Nos. 15-1170 & 15-1217

In the United States Court of Appeals for the Fourth Circuit

JAMES HAYES, *et al.*,
Plaintiffs-Appellants-Cross-Appellees,

v.

DELBERT SERVICES CORPORATION,
Defendant-Appellee-Cross-Appellant.

On Appeal from the United States District Court for the Eastern District of Virginia

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June 29, 2015

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-1170 & 15-1217 Caption: James Hayes, et al. v. Delbert Services Corp.

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James Hayes, et al.
(name of party/amicus)

who is appellants/cross-appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Matthew W. H. Wessler Date: June 29, 2015

Counsel for: James Hayes, et al.

CERTIFICATE OF SERVICE

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I certify that on June 29, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Matthew W. H. Wessler (signature) June 29, 2015 (date)

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INTRODUCTION

In a "payday" loan, a consumer who can't afford to wait until payday receives a cash advance and, in exchange, the lender subtracts a larger amount from the consumer's paycheck. Consumers renew the loans when they are unable to pay them off, creating a cycle of mounting debt. The plaintiffs are three Virginians who were lured, through aggressive marketing, into obtaining payday loans from Western Sky. These loans carried triple-digit rates, exponentially higher than the 12% rate cap under Virginia law. Two of the plaintiffs ended up owing about $14,000 on $2,525 loans—more than five times what they borrowed.

To evade courts and regulators, Western Sky did its lending over the Internet and sought to cloak itself in tribal immunity through association with the Cheyenne River Sioux Tribe—a tactic known as "rent-a-tribe." Faced with public enforcement actions and lawsuits nationwide, Western Sky's lending came to a halt two years ago. But its collection arms—including defendant Delbert Services—continue to pursue consumers, like the plaintiffs, who took out Western Sky loans.

This appeal concerns the enforceability of Western Sky's efforts, through its contracts with consumers, to draft its way out of legal accountability. Western Sky's unusual "tribal arbitration" scheme has been called a "sham from stem to stern," and both the Seventh and Eleventh Circuits have refused to honor it. *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 779 (2014), *cert. denied*, 135 S. Ct. 1894 (2015);

Inetianbor v. CashCall, Inc., 768 F.3d 1346, 1354 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015). Judges of this Court have also recently remarked on the scheme's troubling nature. *See Moses v. CashCall*, 781 F.3d 63, 67, 94 (4th Cir. 2015).

Among other things, Western Sky's contract requires arbitration before an "authorized representative" of the Tribe, but it doesn't define what that means. The Tribe itself has publicly disavowed any role, and numerous courts have found that no representative is available. In one case, the designated "arbitrator" turned out to be a non-lawyer with no training who admitted that he was hand-picked by Western Sky's owner and that his daughter worked at Western Sky. The agreement also requires arbitration under the Tribe's "consumer dispute rules," but the company concedes that these rules "do not exist." And the agreement expressly forbids an arbitrator from applying *any* state or federal law in the arbitration proceeding—thus prospectively waiving any relief under consumer-protection statutes. Standing alone, any one of these defects renders the clause unenforceable. Taken together, they comprise a "sham system unworthy even of the name arbitration." *Hooters of Am. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999).

Western Sky's affiliates now seek to salvage this "sham system." They seize on the agreement's reference to the possibility that a legitimate arbitral provider (such as AAA) could *administer* the tribal arbitration—only "to the extent that [its] rules and procedures do not contradict either the law of the … Tribe or the express

terms of the Agreement." But changing the entity that formally administers the proceeding does nothing to change *who* must conduct it (an "authorized representative" of the Tribe), *how* it is conducted (under the Tribe's non-existent "consumer dispute rules") and *what* law may apply (no state or federal law)—all features that render it "hardly recognizable as arbitration at all." *Id.* at 940.

