognized . . . public policy against allowing usury by unregulated lenders"); *see also Williams v. Big Picture Loans, LLC*, Case No. 3:17cv461 (REP), ECF No. 125 ¶ 6 (E.D. Va. June 26, 2018) (denying motion to dismiss based on choice-of-law provision, in part, because the complaint "plausibly and adequately alleges that the choice-of-law provision at issue violates the public policy of the Commonwealth of Virginia against usurious loans"). The Court's own review of Virginia's regulation of usurious lending leads it to the same conclusion.

Since as early as 1734, Virginia's legislature has regulated usurious loans. *Town of Danville v. Pace*, 66 Va. 1, 20 (1874). These "usury laws are founded upon considerations of public policy . . . [and] are modified from time to time, and even abolished, as the popular sentiment may dictate, or the public interest require." *Id.* at 19. In modern times, "'usury statutes represent a clarification of the public policy of [Virginia] that usury is not to be tolerated, and . . . court[s] should therefore be chary in permitting this policy to be thwarted.'" *Radford v. Cmty. Mortg. & Inv. Corp.*, 312 S.E.2d 282, 285 (Va. 1984) (quoting *Heubusch v. Boone*, 192 S.E.2d 783, 789 (Va. 1972)). To be sure, Virginia does not categorically prohibit loans with interest rates greater than 12 percent; however, the General Assembly has outlined a specific

licensure and regulatory scheme for lenders wishing to offer otherwise usurious loans. *See* Va. Code § 6.2-303(B) (providing for exceptions to the general usury cap under enumerated statutory provisions); § 6.2-1500 (providing for the regulation and licensure of consumer finance companies); § 6.2-1800 (providing for the regulation and licensure of payday lenders). The General Assembly has also affirmed its intention that its usury laws should apply to all contracts without waiver. § 6.2-306(A). And, notably, Virginia's usury laws reside within a larger statutory scheme designed to afford greater protections to Virginia consumers. *See NC Fin. Sols.*, 2018 WL 9372461, at *12 (describing Virginia's "statutory scheme regulating deceptive trade practices encompassing the inducement, terms, and collection of loans in general," thereby expressing "a strong public policy to 'expand the remedies afforded to consumers and to relax the restrictions imposed upon them by the common law'" (quoting *Owens v. DRS Auto. Fantomworks*, 764 S.E.2d 256, 260 (Va. 2014))).

Considering the evolution of Virginia's usury protections, the Court finds that enforcement of the Choice-of-Law Provision would violate Virginia's compelling public policy against the unregulated lending of usurious loans. Indeed, enforcement of the Choice-of-Law Provision would allow Defendants to circumvent the comprehensive consumer finance regulatory scheme established by Virginia's General Assembly in favor of a regulatory scheme that provides not only no usury protections but also comparatively little in remedies to consumers. *Compare* Va. Code § 6.2-305 (providing for the recovery of all interest paid in excess of the statutory cap, twice the total amount of interest paid during the two years immediately preceding the date of the filing of the action and reasonable fees and costs), *with* (Ordinance § 11.4(e) (providing for the recovery of no more than the total loan amount)). Of course, a court should not void a choice-of-law provision merely because the chosen forum's

laws do not provide the same type or degree of protection as Virginia, but the apparent absence of any comparable protection for aggrieved consumers under the Tribe's laws rises to the level of "shocking one's sense of right" such that enforcement of the Choice-of-Law Provision would violate Virginia's compelling public policy against usurious lending practices.[10]

For these reasons, the Court will not enforce the Choice-of-Law Provision and will instead apply Virginia's standard choice-of-law rules for contract claims. To that end, Virginia follows the longstanding rule that "[t]he nature, validity and interpretation of contracts are governed by the law of the place where made." *C.I.T. Corp. v. Guy*, 195 S.E. 659, 661 (Va. 1938). "[T]he place of acceptance of a proposal is the place where a contract is made, since acceptance by the offeree completes the contract process." *Madaus v. Nov. Hill Farm, Inc.*, 630 F. Supp. 1246, 1249 (W.D. Va. 1986). Plaintiffs allege that they accepted their loans while in Virginia, so Virginia law governs the loans' validity at this stage. (Am. Compl. ¶ 110.) Pursuant to Virginia law, "[e]xcept as otherwise permitted by law, no contract shall be made for the payment of interest on a loan at a rate that exceeds 12 percent per year." Va. Code § 6.2-303. Under RICO, "'unlawful debt' means a debt . . . which was incurred in connection with the business . . . of lending money . . . at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." 18 U.S.C. § 1961(6). Plaintiffs allege, and the Court accepts as true, that the Tribal Lending Entities do not possess a consumer finance

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[10] In their Reply, the Tribal Officials cite to a February 12, 2018 letter from the Virginia State Corporation Commission's Bureau of Financial Institutions, in which the Bureau denied that it has any authority to regulate Mountain Summit, because Mountain Summit constitutes an arm of the Tribe. (Ex. 2 to Treppa Aff. (ECF No. 44-3) at 2.) The Tribal Officials contend that this letter confirms that Virginia does not have a compelling public policy against usurious lending. (Tribe MTD Reply at 5.) The Court finds this argument unavailing, because the letter lacks any explanation and has no binding effect on this Court. To the extent that the Bureau's letter might support the argument that Virginia's usury laws do not apply to the Tribal Lending Entities, the Court will defer consideration of that argument until a later stage.

license that would permit them to issue loans with greater than 12 percent interest under Virginia law. (Am. Compl. ¶ 113.) Yet, the Tribal Lending Entities issued and collected on loans with interest rates of at least 300 percent, far exceeding Virginia's usury cap. (Am. Compl. ¶ 112.) Accordingly, Plaintiffs have stated a plausible claim that the loans at issue violate Virginia's usury statute and constitute an "unlawful debt" under RICO, and the Court denies Defendants' Motions to Dismiss (ECF Nos. 59, 64) to the extent that they argue that Plaintiffs' loans are not usurious or unlawful under RICO.

B. The Tribal Lending Entities Do Not Constitute Indispensable Parties Under Rule 19.

Defendants contend that the Court should dismiss Plaintiffs' claims pursuant to Rules 12(b)(7) and 19 for failure to join the Tribal Lending Entities as indispensable parties. (Tribe MTD Mem. at 25-27.)[11] Specifically, Defendants argue that the Tribal Lending Entities constitute necessary parties under Rule 19, because they — not Defendants — have the direct contractual relationship with Plaintiffs pursuant to Plaintiffs' loan agreements. (Tribe MTD Mem. at 25.) Defendants argue that the Tribal Lending Entities' direct contractual relationship with Plaintiffs both requires their joinder to accord complete relief and provides the Entities with a legally protected interest in the subject matter of Plaintiffs' claims. (Tribe MTD Mem. at 26.) Because the Tribal Lending Entities enjoy sovereign immunity, Defendants argue that their joinder as necessary parties proves infeasible and that equity and good conscience require dismissal of Plaintiffs' claims. (Tribe MTD Mem. at 26-27.)

[11] Because Asner and Landy reiterate the Tribal Officials' arguments on this point, the Court will consider the Tribal Officials' arguments as representing the interests of all Defendants. (A/L MTD Mem. at 15-16.)

Plaintiffs respond that the Tribal Lending Entities do not constitute necessary parties, because Plaintiffs have sued the Tribal Officials in their official capacities and those officials adequately represent the interests of the Entities. (Pls.' Tribe MTD Resp. at 41-42.) Plaintiffs likewise contend that inclusion of the Tribal Officials allows for the accordance of complete relief among the parties. (Pls.' Tribe MTD Resp. at 42-43.)

Federal Rule of Civil Procedure 12(b)(7) allows a party to move for dismissal of a claim for failure to join a necessary party under Rule 19. Rule 19 requires a two-step inquiry, namely: (1) whether the party is "necessary" to the action under Rule 19(a); and, (2) whether the party is "indispensable" under Rule 19(b). *Nat'l Union Fire Ins. Co. v. Rite Aid of South Carolina, Inc.*, 210 F.3d 246, 249 (4th Cir. 2000). A party is necessary under Rule 19(a) if "in that person's absence, the court cannot accord complete relief among the existing parties" or "that person claims an interest relating to the subject matter of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest . . . or leave an existing party subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(A)-(B). A necessary party proves indispensable to an action if it cannot be joined and "in equity and good conscience" the court determines that the action should be dismissed after considering: (a) "the extent to which a judgment rendered in the [necessary party's] absence might prejudice that [necessary party] or the existing parties;" (b) "the extent to which any prejudice could be lessened or avoided by . . . protective provisions in the judgment . . . shaping of relief . . . [or] other measures;" (c) "whether a judgment rendered in the [necessary party's] absence would be adequate;" and, (d) "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(1)-(4).

Ultimately, the burden rests on the party asserting failure to join "to 'show that the person who was not joined is needed for a just adjudication.'" *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005) (quoting 7 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 1609 (3d ed. 2001)). "Courts are loathe to dismiss cases based on nonjoinder of a party, so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will certainly result." *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 441 (4th Cir. 1999).

In support of their argument that the Tribal Lending Entities constitute necessary parties, Defendants rely primarily on the Fourth Circuit's decision in *Yashenko v. Harrah's NC Casino Company, LLC*, 446 F.3d 541 (4th Cir. 2006). (Tribe MTD Mem. at 25.) *Yashenko* considered, in part, the implications of a tribe's contract with a private employer that obligated the employer to give preference to qualified members of the tribe in recruiting, training and employment decisions. 446 F.3d at 543. Yashenko sued the private employer, alleging that the tribal preference policy violated 42 U.S.C. § 1981. *Id.* at 545. The district court granted summary judgment to the employer. *Id.*

On appeal, the Fourth Circuit affirmed the decision of the district court, holding that Yashenko could not pursue his § 1981 claim, because the tribe constituted a necessary party under Rule 19 whose joinder proved infeasible due to tribal sovereign immunity. *Id.* at 552. The Fourth Circuit found the tribe to be necessary, because "a judgment in the plaintiff's favor would only bind him and the private employer and would not prevent the tribe from continuing to enforce its tribal preference policy on its own property." *Id.* at 553 (citing *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155-56 (9th Cir. 2002)). The Fourth Circuit also reasoned that "any judgment on [the § 1981 claim] would threaten 'to impair

the [Tribe]'s contractual interests, and thus, its fundamental economic relationship with'" the private employer, "as well as 'its sovereign capacity to negotiate contracts and, in general, to govern' the reservation." *Id.* (quoting *Dawavendewa*, 276 F.3d at 1157). And the Fourth Circuit found that any judgment in Yashenko's favor would leave the private employer "'subject to substantial risk of incurring multiple or inconsistent obligations.'" *Id.* (quoting *Dawavendewa*, 276 F.3d at 1157). Because the district court "could not shape the relief sought in such a way as to mitigate this prejudice to [the employer] and the [t]ribe," the Fourth Circuit found that the tribe's absence required dismissal of Yashenko's § 1981 claim. *Id.*

Plaintiffs argue that *Yashenko* proves distinguishable from this case, because, unlike Yashenko, they bring suit against the Tribal Officials, whose inclusion allows the Court to accord complete relief without joinder of the Tribe or the Tribal Lending Entities. (Pls.' Tribe MTD Resp. at 42-43.) In support of this argument, Plaintiffs cite to the Ninth Circuit's post-*Dawavendewa* decision in *Salt River Project Agricultural Improvement & Power District v. Lee*, which distinguished between cases involving tribal officials and those involving no representatives of the tribe at all, 672 F.3d 1176, 1181 (9th Cir. 2012). (Pls.' Tribe MTD Resp. at 42-43.)

Indeed, in *Salt River Project*, the Ninth Circuit expressly noted that "[in *Dawavendewa*] — unlike here — the tribal officials were *not* parties to the action and thus could not represent the absent tribe's interests." 672 F.3d at 1181 (emphasis supplied). Because *Salt River Project* included claims for injunctive relief against the tribal official defendants in their official capacities, the Ninth Circuit found that: (1) the tribe did not constitute a necessary party under Rule 19(a)(1)(A), because "[a]n injunction against a public officer in his official capacity . . . remains in force against the officer's successors;" (2) the tribe did not constitute a necessary

party under Rule 19(a)(1)(B)(i), because the tribal officers adequately represented the tribe's interests; and, (3) the tribe did not constitute a necessary party under Rule 19(a)(1)(B)(ii), because although the tribe would not be bound by the requested injunction, the tribe could not enforce the injurious tribal statute without the aid of the tribal official defendants who would be bound by the plaintiffs' requested injunction. *Id.* at 1180-81. The Ninth Circuit added that to hold otherwise "would effectively gut the *Ex parte Young* doctrine," which "permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or tribe." *Id.* at 1181 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

The Court agrees with Plaintiffs that their claims against the Tribal Officials in their official capacities renders the inclusion of the Tribal Lending Entities unnecessary under Rule 19. First, because Plaintiffs seek an injunction against the Tribal Officials which will also enjoin future officials in those same positions, Plaintiffs may obtain complete relief without specific redress against the Tribal Lending Entities. Indeed, the Tribal Officials affirm that the Tribe's Executive Council has full control of the Entities' operations. (*See* Treppa Aff. ¶¶ 200-10 (describing the current organizational structure of the Tribe's lending businesses, with the Tribe's Executive Council composing the Board of Directors that has final authority over the Tribe's lending businesses).) Thus, if successful on the merits of their claims, Plaintiffs will enjoin the Tribal Officials who, by virtue of their positions on the Tribe's Executive Council, control the Tribal Lending Entities, rendering the Tribal Lending Entities unnecessary to accord complete relief. *See Gingras v. Rosette*, 2016 WL 2932163, at *20 (D. Vt. May 18, 2016) (rejecting similar argument for the joinder of a tribal lending entity and its associated tribe, because "the presence of the [tribal officials] in this case satisfies the requirements of Rule 19").

Plaintiffs' inclusion of the Tribal Officials likewise renders the Tribal Lending Entities unnecessary under Rule 19(a)(1)(B). As with *Salt River Project*, the Tribal Officials here can adequately represent the interests of the Tribe and the Tribal Lending Entities that the Tribe effectively control. 672 F.3d at 1181; *see also Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (reasoning that the potential for prejudice to a non-party tribe was "largely nonexistent due to the presence in this suit of . . . the tribal officials" and other similarly interested defendants). And though any injunction against the Tribal Officials will not directly enjoin the Tribal Lending Entities, by the Tribal Officials' own admission, they retain control of those Entities such that any act or omission by the Entities could not be undertaken without the Officials' consent, meaning Plaintiffs would not be exposed to inconsistent obligations if they succeed on the merits.

Because the Tribal Lending Entities do not constitute necessary parties under Rule 19(a), the Court need not consider whether those Entities prove indispensable to Plaintiffs' claims. Accordingly, the Court denies Defendants' Motions to Dismiss (ECF Nos. 59, 64) to the extent that they move for dismissal for Plaintiffs' failure to join the Tribal Lending Entities as indispensable parties.

C. Tribal Sovereign Immunity Does Not Shield the Tribal Officials from Plaintiffs' *Ex Parte Young*-Style Claims Under State Law.

The Tribal Officials move to dismiss Plaintiffs' claims against them for lack of subject matter jurisdiction, claiming that they enjoy the same immunity from suit as the Tribe and as legislators. (Tribe MTD Mem. at 11-25.) The Tribal Officials argue that "the relief Plaintiffs seek would nullify the Tribe's laws and policies by dictating that it must comply with the contrary law of a state that has no political or regulatory power over the Tribe," rendering "meaningless" the Tribal Lending Entities' sovereign immunity as arms of the Tribe. (Tribe

MTD Mem. at 12.) The Tribal Officials maintain that Plaintiffs fail to overcome this immunity by limiting their desired relief against the Officials to only prospective, injunctive relief, because the Tribe constitutes the "real party in interest," as any relief against the Officials would operate primarily against the Tribe. (Tribe MTD Mem. at 13-15.) The Tribal Officials add that to allow Plaintiffs to obtain their desired relief against the Officials would "eviscerate" the interests of tribal self-government and self-sufficiency that underpin the tribal sovereign immunity doctrine. (Tribe MTD Mem. at 15-16.) And the Tribal Officials contend that *Ex parte Young*'s "limited intrusion on sovereign immunity" does not allow for vindication of Plaintiffs' state-law and RICO claims. (Tribe MTD Mem. at 17-25.)

Plaintiffs respond that tribal immunity "'is a shield, however, not a sword'" and "'poses no barrier to plaintiffs seeking prospective equitable relief for violations of federal or state law.'" (Pls.' Tribe MTD Resp. at 20-21 (quoting *Gingras*, 922 F.3d at 128).) Plaintiffs argue that the Supreme Court's holding in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), allows *Ex parte Young*-style claims against tribal officials for violations of state law. (Pls.' Tribe MTD Resp. at 21 (citing *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 121 (2d Cir. 2019)).) As for the Tribal Officials' argument that the Tribe constitutes the "real party in interest" in this suit, Plaintiffs contend that the "real party in interest" analysis addresses claims that seek monetary relief against government employees merely to overcome sovereign immunity and therefore proves inapposite to their claims for injunctive and declaratory relief. (Pls.' Tribe MTD Resp. at 23-24.) Plaintiffs maintain that the Court need only perform a "'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" (Pls.' Tribe MTD Resp. at 25 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002)).)

1. Plaintiffs May Use Ex parte Young *to Vindicate Their State-Law Claim Against the Tribal Officials to the Extent that Plaintiffs Seek to Enjoin Future Collection of Their Loans, Declare Their Loans Void and Require Notice to the Putative Class in Count Seven.*

The Court will first address the Tribal Officials' argument that Plaintiffs cannot bring *Ex parte Young*-style claims to vindicate violations of state law and RICO, for if Plaintiffs cannot obtain their desired relief in an *Ex parte Young*-style action generally, the Court need not address whether tribal sovereign immunity protects the Tribal Officials in this case. To that end, as mentioned, Plaintiffs contend that the Supreme Court in *Bay Mills* endorsed *Ex parte Young* actions against tribal officials for violations of state law. (Pls.' Tribe MTD Resp. at 21.) The Tribal Officials characterize the language in *Bay Mills* on which Plaintiffs rely as mere dictum that does not support Plaintiffs' "novel riff on *Ex parte Young*." (Tribe MTD Mem. at 18.)

a. Bay Mills *Permits* Ex parte Young*-Style Claims Against Tribal Officials for Violations of State Law.*

Bay Mills addressed a gaming compact between Michigan and the Bay Mills Indian Community executed pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.* 572 U.S. at 785-86. Under the compact, Bay Mills could conduct Class III gaming activities — namely, casino games, slot machines and horse racing — on Indian lands, but could not conduct such activities on non-Indian lands. *Id.* at 786. In 2010, Bay Mills began operating a Class III gaming facility on non-Indian land that it had purchased using an appropriation from Congress. *Id.* The congressional appropriation provided that any land acquired using the funds "shall be held as Indian lands are held." *Id.* (internal quotations and citations omitted). Bay Mills therefore argued that the previously non-Indian land became Indian land under the compact, permitting the operation of Class III gaming facilities on that land. *Id.* Michigan disagreed and sued Bay Mills in federal court to enjoin the operation of a casino on the

new land. *Id.* at 787. After the district court issued a preliminary injunction against Bay Mills, the tribe appealed, and the Sixth Circuit reversed, finding that tribal sovereign immunity barred Michigan's suit against Bay Mills unless Congress provided otherwise. *Id.* Because the IGRA provision on which Michigan relied permitted a suit to enjoin gaming activities only on Indian lands, the Sixth Circuit held that Congress did not abrogate the tribe's sovereign immunity for gaming activities on non-Indian lands, which included the new land purchased by Bay Mills. *Id.* at 787-88.