No law authorizes a judicial rewriting of this flawed scheme. Doing so would be a woefully "insufficient antidote" here, rewarding overreaching and creating a race to the bottom. *Inetianbor*, 768 F.3d at 1356–67 (Restani, J., concurring). Future drafters would devise the most one-sided clauses imaginable, content in the knowledge that judges would rescue them. "Although the [Federal Arbitration Act] indicates a policy favoring enforcement of arbitration agreements, its purpose is not to allow parties to make up non-existent forums and rules in an effort to create the façade of a legitimate, reasonable dispute-resolution system, especially one conducted by a sovereign entity." *Id.* This Court should not become a party to Western Sky's "odiou[s] … practice of using tribal arbitration agreements to prey on financially distressed consumers, while shielding itself" from the law. *Moses*, 781 F.3d at 94 (Davis, J., concurring in part and dissenting in part).

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. Holding Western Sky's arbitration agreement enforceable, the court issued a final

judgment granting Delbert's motion to dismiss and to compel arbitration on January 21, 2015. JA262–70. The appellants timely appealed on February 18, 2015. JA275. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court err in enforcing Western Sky's tribal-arbitration agreement—an agreement expressly forbidding an arbitrator from applying any state or federal law, and requiring that arbitration be conducted by an "authorized representative" of the Cheyenne River Sioux Tribe under the Tribe's non-existent "consumer dispute rules"?

2. The agreement refers to the possibility that a legitimate arbitral provider could administer the arbitration "to the extent that [the provider's] rules and procedures do not contradict either the law of the … Tribe or the express terms of the Agreement." Changing the formal administrator, however, would not change *who* must conduct the arbitration (the Tribe's representative), *how* it is conducted (under non-existent tribal rules), or *what* law may apply (no state or federal law). Does this lone reference salvage an otherwise unenforceable agreement?

STATEMENT OF THE CASE

1. Western Sky's lending scheme. Like many consumers on the knife's-edge of financial solvency, the three named plaintiffs in this case, James Hayes, Debera Grant, and Herbert White all turned to a dubious but remarkably popular

source: an internet payday lender.

Western Sky Financial was an online lender owned by Martin Webb. In 2009, Webb and Western Sky began using an association with the Cheyenne River Sioux Tribe of South Dakota to pedal low-dollar loans to thousands of consumers through marketing "designed to reach potential borrowers who reside off the Reservation and outside of South Dakota." *F.T.C. v. Payday Financial LLC*, 935 F. Supp. 2d 926, 932 (D.S.D. 2013) ("*FTC I*"). But these low-dollar loans come at a high cost: massive up-front fees, lengthy repayments terms, and annual interest rates topping out at nearly 350%. In a typical loan, a consumer borrows $1,000 but has to "repay Western Sky $1,500 and 149% interest, for an effective interest rate of 233.10% per annum" and a total amount owed of $4,893. *See Moses*, 781 F.3d at 66.

Although "clearly illegal" under both state and federal law, *id.*; *F.T.C. v. Payday Financial LLC*, 989 F. Supp. 2d 799, 805 (D.S.D. 2013) ("*FTC II*"), Webb and Western Sky premised their lending-scheme on one crucial factor: a claimed ability to avoid liability by cloaking its activities in tribal immunity. *See* Heather L. Petrovich, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. Rev. 326 (2012). Webb "is not an official of the Tribe," and "does not represent or act on behalf of the Tribe." *FTC I*, 935 F. Supp. 2d at 929. But Western Sky claimed that any challenge to its loans would be "governed

by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe" and that "no United States state or federal law applies." JA154.

Not only has no court ever accepted this confusing premise—for starters, it simply "misunderstand[s]" the Indian Commerce Clause, *see FTC I*, 935 F. Supp. 2d at 931 n.4—but Native American advocacy groups have condemned Western Sky's cynical efforts to play games with tribal sovereignty. When the New York Attorney General sued Western Sky for illegal lending practices, the Native American Financial Services Association "applaud[ed]" the action, explaining that, unlike member tribes, Western Sky "does not operate under tribal law or abide by tribal regulatory bodies and is not wholly-owned by a federally-recognized tribe."[1] Nevertheless, to this day Western Sky's constellation of affiliates continues to insist they are free from state and federal consumer-protection laws. *See*, *e.g.*, JA264.

But two years ago, Western Sky's lending scheme came to a screeching halt. Faced with multiple regulatory enforcement efforts, as well as a raft of diverse lawsuits challenging its lending and business practices, Western Sky shuttered its doors in September 2013[2] Those enforcement efforts exposed Western Sky for

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[1] *See* NAFSA Applauds New York Attorney General Decision to File Suit Against Lender Circumventing Tribal Law (Aug. 13, 2013), http://bit.ly/1BrO6iN.

[2] *See* CFPB Sues CashCall for Illegal Online Loan Servicing (Dec. 16, 2013), *available at* http://1.usa.gov/1EAEgew.

what it was: a predatory scheme in which, as the FTC put it, "every step of the payday loan operation involved law violations." JA102; *see F.T.C. v. PayDay Fin., LLC*, No. 11-cv-03017 (D.S.D. Sept. 6, 2011).

These "violations started with the use of loan contracts containing unlawful provisions" and spiraled out from there. JA103. The FTC condemned Western Sky's ploy to subject consumers "to lawsuits in tribal court." JA94. Not only was this forum inconvenient for consumers but it also put them at an unfair procedural advantage because the tribal court's laws "are not readily accessible to consumers nationwide"—a problem Western Sky compounded by using a "boilerplate contract provision" that was "unclear and confusing" about "which laws apply." JA94–95.

The FTC also uncovered rampant violations in Western Sky's collection practices including (1) pursuing illegal "wage garnishment," in which Western Sky would "mimic" federally-authorized notices (substituting its own name for "United States") and then send them to consumers' employers without court authorization; (2) filing thousands of collection lawsuits in tribal court, which resulted in numerous default judgments because only "two consumers appeared [from out of state] to defend these lawsuits"; and (3) communicating with consumers' employers and co-workers without the consumers' knowledge or consent, JA127–32. These abuses allowed Western Sky and its affiliates to collect nearly $36 million from

consumers—more than $23 million of which qualified as "fees, interest, finance charges, and miscellaneous items." JA131.

While the FTC brought enforcement proceedings against the named loan originators, the U.S. Consumer Financial Protection Bureau (CFPB) aimed its fire at Western Sky's collection agents. In its complaint against CashCall and Delbert, the Bureau described an even more troubling shell game: Although Western Sky "purports" to make loans "in its name," in fact the loans are "marketed by CashCall, financed by WS Funding," and "almost immediately sold and assigned to WS Funding, and then serviced and collected by CashCall, Delbert, or both."[3] Over the course of three years—including the period of time when the consumers in this case were subject to CashCall and Delbert's collection efforts—"hundreds of thousands of WS loans were made to consumers nationwide." *Id.* ¶ 22. These loans, according to the Bureau, violated a host of state usury laws, by obliterating interest-cap rates and ignoring licensing requirements. *Id.* ¶¶ 26–31.[4]

Yet, despite the illegality of the lending scheme, CashCall and Delbert "engaged in the full array of collection activit[ies]," including "demand[ing] loan payments through repeated calls, letters, and other communications." CFPB

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[3] Am. Compl. ("CFPB Compl.") ¶¶ 19, 21, *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. 13-cv-13167 (D. Mass. Mar. 21, 2014).

[4] Initially, Delbert only serviced loans that were delinquent. CFPB Compl. ¶ 41. But, by early September 2013, CashCall "transferred most, if not all, of its remaining WS loans to Delbert."*Id.*

Compl. ¶¶ 36, 42. Neither CashCall nor Delbert ever disclosed to consumers that "their loans were void or that, under applicable state laws, they were not obligated to make some or all of the payments." *Id.* ¶¶ 37, 43. "To the contrary," the Bureau explained, "in calls, letters, and other communications," CashCall and Delbert "referred consumers back to their loan agreements with Western Sky, which affirmatively represented that the loans were not subject to any state's law." *Id.* ¶¶ 38, 44.