The Supreme Court affirmed the Sixth Circuit's reasoning, agreeing that the IGRA abrogated tribal sovereign immunity only for gaming activities on Indian lands. *Id.* at 791-97. As part of its opinion, the Court addressed Michigan's concern that such a narrow abrogation would leave states without the effective power to regulate gaming within their borders. *Id.* at 795-96. Rejecting this argument, the Court noted that states have "many other powers over tribal gaming that [they] do[] not possess (absent consent) in Indian territory." *Id.* at 795. The Court proceeded to list examples of these powers, including using generally applicable casino licensing schemes to deny a license to off-reservation tribal casinos. *Id.* at 795-96. Relevant here, the Supreme Court further opined that "if Bay Mills went ahead [with operating an unlicensed casino] anyway, Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license" in violation of state law. *Id.* at 796 (citing Mich. Comp. Laws Ann. §§ 432.220, 600.3801(1)(a) (West 2013)). The Supreme Court added that, pursuant to *Ex parte Young*, "tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Id.* (emphasis supplied) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)).

The Fourth Circuit has yet to conclude whether the language in question — opining that Michigan could seek to enjoin tribal officials for violations of state law pursuant to *Ex parte Young* — constitutes mere dictum or proves central to the Supreme Court's holding in *Bay Mills*; however, other courts have taken up the issue. Most notably, in *Gingras v. Think Finance, Inc.*, the Second Circuit directly addressed an identical argument to the one lodged by the Tribal Officials here. 922 F.3d at 122-24. In finding that the language in question constituted binding precedent, the Second Circuit reasoned that the availability of alternative remedies, including *Ex parte Young*-style actions for violations of state law, served as a central justification for the Supreme Court's holding that the IGRA does not abrogate tribal sovereign immunity for off-reservation gaming activity. *Id.* at 122.

For one, the Second Circuit noted that the Supreme Court relied on the alternative remedies available to Michigan to support its reasoning that Congress in enacting the IGRA intended to narrowly abrogate tribal sovereign immunity for only on-reservation activities. *Id.* (citing *Bay Mills*, 572 U.S. at 794-95). The Second Circuit also cited to the Supreme Court's explanation for refusing to overturn its decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), in which the Court reasoned that "'[a]dhering to *stare decisis* is particularly appropriate here given that [Michigan], as we have shown, has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges.'" *Id.* (quoting *Bay Mills*, 572 U.S. at 799 n.8). And the Second Circuit observed that "[t]hree distinct opinions in *Bay Mills* recognized the availability of *Ex parte Young* actions for violations of state law." *Id.* (citing *Bay Mills*, 572 U.S. at 796; *id.* at 809 (Sotomayor, J., concurring) (rejecting the dissent's "concern that, although tribal leaders can be sued for prospective relief," (citing

majority op.), "Tribes' purportedly growing coffers remain unexposed to broad damages liability," (citing dissenting op.)); *id.* at 822-24 (Thomas, J., dissenting)).

As for the tribal defendants' argument that to read the language in *Bay Mills* as more than mere dictum would "upset decades of immunity jurisprudence," the Second Circuit found no such contradiction. *Id.* The Second Circuit acknowledged that the Supreme Court in *Pennhurst State School & Hospital v. Halderman* "declined to extend the *Ex parte Young* rationale to suits seeking to hold state officials accountable for violations of that state's laws." *Id.* (citing 465 U.S. 89, 106 (1984)). However, the Second Circuit found that the justification behind the *Pennhurst* holding — that *Ex parte Young* is designed to "hold state officials responsible to the supreme authority of the United States" and thus cannot be used to hold a state official responsible to the authority of her own state's laws — did not apply to suits seeking to hold tribal officials responsible to the laws of a state, "because tribes cannot empower their officials to violate state law the way a state can interpret its own laws to permit a state official's challenged conduct." *Id.* at 122-23 (quotations and citations omitted). In other words, the Second Circuit reasoned that the "concomitant sovereign concerns" at issue in *Pennhurst* did not "prevent the federal courts from instructing a tribal official how to conform that official's conduct to either state or federal law," meaning *Pennhurst* and the language at issue in *Bay Mills* could stand in harmony. *Id.* at 123. The Second Circuit added that the Supreme Court's citation to its previous decision in *Santa Clara Pueblo* when affirming Michigan's ability to enjoin tribal officials for violations of its laws confirmed that "*Bay Mills* was not a wayward departure from, but rather a clear demarcation of, the outer limits of tribal sovereign immunity." *Id.*

Finally, the Second Circuit rejected the tribal defendants' argument that *Bay Mills* provided for only individual, and not official, capacity suits, explaining that the defendants'

"proffered reading makes little sense . . . [f]rom an efficiency perspective, [because] it is impractical to require a new lawsuit and a new injunction each time a tribal official is replaced." *Id.* The Second Circuit likewise rejected the tribal defendants' argument that *Bay Mills* authorized only states to sue tribal officials, noting that "[o]fficial capacity suits . . . have long been available to private parties" and seeing "no reason to depart from that tradition now." *Id.* at 123-24 (citations omitted).

Although the Tribal Officials contend that *Gingras* reached the wrong conclusion, because the language at issue did not prove "'necessary to [the] result'" of the *Bay Mills* holding, (Tribe MTD Mem. at 18 n.4 (modifications supplied) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996))), the Court finds the reasoning in *Gingras* persuasive and will join the Second Circuit in finding that *Bay Mills* permits *Ex parte Young*-style claims against tribal officials for violations of state law that occur on non-Indian lands.[12] To hold otherwise would allow "[t]ribes and their officials . . ., in conducting affairs outside of reserved lands, to violate state laws with impunity." *Gingras*, 922 F.3d at 124. Moreover, allowing *Ex parte Young*-style suits against tribal officials for violations of state law aligns with "the federal government's strong interest in providing a neutral forum for the peaceful resolution of disputes between domestic sovereigns," because such suits would fall within the jurisdiction of the federal courts, who already serve as the constitutionally designated arbiter of disputes between the states. *Id.* (citing U.S. Const. art. III, § 2, cl. 2).

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[12] Notably, the Eleventh Circuit has reached the same conclusion. *See Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015) ("[T]ribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands." (citing *Bay Mills*, 572 U.S. at 795-96)).

b. Plaintiffs' Loans Constitute Off-Reservation Conduct Subject to State Law.

Assuming that *Gingras* reached the correct conclusion, the Tribal Officials further argue that the holding in *Bay Mills* "does not extend to the on-reservation conduct challenged in this lawsuit." (Tribe MTD Mem. at 18, 21-22.) The Tribal Officials cite to the decision of Senior United States District Judge Robert E. Payne in *Williams v. Big Picture Loans*, which found that "because all loan applications are approved by [the tribal lender's] employees on the Reservation, all consumer loans are originated there." 329 F. Supp. 3d 248, 264 (E.D. Va. 2018). The Tribal Officials aver that the Tribal Lending Entities also approved loan applications on the Tribe's reservation, noting that the loan agreements stated that each loan was "made and accepted in the sovereign territory of the [Tribe]," which "precludes [Plaintiffs] from arguing that the loans originated elsewhere." (Tribe MTD Mem. at 21 (internal quotations and citations omitted).)

Plaintiffs respond that the Tribal Officials ignore the findings in *Gingras* and similar lawsuits that tribal lending practices constitute off-reservation activity subject to generally applicable state laws. (Pls.' Tribe MTD Resp. at 25-26 (citing *Gingras* 922 F.3d at 121; *United States v. Hallinan*, 2016 WL 7477767, at *1 (E.D. Pa. Dec. 29, 2016); *Otoe-Missouria*, 974 F. Supp. 2d at 361; *Colorado v. W. Sky Fin., LLC*, 845 F. Supp. 2d 1178, 1181 (D. Colo. 2011)).) Plaintiffs contend that the Tribal Officials mischaracterize Judge Payne's finding in *Williams*, because the statement quoted by the Officials concerned the relevant tribal lender's associations with the tribe in that case, not whether the tribal lender's practices constituted on- or off-reservation activity. (Pls.' Tribe MTD Resp. at 27 (citing *Williams*, 329 F. Supp. 3d at 264).) Plaintiffs note that Judge Payne later made a contrary finding when examining whether the plaintiffs had to exhaust tribal remedies, ruling that "'there was no basis on which to conclude

that a non-member of the Tribe acted on tribal land.'" (Pls.' Tribe MTD Resp. at 27 (quoting *Williams v. Big Picture Loans*, No. 3:17-cv-461 (REP), ECF No. 142 ¶ 1 (E.D. Va. July 25, 2018)).) And Plaintiffs contend that, in any case, there exists sufficient evidence at this stage to find that the loans issued by the Tribal Lending Entities originated in Kansas, not on the Tribe's reservation in California. (Pls.' Tribe MTD Resp. at 28.)

Even after accepting the Tribal Officials' contention that Plaintiffs' loans originated on the Tribe's reservation, that fact alone does not render the Tribal Lending Entities' lending activities wholly on-reservation conduct. The Tribal Officials do not dispute that Plaintiffs resided on non-Indian lands when applying for their respective loans, executing relevant loan documents and making loan payments from bank accounts maintained in Virginia. Plaintiffs did not travel to the Tribe's lands at any point. Such activity proves directly analogous to the lending activity that other courts have found to clearly constitute off-reservation conduct subject to nondiscriminatory state regulation. *See Gingras* 922 F.3d at 121 (finding that the tribal defendants "engaged in conduct outside of Indian lands when they extended loans to the Plaintiffs in Vermont"); *Hallinan*, 2016 WL 7477767, at *1 ("Because the loans at issue involve activity that takes place, at least in part, off reservation, state law still applies."); *Otoe-Missouria*, 974 F. Supp. 2d at 361 ("The undisputed facts demonstrate that the activity the State seeks to regulate is taking place in New York, off of the Tribes' lands."); *W. Sky Fin., LLC*, 845 F. Supp. 2d at 1181 ("Business conducted over the Internet that would confer jurisdiction on a state court also demonstrates that the business activity constitutes off-reservation activity."); *cf. Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1304 (10th Cir. 2008) (finding that Kansas could regulate Utah lender's loans to Kansas residents despite lender's lack of physical presence in Kansas, because lending to Kansas residents constituted in-state activity).

As for the Tribal Officials' reliance on Judge Payne's finding in *Williams* that "because all loan applications are approved by [the tribal lender's] employees on the Reservation, all consumer loans are originated there," such a finding proves inapposite to the issue here. 329 F. Supp. 3d at 264. The statement on which the Tribal Officials rely appears within the background section of the *Williams* opinion and merely draws an obvious conclusion: that if the tribal lender's employees approve loan applications on the tribe's reservation, the loans originate on the reservation. *Id.* The court in *Williams* said nothing about whether the lending practices constituted on- or off-reservation activity. And, in any case, that loans originate in one sovereign jurisdiction does not end the Court's analysis, for, as the Court explains above, a loan transaction inherently involves more than the originator.[13]

The Tribal Officials contend that the Court should not determine the locus of the lending conduct "based solely on 'a mere determination of the [borrower's] physical location,'" because doing so "would make little sense in the context of 'many modern-day contracts involving reservation-based business.'" (Tribe MTD Mem. at 22 (quoting *FTC v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 940 (D.S.D. 2013)).) But the Tribal Officials again mischaracterize the quoted text, which addressed the extent of tribal jurisdiction over non-Indian borrowers, not the extent of state jurisdiction over off-reservation conduct. *Payday Fin.*, 935 F. Supp. 2d at 940. Indeed, the Tribal Officials' contention stands in direct opposition to the Supreme Court's instruction

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[13] In their Reply, the Tribal Officials argue that the loan agreements explicitly provide that the agreements are made and accepted on the Tribe's reservation, which binds the Plaintiffs to accept that the Tribe's lending practices constituted wholly on-reservation activity. (Tribe MTD Reply at 14-15.) The Court disagrees that Plaintiffs' stipulation that they accepted the loans on the Tribe's reservation precludes the application of Virginia law to clearly off-reservation activity occurring in Virginia. *See* Restatement (Second) of Contracts § 207 (Am. Law Inst. 2019) ("In choosing the meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred.").

that "[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983). Such "off-reservation effects" clearly exist here and warrant the imposition of Virginia's generally applicable laws. Moreover, the Court does not base its off-reservation-conduct finding solely on the physical location of Plaintiffs when they executed the loan agreements; rather, as explained above, the lending activities in question constitute at least partly off-reservation conduct, because they reach into the sphere of a different sovereign and rely on conduct — including performance of the loan agreements — that occurred within that sphere.

Neither does the Court agree with the Tribal Officials' argument that enjoining them from violating state law would "eviscerate modern federal Indian policy and the purposes of sovereign immunity, which are designed to encourage Tribes to seek out new business ventures like e-commerce." (Tribe MTD Mem. at 22.) If anything, the conclusion that the Tribal Officials ask the Court to reach would eviscerate the power of states to subject "Indians going beyond reservation boundaries . . . to any generally applicable state law" by allowing tribes operating as payday lenders to reach far beyond their sovereignty and violate state consumer protection statutes with impunity. *Bay Mills*, 572 U.S. at 795. Further, that Plaintiffs might be able to vindicate their state-law claims through injunctive relief in this instance does not mean that the Tribal Lending Entities cannot structure their future loans to balance the Tribe's interest in self-sufficiency with the Entities' obligation to obey the laws of the sovereign states into which they reach.[14] Nor does the Court's conclusion preclude the Tribe from structuring its

[14] In its Amicus Brief, the Commission argues that tribes "cannot be sovereign and yet be required to follow laws enacted by states," citing to cases that extend tribal sovereign immunity to commercial activities on non-Indian lands. (Comm'n Amicus Br. at 11.) However, as the

loans and lending practices to properly avoid Virginia's consumer finance statutes in favor of its own.

c. Plaintiffs May Enjoin the Tribal Officials from Violating Virginia's Consumer Finance Act Only to the Extent that the Officials' Violations Affect Loans Issued to Them and the Putative Class in Count Seven.

The Tribal Officials also argue — albeit briefly — that Plaintiffs cannot enjoin them from violating state law, because the Virginia statutes invoked by Plaintiffs provide for injunctive relief against only "lenders," which in this case would be the Tribal Lending Entities. (Tribe MTD Mem. at 22 (citing Va. Code § 1541(B)).) Plaintiffs respond that Virginia law permits them to obtain an injunction even when a statute does not provide for equitable remedies. (Pls.' Tribe MTD Resp. at 39 (citing *Levisa Coal Co. v. Consolidation Coal Co.*, 662 S.E.2d 44, 53

Supreme Court noted in *Kiowa*, "[t]here is a difference between the right to demand compliance with states laws and the means available to enforce them [i.e., *Ex-parte Young* actions, taxation, etc.]." 523 U.S. at 755; *see also Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1130 (11th Cir. 1999) ("[W]hether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." (emphasis supplied)). The cases cited by the Commission refer to the latter issue and do not preclude Virginia — or private plaintiffs authorized to bring suit under Virginia law — from demanding compliance with Virginia laws when the Tribe reaches into the Commonwealth.

Similarly, various tribal nonprofit organizations led by the Native American Finance Officers Association ("NAFOA") (collectively, the "Tribal Amici Curiae") argue in their own amicus brief that "a decision to override the well-established doctrine of sovereign immunity and subject tribal governments . . . to the disparate laws of the various states would constitute a sea-change in the management of tribal affairs and result in a myriad of deleterious consequences." (Amicus Br. of Tribal Amici Curiae ("NAFOA Amicus Br.") (ECF No. 102) at 6.) Yet, the Tribal Amici Curiae ignore that *Ex parte Young* relief constitutes an *exception* to, and not an override of, tribal sovereign immunity. *See Crowe & Dunlevy v. Stidham*, 640 F.3d 1140, 1154-55 (10th Cir. 2011) (recognizing that *Ex parte Young* constitutes "an exception not just to state sovereign immunity but also tribal sovereign immunity" (collecting cases)). The Tribal Amici Curiae likewise ignore the Supreme Court's express holding that "[u]nless federal law provides differently, Indians going beyond reservation boundaries are subject to any generally applicable state law." *Bay Mills*, 572 U.S. at 795 (internal quotations and citations omitted).

(Va. 2008) ("[U]nless a party is entitled to an injunction pursuant to a statute, a party must establish the traditional prerequisites . . ." (internal quotations and citations omitted)).)

The Supreme Court has recognized that *Ex parte Young* is itself "a judge-made remedy," quite apart from any statutory remedy, designed "'to prevent an injurious act by a public officer.'" *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). However, the Supremacy Clause does not vest private plaintiffs with an implied right of action to bring *Ex parte Young*-style claims. *Id.* Thus, Plaintiffs must rely on the Court's equitable powers to enjoin unlawful executive action, and those equitable powers are "subject to express and implied statutory limitations," meaning a litigant seeking in equity to enjoin a government official from violating federal or, in this case, state law must have the statutory authority to do so. *Id.* at 1385. Notably, when enforcing rights created under state law, federal courts should be especially cautious in exercising their equitable powers. *See Johnson v. Collins Entm't Co.*, 199 F.3d 710, 726 (4th Cir. 1999) (noting that "[t]he district court's reliance on its 'inherent equitable power' in granting [an expansive injunction against video poker operators] made federal encroachment on the state's regulatory domain all the more invasive").

Applying these principles, the Supreme Court in *Seminole Tribe* found that permitting *Ex parte Young*-style suits to enforce § 2710(d)(3) of the IGRA proved inconsistent with the statute's "detailed remedial scheme." 517 U.S. at 74. Similarly, in *Armstrong*, the Court held that private litigants could not obtain *Ex parte Young*-style relief for violations of § 30(A) of the Medicaid Act, because "the sole remedy Congress provided for a State's failure to comply with [the Section] . . . is the withholding of Medicaid funds by the Secretary of Health and Human Services" and the Section's text proved "judicially unadministrable," foreclosing the possibility that Congress intended for private enforcement of the provision. 135 S. Ct. at 1378. By

comparison, in *Verizon*, the Supreme Court found that the Telecommunications Act of 1996 did not foreclose jurisdiction under *Ex parte Young*, because the Act places "no restriction on the relief a court can award," "does not even say whom the suit is to be brought against" and does not "'impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*.'" 535 U.S. at 647-48 (quoting *Seminole Tribe*, 517 U.S. at 75-76).