State regulators have likewise stepped in to stop this illegal lending scheme. The New Hampshire Banking Department, for example, ordered CashCall and its founder, J. Paul Reddam, to cease and desist its illegal lending activities.[5] Like the CFPB, it found that CashCall and WS Funding—not Western Sky—is the "actual or de facto lender" for the loans. *Id.* at 6. Cashcall "supplies funds for the loans," bears "the risk of loss on the loans," and has "agreed to indemnify Western Sky for any liability associated with the business scheme." *Id.* at 6–7. As a result, "[a]fter detailed review of [their] business scheme," New Hampshire concluded that "Western Sky is nothing more than a front to enable CashCall to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its

[5] *In re Cashcall, Inc.*, Case No. 12-308 (N.H. Banking Dept. June 4, 2013), *available at* http://1.usa.gov/1LNdVzi.

deceptive business practices from prosecution by state and federal regulators." *Id.* at 5.[6]

2. The plaintiffs' loans. The three plaintiffs all live in Virginia, all obtained a loan from Western Sky Financial through the Internet in 2012 shortly before it halted its lending operation, and all were subject to a series of unlawful collection actions by one of Western Sky's collection-agent affiliates, Delbert Services, after it was assigned responsibility for collecting on the loans in late 2013. JA10–19. In Virginia, unlicensed lenders like Western Sky are prohibited from making loans that impose an annual interest rate higher than 12%, *see* Va. Code § 6.2-303, but here, Western Sky's loans came with triple-digit interest rates—exponentially higher than what is allowed under state law.

Both James Hayes and Debera Grant obtained loans from Western Sky in August 2012. JA152; JA159. For both loans, Western Sky promoted a loan amount

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[6] At least seven other states—Nevada, Maryland, Colorado, Massachusetts, Illinois, Oregon, and Washington—have issued similar cease-and-desist orders against the Western Sky-and-affiliates operation. *See In re CashCall, Inc.*, DFI No. C-11-0701-14-FO1 (Wash. Dep't Fin. Insts. May 30, 2014), *available at* http://1.usa.gov/1BrLW2Q; *In re Western Sky Fin., LLC*, (Nev. Dept. Bus. & Indus. June 28, 2013), *available at* http://bit.ly/1RrcASN; *Colorado ex rel. Struthers v. Western Sky Fin., LLC,* No. 11-cv-638, 2013 WL 9670692, at *1 (Colo. Dist. Ct. Apr. 15, 2013); *In re CashCall, Inc. & WS Funding, LLC*, No. 2013-010 (Mass. Comm'r Banks & Small Loan Licensing Apr. 4, 2013), *available at* http://1.usa.gov/1JXpCVO; *In re Western Sky Fin., LLC*, No. 13 CC 265 (Ill. Dep't Fin. & Prof'l Regulation Mar. 8, 2013), *available at* http://bit.ly/1clA4Zt; *In re Western Sky Fin., LLC*, No. I-12-0039 (Or. Dep't Consumer & Bus. Servs. Dec. 13, 2012), *available at* http://bit.ly/1QdbBTB; *Maryland Comm'r Fin. Regulation v. Western Sky Fin., LLC*, No. 11-cv-00735 (D. Md. Mar. 18, 2011).

of $2,600, but when the loan was finalized, the company immediately took $75 off the top as a "Prepaid Finance Charge/Origination Fee." JA153; JA160. Interest was nonetheless compounded on the total amount ($2,600) at an annual percentage rate of 139.12%, and Western Sky required both Mr. Hayes and Ms. Grant to make monthly payments of $294.46 over the life of the repayment plan—a total of four years. JA152–53; JA159–60. In real dollar amounts, for a loan of $2,525, Western Sky charged Mr. Hayes and Ms. Grant approximately $14,000—more than five times the amount borrowed—including around $11,500 in "finance charge[s]." JA152; JA159.

Herbert White's loan, though smaller in dollar amount, involved even worse terms. Promoted at $1,500, once Mr. White accepted the loan Western Sky took a full third—$500—directly off the top as its finance charge/origination fee. JA167. It also imposed an effective APR of 233.84% and a repayment plan that required two years of $198.19 monthly payments. JA166–67. Ultimately, in exchange for a true-dollar loan of $1,000, Mr. White would owe $4,818.14—$3,818.64 of which was labeled a "finance charge." JA166.

3. Delbert—one of Western Sky's constellation of debt-collection affiliates—goes after the plaintiffs. One might have thought that Western Sky's demise would mark the end of this particular tribal-lending experiment. But well after Western Sky shut down, its debt-collection affiliates continue to take

monthly installment payments from consumers' bank accounts and pursue other methods of collecting money from consumers.[7] The collection affiliate at issue here, Delbert Services, is neither owned nor operated by a tribe or tribal entity. JA12; JA226; JA266. Instead, it plays the role of third-party debt collector in Western Sky's lending scheme. *See* JA227.

Shortly after Western Sky agreed to provide loans to the plaintiffs, it sold their loans, within a matter of days, to its "holding company," WS Funding. JA200–01. Although the loans made a brief stop with WS Funding, they were then almost immediately turned over to CashCall—WS Funding's "loan servicer." JA223. Here, that happened on the same day that WS Funding allegedly "purchased" them. JA223–24. Often, CashCall is the lone collection entity at the bottom of this lending pyramid, but in many cases, WS Funding takes CashCall off the account and transfers ownership of the consumer's loan to an entity called Consumer Loan Trust. JA223–24. Consumer Loan Trust then engages a different collection agent, Delbert Services, to "service" the loan. JA223–24. In this case, WS Funding transferred the consumers' loans to Consumer Loan Trust, which then engaged Delbert to collect on them. JA223–24.

Once Delbert assumed responsibility for the loans, it engaged in a pattern of harassing and unlawful debt-collection conduct in an effort to extract money from

[7] *See* CFPB Sues CashCall for Illegal Online Loan Servicing (Dec. 16, 2013), http://1.usa.gov/Jx8H0H.

the plaintiffs. It sent collection notices demanding payment of the debt but omitted from the notice the name of the creditor to whom the debt was owed. *See* JA13. And after both Mr. Hayes and Ms. Grant disputed Delbert's claim of money owed, it continued to correspond with them without disclosing that it was a debt collector. JA13–14. Delbert also launched a collection campaign via telephone, using an automatic dialing system to call Mr. Hayes and Mr. White repeatedly—multiple times a week and, on some days, multiple times a day—leaving pre-recorded voicemails when they did not answer—all despite the fact that these consumers never consented to being called. JA14–15.

4. Based on the unlawful collection practices, the consumers sue. In an effort to curtail Delbert's unlawful conduct in their own cases, the plaintiffs brought a putative class action against Delbert, alleging that Delbert had consistently violated the Fair Debt Collection Practices Act and the Telephone Consumer Protection Act by, among other things, sending deceptive collection demands, omitting statutorily-required notices, and making automated telephone calls to consumers without obtaining their consent. JA37. They also sought injunctive and declaratory relief against Delbert's effort to leverage Western Sky's dubious claim of tribal sovereign immunity and its use of tribal forum-selection provisions to eliminate liability under federal or state law. JA39–40.

5. Western Sky and its affiliates attempt to shield their collection practices from scrutiny. Almost immediately, Delbert moved to force the case into some type of tribal forum, advancing a cascade of arguments based on the Western Sky Loan Agreement.

First, Delbert argued that the Loan Agreement's forum-selection clause, coupled with its choice-of-law provision, required that "every aspect of this case" be sent to the "Cheyenne River Sioux Tribal Court," for resolution exclusively under "the laws and jurisdiction of the Cheyenne River Sioux Tribe." Dkt. No. 26 at 1–2. Both of these clauses are set out, in relevant part, here:

> **This Loan Agreement is subject to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation.** By executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.

JA68.

> **GOVERNING LAW.** This Agreement is governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe. We do not have a presence in South Dakota or any other states of the United States. Neither this Agreement nor lender is subject to the laws of any state of the United States of America. . . . You also expressly agree that this Agreement shall be subject to and construed in accordance only with the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law applies to this Agreement.

JA70.