Here, in Count Seven (Count Eight in the Amended Complaint), Plaintiffs bring a claim for injunctive relief against the Tribal Officials under Virginia's Consumer Finance Act ("VCFA"). (Am. Compl. ¶¶ 224-36.) Though Plaintiffs do not specify the statutory section entitling them to relief, the Court presumes that Plaintiffs seek relief pursuant to Virginia Code § 6.2-1541, which provides that:

> A. A loan contract shall be void if any act has been done in the making or collection thereof that violates § 6.2-1501.
>
> B. The lender on any loan for which a person has taken any action in its making or collection in violation of § 6.2-1501 shall not collect, receive, or retain any principal, interest, or charges whatsoever with respect to the loan, and any principal or interest paid on the loan shall be recoverable by the person by or for whom payment was made.

Section 6.2-1501 prohibits the unlicensed lending of consumer loans with interest rates exceeding Virginia's usury cap. The Virginia Supreme Court has found that § 6.2-1541(B) permits "a recovery of restitution only from the lender," which excludes members, officers, directors, agents and employees of that lender. *Greenberg v. Commonwealth ex rel. Att'y Gen. of Va.*, 499 S.E.2d 266, 270 (Va. 1998). Notably, restitution provides for only retrospective relief by returning to the plaintiff what the defendant rightfully owes her. Restatement (Third) of Restitution § 1 cmt. a (Am. Law Inst. 2019). However, § 6.2-1541(B) also implicitly provides for prospective injunctive relief by prohibiting the collection, receipt and retention of principal,

interest and charges with the respect to any unlawful loan. The question thus becomes whether this prospective relief allows the Court, in equity, to use *Ex parte Young* to enjoin the Tribal Officials from issuing future usurious loans in Virginia. The Court finds that it does not.

In Virginia, when "'a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise.'" *Concerned Taxpayers of Brunswick Cty. v. County of Brunswick*, 455 S.E.2d 712, 717 (Va. 1995) (quoting *Vansant & Gusler, Inc. v. Washington*, 429 S.E.2d 31, 33 (Va. 1993) (internal quotations and citations omitted)). Here, the rights relied upon by Plaintiffs are purely statutory. Although Plaintiffs contend that Virginia recognizes a right to injunctive relief apart from any statute, the case to which they cite in support of that proposition, *Levisa Coal Company*, merely clarifies that a plaintiff seeking injunctive relief must first prove irreparable harm unless a statute provides for injunctive relief, in which case a plaintiff proves irreparable harm by proving the harm under the statute. 662 S.E.2d 44, 53. *Levisa* does not provide a blanket right to injunctive relief for purely statutory claims. Plaintiffs otherwise fail to point to any equitable remedy concerning usurious lending that preexists those enumerated in the VCFA. Indeed, as mentioned, usury regulation in Virginia has been a creature of statute since the colonial period. *Pace*, 66 Va. at 20. Thus, Plaintiffs must rely exclusively on the remedies provided by the VCFA.

Because the VCFA provides for prospective relief only to the extent necessary to prevent the collection and receipt of any principal, interest and charges on a plaintiff's unlawful loan, the Court may use *Ex parte Young*-style relief only to the same extent, meaning the Court cannot use *Ex parte Young* to enjoin future usurious lending by the Tribal Officials. Neither may the Court order the Tribal Officials to restore monies already paid by Plaintiffs, because restitution, though often classified as an equitable remedy, "is in practical effect indistinguishable in many aspects

from an award of damages against the State." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Of course, should Plaintiffs succeed on the merits, assuming the Tribal Lending Entities do not establish a lawful workaround, any future loans issued to Virginia residents by those Entities would have to conform to Virginia's legal requirements, with collateral estoppel effect given to this Court's judgment on the usury issue.

As for the Tribal Officials' argument that the VCFA permits relief only against a "lender," the Court finds that the Tribal Officials constitute the "lender" under the fiction of *Ex parte Young*, because, as discussed above, the Tribal Lending Entities cannot act without the explicit or implicit approval of the Tribal Officials. Indeed, as in *Verizon*, the liability imposed on the Tribal Officials here would not be any more — and, in fact, would be less — than the liability imposed on the Tribal Lending Entities if Plaintiffs could sue them directly under the VCFA. 535 U.S. at 647-48. Thus, Plaintiffs may vindicate their VCFA claim against the Tribal Officials using *Ex parte Young*, but only to the extent of their outstanding debts.

d. RICO Does Not Permit Ex Parte Young*-Style Relief Against the Tribal Officials.*

The Tribal Officials argue that Plaintiffs may not vindicate their RICO claims using *Ex parte Young*-style relief, because § 1964(c) of RICO provides private plaintiffs with a right to only monetary damages, not injunctive or declaratory relief. (Tribe MTD Mem. at 23 (citing *Johnson*, 199 F.3d at 726).) The Tribal Officials further contend that they cannot be held liable under RICO, because RICO "'entails a *mens rea* requirement that a governmental entity cannot form.'" (Tribe MTD Mem. at 23 (quoting *Gil Ramirez Grp., LLC v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 412 (5th Cir. 2015)).) The Tribal Officials maintain that Plaintiffs cannot evade RICO's *mens rea* requirement by suing the Officials in their official capacities, because Plaintiffs

have sued every member of the Tribe's Executive Council, which equates to suing the Tribe's government. (Tribe MTD Mem. at 24.)

Plaintiffs respond that the law remains unsettled on whether a litigant may sue governmental entities under RICO, noting that while the Fifth and Ninth Circuits have precluded RICO claims against such entities, the Second and Third Circuits have permitted such claims. (Pls.' Tribe MTD Resp. at 29 (comparing *Gil Ramirez*, 786 F.3d at 412 and *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991) with *Gingras*, 922 F.3d at 124-15 and *Genty v. Resolution Tr. Corp.*, 937 F.2d 899, 909 (3d Cir. 1991)).) Plaintiffs argue that the Court should side with the Second and Third Circuits, because: (1) RICO defines a "person" capable of violating the Act as "'any individual or entity capable of holding a legal or beneficial interest in property,'" which includes the Tribe, (Pls.' Tribe MTD Resp. at 29-30 (quoting 18 U.S.C. § 1961(3))); (2) RICO is itself silent on the *mens rea* issue, so Plaintiffs need not show that the Tribal Officials acted with criminal intent but merely performed the predicate act — in this case, collecting an unlawful debt, (Pls.' Tribe MTD Resp. at 30); and, (3) the cases exempting governmental bodies from RICO liability provide no legitimate reasoning for such a categorical conclusion, (Pls.' Tribe MTD Resp. at 30-31).

As for the Tribal Officials' contention that the Fourth Circuit in *Johnson* held that RICO provides for only monetary damages, Plaintiffs respond that although *Johnson* expressed "'substantial doubt'" whether RICO allows injunctive relief for private plaintiffs, the Fourth Circuit did not decide the issue. (Pls.' Tribe Resp. at 31 (quoting *Johnson*, 199 F.3d at 726), 32-33.) And Plaintiffs note that "Supreme Court jurisprudence 'has consistently rejected interpretations by the courts of appeals that would limit the scope of RICO actions in ways not contemplated by the text of the statute.'" (Pls.' Tribe MTD Resp. at 31 (quoting *Nat'l Org. for*

Women, Inc. v. Scheidler, 267 F.3d 687, 698 (7th Cir. 2001) (collecting cases), *rev'd on other grounds*, 537 U.S. 393 (2003)).) Plaintiffs maintain that a plain reading of § 1964 and statutory context clearly allow for injunctive relief. (Pls.' Tribe MTD Resp. at 34-39.) Before addressing whether Plaintiffs may hold the Tribal Officials liable under RICO, the Court will first consider whether RICO precludes *Ex parte Young*-style relief.

In support of their argument that RICO precludes injunctive and declaratory relief for private plaintiffs, the Tribal Officials rely primarily on the Fourth Circuit's opinion in *Johnson v. Collins Entertainment Company*, 199 F.3d 710 (4th Cir. 1999). In *Johnson*, the Fourth Circuit considered a district court's order enjoining video poker operators from paying out more than $125 daily to a customer at one location pursuant to South Carolina law. *Id.* at 715. The Fourth Circuit reversed the district court, holding that the court should have abstained from exercising jurisdiction over the plaintiffs' predominantly state-law claims. *Id.* at 719-21. In reaching this conclusion, the Fourth Circuit addressed the plaintiffs' assertion of RICO claims against the video poker operators, finding that such claims amounted to "state law in federal clothing," which could not "mask the quintessentially state character of [the present] controversy." *Id.* at 721-22. The Fourth Circuit also faulted the district court's reliance on its "inherent equitable power" to issue the injunction, noting that "[n]o federal statute expressly authorized the relief that [the] plaintiffs sought," because § 1964(c) of RICO "makes no mention whatever of injunctive relief," thereby creating "'substantial doubt whether RICO grants private parties . . . a cause of action for equitable relief.'" *Id.* at 726 (quoting *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983)).

Although the Tribal Officials cite to *Johnson* for the proposition that RICO does not allow private parties to obtain equitable relief, the Court interprets *Johnson* merely as expressing

doubt in the context of an expansive injunction issued by a district court without any clear statutory basis. Indeed, as Plaintiffs note, two years after *Johnson*, the Fourth Circuit reaffirmed that it had not yet addressed the question of whether RICO permits injunctive relief for private litigants, again deferring the issue. *See Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc.*, 262 F.3d 260, 268 n.4 (4th Cir. 2001) ("[W]e have no occasion to consider the parties' arguments as to whether equitable relief is available in a private civil RICO action, and reserve for another day the question of whether relief which goes beyond a purely compensatory measure of money damages is available in private civil RICO actions.") Thus, the *Johnson* language constitutes non-binding dictum. Because the *Johnson* dictum does not appear to result from thorough consideration of adversarial arguments or provide clear instruction to lower courts, the Court will decide on its own whether RICO provides private plaintiffs with a right to injunctive relief. *See Companion Prop. & Cas. Ins. Co. v. U.S. Bank, N.A.*, 2016 WL 6781057, at *16 (D.S.C. Nov. 16, 2016) (noting that "dictum of a superior tribunal should be followed if it is the result of thorough consideration of the issue and is intended as a guide for the future conduct of lower courts" (citing *United States v. Bell*, 542 F.2d 202, 206 (2d Cir. 1975))).

In relevant part, § 1964 of RICO provides that:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to . . . imposing reasonable restrictions on the future activities or investments of any person[.]
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee[.]

> (d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent proceeding brought by the United States.

18 U.S.C. § 1964(a)-(d).

Circuit courts that have directly addressed whether § 1964 provides for injunctive and declaratory relief in private RICO actions have reached opposite conclusions. On the one hand, the Ninth Circuit in *Religious Technology Center v. Wollersheim*, on a matter of first impression for any circuit court, concluded that RICO does not authorize injunctive relief for private litigants. 796 F.2d 1076, 1084 (9th Cir. 1986). The Ninth Circuit began with an analysis of the language in § 1964, noting that:

> Part (a) is a broad grant of equitable jurisdiction to the federal courts. Part (b) permits *the government* to bring actions for equitable relief. Part (d) grants collateral estoppel effect to a criminal conviction in a subsequent civil action by the government. Part (c), the private civil RICO provision, states that a private plaintiff may recover treble damages, costs and attorney's fees. In contrast to part (b), there is no express authority to *private plaintiffs* to seek the equitable relief available under part (a).

Id. at 1082. The Ninth Circuit observed that although part (c) did not "expressly limit private plaintiffs to 'only' the enumerated remedies," and although part (a) did not "expressly limit the availability of the illustrative equitable remedies to the government," "the inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in part (c), logically carries the negative implication that no other remedy was intended to be conferred on private plaintiffs." *Id.* at 1082-83.

The Ninth Circuit rejected two alternative readings offered by the plaintiff. In the first, the plaintiff suggested that because the treble damages provision followed the word "and" and not the word "to," Congress intended treble damages to be an additional remedy beyond

equitable relief. *Id.* at 1083. The Ninth Circuit found such an interpretation unconvincing, noting that "[n]o court has accepted this reading." *Id.* In the second reading, the plaintiff argued that part (a) provides a general grant of equitable relief, placing "no limit on the class or category of litigants who might avail themselves of the remedies it makes available under RICO." *Id.* The Ninth Circuit found the second reading "plausible" on its face but untenable upon review of Congress's actions in enacting the civil RICO provision. *Id.* at 1084.

Specifically, the Ninth Circuit observed that during the RICO bill's passage through Congress, the House of Representatives "rejected an amendment . . . which would expressly permit private parties to sue for injunctive relief under section 1964(a)" and "the very next year after RICO's enactment, Congress refused to enact a bill to amend section 1964 and give private plaintiffs injunctive relief." *Id.* at 1085. The Ninth Circuit also found RICO's treble damages provision analogous to § 4 of the Clayton Act, which the Supreme Court found does not include private injunctive relief. *Id.* at 1087 (citing *Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917)). Based on this legislative history, the Ninth Circuit rejected the plaintiff's second reading, finding that RICO does not provide injunctive relief to private RICO plaintiffs. *Id.*

Fifteen years after *Wollersheim* — and two years after the Fourth Circuit's dictum in *Johnson* — the Seventh Circuit took up the same issue, reaching the opposite conclusion to the Ninth Circuit. *Scheidler*, 267 F.3d at 695-700. Specifically, the Seventh Circuit found that "Supreme Court decisions since the 1986 *Wollersheim* opinion convince[] us that the approach of the Ninth Circuit (which relied almost exclusively on legislative history of RICO to reach its result, as opposed to the actual language of the statute) no longer conforms to the Court's present jurisprudence." *Id.* at 695. Contrary to the Ninth Circuit in *Wollersheim*, the Seventh Circuit read § 1964(a) to provide "general remedies, including injunctive relief, that all plaintiffs

authorized to bring suit may seek," with §§ 1964(b) and (c) simply providing for additional remedies depending on the category of plaintiff. *Id.* at 696. The Seventh Circuit found that "this reading of the statute gives the words their natural meaning and gives effect to every provision in the statute." *Id.*

The Seventh Circuit then proceeded to consider the defendants' counterarguments, including that § 1964(a) constitutes "purely a jurisdictional provision authorizing the district court to hear RICO claims and to grant injunctions to parties authorized by other provisions of the law to seek that form of relief." *Id.* The defendants argued that § 1964(b) permits the Attorney General to seek relief prescribed under that provision and the equitable relief prescribed in § 1964(a), while § 1964(c) provides only "a limited right of action for private parties." *Id.* The Seventh Circuit rejected this reading of the statute, opining that the *Wollersheim* decision misread § 1964(b) as permitting the government to bring actions for equitable relief when in fact it provides only for "*interim* remedies." *Id.* (emphasis supplied). Thus, the Seventh Circuit reasoned, the government's ability to obtain permanent injunctive relief derives not from § 1964(b), but § 1964(a). *Id.* at 696-97. "Given that the government's authority to seek injunctions comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a)," the Seventh Circuit concluded that, "by parity of reasoning, . . . private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c)." *Id.* at 697.

The Seventh Circuit likewise rejected the defendants' contention that § 1964(a) is purely jurisdictional, analogizing the language in § 1964(a) to a similar statute interpreted by the Supreme Court as remedial as well as jurisdictional. *Id.* (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (interpreting 42 U.S.C. § 11046(c), which provides that "[t]he

district court shall have jurisdiction in actions brought under subsection (a) of this section . . . to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement," as specifying remedial powers of the court and not simply providing for jurisdiction)). The Seventh Circuit reasoned that the defendants' desired reading would render the remedies enumerated in § 1964(a) unavailable unless explicitly provided in another section; yet, no other section provided for permanent, equitable relief. *Id.*

Finally, the Seventh Circuit found inapposite the defendants' argument that providing injunctive relief to private plaintiffs would read injunctive relief into a statute that prescribes specific remedies to such plaintiffs, noting that § 1964(a) does explicitly provide for injunctive relief and that the absence of a specific category of plaintiff in that section merely reinforces that RICO provides injunctive relief to all plaintiffs, governmental or private. *Id.* at 698. The Seventh Circuit opined that its reading aligned with both "Congress's admonition that the RICO statute is to be 'liberally construed to effectuate its remedial purposes,'" *id.* (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)), and the Supreme Court's consistent rejection of "interpretations by the courts of appeals that would limit the scope of RICO actions in ways not contemplated by the text of the statute," *id.* (collecting cases).

Having considered these opinions and district court opinions addressing the same issue, the Court finds the Ninth Circuit's interpretation of § 1964 more persuasive, though without relying on legislative history. Indeed, when interpreting statutes, courts "must first and foremost strive to implement congressional intent by examining the plain language of the statute." *United States v. Passaro*, 577 F.3d 207, 213 (4th Cir. 2009). "[I]f a disputed statutory provision has a plain and unambiguous meaning, then interpretation giving effect to that meaning must be adopted and the statutory construction inquiry ends." *United States v. Mitchell*, 691 F. Supp. 2d

655, 668 (E.D. Va. 2010) (citing *United States v. Whitley*, 529 F.3d 150, 156 (2d Cir. 2008)); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." (internal quotations and citations omitted)). By its plain terms, § 1964 vests district courts with the authority "to prevent and restrain violations of section 1962 . . . by issuing appropriate orders." 18 U.S.C. § 1964(a). Section 1964(a) then provides a non-exhaustive list of the types of "appropriate orders" that a court may issue to prevent and restrain violations. Such language cannot possibly be read as only jurisdictional, for no other provision in § 1964 provides for any equitable remedies of the type listed in § 1964(a). That said, §§ 1964(b) and (c), not § 1964(a), provide the distinguishing language that precludes injunctive relief for private plaintiffs.

For one, after providing the courts with a general grant of remedial powers in § 1964(a), § 1964(b) provides that "[t]he Attorney General may institute proceedings under *this section*," listing interim forms of relief that the Attorney General may receive "[p]ending final determination thereof." (emphasis added). By comparison, § 1964(c) provides a specific cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962," explaining that such persons "shall recover threefold the damages he sustains and the cost of the suit." By providing the government with authority to institute proceedings under § 1964 and not providing private plaintiffs with that same authority, Congress expressed an intent that the general grant of injunctive power to the courts in § 1964(a) not apply in cases involving only private plaintiffs. Indeed, by providing a cause of action only if a private plaintiff has suffered monetary damages, Congress implicitly precluded the possibility of equitable relief for such plaintiffs, because — as has been the case since the conception of courts of equity — to obtain equitable relief, a plaintiff must have an inadequate remedy at law. *See eBay Inc. v.*

MercExchange, LLC, 547 U.S. 388, 391 (2006) ("According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief," including "(2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury"). In other words, by requiring that private plaintiffs have first suffered monetary damages and then explaining that those plaintiffs shall obtain treble those damages, Congress provided an adequate remedy at law that would seemingly preclude equitable relief of the sort described in § 1964(a).

Moreover, § 1964(b) lists interim forms of equitable relief while § 1964(c) does not, which further demonstrates that RICO precludes injunctive relief for private plaintiffs. Interim remedies are often necessary "to preserve the court's power to render a meaningful decision after a trial on the merits." 11A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2947 (3d ed. 2013). Thus, the explicit provision of interim equitable relief in RICO actions instituted by the Attorney General and the absence of any provision for such relief in private-plaintiff suits confirms that the power of courts to issue equitable remedies under § 1964(a) applies only to government-instituted proceedings. To interpret § 1964 otherwise would render superfluous the additional provision of interim remedies in § 1964(b) — a result the Court must avoid. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous.").

Furthermore, as the Ninth Circuit observed in *Wollersheim*, § 1964 mirrors § 4 of the Clayton Act, 796 F.2d at 1085, which the Supreme Court in *Pain Lumber Co.* found not to include a private right to injunctive relief, 244 U.S. at 471. Indeed, 15 U.S.C. § 4 provides that "[t]he several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title," which mirrors § 1964(a)'s grant of jurisdiction

and power to the district courts to "prevent and restrain" violations of § 1962. Section 4 then proceeds to empower United States attorneys, "under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations," which mirrors § 1964(b)'s authorization to the Attorney General to "institute proceedings under this section." But § 4 does not allow private plaintiffs to bring such claims, suggesting that §§ 1964(a) and (b) are intended to mirror § 4 of the Clayton Act, including its exclusion of private equity claims, while § 1964(c) provides an additional, narrower right to recovery for private plaintiffs. *See Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (noting that similarity of language between two statutory provisions "is, of course, a strong indication that the two statutes should be interpreted pari passu," adding that a shared "raison d'etre" between the statutes creates an even stronger indication); *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987) (finding that "the Clayton Act clearly provides a far closer analogy" to RICO and thus adopting the Clayton Act's statute of limitations for civil RICO claims).

As for the extent to which § 1964(c) provides an additional right to recovery for private plaintiffs, the antitrust statutes once more prove instructive. Like RICO, the antitrust statutes include a provision allowing for private causes of action to obtain treble damages, *see* 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained"); yet, unlike RICO, the antitrust statutes also include a separate provision permitting injunctive relief for private plaintiffs, *see* 15 U.S.C. § 26 ("Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws."). That Congress would provide private antitrust plaintiffs with a separate right to prospective, injunctive relief under a nearly

identical remedial structure and not provide the same right under RICO further confirms that RICO does not provide for injunctive relief in private civil actions. *Northcross*, 412 U.S. at 428.

For these reasons, the Court finds that RICO does not provide private plaintiffs with a right to injunctive relief. Because RICO does not provide private plaintiffs with equitable remedies while providing such remedies to the government, the Act expresses a congressional intent not to provide *Ex parte Young*-style relief of the sort requested by Plaintiffs. *Armstrong*, 135 S. Ct. at 1384. Accordingly, the Court dismisses without prejudice Count Five of Plaintiffs' Amended Complaint.

In sum, based on the foregoing analysis, Plaintiffs may receive prospective injunctive relief against the Tribal Officials under the principles of *Ex parte Young* only to the extent that they seek to enjoin future collection on the loans issued to them and the putative class under Count Seven. Plaintiffs may also pursue their declaratory judgment claim (Count Six) to the same extent. *See Alden v. Maine*, 527 U.S. 706, 757 (1999) (noting that sovereign immunity does not bar suits against officers for "injunctive or declaratory relief" (citations omitted)).

2. Tribal Sovereign Immunity Does Not Bar Plaintiffs' Narrowed Claims.

The Tribal Officials contend that to allow Plaintiffs' claims to proceed would render meaningless the Tribal Lending Entities' sovereign immunity as arms of the tribe. (Tribe MTD Mem. at 12.) Specifically, the Tribal Officials maintain that the Tribe and the Tribal Lending Entities constitute the real parties in interest under Plaintiffs' claims. (Tribe MTD Mem. at 13-15.) The Tribal Officials stress that the principles of tribal self-governance and self-sufficiency that undergird the tribal sovereign immunity doctrine militate in favor of barring all claims against them. (Tribe MTD Mem. at 15-16.)

Plaintiffs respond that the "real party in interest" analysis addresses claims that seek monetary relief against government employees merely to overcome sovereign immunity and therefore proves inapposite to their claims for injunctive and declaratory relief. (Pls.' Tribe MTD Resp. at 23-24.) Plaintiffs argue that the Court need only perform a "'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" (Pls.' Tribe MTD Resp. at 25 (quoting *Verizon*, 535 U.S. at 645).)

"When a suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself." *Pennhurst*, 465 U.S. at 101. Sovereign immunity will bar a suit against state officials when "'the state is the real, substantial party in interest.'" *Id.* (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945)). "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963). "[A] suit against state officials that is in fact against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst*, 465 U.S. at 102. The same principles apply in the context of tribal sovereign immunity, *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017), and in *Ex parte Young* actions, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 277 (1997); *see also Ex parte New York*, 256 U.S. 490, 500 (1921) (noting that *Ex parte Young*'s applicability "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record").

The Fourth Circuit in *Martin v. Wood* outlined a non-exhaustive, five-part inquiry to determine the real, substantial party in interest in a government-official suit. 772 F.3d 192, 196 (4th Cir. 2014). Pursuant to this inquiry, courts should consider whether: (1) "the allegedly

unlawful actions of the . . . officials [were] tied inextricably to their official duties;" (2) "if the . . . officials had authorized the desired relief at the outset, . . . the burden [would] have been borne by the State;" (3) a judgment against the officials would be "institutional and official in character, such that it would operate against the State;" (4) the actions of the officials were "taken to further personal interests distinct from the State's interests;" and, (5) the officials' actions were *ultra vires*. *Id.* Applying this test, the Fourth Circuit in *Martin* found that the plaintiff failed to allege that her supervisors acted in an *ultra vires* manner or attempted to serve their own personal interests by refusing to approve overtime compensation for the plaintiff, because the supervisors acted within their lawful discretion. *Id.*

In considering whether the Tribe or the Tribal Lending Entities constitute the real parties in interest, the Court will cabin its analysis to the surviving claims for injunctive and declaratory relief against the Tribal Officials, which, as explained, do not affect the Tribe's ability to offer loans to Virginia consumers in the future and do not require restitution of monies already paid by Plaintiffs. Based on these narrowed claims, the Court finds that neither the Tribe nor the Tribal Lending Entities constitute the real parties in interest. Unlike the plaintiff in *Martin*, Plaintiffs here do not allege that the Tribal Officials' exercise of their lawful discretion resulted in the alleged wrong. Rather, Plaintiffs allege that the Tribal Officials, through their control of the Tribal Lending Entities, continue to reach beyond the Tribe's reservation to collect and receive principal, interest and costs associated with loans that violate Virginia law. As explained above, these alleged practices constitute off-reservation activity subject to generally applicable state laws, and Plaintiffs may seek to enjoin further violations of such laws, including the VCFA, through an *Ex parte Young*-style claim against the Tribal Officials.

Moreover, although the narrowed relief available to Plaintiffs may have certain ancillary effects on the revenues collected by the Tribe and the Tribal Lending Entities, such effects do not render those bodies the real parties in interest. Indeed, the Supreme Court has endorsed *Ex parte Young* claims that have arguably had greater monetary consequences. *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1971) (prohibiting state officials from denying welfare benefits to otherwise qualified noncitizens); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (enjoining New York welfare officials from terminating benefits paid to welfare recipients without a hearing). Neither will the Court infringe on the sovereign immunity of the Tribe and the Tribal Lending Entities by requiring the Tribal Officials to provide notice to the putative class in Count Seven that the loans issued to them are void under Virginia law, for such relief likewise proves ancillary to the alleged ongoing violations of Virginia law that Plaintiffs seek to enjoin. *See Green v. Mansour*, 474 U.S. 64, 71 (1985) (holding that "a request for a limited notice order will escape the [sovereign immunity] bar if the notice is ancillary to the grant of some other appropriate relief that can be 'noticed," such as an ongoing violation of federal or, in this case, state law).

For these same reasons, the Court also rejects the Tribal Officials' argument that Plaintiffs' desired relief will violate their immunity as legislators. (Tribe MTD Mem. at 12.) Plaintiffs' limited relief does not seek to hold the Tribal Officials liable for passing the Ordinance or for licensing the Tribal Lending Entities, but merely for allowing the continued collection of loans deemed usurious under generally applicable Virginia law.

Accordingly, the Court finds that regardless of the sovereign immunity enjoyed by the Tribe and the Tribal Lending Entities, Plaintiffs may proceed to bring their now-narrowed claims for injunctive and declaratory relief against the Tribal Officials pursuant to *Ex parte Young*.

D. Bumbray, Blackburn and Collins Lack Standing to Enjoin Future Collection on Outstanding Loans.

The Tribal Officials challenge Plaintiffs' standing on two grounds. (Tribe MTD Mem. at 28-30.) First, the Officials contend that Plaintiffs as a whole lack standing to enjoin future lending by the Tribal Lending Entities. (Tribe MTD Mem. at 28-29.) Second, the Officials argue that Bumbray, Blackburn and Collins (the "Paid-Off Plaintiffs") lack standing to enjoin future collection efforts, because all three have no outstanding debt with the Tribal Lending Entities. (Tribe MTD Mem. at 29-30.) Because the Court has already found that Plaintiffs may not enjoin the Tribal Officials from issuing usurious loans in the future, the Court will focus its analysis on the standing of the Paid-Off Plaintiffs to enjoin future collection of existing loans.

Plaintiffs argue that the Paid-Off Plaintiffs have standing to enjoin future collection efforts on their loans, because even though they have paid off their loans, "it is not uncommon for a debt collector to nonetheless collect the debt." (Pls.' Tribe MTD Resp. at 44.) Plaintiffs add that even without the threat of potential debt collection on their paid-off loans, the Paid-Off Plaintiffs "have been subject to harm and have a sufficient personal stake in the outcome to seek an injunction on behalf of other consumers." (Pls.' Tribe MTD Resp. at 44.) And the Paid-Off Plaintiffs maintain that they have standing to seek a declaratory judgment that their loans are void, because such a declaration would redress at least some of the harm caused by having their loans on their credit reports. (Pls.' Tribe MTD Resp. at 45.)

A defendant moving to dismiss a claim pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges the Court's subject-matter jurisdiction over the complaint. Article III of the Constitution limits federal courts' jurisdiction to "Cases" and "Controversies." U.S. Const. Art. III, § 2. To satisfy the case-or-controversy requirement of Article III, a plaintiff must establish his standing to sue. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Specifically, a plaintiff must show that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016) (citing *Lujan*, 504 U.S. at 560-61 (additional citations omitted)). The Court must dismiss an action if it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3).

In a class action, the Court "analyze[s] standing based on the allegations of personal injury made by the named plaintiffs. 'Without a sufficient allegation of harm to the named plaintiff in particular, [he] cannot meet [his] burden of establishing standing.'" *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 343 (4th Cir. 2017) (quoting *Beck v. McDonald*, 848 F.3d 262, 269-70 (4th Cir. 2017) (additional citations omitted)). As the parties invoking federal jurisdiction, Plaintiffs bear the burden of establishing all three elements of standing. *Id.*

The Paid-Off Plaintiffs' standing to enjoin future collection of their loans boils down to redressability. Plaintiffs argue that an injunction against future collection on outstanding loans would redress the Paid-Off Plaintiffs' alleged injury, because it would foreclose potential future debt collection on their paid-off loans and would also satisfy their interest in seeing future collection efforts against other consumers halted. But the mere possibility of future debt collection by non-party debt collectors and the Paid-Off Plaintiffs' gratification in seeing justice delivered do not satisfy the redressability requirement. Indeed, the Supreme Court has held that "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co.*, 523 U.S. at 107. And the Supreme Court has likewise required a showing of a "real [and] immediate threat that [a] plaintiff will be wronged again" to obtain an injunction against future harm. *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Plaintiffs' affirmation that "it is not uncommon for [a] debt collector to nonetheless collect [a

paid-off] debt" does not rise to the level of a real and immediate threat. (Pls.' Tribe MTD Resp. at 44.)

Thus, the Paid-Off Plaintiffs lack standing to enjoin future collection on the outstanding loans in Count Seven and their claims in that Count will be dismissed. That said, the Paid-Off Plaintiffs have standing to seek a declaratory judgment that their loans are void in Count Six, because the avoidance of their loans has a likelihood of redressing at least some of the harm from the loans issued to them, including allowing the Paid-Off Plaintiffs to remove the loans from their credit histories.[15] *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (noting that a plaintiff need only show that a favorable decision would redress "an injury" not "every injury").

To summarize, having addressed the Tribal Officials' arguments for dismissal, the Court will dismiss Count Five of Plaintiffs' Amended Complaint and dismiss Count Seven to the extent that it seeks to enjoin future lending by the Tribal Lending Entities. Plaintiffs may prosecute their declaratory judgment claim in Count Six, and Plaintiffs except the Paid-Off Plaintiffs may prosecute the remaining requests for injunctive relief in Count Seven.

E. The Statutes of Limitations and Time Periods at Issue Do Not Warrant Dismissal of Plaintiffs' Claims at this Stage.

Asner and Landy primarily argue that Plaintiffs' claims against them must fail, because they fall either outside the statute of limitations or the time during which Asner and Landy were involved in the alleged RICO enterprise. (A/L MTD Mem. at 6-14.) Specifically, Asner and Landy contend that Plaintiffs' allegations show that their involvement ended in August 2014,

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[15] Notably, Plaintiffs define the Declaratory Judgment Class in Count Six as those Virginia residents "who have outstanding balances" on their loans. (Am. Compl. ¶ 205.) This definition seemingly excludes the Paid-Off Plaintiffs from the Class. However, because Plaintiffs have not yet sought certification of the Declaratory Judgment Class in Count Six, the Court will postpone consideration of this issue until a later stage.

when Plaintiffs allege that Asner and Landy sold their companies to the Tribe. (A/L MTD Mem. at 6.) Asner and Landy also note that the limitations period on Plaintiffs' RICO and state-law claims expired after four and two years respectively. (A/L MTD Mem. at 7.) Therefore, Asner and Landy maintain that Plaintiffs' claims against them are either: (1) time-barred, because the claims accrued over four years ago while Asner and Landy were involved with the alleged RICO enterprise; or, (2) inapplicable to them, because the claims accrued after Asner and Landy sold their interests in the alleged enterprise. (A/L MTD Mem. at 7.)

Asner and Landy argue that Plaintiffs' amended allegation — that, "[u]pon information and belief, Landy and Asner continue to participate in the affairs of the illegal lending enterprise, now as high-paid executives of the Tribal Lending Entities, as opposed to owners of the businesses that previously ran the companies," (Am. Compl. ¶ 3) — fails to salvage the timeliness problem, because: (1) the allegation proves too conclusory to support a plausible inference that Asner and Landy are still involved with the Tribal Lending Entities; (2) the Affidavit of Chairwoman Sherry Treppa (the "Treppa Affidavit") on which Plaintiffs relied in formulating their Amended Complaint directly contradicts the allegation; and, (3) Plaintiffs may not rely upon information and belief to support the allegation, because whether Asner and Landy are still involved in the Tribal Lending Entities was not information solely within Defendants' control and Plaintiffs point to no contextual facts or second-hand information to support the allegation. (A/L MTD Mem. at 9-14.)

Plaintiffs respond that for a coconspirator to escape liability for post-involvement conduct, RICO requires more than merely selling off an interest in a RICO enterprise, which is all that Asner and Landy point to as their act of withdrawal. (Pls.' A/L MTD Resp. at 6.) Instead, a coconspirator must "'take affirmative actions inconsistent with the object of the

conspiracy and communicate his intent to withdraw in a manner likely to reach his accomplices.'" (Pls.' A/L MTD Resp. at 6 (quoting *United States v. Hill*, 2019 WL 4040619, at *12 (E.D. Va. Aug. 27, 2019)).) Plaintiffs contend that Asner and Landy's sale of their lending-associated companies to the Tribe does not meet this standard, exposing both Defendants to continued liability for any unlawful debt collection after August 2014. (Pls.' A/L MTD Resp. at 7.) And Plaintiffs maintain that their allegations regarding the similar operational structure of the alleged RICO enterprise both before and after Asner and Landy sold their businesses to the Tribe support the plausible inference that Asner and Landy maintained at least some role in the RICO enterprise after their alleged withdrawal. (Pls.' A/L MTD Resp. at 7.)

Plaintiffs further argue the Court should toll the statutes of limitations for their state-law claims, because Asner and Landy acted fraudulently to conceal their wrongdoing and keep Plaintiffs ignorant of their rights. (Pls.' A/L MTD Resp. at 8-10 (citing Va. Code § 8.01-229(D)).) Specifically, Plaintiffs point to the purported prospective waiver of Plaintiffs' rights in the loan agreements and the complex system of arbitration and tribal exhaustion that the agreements attempted to create to avoid federal- and state-law claims. (Pls.' A/L MTD Resp. at 9-10.) Plaintiffs maintain that the same conduct permits tolling under an estoppel theory. (Pls.' A/L MTD Resp. at 10.)

"The statute of limitations is an affirmative defense that may be raised in a Rule 12(b)(6) motion to dismiss for failure to state a claim." *United States v. Kivanc*, 714 F.3d 782, 789 (4th Cir. 2013). However, because courts generally do not reach the merits of affirmative defenses at the motion-to-dismiss stage, dismissal based on statutes of limitations occurs in "relatively rare circumstances." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007). Ultimately, for a claim to be dismissed as time-barred on a 12(b)(6) motion, "all facts necessary to show the time

bar must clearly appear 'on the face of the complaint.'" *Dickinson v. Univ. of N.C.*, 91 F. Supp. 3d 755, 763 (M.D.N.C. 2015) (quoting *Goodman*, 494 F.3d at 464). In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court accepts Plaintiffs' well-pleaded factual allegations as true. *Iqbal*, 556 U.S. at 678.

1. Asner and Landy Remain Liable Under RICO.

Plaintiffs must bring civil RICO claims within four years of the claims' accrual. *Agency Holding Corp.*, 483 U.S. at 156. A civil RICO claim accrues when a plaintiff knew or should have known of his injury. *Rotella v. Wood*, 528 U.S. 549, 553-54 (2000). An action based on the collection of unlawful debts "requires only a single act of collection as a predicate for RICO liability." *Proctor v. Metro. Money Store Corp.*, 645 F. Supp. 2d 464, 481 (2009) (citing *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 232 (1989)).