But Delbert had a problem (the first of many). The clauses are silent on whether they reach a third-party entity like Delbert, and another provision in the Loan Agreement defined the terms "'[w]e,' 'us,' 'our,' and 'Lender'" to mean "Western Sky Financial, LLC . . . and any subsequent holder of this note." JA264. Read literally, that definition did not include Delbert, which is not a "subsequent holder" of the Note. JA265. So Delbert argued that that the plaintiffs had "agreed that in-court disputes about their loans would be brought in tribal court," and pointed to the part of the forum-selection clause that said each consumer "consented to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court." Dkt. No. 26 at 10–11.

Second, Delbert argued that, even if the forum-selection clause was unenforceable, the "doctrine of tribal exhaustion" required the case to be sent to the Cheyenne River Sioux Tribal Court. *Id.* at 18–19. Delbert admitted that the consumers here "did not physically enter the designated jurisdiction." Dkt. No. 31 at 6. But it pointed to another provision in the Loan Agreement forcing the consumers to pretend that they had executed the agreement as though physically present on tribal land:

> You further agree that you have executed the Loan Agreement as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation . . . and that this Loan Agreement is fully performed within the exterior boundaries of the Cheyenne River Indian Reservation[.]

JA52. Because, in Delbert's view, "the Reservation [wa]s the place of contracting," the tribal court had "jurisdiction over all disputes over the Loan Agreement, including disputes over whether Delbert serviced those agreements in accord with the Agreements and governing law." Dkt. No. 26 at 21.

Third, assuming (1) the forum-selection clause was invalid and (2) tribal exhaustion was a nonstarter, Delbert argued that Western Sky's tribal-arbitration clause required the parties to arbitrate all of their claims.

The system contemplated by Western Sky's arbitration agreement has been called a "procedural nightmare," lacking in any ability to ensure the "orderly administration of justice." *Heldt v. Payday Fin., LLC*, 12 F. Supp. 3d 1170, 1192 (D.S.D. 2014). The agreement contains multiple conflicting, ambiguous, or downright impossible sections, including a requirement that any dispute be resolved under a set of rules—the Cheyenne River Sioux Tribal Nation "consumer dispute rules"—and before an arbitrator who must be an "authorized representative" of the Tribe, neither of which exist. *Jackson*, 764 F.3d at 779.

In addition, the agreement seeks to displace state and federal law. It expressly disclaims application of all state and federal law, presumably including the Federal Arbitration Act itself, stating (in all caps):

> THIS ARBITRATION PROVISION IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED

> STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE CHEYENNE RIVER SIOUX TRIBE.

JA156; *id.* at 154 (stating that "no United States state or federal law applies to this Agreement"). It also expressly requires that any dispute "will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement." JA155. And it mandates that "[t]he Arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement." JA156.

In response to court decisions invaliding the agreement, Western Sky added a single reference to the possibility that AAA or JAMS may formally *administer* the arbitration: "Regardless of who demands arbitration, you shall have the right to select any of the following arbitration organizations to administer the arbitration: [the AAA or JAMS] or an arbitration organization agreed upon by you and the other parties to the Dispute." JA155. But, at the same time, the agreement limits the AAA's or JAMS's role, providing that the agreement may be governed by those organizations' rules only "to the extent that those rules and procedures do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate, including the limitations on the Arbitrator below." JA155.

As discussed in more detail below, multiple federal courts, including a recent panel of this Court, have evaluated similar or identical versions of Western Sky's tribal-arbitration agreement and have doubted that it provides any meaningful dispute-resolution forum at all. *See, e.g.*, *Moses*, 781 F.3d at 67; *Jackson*, 764 F.3d at 779. The Tribe itself has stated that it does not authorize anyone to conduct arbitrations, and the Tribe has no consumer dispute rules. *See Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303, 1309 (S.D. Fla. 2013). In support of its effort to compel arbitration, however, Delbert tried to walk back the most obviously defective features of the Western Sky agreement. It argued that, assuming that actual tribal arbitration was unavailable, the agreement allowed a consumer to "replace arbitration before a tribal 'representative' under the tribe's 'consumer dispute rules' with arbitration before [AAA or JAMS]." Dkt. No. 26 at 26. This way, Delbert argued, the consumer need not arbitrate within its sham system—with no arbitrators and no rules—but instead "before neutral, reputable arbitration organizations . . . under the consumer dispute rules of those organizations." *Id.*

6. The district court's decision. The district court refused to allow Delbert to enforce Western Sky's forum-selection clause and rejected its bid to dismiss the case based on tribal exhaustion. JA262.