Here, Plaintiffs fail to allege the exact dates of the loans at issue; however, the Court may rely on the loan agreement documents to determine the timeliness of Plaintiffs' claims, because neither party disputes the authenticity of the agreements and Plaintiffs clearly relied on those agreements in drafting their Amended Complaint. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (holding that courts considering motions to dismiss may consider a document that proved "integral to the complaint," so long as "there is no dispute about the document's authenticity"). The agreement documents show that the Tribal Lending Entities issued all but one of Plaintiffs' loans within the last four years, with Mwethuku's July 29, 2013 loan being the only loan issued before October 19, 2015. (*See* Exs. 83-100 to Treppa Aff. (ECF Nos. 45-33 to 45-50) (loan agreements for Plaintiffs' loans).) Thus, Mwethuku's injury accrued outside of the four-year limitations period for civil RICO claims and the remaining Plaintiffs accrued injuries within four years of the present action, but after Asner and Landy sold their

businesses to the Tribe. Given these distinctions, the Court must conduct a two-fold inquiry, asking whether: (1) the limitations period for Mwethuku's claims should be tolled; and, (2) Asner and Landy remain liable for the injuries to the remaining Plaintiffs despite their August 2014 sale of their interests in the alleged RICO enterprise.

As to the first inquiry, the Supreme Court has affirmed that equitable principles may toll RICO's statute of limitations. *Rotella*, 528 U.S. at 560-61. To toll a limitations period, "[t]he circumstances preventing a party from pursuing his or her rights must be external to the party's own conduct." *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 478 (4th Cir. 2015) (quotations and citations omitted). Such circumstances must be extraordinary and include instances when "'wrongful conduct on the part of the defendant'" prevents the plaintiff from asserting his claims. *Id.* (quoting *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000)). For a court to equitably toll a plaintiff's claim, the plaintiff must also demonstrate diligence in pursuing his or her rights. *Id.* at 476 (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010)). Ultimately, whether to equitably toll a plaintiff's claims falls within the Court's discretion, and appellate courts will overturn such decisions only if arbitrary or based on "erroneous factual or legal premises." *Id.* (citations omitted).

Based on these standards, the Court finds that equity warrants tolling of Mwethuku's RICO claims against Asner and Landy until at least June 2017, when similarly situated consumers first filed suit against a tribal payday lending practice in this District, putting Mwethuku on notice that he could pursue similar claims in federal court. *Williams v. Big Picture Loans, LLC*, No. 3:17cv461 (REP), ECF No. 1 (E.D. Va. June 22, 2017). The Court finds that the terms of Mwethuku's loan agreement warrant tolling, because they purported to waive Mwethuku's federal rights and force him to litigate any remaining rights in an ill-defined "Tribal

Forum" with no apparent existence. (Mwethuku Agreement at 4 ¶¶ 6, 9.) Thus, the Court will not fault Mwethuku for failing to bring any RICO claim until after June 2017, because the plain terms of his loan agreement purported to waive such a claim and provided an ambiguous forum for the presentation of any claims, even those arising under tribal law. Plaintiffs' allegations regarding Asner and Landy's pre-2014 involvement in the alleged enterprise proves sufficient at this stage to hold them accountable, in equity, for this concealment. (Am. Compl. ¶¶ 55-78; *see* Treppa Aff. ¶ 128 (affirming that Landy served as a manager of NPA before the Tribe purchased NPA's assets and for some time thereafter).) And the Court finds that tolling would not defeat the "basic policies of all limitations provisions" — namely, "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities" — because Mwethuku's claims rely on nearly identical factual and legal issues as the remaining Plaintiffs' claims against Asner and Landy, for which, as explained below, the two remain liable. *Rotella*, 528 U.S. at 555.

At this stage, Asner and Landy remain liable for the injuries to the remaining Plaintiffs, because, "[l]ike other conspiracies, a defendant who agrees to do something illegal and opts into or participates in a [RICO] conspiracy is liable for the acts of his coconspirators even if the defendant did not agree to do or conspire with respect to that particular act." *Proctor*, 645 F. Supp. 2d at 483. Thus, so long as a civil RICO complaint, "at the very least . . . allege[s] specifically . . . an agreement" to commit predicate RICO acts, *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990), and also pleads independent acts prohibited by RICO in furtherance of that conspiracy, *Beck v. Prupis*, 529 U.S. 494, 501-04 (2000), coconspirators may be held vicariously liable for those independent acts until the object of the conspiracy has been achieved or the coconspirators effectively withdraw from or abandon the

conspiracy, *cf. Osborn v. Visa Inc.*, 797 F.3d 1057, 1067-68 (D.D.C. 2015) (applying similar concepts in a civil antitrust action). "Whether there was an effective withdrawal is typically a question of fact for the jury." *Id.* at 1068 (citations omitted). A court may infer a defendant's agreement to join a RICO conspiracy "from circumstantial evidence of the defendant's status in the enterprise or knowledge of the wrongdoing." *First Interreg'l Advisors Corp. v. Wolff*, 956 F. Supp. 480, 488 (S.D.N.Y. 1997).

As discussed below, Plaintiffs have alleged sufficient facts to support the plausible inference that Asner and Landy entered a conspiracy to collect unlawful debts and that their coconspirators committed independent acts prohibited by RICO in furtherance of that conspiracy, namely: participation in the affairs of an enterprise through the collection of unlawful debts. § 1962(c). Although Asner and Landy contend that the sale of their businesses to the Tribe withdrew them from the alleged conspiracy, such a defense proves better suited for summary judgment or trial. *See Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (noting that a Rule 12(b)(6) motion "tests the sufficiency of a complaint . . . [and] does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses" (citations omitted)).

The Court likewise finds unpersuasive Asner and Landy's argument that because § 1962(c) requires proof of their ongoing involvement in the alleged RICO enterprise, Plaintiffs cannot hold them liable for post-2014 conduct under that section based on a coconspirator liability theory. (A/L MTD Reply at 18.) As the Supreme Court has noted, "conspiracy is an inchoate [violation]" separate from a violation of § 1962(c); therefore, Plaintiffs may simultaneously hold Asner and Landy liable for their coconspirators' violations of § 1962(c) under a coconspirator liability theory while also holding Asner and Landy liable for the separate

act of conspiring to violate § 1962(c). *Boyle v. United States*, 556 U.S. 938, 950 (2009); *see also United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 13, 18 (D.D.C. 2004) (noting in the context of a civil RICO action that "one who opts into or participates in a Section 1962(d) conspiracy to violate Section 1962(c) is liable for the acts of his co-conspirators even if that defendant did not personally agree to commit, or to conspire with respect to, any particular one of those acts." (citing *Salinas v. United States*, 522 U.S. 52, 65 (1997))). Accordingly, because the remaining Plaintiffs timely filed their RICO claims and plausibly allege that Asner and Landy remain liable for post-2014 conduct, the Court will not dismiss those claims as untimely.

2. The Court Will Allow Plaintiffs' State-Law Claims Against Asner and Landy to Proceed at this Stage.

Plaintiffs also bring two state-law claims against Asner and Landy for violations of Virginia's usury statutes (Count Three) and unjust enrichment (Count Four). Virginia Code § 6.2-305(A) permits recovery for violations of Virginia's usury statute "within two years of the first to occur of: (i) the date of the last loan payment or (ii) the date of the payment of the loan in full." And unjust enrichment claims must be filed within three years of accrual. *Belcher v. Kirkwood*, 383 S.E.2d 729, 731 (Va. 1989). Because all facts necessary to prove the time bar argued by Asner and Landy do not appear on the face of Plaintiffs' Amended Complaint, the Court will postpone consideration of Asner and Landy's limitations arguments regarding Plaintiffs' state-law claims. *Goodman*, 494 F.3d at 464. As for Asner and Landy's argument that they are not liable under state law for post-2014 loans, at this stage in the proceedings, the Court will allow Plaintiffs' state-law claims based on post-2014 loans to proceed on the theory of civil conspiracy liability, which Virginia recognizes. *See Gelber v. Glock*, 800 S.E.2d 800, 821 (Va. 2017) (noting that "[t]he object of a civil conspiracy claim is to spread liability to persons other than the primary tortfeasor" (citing *Beck v. Prupis*, 162 F.3d 1090, 1099 n.8 (11th Cir.

1998) ("[A] civil conspiracy plaintiff must prove that someone in the conspiracy committed a tortious act that proximately caused his injury; the plaintiff can then hold other members of the conspiracy liable for that injury.")); *Citizens of Fauquier Cty. v. SPR Corp.*, 1995 WL 1055819, at *3 (Va. Cir. Ct. Mar. 27, 1995) (sustaining statutory cause of action against coconspirators based on civil conspiracy liability theory).

F. Plaintiffs State Plausible Claims Against Asner and Landy.

Asner and Landy argue that Plaintiffs fail to state plausible state-law claims against them in Counts Three and Four, because: (1) Plaintiffs fail to allege sufficient facts to hold Asner and Landy personally liable as corporate officers, (A/L MTD Mem. at 16-18); (2) Asner and Landy do not constitute "lenders" under Virginia Code § 6.2-1541(B), (A/L MTD Mem. at 18-20); and, (3) Plaintiffs fail to allege that Asner and Landy received any benefit in support of their unjust enrichment claim, (A/L MTD Mem. at 19-22). Asner and Landy also move to dismiss Plaintiffs' RICO claims for failure to state a claim, because: (1) Plaintiffs do not allege that Asner and Landy collected unlawful debts, (A/L MTD Mem. at 23); (2) Asner and Landy cannot be held liable for collection of unlawful debts after the August 2014 sale of their businesses to the Tribe, (A/L MTD Mem. at 23-24); (3) Plaintiffs fail to allege that Asner and Landy participated in or associated with the conduct of the alleged RICO enterprise before the August 2014 sale of their businesses, (A/L MTD Mem. at 24-28); and, (4) Plaintiffs cannot hold Asner and Landy liable for loans issued by Majestic Lake, because the Tribe established that company in 2015, after the sale of Asner and Landy's interests in the alleged RICO enterprise, (A/L MTD Mem. at 28).

Plaintiffs respond that they seek to hold Asner and Landy liable pursuant to Virginia Code § 6.2-305, not § 6.2-1541, citing to the language of their Amended Complaint. (Pls.' A/L MTD Resp. at 18 (citing Am. Compl. ¶ 8).) Plaintiffs maintain that § 6.2-305 permits recovery

against any "person" who takes or receives payments on usurious loans, which includes Asner and Landy. (Pls.' A/L MTD Resp. at 17.) And Plaintiffs contend that they have alleged sufficient facts to support the plausible inference that they unjustly enriched Asner and Landy personally. (Pls.' A/L MTD Resp. at 18-21.)

As for their RICO claims, Plaintiffs respond that their allegations clearly support an inference that Asner and Landy engaged in an enterprise that collected unlawful debts. (Pls.' A/L MTD Resp. at 20-22.) Plaintiffs reiterate that because Asner and Landy failed to affirmatively withdraw from the alleged RICO conspiracy, they may be held liable for post-2014 debt collection. (Pls.' A/L MTD Resp. at 22-24.) And Plaintiffs argue that they have plausibly pled sufficient involvement by Asner and Landy in the alleged RICO enterprise and conspiracy to hold them liable under §§ 1962(c) and (d). (Pls.' A/L MTD Resp. at 24-29.)

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of a complaint or counterclaim; it does not serve as the means by which a court will resolve contests surrounding the facts, determine the merits of a claim or address potential defenses. *Republican Party of N.C.*, 980 F.2d at 952. In considering a motion to dismiss, the Court will accept a plaintiff's well-pleaded allegations as true and view the facts in a light most favorable to the plaintiff. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

Under the Federal Rules of Civil Procedure, a complaint or counterclaim must state facts sufficient to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). As the Supreme Court opined in *Twombly*, a complaint or counterclaim

must state "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action," though the law does not require "detailed factual allegations." *Id.* (citations omitted). Ultimately, the "[f]actual allegations must be enough to raise a right to relief above the speculative level," rendering the right "plausible on its face" rather than merely "conceivable." *Id.* at 555, 570. Thus, a complaint or counterclaim must assert facts that are more than "merely consistent with" the other party's liability. *Id.* at 557. And the facts alleged must be sufficient to "state all the elements of [any] claim[s]." *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003) (citing *Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002) and *Iodice v. United States*, 289 F.3d 270, 281 (4th Cir. 2002)).

1. Plaintiffs State a Plausible Claim Under Virginia Code § 6.2-305.

Virginia Code § 6.2-305(A) permits "[the person paying] interest in excess of that permitted by an applicable statute . . . to recover from the person taking or receiving such payments: 1. The total amount of the interest paid to such person in excess of that permitted by the applicable statute; 2. Twice the total amount of interest paid to such person during the two years immediately preceding the date of the filing of the action; and 3. Court costs and reasonable attorney fees." Relying on this provision, Plaintiffs seek recovery from Asner and Landy personally. (Am. Compl. ¶ 164.) The Court finds that Plaintiffs have stated a plausible claim under § 6.2-305.

Although Asner and Landy argue that the corporate veil shields them from liability, such an inquiry proves better suited for later stages in the litigation process. *See Greenberg*, 499 S.E.2d at 272 (noting that "a decision whether to disregard the corporate structure to impose personal liability is a fact-specific determination," requiring "close examination of the factual circumstances surrounding the corporation"). For now, the Court finds that Plaintiffs have stated

a plausible claim, because § 6.2-305 permits recovery against any "person" who takes or receives payments on usurious loans. A court within this District has found that owners and managers of entities receiving payments on usurious loans constitute a "person taking or receiving such payments." *Gibbs I*, 368 F. Supp. 3d 901, 928 (E.D. Va. 2019) (Lauck, J.). Indeed, while the usury statute provides no definition of "person," the plain meaning of the word includes any "human being." *Person*, Black's Law Dictionary (11th ed. 2019); *see Hubbard v. Henrico Ltd. P'ship*, 497 S.E.2d 335, 338 (Va. 1998) ("When . . . a statute contains no express definition of the term, the general rule of statutory construction is to infer the legislature's intent from the plain meaning of the language used."). Thus, a plain reading of § 6.2-305 plausibly permits recovery against individuals who take and receive payments on usurious loans, even if those payments pass through corporate entities.

Asner and Landy's reliance on § 6.2-1541 to avoid liability proves equally unavailing, for Plaintiffs clearly rely on § 6.2-305 as their basis for relief in Count Three. (Am. Compl. ¶ 164.) Because Plaintiffs' allegations prove sufficient at this stage to hold Asner and Landy liable for even post-2014 loans on a civil conspiracy theory, the Court denies Asner and Landy's Motion to Dismiss as to Count Three.

2. Plaintiffs State a Plausible Claim for Unjust Enrichment.

In Virginia, to recover for unjust enrichment, a plaintiff must demonstrate that: "(1) [she] conferred a benefit on [the defendant]; (2) [the defendant] knew of the benefit and should reasonably have expected to repay [the plaintiff]; and (3) [the defendant] accepted or retained the benefit without paying for its value." *Schmidt v. Household Fin. Corp., II*, 661 S.E.2d 834, 838 (Va. 2008). The Court finds that Plaintiffs have stated a plausible claim for relief under these elements.

Asner and Landy contend that this case proves analogous to *Hyundai Emigration Corporation v. Empower-Visa, Inc.*, in which a court in this District dismissed the plaintiff's unjust enrichment claim against an individual defendant, because the plaintiff "fail[ed] to allege that it paid [the individual defendant] directly or that [the individual defendant] received any portion of the payments [that the plaintiff] made to Empower." 2009 WL 10687986, at *7 (E.D. Va. June 17, 2009). However, the Court finds *Hyundai* distinguishable, because Plaintiffs here have alleged sufficient facts to support the inference that Asner and Landy owned and operated companies that received a substantial portion of the revenues from the Tribe's lending businesses pre-merger, (Am. Compl. ¶¶ 70-72), which includes payments plausibly made by Mwethuku, whose loan predates the alleged sale of Asner and Landy's companies, (Am. Compl. ¶¶ 94-104; Mwethuku Agreement at 7). *See Gibbs I*, 368 F. Supp. 3d at 933-34 (finding that the plaintiffs stated a plausible unjust enrichment claim, because the alleged facts showed that the nontribal defendants "benefitted from Plaintiffs' payments on their loans because . . . [the nontribal defendants] derived income from the enterprise based on borrowers entering into loan [c]ontracts with [the tribal lending entities]"). And Plaintiffs' allegations support a civil conspiracy theory of liability against Asner and Landy for the post-2014 loan payments. As with Plaintiffs' usury claim, the Court will defer answering whether corporate liability principles shield Asner and Landy from liability until a later stage.

3. Plaintiffs Have Stated a Plausible Claim Under § 1962(c).

In Count One, Plaintiffs allege that Asner and Landy violated 18 U.S.C. § 1962(c), which prohibits "any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce" from conducting or participating "direct or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." "To

establish a violation of § 1962(c), Plaintiffs must allege that [Asner and Landy] (1) conducted the affairs of an enterprise (2) through collection of unlawful debt (3) while employed by or associated with (4) the enterprise engaged in . . . interstate or foreign commerce." *Gibbs I*, 368 F. Supp. 3d at 932 (internal quotations and citations omitted). Asner and Landy challenge the first and third elements, so the Court will focus on those elements in its analysis.

In *Reves v. Ernst & Young*, the Supreme Court adopted the "operation or management" test to determine whether someone has conducted the affairs of an enterprise. 507 U.S. 170, 179 (1993). To be sure, "[a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management," as well as third parties who are somehow "associated with" the enterprise and exert control over it. *Id.* at 184. However, to be liable under § 1962(c), an individual must be a "direct participant" in the affairs of the enterprise and not merely "acting in an advisory professional capacity (even if in a knowingly fraudulent way)." *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 633 F. Supp. 2d 214, 230 (E.D. Va. 2008).

Based on these standards, the Court finds that Plaintiffs have stated a plausible claim that Asner and Landy conducted the affairs of the alleged RICO enterprise. For example, Plaintiffs alleged that Defendants, including Asner and Landy, established several of the Tribal Lending Entities. (Am. Compl. ¶¶ 59, 61.) Plaintiffs also allege that non-tribal entities owned and operated by Asner and Landy performed nearly all of the operations of the Tribal Lending Entities, working in tandem with those entities to issue and collect on triple-digit, high-interest loans. (Am. Compl. ¶¶ 67-69, 72.) Plaintiffs further describe a revenue sharing scheme between Asner and Landy's businesses and the Tribe, in which Asner and Landy received nearly all of the revenues from the collected debts. (Am. Compl. ¶¶ 70-71.) And Plaintiffs allege facts

supporting the inference that Asner and Landy were not mere passive investors in the lending scheme but possessed significant authority and influence over the alleged enterprise. (Am. Compl. ¶¶ 73-78.) Importantly, Plaintiffs describe in sufficient detail a coordinated effort by Asner and Landy and the Tribe to shield the enterprise from perceived liability. (Am. Compl. ¶¶ 79-104.)

These same facts support the plausible inference that Asner and Landy were "associated with" the alleged enterprise. "[O]nly a person employed by or associated with an enterprise, and not the enterprise itself, may violate section 1962(c)." *Levinson v. Mass. Mut. Life Ins. Co.*, 2006 WL 3337419, at *7 (E.D. Va. Nov. 9, 2006). Thus, "RICO liability depends upon a showing that a defendant acted or participated in the enterprise's affairs, and not just his or her own affairs." *Id.* (citing *Reves*, 507 U.S. at 185). Plaintiffs satisfy this distinction requirement by alleging facts regarding the formation, nature and operation of the alleged enterprise. The facts detailed above support the plausible inference that Asner and Landy did not merely participate in the alleged enterprise through their ordinary business activity, but helped to devise and structure an associated group of individuals and businesses that issued and collected unlawful debts under the auspices of the Tribe while in fact funneling most of the revenues to nontribal entities and individuals, including Asner and Landy. These facts prove sufficient to support the plausible inference that Asner and Landy were "associated with" the alleged enterprise as distinct persons.

Because Plaintiffs otherwise allege sufficient facts to support the remaining elements of their § 1962(c) claim, and because Asner and Landy plausibly remain liable for the post-2014 conduct of their coconspirators, the Court denies Asner and Landy's Motion to Dismiss as to Count One.

4. Plaintiffs Have Stated a Plausible Claim under § 1962(d).

Asner and Landy argue that Plaintiffs' allegations fail to plausibly demonstrate that they knew of or agreed to the overall objective of the RICO enterprise, *i.e.*, the collection of unlawful debts. (A/L MTD Mem. at 27.) Asner and Landy aver that Plaintiffs' allegations in fact support the inference that they wished not to be involved with the alleged enterprise, because they sold their businesses to the Tribal Lending Entities in August 2014. (A/L MTD Mem. at 27.)

"A conspiracy may exist even if a coconspirator does not agree to commit or facilitate each and every part of the substantive offense." *Salinas*, 522 U.S. at 63. Nonetheless, coconspirators "must agree to pursue the same criminal objective." *Id.* Under RICO, "liability only attaches to 'the knowing agreement to participate in an endeavor which, if completed, would constitute a violation of the substantive statute.'" *Solomon v. Am. Web Loan*, 2019 WL 1320790, at *11 (E.D. Va. Mar. 22, 2019) (quoting *United State v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012)). "Accordingly, to prove a RICO conspiracy, two things must be established: '(1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense.'" *Id.* (quoting *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998)). Proof of such an agreement "may be established solely by circumstantial evidence." *Id.* (citations omitted).

Plaintiffs have alleged sufficient facts to support the plausible inference that Asner and Landy agreed to engage in a conspiracy with other individuals and entities with knowledge that the objective of the conspiracy would be the collection of unlawful debts. Plaintiffs allege multiple business arrangements between Asner and Landy and other entities in the alleged enterprise, including revenue sharing, operations and merger agreements. Although Asner and Landy contend that the 2014 sale of their companies to the Tribal Lending Entities only

demonstrates their desire to leave the alleged RICO conspiracy, such a sale does not nullify the initial agreement to violate RICO, nor does it necessarily establish sufficient withdrawal from the conspiracy. Indeed, in the context of the mounting regulatory and legal pressure facing tribal lending businesses across the United States, the 2014 sale of Asner and Landy's businesses only highlights their perception of the unlawfulness of the alleged enterprise's activities.

Ultimately, these facts support the inference that Asner and Landy "objectively manifested an agreement to participate directly or indirectly in the affairs of the enterprise" through the collection of unlawful debts and "had knowledge of the essential nature of the plan" of the conspiracy. *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985). Accordingly, the Court denies Asner and Landy's Motion to Dismiss (ECF No. 59) as to Count Two. Because Asner and Landy's personal jurisdiction challenge relies on the Court dismissing Plaintiffs' RICO claims, such a challenge must also fail. (A/L MTD Mem. at 28-29.) Thus, the Court denies Asner and Landy's Motion to Dismiss (ECF No. 59) as to all Counts against them.

IV. CONCLUSION

For the reasons set forth above, the Court DENIES Defendants' Motions to Compel Arbitration (ECF Nos. 57, 62), GRANTS IN PART and DENIES IN PART the Tribal Officials' Motion to Dismiss (ECF No. 64) and DENIES Asner and Landy's Renewed Motion to Dismiss (ECF No. 59). The Court DISMISSES WITHOUT PREJUDICE Count Five of Plaintiffs' Amended Complaint and Count Seven to the extent that it seeks to enjoin future lending activities by the Tribal Lending Entities and to the extent that Bumbray, Blackburn and Collins

seek to enjoin future collection of any outstanding loans. An appropriate Order shall issue.

Let the Clerk file a copy of this Memorandum Opinion electronically and notify all counsel of record.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Date: January 9, 2020

TAB D

EXHIBIT 93

CONSUMER LOAN AND ARBITRATION AGREEMENT

Lender: **Mountain Summit Financial, Inc.** **635 East Hwy 20, F** **Upper Lake, CA 95485** **Phone Number: 855-819-7195** **Fax Number: 855-819-7196**	**Consumer:** **TIFFANI MYERS** [redacted] **ALEXANDRIA, VA 22306** **Customer ID:** [redacted] **Loan Type: Installment** **Loan Number:** [redacted]**3493**

TRUTH IN LENDING DISCLOSURE

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL PAYMENTS
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The amount you will have paid after you have made all payments as scheduled.
565.3604%	**$3,600.00**	**$1,200.00**	**$4,800.00**

Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due
1	$240.00	October 7, 2016
1	$402.00	October 21, 2016
1	$384.00	November 4, 2016
1	$366.00	November 18, 2016
1	$348.00	December 2, 2016
1	$330.00	December 16, 2016
1	$312.00	December 30, 2016
1	$294.00	January 13, 2017
1	$276.00	January 27, 2017
1	$258.00	February 10, 2017
1	$240.00	February 24, 2017
1	$222.00	March 10, 2017
1	$204.00	March 24, 2017
1	$186.00	April 7, 2017
1	$168.00	April 21, 2017
1	$150.00	May 5, 2017
1	$132.00	May 19, 2017
1	$114.00	June 2, 2017
1	$96.00	June 16, 2017
1	$78.00	June 30, 2017

Itemization of Amount Financed: $1,200.00
Amount Given to You Directly: $1,200.00

NOTICE: A SHORT TERM LOAN SHOULD BE USED FOR SHORT-TERM FINANCIAL NEEDS ONLY, NOT AS A LONG-TERM FINANCIAL SOLUTION. CUSTOMERS WITH CREDIT DIFFICULTIES SHOULD SEEK CREDIT COUNSELING OR MEET WITH A NONPROFIT FINANCIAL COUNSELING SERVICE IN THEIR COMMUNITY.

Agreement Date: September 12, 2016

In this Agreement, "Company," "We," "Our" and "Us" means Mountain Summit Financial, Inc., an arm of the Habematolel Pomo of Upper Lake Tribe of Indians that is a federally recognized Native American Indian Tribe, and any authorized representative, agent, independent contractor, affiliate or assignee We use in the provision of Your loan. "You" and "Your" means the consumer who signs the Agreement electronically. The term "business day" means any calendar day other than a Saturday, Sunday or a bank or federal holiday.

PROMISE TO PAY: You promise to pay to the order of Mountain Summit Financial, Inc., an arm of the Habematolel Pomo of Upper

Lake Tribe of Indians, a federally recognized Native American Indian Tribe, or any subsequent holder of this Agreement any and all sums due hereunder. You promise to pay these amounts on the dates listed in the Payment Schedule above. You also promise to pay to Us any other fees provided for under this Agreement.

SAME DAY FUNDING: You may have the option to elect a convenience service to have Your loan funded on the same day subject to the terms and conditions in this Agreement. If You elect this convenience service, the charge for same day funding will be $20.00 and you will be required to agree to the terms. Please note that certain conditions may delay or prevent Us from funding Your loan the same day, including but not limited to wire cut off times, bank holiday and weekend schedules, and any processing schedule restrictions that may be imposed by Your individual financial institution.

DISBURSEMENT DATE: If Your loan is approved, it will be consummated as of September 12, 2016 (the "Disbursement Date") except as provided herein. If you elect an electronic method to receive the proceeds from the transaction reflected by this Agreement, we will use commercially reasonable efforts to effect a credit entry by depositing such proceeds into the bank account you provide to us (Your "Bank Account") on the next business day; provided, however, should you select the Same Day Funding option, then subject to the terms of this Agreement, we will use commercially reasonable efforts to effect a wire transfer to your account on the same business day. If you elect the Postal Mail or Check via Mail Option, then we will use commercially reasonable efforts to issue a check the next business day but you should allow seven (7) to ten (10) business days for mailing and delivery. Unavoidable delays that occur as a result of bank holidays, the processing schedule of Your individual bank, the untimely receipt of pay stubs, if such pay stubs are required, inadvertent processing errors, "acts of God", and/or "acts of terror"may extend the time for the deposit and may cause a change in the Disbursement Date and Your Annual Percentage Rate ("APR") as disclosed herein. In the event that disbursement is delayed, the Disbursement Date will automatically adjust to the actual date of disbursement.

WHEN YOU BEGIN PAYING FINANCE CHARGE(S): You begin to pay Us finance charge(s) for the loan on the Disbursement Date. The first Installment Period on the loan begins on the Disbursement Date and ends on the first Payment Due Date. Thereafter, each Installment Period begins on the first date following the Payment Due Date and ends on the next Payment Due Date. You will be charged finance charge(s) on the entire Installment Period beginning on the first day of the Installment Period. In calculating Your payments, We have assumed You will make each payment on the day and in the amount due. If any payment is received after the Payment Due Date, You may be required to pay any additional finance charge(s) that accrues after such date. If any payment is made before the Payment Due Date, the finance charge(s) are due for the entire Installment Period and no refund shall be made for the finance charge(s) charged for the Installment Period. Time is of the essence, which means that there are no grace periods for when payments must be made. If any payment is due on a day on which Your bank is not open, then such payment shall be due on the next day Your bank is open.

CALCULATION OF FINANCE CHARGE(S) AND PAYMENTS: Finance charge(s) are calculated as a percent of the outstanding principal amount and finance charge(s) are earned on the first day of each Installment Period for that period. Each loan installment payment under the Payment Schedule shall consist of: (i) the financial charges assessed for an Installment Period, and (ii) a sum representing 5% of Your initial principal loan amount (the "buy-down").

PAYMENTS: You are required to make the payments for each Installment Period on or before the payment due dates in your payment schedule ("Payment Due Dates"). If You would like to repay Your loan according to a payment plan other than as set forth herein and such loan modification option is not available through our web site, You must contact a customer service representative no later than three (3) days prior to Your next Payment Due Date to obtain approval. You will make your payments on or before every Payment Due Date until You have paid the entire principal and accrued finance charge(s) and any other charges as described in this Agreement. If on the final scheduled Payment Due Date ("Maturity Date"), You still owe amounts under this Agreement, You will pay those amounts in full on that date.

ELECTRONIC PAYMENT: If you have elected to pay your payments electronically, then your payment plus any fees due to Us (if applicable) will be debited electronically from Your Bank Account on each Payment Due Date as set forth below (see "ELECTRONIC AUTHORIZATION TO DEBIT BANK ACCOUNT").

PAYMENT BY CHECK OR MONEY ORDER: If You have selected the Postal Mail or Check via Mail Option, then you have agreed to repay all amounts due pursuant to this Agreement via money order or check. Please make Your money order(s) or check(s) payable to Mountain Summit Financial, Inc., and mail them to 635 East Hwy 20, F , Upper Lake, CA 95485 for receipt and processing on or before the Payment Due Dates. All mailed payments must reach this address by 4:00 pm Eastern Time on or before the Payment Due Date.

As an alternative to other forms of payment you may have agreed to, You may pay any payment owing under this Agreement by check or money order. If you utilize this option, please notify a customer service representative no later than three (3) days prior to Your Payment Due Date.

CHECKS: If You provide a check as a payment, You authorize Us either to use information from Your check to make a one-time electronic fund transfer from Your account or to process the payment as a check transaction. When We use information from Your check to make an electronic funds transfer, funds may be withdrawn from your account as soon as the same day that We receive

Your payment, and You will not receive Your check back from Your financial institution. For questions, please contact our customer service at 855-819-7195.

NO CONTINGENCY: You acknowledge and agree that We cannot make and have not made the Loan contingent upon You obtaining any other product or service from Us or anyone else. You also acknowledge and agree that We have not made this Loan contingent upon You repaying the Loan via ACH debit or other electronic fund transfer.

PAYMENT APPLICATION: We will apply Your payments first to any fees due to Us, then to earned but unpaid finance charge(s), and then to principal amounts outstanding.

SECURITY INTEREST DISCLOSURE: If you have selected to pay your loan payment electronically, You acknowledge and agree that we have disclosed to you the existence of a security interest to the extent Your Agreement to have us withdraw money from Your Bank Account is deemed a security interest under applicable law.

ATTORNEYS' FEES RELATED TO COLLECTION: You understand that in the event that We are required to employ an attorney at law to collect any amounts due under this Agreement, You will be required to pay the reasonable fees of such attorney to protect Our interest or to take any other action required to collect the amounts due hereunder.

PREPAYMENT: You may prepay all or part of the amount You owe Us at any time before the Maturity Date without penalty. If You prepay in full, You must pay the finance charge(s) accrued on Your Loan and all other amounts due up to the date of Your payment. If you wish to prepay Your loan and the payoff method or amount is not available through Our website, then You must contact a customer service representative at: 855-819-7195 to obtain an accurate payoff amount and either provide us with authorization to effect a debit entry to Your bank account for the prepayment, or otherwise advise us of your intended method of prepayment. If you prepay in part, by paying part of your outstanding principal balance, your additional payment will reduce your outstanding principal balance and consequently reduce your future finance charges, however, the buy-down and the scheduled Payment Due Dates shown on your Payment Schedule will not change until the outstanding principal balance is paid in full.

AUTHORIZATION TO CREDIT BANK ACCOUNTS: If you have opted to receive your funds electronically, then You authorize us and our agents to initiate a credit entry to Your Bank Account to disburse the proceeds of this Loan.

ELECTRONIC AUTHORIZATION TO DEBIT BANK ACCOUNT: If you have elected to receive your funds electronically, then You will be required to electronically sign a separate Electronic Payment Authorization Agreement in which You will authorize us, and our agents, successors, employees and assigns to withdraw money on each scheduled Payment Due Date shown on your Payment Schedule from the financial accounts you designate in the Authorization Agreement for each payment You owe Us, including any returned payment charges and the total amount You owe if You do not pay us when You agreed in the Agreement. You acknowledge and agree that such debit entries may be made from your account(s) as an automated clearinghouse entry, by drafting a remotely created check, and/or by another payment method or network such as electronic fund transfer if you provide Us with account access information, such as a debit card, Check card, or other account access device or code.

TERMINATING ELECTRONIC AUTHORIZATION: For those customers who electronically sign an Electronic Payment Authorization Agreement pursuant to this Agreement, that authorization will remain in full force and effect until the earlier of the following occurs: (i) You satisfy all of Your payment obligations under this Agreement; or (ii) You tell us or Your bank that We can no longer withdraw funds from Your designated accounts not less than three (3) business days prior to the scheduled Payment Due Date to provide enough time to let the Bank or us stop the money withdrawal or transfer. If you give Lender oral notification to stop payments, you agree that you must confirm your stop-payment order within 14 days in writing or else the stop payment order is no longer effective. Such notifications should be sent to: Mountain Summit Financial, Inc., 635 East Hwy 20, F , Upper Lake, CA 95485. You understand that revoking your authorization does not relieve you of the responsibility of paying all amounts due in full that are owed under this Agreement.

NOTICE OF VARYING AMOUNTS: For those customers who electronically sign an Electronic Payment Authorization Agreement pursuant to this Agreement, please note that the authorization will authorize Us to make withdrawals from your designated accounts in varying amounts; accordingly, you have the right to receive notice of the range of withdrawals that We may make. For purposes of this authorization, the range of withdrawal will be from an amount equal to the amount owing on Your Payment Due Date up to an amount equal to the outstanding balance on Your loan; You acknowledge that the amounts in the authorized range of withdrawal may vary and may be as little as $20 and may be greater than an installment payment or the amount of the loan due to factors such as your payment history, and any late, returned item charges, nonsufficient fund fees or other fees assessed pursuant to and in accordance with this Agreement (the "Range of Withdrawal"). For any withdrawal outside of the Range of Withdrawal, We will send You a notice at least ten (10) days prior to the date of the withdrawal. You acknowledge and agree that You will only receive notice when a withdrawal exceeds the Range of Withdrawal.

RETURNED PAYMENT FEE: If any payment made by You on this Loan is not honored or cannot be processed for any reason, including not enough money in Your Bank Account, You agree to pay Us a fee of $20.00 for that returned payment. You further authorize Us and Our agents to make a one-time withdrawal from your designated account(s) to collect this fee. Your financial institution may also

impose a fee if Your designated account(s) does not have sufficient funds to cover any debit processed for payment from such account.

BANKRUPTCY: You certify to Us that You are not a debtor under any proceeding in bankruptcy and have no intention to file a petition for relief under any chapter of the United States Bankruptcy Code.

VERIFICATION: You authorize Us to verify the information You provided to Us in connection with Your Loan application. You give Us consent to obtain information about You from consumer reporting agencies or other sources at any time that You have repayment obligations under this Loan. We reserve the right to withhold funding of this Loan, at any time prior to disbursement, to allow Us to verify the information You have provided to Us.

CREDIT REPORTING: We may report information about Your loan to consumer reporting agencies. Late payments, missed payments, or other reportable events may be reflected on Your credit report and may result in fees and other collection activities.

RESCISSION: You have the right to rescind the amount borrowed hereunder without incurring any fee if the amount borrowed, in full, is returned to Us on or before the close of business of the business day following the day on which such sum was delivered to You (the "Rescission Deadline"). To rescind this Agreement, You must inform us in writing, by the Rescission Deadline, by faxing notice to our toll free fax number at 855-819-7196 that You want to cancel this Agreement and that You authorize us to effect a debit entry to Your Bank Account for the principal amount of Your Loan. In the event that We timely receive Your written notice of rescission on or before the Rescission Deadline but before the loan proceeds have been credited to Your Bank Account, We will not effect a debit entry to Your Bank Account and both Our and Your obligations under this Agreement will be rescinded. In the event that We timely receive Your written notice of rescission on or before the Rescission Deadline but after the loan proceeds have been credited to Your Bank Account, We will effect a debit to Your Bank Account for the principal amount of Your Loan. If you have selected the Postal Mail or Check via Mail Option, you may rescind by notifying our office and promptly returning the check upon receipt.

DEFAULT: You will be in default under this Agreement if: (a) You provide false or misleading information about Yourself, Your employment, or Your financial condition (including any accounts that you may provide to Us on which the electronic debit or withdrawal is drawn); (b) You fail to make a payment on any Payment Due Date or Your payment is returned to us unpaid for any reason; or (c) any of the following things occur: appointment of a committee, receiver, or other custodian of any of Your property, or the commencement of a case under the U.S. Federal Bankruptcy Laws by or against You as a debtor.

CONSEQUENCES OF DEFAULT: Upon a default by You under this Agreement, We may, at our sole option, take any one or more of the following actions:

(a) agree to permit you to correct a payment default by modifying your Loan Schedule and/or payment amounts (a "Cure arrangement"). If We agree to a Cure arrangement and you fail to honor its terms, then we will have the right, at our sole discretion, to modify the Cure arrangement or terminate the Cure arrangement and immediately and without notice declare the entire unpaid principal balance and all accrued unpaid finance charge(s) and fees immediately due under your Loan ("Accelerate your Loan");

(b) automatically and without further action or notice Accelerate your Loan and require you to immediately pay us all amounts due and owing pursuant to such Acceleration;

(c) if you have elected to repay your Loan electronically, we may automatically and without further action or notice withdraw from your designated account(s) an amount equal to the amount owing on Your unpaid scheduled payment date up to an amount equal to the amount owed if we have Accelerated your loan; and

(d) pursue all legally available means to collect what you owe Us.

By electing any one of these options, we do not waive or release our right to subsequently elect and apply any other options to collect the amounts due and owing to Us.

REMOTELY CREATED CHECK AUTHORIZATION: You authorize Us and our agents, successors and assigns to automatically and without notice, create and submit remotely created checks, which is a check that does not require your signature, for payment to us in the amount owing and on the date of each payment due under this Agreement. This authorization shall apply to all payments due under this Agreement including any late, returned item charges, nonsufficient fund fees and other fees imposed under this Agreement, any acceleration of amounts owed upon a Default under this Agreement and any other amounts owing to Us as a result of Your Default.

ERROR RESOLUTION NOTICE: In the event you have elected an electronic method to receive your funds or pay your loan and (i) you have a question about an electronic transfer or if (ii) you find an error, you must telephone us at 855-819-7195 or write us at Mountain Summit Financial, Inc., 635 East Hwy 20, F , Upper Lake, CA 95485 as soon as you can. We must hear from you no later than 60 days after the FIRST debit or credit that is the basis of the problem or error. (1) Tell us your name and account number (if any); (2) Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information; and (3) Tell us the dollar amount of the suspected error. If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days. We will determine whether an error occurred within 10 business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 days to

investigate your complaint or question. If we decide to do this, we will credit your account within 10 business days for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may not credit your account. For errors involving new accounts, we may take up to 90 days to investigate your complaint or question. For new accounts, we may take up to 20 business days to credit your account for the amount you think is in error. We will tell you the results within 3 business days after completing our investigation. If we decide that there was no error, we will send you a written explanation. You may ask for copies of the documents that we used in our investigation.

RESOLVING DISPUTES; WAIVER OF JURY TRIAL AND ARBITRATION PROVISION.

In general, binding arbitration is a process in which persons with a dispute waive their rights to file a lawsuit in a court and waive their rights to have a jury trial. Instead, the parties agree to submit their disputes to a neutral third person (an "arbitrator") for a decision. Arbitration proceedings are private and less formal than court proceeding. Each party to a dispute has an opportunity to present their evidence to the arbitrator regarding the dispute. After considering each party's evidence and arguments, the arbitrator then issues a final and binding decision resolving the dispute. We will follow and you agree to follow Our policy of arbitrating all disputes, including the scope and validity of this Arbitration Provision. As part of agreeing to arbitrate any dispute, You explicitly waive any right You may have to participate in any class action against Us.

PRESERVATION OF SOVEREIGN IMMUNITY: This loan and all related documents are being submitted by you to us as an economic arm, instrumentality, and corporation owned by the Tribe. The Tribe is a federally-recognized Tribe and enjoys governmental sovereign immunity. Because we and the Tribe are entitled to sovereign immunity, you will be limited as to what claims, if any, you may be able to assert against the Tribe and Us. Any complaint must be submitted by you or on your behalf to us as described below. It is the express intention of the Tribe and Us operating as an economic arm of the Tribe, to fully preserve, and not waive either in whole or in part, sovereign governmental immunity, and any other rights, titles, privileges, and immunities, to which we and the Tribe are entitled. To protect and preserve the rights of the parties, no person may assume a waiver of sovereign immunity.

THEREFORE, YOU ACKNOWLEDGE AND AGREE AS FOLLOWS:

1. For purposes of this Agreement, the words "dispute" and "disputes" are given the broadest possible meaning and include, without limitation, (a) all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision, the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision; (b) all tribal, federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to this Agreement, the information You gave Us before entering into this Agreement, including the customer information application, and/or any past agreement or agreements between You and Us; (c) all counterclaims, cross-claims and third-party claims; (d) all common law claims, based upon contract, tort, fraud, or other intentional torts; (e) all claims based upon a violation of any tribal, state or federal constitution, statute or regulation; (f) all claims asserted by Us against You, including claims for money damages to collect any sum We claim You owe Us; (g) all claims asserted by You individually against Us and/or any of Our employees, agents, directors, officers, shareholders, governors, managers, members, parent company or affiliated entities (hereinafter collectively referred to as "related third parties"), including claims for money damages and/or equitable or injunctive relief; (h) all claims asserted on Your behalf by another person; (i) all claims asserted by You as a private attorney general, as a representative and member of a class of persons, or in any other representative capacity, against Us and/or related third parties (hereinafter referred to as "Representative Claims"); and/or (j) all claims arising from or relating directly or indirectly to the disclosure by Us or related third parties of any non-public personal information about You.

2. You acknowledge and agree that by entering into this Arbitration Provision:

(a) YOU ARE GIVING UP YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES;

(b) YOU ARE GIVING UP YOUR RIGHT TO HAVE A COURT RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; and

(c) YOU ARE GIVING UP YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.

3. All disputes including any Representative Claims against Us and/or related third parties shall be resolved by binding arbitration only on an individual basis with You. THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION.

4. Any party to a dispute, including related third parties, may send the other party written notice by certified mail return receipt requested of their intent to arbitrate and setting forth the subject of the dispute along with the relief requested, even if a lawsuit has been filed. Regardless of who demands arbitration, You shall have the right to select any of the following arbitration organizations to

administer the arbitration: the American Arbitration Association (1-800-778-7879) http://www.adr.org or JAMS (1-800-352-5267) http://www.jamsadr.com. The party receiving notice of arbitration will respond in writing by certified mail return receipt requested within twenty (20) days. If You demand arbitration, You must inform Us in Your demand of the arbitration organization You have selected. If related third parties or We demand arbitration, You must notify Us within twenty (20) days in writing by certified mail return receipt requested of Your decision to select an arbitration organization. If You fail to notify Us, then We have the right to select an arbitration organization. The parties to such dispute will be governed by the laws of the Habematolel Pomo of Upper Lake and such rules and procedures used by the applicable arbitration organization applicable to consumer disputes, to the extent those rules and procedures do not contradict the express terms of this Arbitration Provision or the law of the Habematolel Pomo of Upper Lake, including the limitations on the arbitrator below. You may obtain a copy of the rules and procedures by contacting the arbitration organization listed above.

You have the right to request that arbitration take place within thirty (30) miles of Your residence or some other mutually agreed upon location, provided, however, that such election to have binding arbitration occur somewhere other than on Tribal land shall in no way be construed as a waiver of sovereign immunity or allow for the application of any other law other than the laws of the Habematolel Pomo of Upper Lake.

5. Regardless of who demands arbitration, We will advance Your portion of the arbitration expenses, including the filing, administrative, hearing and arbitrator's fees ("Arbitration Fees") at Your request. Throughout the arbitration, each party shall bear his or her own attorneys' fees and expenses, such as witness and expert witness fees. The arbitrator shall apply applicable substantive Tribal law consistent with the Federal Arbitration Act (FAA), and applicable statutes of limitation, and shall honor claims of privilege recognized at law. The arbitrator may decide, with or without a hearing, any motion that is substantially similar to a motion to dismiss for failure to state a claim or a motion for summary judgment. If allowed by statute or applicable law, the arbitrator may award statutory damages and/or reasonable attorneys' fees and expenses. If the arbitrator renders a decision or an award in Your favor resolving the dispute, then You will not be responsible for reimbursing Us for Your portion of the Arbitration Fees, and We will reimburse You for any Arbitration Fees You have previously paid. If the arbitrator does not render a decision or an award in Your favor resolving the dispute, then the arbitrator shall require You to reimburse Us for the Arbitration Fees We have advanced less any Arbitration Fees You have previously paid. At the timely request of any party, the arbitrator shall provide a written explanation for the award. The arbitrator's award is binding and not appealable.

6. All parties, including related third parties, shall retain the right to enforce an arbitration award before the applicable governing body of the Habematolel Pomo of Upper Lake Tribe ("Tribal Forum"). Both You and We expressly consent to the jurisdiction of the Tribal Forum for the sole purposes of enforcing the arbitration award. The Tribe does not waive sovereign immunity.

7. This Arbitration Provision is made pursuant to a transaction involving both interstate commerce and Indian commerce under the United States Constitution and other federal and tribal laws. Thus, any arbitration shall be governed by the FAA and subject to the laws of the Habematolel Pomo of Upper Lake. If a final non- appealable judgment of a court having jurisdiction over this transaction and the parties finds, for any reason, that the FAA does not apply to this transaction, then Our agreement to arbitrate shall be governed by the laws of the Habematolel Pomo of Upper Lake Tribe.

8. This Arbitration Provision is binding upon and benefits You, Your respective heirs, successors and assigns. This Arbitration Provision is binding upon and benefits Us, Our successors and assigns, and related third parties. This Arbitration Provision continues in full force and effect, even if Your obligations have been paid or discharged through bankruptcy. This Arbitration Provision survives any cancellation, termination, amendment, expiration or performance of any transaction between You and Us and continues in full force and effect unless You and We otherwise agree in writing. If any of this Arbitration Provision is held invalid, the remainder shall remain in effect.

AGREEMENT TO RECEIVE NOTICES ELECTRONICALLY: You acknowledge that when you were approved for a loan, you agreed to the terms of our Electronic Consent Authorization. You further acknowledge and agree that, if You have provided to Us an electronic or email address, any notices required by the Truth in Lending Act, Regulation Z, The Electronic Funds Transfer Act, Regulation E, The Equal Credit Opportunity Act, Regulation B, Title V of the Gramm-Leach-Bliley Act, Regulation P (or its applicable equivalent), The Fair Credit Reporting Act, and/or any other provision of applicable federal or tribal law or regulation may be delivered electronically, to the extent permitted by law. Except as otherwise provided in the Agreement, You specifically agree that all notices required to be sent to You are effective when emailed or delivered to Your last known mail or e-mail address as identified in Our records. You agree that We may send or provide by electronic communication any notice, communication, disclosure amendment or replacement to the Agreement. All notices to Us from You should be forwarded to Mountain Summit Financial, Inc., 635 East Hwy 20, F Upper Lake, CA 95485, or faxed to 855-819-7196.

YOUR ELECTRONIC SIGNATURE: You acknowledge and agree that when You express your consent as required for this document, You are electronically signing this document. By electronically signing this document, You are agreeing to all the terms and conditions set forth in the Agreement, and certifying that all information You have provided in connection with this transaction is complete and accurate. You agree that Your electronic signature shall have the same force and effect, and shall bind You to this Agreement in the same manner and to the same extent as a physical signature, in accordance with the Electronic Signatures in Global and National Commerce Act ("ESIGN") to the extent applicable. You also agree that this Agreement and all related documents are electronic

records and that, as such, they may be transferred, authenticated, stored, and transmitted by electronic means.

GOVERNING LAW: This Agreement is made and accepted in the sovereign territory of the Habematolel Pomo of Upper Lake, and shall be governed by applicable tribal law, including but not limited to the Habematolel Tribal Consumer Financial Services Regulatory Ordinance. You hereby agree that this governing law provision applies no matter where You reside at the time You request Your loan from Mountain Summit Financial, Inc.. Mountain Summit Financial, Inc. is regulated by the Habematolel Pomo of Upper Lake Tribal Consumer Financial Services Regulatory Commission. You may contact the Commission by mail at P.O. Box 516 Upper Lake CA 95485.

ADDITIONAL PROVISIONS: The parties do not intend the benefits of this Agreement to inure to any third party, and nothing contained herein shall be construed as creating any right, claim or cause of action in favor of any such third party. If any part of this Agreement is found invalid, the rest of the Agreement will remain valid and enforceable.

ASSIGNMENT: You may not assign the Agreement to any other party. We may assign the Agreement or delegate any or all of Our rights and duties under the Agreement to any third party without notifying You. No delay or omission by Us in exercising any rights or remedies hereunder shall impair or waive such right or remedy.

ENTIRE AGREEMENT: This Agreement and any other written agreement You entered with Us in obtaining this loan constitute the entire agreement between Us and supersedes all prior agreements, understandings, statements or proposals, and representations, whether written or oral. This Agreement and any other written agreement You entered with Us in obtaining this loan, may not be modified except by written amendment signed by both parties.

NOT MILITARY: By signing this Agreement You represent that You are not a member of the military or the spouse/dependent of a military member. Specifically, You further represent that You are not (nor are You a spouse or dependent of) a regular reserve member of the Army, Navy, Marine Corps, Air Force or Coast Guard, serving on active duty under a call or order that does not specify a period of 30 days or fewer or serving on Active Guard or Reserve Duty. (Dependents include the member's spouse, child under the age of 18 years old or an individual for whom the member provided more than one half of their financial support for 180 days preceding the date of this Agreement.)

COMMUNICATIONS: You acknowledge and agree that We may contact You at any telephone number (that You provide to us or that We may obtain from third parties in the course of evaluating credit eligibility, while servicing your Loan, managing your account(s) with US; and/or in the course of collecting any amounts owed under this Agreement), using any means of communication including but not limited to telephone calls (whether dialed manually or delivered via automatic telephone dialing systems and/or prerecorded messaging), SMS, and/or text messaging sent to any mobile device, and written communications (whether sent to a mobile device, computer or physical address) for purposes of, including but not limited to management and service of Your account(s); providing you with any account disclosures which federal law requires or which Mountain Summit Financial, Inc. deems necessary; providing You with payment reminders and other account notifications; collection of any amounts due from You; and sharing offers for products and services that may be of interest to You. Standard text messaging and/or calling charges may apply. You understand that You may terminate your consent to receive text messages by texting "STOP" from Your mobile device, or speaking with one of our customer service agents.

If you do not wish to receive promotional communications, then You may terminate your consent at any time by calling 855-819-7195, or by sending written instructions to Us via email, regular mail, or by texting "STOP" (as applicable). **You are not required to agree to receive promotional communications as a condition of obtaining a loan.**

YOU UNDERSTAND AND AGREE THAT THIS LOAN IS NOT INTENDED TO MEET LONG TERM FINANCIAL NEEDS.

By electronically signing this Agreement below, You certify that the information given in connection with this Agreement is true and correct. You authorize Us to verify the information given in connection with this Agreement, and You give Us consent to obtain information about You from consumer reporting agencies or other sources. **You acknowledge, represent and warrant that: (a) You have read, understand, and agree to all of the terms and conditions of this Agreement, including the Arbitration Agreement, and specifically the waivers of any rights to a jury trial and any rights to participate in class proceedings contained herein, (b) this Agreement contains all of the terms of the agreement between You and Us and that no representations or promises other than those contained in this Agreement have been made, (c) You specifically authorize deposits to and withdrawals from the accounts you designate if you electronically sign an Electronic Payment Authorization Agreement pursuant to this Agreement, (d) You are not a debtor under any proceeding in Bankruptcy and have no intention to file a petition for relief under any chapter of the United States Bankruptcy Code, (e) this Agreement was filled in before You signed it, (f) You have reviewed and been given the option to print or retain a copy of Our privacy policy and terms and conditions, and (g) You have the ability to print or retain a completed copy of this Agreement. You further acknowledge that We may withhold funding of Your Loan until We ensure all the information You gave Us on Your application is true and We decide whether You meet Our requirements to receive the Loan.**

TIFFANI MYERS	9/9/2016 9:09:58 AM	[redacted]	[redacted]3493

Signature	Date Signed	Signature IP	Contract #

Lender:	Consumer:
Mountain Summit Financial, Inc. **635 East Hwy 20, F** **Upper Lake, CA 95485** **Phone Number: 855-819-7195** **Fax Number: 855-819-7196**	**TIFFANI MYERS** [redacted] **ALEXANDRIA, VA 22306**

Loan Number: [redacted]3493
Agreement Date: September 12, 2016

AUTHORIZATION AGREEMENT

The term "Lender," means Mountain Summit Financial, Inc., an arm of the Habematolel Pomo of Upper Lake Tribe of Indians, a federally recognized Native American Indian Tribe, and any representative, agent, independent contractor, affiliate or assignee it uses in the provision of my loan under the Consumer Loan and Arbitration Agreement (the "Loan Agreement") executed by me and accepted by Lender. This Authorization Agreement ("Authorization") is a part of and relates to the Loan Agreement, and Lender's Terms of Use, which are available through Lender's website. Unless otherwise defined in this Authorization, capitalized terms used herein shall have the meanings assigned to such terms in the Loan Agreement.

Credit Authorization: I hereby authorize Lender to initiate credit entries to my Account identified below consistent with the terms of my Loan Agreement with Lender. The term "Account" shall mean the any and all financial accounts you have with a financial institution of which you have voluntarily supplied identifying information.

Debit Authorization: I hereby voluntarily authorize Lender and its successors and assigns to initiate debit entries from the Account for all payments due under the Loan Agreement in a sum equal to my installment payment amount due under the Loan Agreement; provided, however, that I pre-authorize Lender to vary the amount of any debit entry on each Payment Due Date as needed to adjust an installment payment due on the Loan to reflect any payment I make, and for any late, returned item charges, nonsufficient fund fees and other fees imposed under the Loan Agreement, and for acceleration of amounts owed upon default under the Loan Agreement. If any payment date occurs on a day that is not a business day, the debit authorized by this Authorization will occur on the next following business day. The term "business day" refers to a calendar day other than a Saturday, Sunday or a bank or federal holiday. I acknowledge and agree that debit entries may be made from my Account(s) as an automated clearing house entry using my account and routing number, and, if I supply account access device information, may also be made by another payment method or network such as electronic fund transfer using my debit card, Check card, or other account access device or code supplied by me which card is not a credit card.

Notice of Varying Amounts: Please note that you have the right to receive notice of the withdrawals from your Account by an electronic debit that varies in amount. However, by agreeing to let us withdraw the money from your Account as forth above in "Debit Authorization," you agree we only have to tell you the range of withdrawals that we can make. For any withdrawal outside of this specified range, we will send you a notice 10 days prior to the date of the debit. Therefore, by signing below, you acknowledge that you will only receive notice when a withdrawal exceeds the amount in the specified range as set forth in "Debit Authorization.".

Terminating Authorization: This authority is to remain in full force and effect until my loan is paid in full, including any fees and charges under my Agreement or Lender has received notification from me of termination of my ACH authorization or my electronic fund transfer authorization at least three (3) business days prior to the Payment Due date. If I give Lender oral notification to stop payments, I agree that I must confirm my stop-payment order within 14 days in writing or else the stop payment order is no longer effective. Such notifications should be sent to: Mountain Summit Financial, Inc., 635 East Hwy 20, F , Upper Lake, CA 95485. I further understand that any termination of a payment method authorization will not relieve me of the responsibility of paying all amounts due in full that are owed under the Loan Agreement.

Return Fees: I understand if a payment is not honored or cannot be processed for any reason, it may be electronically re-presented up to two times. I authorize Lender to debit a fee of $20.00 for each payment returned unpaid. I understand that my financial institution may also impose a fee if my Account does not have sufficient funds to cover any debit processed for payment from such Account.

Error Resolution Notice: In the event you have elected an electronic method to receive your funds or pay your loan and (i) you have a question about an electronic transfer or if (ii) you find an error, you must telephone us at 855-819-7195, write us at Mountain Summit Financial, Inc., 635 East Hwy 20, F , Upper Lake, CA 95485 as soon as you can. We must hear from you no later than 60 days after the FIRST debit or credit that is the basis of the problem or error. (1) Tell us your name and account number (if any); (2) Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information; and (3) Tell us the dollar amount of the suspected error. If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days. We will determine whether an error occurred within 10 business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will credit your account within 10 business days for the amount you think is in error, so that you will have the use of the money during the time it

takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may not credit your account. For errors involving new accounts, we may take up to 90 days to investigate your complaint or question. For new accounts, we may take up to 20 business days to credit your account for the amount you think is in error. We will tell you the results within 3 business days after completing our investigation. If we decide that there was no error, we will send you a written explanation. You may ask for copies of the documents that we used in our investigation. In the event of any conflict between the notification procedures contained herein and in the Terms of Use Agreement, the Terms of Use Agreement will control.

Electronic Signature: When I apply my signature in the indicated boxes on this document, I am providing my electronic signature on this document. By electronically signing this document, I am agreeing to all the terms and conditions set forth in this authorization, and certifying that all information I have provided in connection with it is complete and accurate, and that I have the authority to authorize Lender and its agents, successors and assigns to initiate debit and credit entries from the Account specified below. I agree that my electronic signature will have the same force and effect, and shall bind me in the same manner and to the same extent as a physical signature would do, in accordance with the Electronic Signatures in Global and National Commerce Act ("ESIGN") to the extent applicable. I also agree that this authorization and all related documents are electronic records and that, as such, they may be transferred, authenticated, stored, and transmitted by electronic means.

Confidentiality. We will disclose information to third parties about your account or the transfers you make: (1) where it is necessary for completing transfers; or (2) in order to verify the existence and condition of your account to a third party, such as a credit bureau, or merchant; or (3) in order to comply with a government agency or court orders; or (4) as described in our privacy notice, provided separately.

Miscellaneous: If there is any missing or erroneous information in this Authorization regarding my Account, then I authorize Lender to verify and correct such information. I attest that I am the person who owns the Account supplied below, or is a beneficiary of the Account and has authority to make withdrawals or transfers to and from the Account.

TIFFANI MYERS	9/9/2016 9:09:58 AM	[redacted]	[redacted]3493
Signature	Date Signed	Signature IP	Contract#

ACCOUNT INFORMATION
Financial Institution Name: [redacted]
Name(s) on Account: TIFFANI MYERS
Financial Institution Routing No. / ABA No.: [redacted]
Financial Institution Acct No.: [redacted]

Lender: **Mountain Summit Financial, Inc.** **635 East Hwy 20, F** **Upper Lake, CA 95485** **Phone Number: 855-819-7195** **Fax Number: 855-819-7196**	**Consumer:** **TIFFANI MYERS** [redacted] **ALEXANDRIA, VA 22306** **Customer ID:** [redacted] **Loan Number:** [redacted]**3493**

NOTICE AND CONSENT REGARDING ELECTRONIC DELIVERY OF DISCLOSURES

The Lender identified in your loan documentation is providing you the following information in a manner consistent with principles under United States federal law.

CONSENT TO ELECTRONIC DELIVERY OF DISCLOSURES

By consenting to the electronic delivery of disclosures, you agree that we may provide electronically any and all communications regarding the loan application and the opening of the Loan (the "Disclosures"). This consent applies to the receipt of electronic Disclosures with respect to this loan application and the opening of the Loan. This consent does not apply to any future transactions that may occur between us.

Paper Copies of Disclosures

When you apply for and obtain a loan from Lender, you agree to receive information and disclosures regarding your loan electronically. You agree to print out, download or otherwise store the Disclosures and other communications to keep for your records. If you consent to the electronic delivery of Disclosures, you may also receive a paper copy of any Disclosure provided to you electronically by writing us at the Lender's address as identified in the loan documentation. There is no fee for the paper copy.

Withdrawing Consent to Electronic Delivery

You may withdraw your consent by sending us your request in writing to the Lender's address as identified in the loan documentation.. If you decide to withdraw Your Consent, the legal effectiveness, validity and/or enforceability of prior electronic Disclosures will not be affected.

Hardware and Software Requirements

You must use a computer processor (CPU), monitor, modem with ISP access to the internet or direct-dial up accessibility and a printer capable of printing text screens or hard drive capable of storing data. In addition, you must use an internet browser software that supports 128-bit encryption. If you want to review additional information on the requirements for using this software and associated hardware requirements, go to www.microsoft.com. Because we may deliver Disclosures to you or otherwise communicate with you using e-mail, you must be able to send e-mail and receive e-mail that contains hyperlinks to websites.

Procedures to Update Email Address
If you provide us with an email address in your application, you may notify us of changes in such address by writing us at the Lender's address as identified in the loan documentation.

CONSENT AND ACKNOWLEDGEMENT
You acknowledge and agree that:

CONSENT AND ACKNOWLEDGEMENT
By signing below you acknowledge and agree that:
I have read the information about the use of electronic records to provide Disclosures and other Communications, and the use of electronic signatures in connection with my loan application and Loan.
I consent to the use of electronic records to provide Disclosures and electronic signatures in Connection with my loan application and Loan in place of written documents and handwritten Signatures, when applicable.
I am able to view this consent. I am also able to download and review files within a web browser.
I have an account with an internet service provider and I am able to send e-mail and receive e-mail with hyperlinks to websites.
I am consenting on behalf of all other co-owners of an account, if applicable. If applicable, I am authorized to consent on their behalf.
I acknowledge and agree that acceptance of this Notice and Consent Regarding Electronic Delivery of Disclosures inures to the benefit of Mountain Summit Financial, its affiliates, agents, employees, successors, and assigns.

TIFFANI MYERS	9/9/2016 9:09:58 AM	[redacted]	[redacted]3493
Signature	Date Signed	Signature IP	Contract#

Lender: **Mountain Summit Financial, Inc.** **635 East Hwy 20, F** **Upper Lake, CA 95485** **Phone Number: 855-819-7195** **Fax Number: 855-819-7196**	**Consumer:** **TIFFANI MYERS** [redacted] **ALEXANDRIA, VA 22306** **Customer ID:** [redacted] **Loan Number:** [redacted]**3493**

TEXT MESSAGING POLICY

TEXT MESSAGING: By electronically signing below, you authorize Lender, our assigns, successors or servicing agents to send SMS Statement Notifications (as defined below) to any phone numbers provided to us, our assigns, successors or service agents in connection with this loan and any modification or renewal of this loan. As used in this text messaging disclosure, "SMS Statement Notifications" means any SMS (text message) communications from us to you pertaining to your loan sent to the phone numbers provided in connection with this loan, including but not limited to payment information, account information, due dates, delinquent accounts, program updates, promotions, coupons and other marketing messages.
How to Unsubscribe: You may withdraw your consent to receive SMS Statement Notifications by replying with "stop" or calling us at 855-819-7195. We may treat your provision of an invalid mobile phone number, or the subsequent malfunction of a previously valid mobile phone number, as a withdrawal of your consent to receive SMS Statement Notifications. Any withdrawal of your consent to use SMS Statement Notifications will be effective only after we have a reasonable period of time to process your withdrawal.

To request additional information, contact us by telephone at 855-819-7195.

In order to access, view, and retain SMS Statement Notifications that we make available to you, you must have: (i) a SMS-capable mobile phone, (ii) an active mobile phone account with a communication service provider; and (iii) sufficient storage capacity on your mobile phone

All SMS Statement Notifications in electronic format from us to you will be considered "in writing."

There is no service fee for SMS Statement Notifications but you are responsible for any and all charges, including but

not limited to fees associated with text messaging, imposed by your communications service provider. Other charges may apply. Such charges may include those from your communications service provider. Please consult your mobile service carrier's pricing plan to determine the charges for sending and receiving text messages. These charges will appear on your phone bill. Message frequency depends on account settings.

Additionally, you agree that we may send any SMS Statement Notifications through your communication service provider in order to deliver them to you and that your communication services provider is acting as your agent in this capacity. You agree to provide a valid mobile phone number for these services so that we may send you certain information about your loan. Additionally, you agree to indemnify, defend and hold us harmless from and against any and all claims, losses, liability, cost and expenses (including reasonable attorneys' fees) arising from your provision of a mobile phone number that is not your own or your violation of applicable federal, state or local law, regulation or ordinance. Your obligation under this paragraph shall survive termination of this Agreement. SMS Statement Notifications are provided for your convenience only.

Receipt of each SMS Statement may be delayed or impacted by factor(s) pertaining to your communications service provider(s). We will not be liable for losses or damages arising from any disclosure of account information to third parties, non-delivery, delayed delivery, misdirected delivery or mishandling of, or inaccurate content in, the SMS Statement Notifications sent by us.

We may modify or terminate our text messaging services from time to time, for any reason, and without notice, including the right to terminate text messaging with or without notice, without liability to you, any other user or third party.

TIFFANI MYERS	9/9/2016 9:09:58 AM	[redacted]	[redacted]3493
Signature	Date Signed	Signature IP	Contract#

Lender: **Mountain Summit Financial, Inc.** **635 East Hwy 20, F** **Upper Lake, CA 95485** **Phone Number: 855-819-7195** **Fax Number: 855-819-7196**	**Consumer:** **TIFFANI MYERS** [redacted] **ALEXANDRIA, VA 22306**

Loan Number: [redacted]3493
Agreement Date: September 12, 2016

AUTHORIZATION AGREEMENT

The term "Lender," means Mountain Summit Financial, Inc., an arm of the Habematolel Pomo of Upper Lake Tribe of Indians, a federally recognized Native American Indian Tribe, and any representative, agent, independent contractor, affiliate or assignee it uses in the provision of my loan under the Consumer Loan and Arbitration Agreement (the "Loan Agreement") executed by me and accepted by Lender. This Authorization Agreement ("Authorization") is a part of and relates to the Loan Agreement, and Lender's Terms of Use, which are available through Lender's website. Unless otherwise defined in this Authorization, capitalized terms used herein shall have the meanings assigned to such terms in the Loan Agreement.

Credit Authorization: I hereby authorize Lender to initiate credit entries to my Account identified below consistent with the terms of my Loan Agreement with Lender. The term "Account" shall mean the any and all financial accounts you have with a financial institution of which you have voluntarily supplied identifying information.

Debit Authorization: I hereby voluntarily authorize Lender and its successors and assigns to initiate debit entries from the Account for all payments due under the Loan Agreement in a sum equal to my installment payment amount due under the Loan Agreement; provided, however, that I pre-authorize Lender to vary the amount of any debit entry on each Payment Due Date as needed to adjust an installment payment due on the Loan to reflect any payment I make, and for any late, returned item charges, nonsufficient fund fees and other fees imposed under the Loan Agreement, and for acceleration of amounts owed upon default under the Loan Agreement. If any payment date occurs on a day that is not a business day, the debit authorized by this Authorization will occur on the next following business day. The term "business day" refers to a calendar day other than a Saturday, Sunday or a bank or federal holiday. I acknowledge and agree that debit entries may be made from my Account(s) as an automated clearing house entry using my account and routing number, and, if I supply account access device information, may also be made by another payment method or network such as electronic fund transfer using my debit card, Check card, or other account access device or code supplied by me which card is not a credit card.

Notice of Varying Amounts: Please note that you have the right to receive notice of the withdrawals from your Account by an electronic debit that varies in amount. However, by agreeing to let us withdraw the money from your Account as forth above in "Debit Authorization," you agree we only have to tell you the range of withdrawals that we can make. For any withdrawal outside of this specified range, we will send you a notice 10 days prior to the date of the debit. Therefore, by signing below, you acknowledge that you will only receive notice when a withdrawal exceeds the amount in the specified range as set forth in "Debit Authorization.".

Terminating Authorization: This authority is to remain in full force and effect until my loan is paid in full, including any fees and charges under my Agreement or Lender has received notification from me of termination of my ACH authorization or my electronic fund transfer authorization at least three (3) business days prior to the Payment Due date. If I give Lender oral notification to stop payments, I agree that I must confirm my stop-payment order within 14 days in writing or else the stop payment order is no longer effective. Such notifications should be sent to: Mountain Summit Financial, Inc., 635 East Hwy 20, F , Upper Lake, CA 95485. I further understand that any termination of a payment method authorization will not relieve me of the responsibility of paying all amounts due in full that are owed under the Loan Agreement.

Return Fees: I understand if a payment is not honored or cannot be processed for any reason, it may be electronically re-presented up to two times. I authorize Lender to debit a fee of $20.00 for each payment returned unpaid. I understand that my financial institution may also impose a fee if my Account does not have sufficient funds to cover any debit processed for payment from such Account.

Error Resolution Notice: In the event you have elected an electronic method to receive your funds or pay your loan and (i) you have a question about an electronic transfer or if (ii) you find an error, you must telephone us at 855-819-7195, write us at Mountain Summit Financial, Inc., 635 East Hwy 20, F , Upper Lake, CA 95485 as soon as you can. We must hear from you no later than 60 days after the FIRST debit or credit that is the basis of the problem or error. (1) Tell us your name and account number (if any); (2) Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information; and (3) Tell us the dollar amount of the suspected error. If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days. We will determine whether an error occurred within 10 business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will credit your account within 10 business days for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may not credit your account. For errors involving new accounts, we may take up to 90 days to investigate your complaint or question. For new accounts, we may take up to 20 business days to credit your account for the amount you think is in error. We will tell you the results within 3 business days after completing our investigation. If we decide that there was no error, we will send you a written explanation. You may ask for copies of the documents that we used in our investigation. In the event of any conflict between the notification procedures contained herein and in the Terms of Use Agreement, the Terms of Use Agreement will control.

Electronic Signature: When I apply my signature in the indicated boxes on this document, I am providing my electronic signature on this document. By electronically signing this document, I am agreeing to all the terms and conditions set forth in this authorization, and certifying that all information I have provided in connection with it is complete and accurate, and that I have the authority to authorize Lender and its agents, successors and assigns to initiate debit and credit entries from the Account specified below. I agree that my electronic signature will have the same force and effect, and shall bind me in the same manner and to the same extent as a physical signature would do, in accordance with the Electronic Signatures in Global and National Commerce Act ("ESIGN") to the extent applicable. I also agree that this authorization and all related documents are electronic records and that, as such, they may be transferred, authenticated, stored, and transmitted by electronic means.

Confidentiality. We will disclose information to third parties about your account or the transfers you make: (1) where it is necessary for completing transfers; or (2) in order to verify the existence and condition of your account to a third party, such as a credit bureau, or merchant; or (3) in order to comply with a government agency or court orders; or (4) as described in our privacy notice, provided separately.

Miscellaneous: If there is any missing or erroneous information in this Authorization regarding my Account, then I authorize Lender to verify and correct such information. I attest that I am the person who owns the Account supplied below, or is a beneficiary of the Account and has authority to make withdrawals or transfers to and from the Account.

Signature	Date Signed	Signature IP	[redacted]3493 Contract#

DEBIT CARD INFORMATION
Cardholder's Name (as it appears on the debit card):
Debit Card No. (Last 4 Digits):
Expiration Date: -
Billing Address:: [redacted] ALEXANDRIA, VA 22306

Lender: **Mountain Summit Financial, Inc.** **635 East Hwy 20, F** **Upper Lake, CA 95485** **Phone Number: 855-819-7195** **Fax Number: 855-819-7196**	**Borrower:** **TIFFANI MYERS** [redacted] **ALEXANDRIA, VA 22306** **Customer ID:** [redacted] **Loan Number:** [redacted]**3493**

COMPANY COMMUNICATION POLICY

This policy describes how Mountain Summit Financial, Inc., its assigns, successors or servicing agents ("Us" or "We") may communicate with you. For detailed information regarding text messages and SMS notifications We may send, please refer to our SMS Policy. For detailed information regarding how we use, disclose and protect your personal information (and how you may limit sharing), please refer to our Privacy Policy on our website.

By electronically signing below, you give Us permission to contact you at any telephone number or mobile access device you supply to Us using any means of communication including but not limited to telephone calls, E-mail, SMS (pursuant to our Text Messaging Policy), autodialer, and prerecorded messages (collectively, "communications").
When you provide Us with this permission, you expressly agree that we may send you these communications to send you notifications regarding your account or your loan, including payment reminders, missed payment notices and default notices; inform you about promotional offers, and to tell you about other offers for products and services (including those of our affiliates or marketing partners) that We think may interest you. You further agree to receive communications from Us on your cell phone for any of the purposes identified above, as well as to collect any amounts due from you.

You acknowledge that you understand that You are not required to agree to receive any such communications to your mobile number or residential number as a condition of obtaining a loan.

To stop receiving marketing and promotional calls: You may stop receiving marketing and other promotional communications by calling us 855-819-7195 and asking to be added to our 'do not market' list, or by sending written notice via email or regular mail at the address provided in your loan agreement.
To stop receiving E-mail solicitations: You may stop E-mail solicitations by clicking the "unsubscribe" link that is provided at the bottom of all marketing Email communications. You may also call us at 855-819-7195 and inform an agent that you no longer want to receive marketing emails, or send written notice via email or regular mail at the address provided in your loan agreement.
To stop receiving text messages: You may stop text messages by replying "STOP" to any text you receive. You may also call us at 855-819-7195. Please refer to our SMS Policy for detailed information regarding text messages and SMS notifications.

TIFFANI MYERS	9/9/2016 9:09:58 AM	[redacted]	[redacted]3493
Signature	Date Signed	Signature IP	Contract#