On Delbert's forum-selection claim, the court held that "[t]he plain language of the forum-selection clause does not reach Delbert" because, as a "third-party debt collector," Delbert is not a "subsequent holder of this Note." JA265.

As for Delbert's tribal-exhaustion theory, the court determined that the doctrine—which contains only two limited exceptions for non-tribal members—did not apply "for three reasons." JA266. *First*, Delbert is "not a tribal- or Indian-owned business"—a point Delbert conceded—which meant that it did not qualify as an arm or member of a tribe. JA266. *Second*, Delbert's collection activity—the conduct that gave rise to the FDCPA and TCPA violations—"did not occur on the . . . reservation," because the dunning letters Delbert sent originated from Delbert's office in Las Vegas and were received by the consumers in Virginia. JA267. *Third*, nothing about the dispute "threatens or directly affects the integrity, security, or welfare of the [Tribe]." JA267. Quite the opposite: "The conduct at issue in this action did not involve an Indian-owned entity, did not occur on the . . . reservation, and did not threaten the integrity of the tribe." JA267.

The district court did, however, enforce Western Sky's tribal-arbitration agreement. It first agreed that the language requiring arbitration by an "authorized representative" of the Tribe in accordance with the Tribe's "consumer dispute rules" constituted a "double failure" because "the [Tribe] did not appoint authorized arbitrators nor did it have consumer dispute rules." JA267–68 (internal

quotation marks omitted). The court noted that this language "has proved problematic in cases involving similar loan agreements for internet lenders" and understood that it created an "illusory" dispute-resolution mechanism. JA267–68. Nevertheless, the court believed that the tribal-arbitration agreement could be "save[d]" on the basis of its lone reference to "well-recognized arbitration organizations and their procedures." JA268. It said no more about why this would save the agreement, or how, under either traditional contract principles or the Federal Arbitration Act itself, the reference to AAA or JAMS could square with the rest of the agreement's terms and requirements. But the court held nonetheless that the "arbitration agreement controls the present dispute." JA269. This appeal followed.

SUMMARY OF ARGUMENT

I. Fifteen years ago—as arbitration clauses were becoming increasingly common in consumer and employment contracts—this Court scoffed at the idea that, under the FAA, a party could design and enforce a dispute-resolution mechanism that operated as a "sham system unworthy even of the name arbitration." *Hooters*, 173 F.3d at 940. "Arbitration," this Court wrote, is "a system whereby disputes are fairly resolved by an impartial third party," under a set of fixed, determinate, and fair rules. *Id.* An arbitration agreement that "warp[s]" this system—by discarding any guarantee of an impartial decisionmaker and

promulgating "egregiously unfair" rules—is no agreement at all, and cannot be enforced under the FAA. *Id.* at 940–41 & n.2.

This case is *Hooters* redux, only worse. The Western Sky arbitration agreement suffers from an array of defects: It requires arbitration before an "authorized representative" of the Cheyenne River Sioux Tribe, a term that is not defined and cannot be satisfied; it requires arbitration under the Tribe's "consumer dispute rules," which, according to numerous courts and the company itself, "do not exist"; and it expressly forbids an arbitrator from applying any U.S. federal or state law in the arbitration proceeding—a clear (and unlawful) prospective waiver of relief under federal statutory causes of action. *See American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (arbitration agreements that "forbid the assertion of certain statutory rights" cannot be enforced under the FAA). Western Sky's "very atypical and carefully crafted" agreement is "designed" for one overarching purpose: "[T]o lull the loan customer into believing that" any dispute would be resolved "under the aegis of a public body"—the Cheyenne River Sioux Tribal Nation—when in reality the arbitration contract is nothing more than an illusory attempt to escape federal and state lending laws. *Jackson*, 764 F.3d at 781.

Both the federal government and several courts have agreed: Western Sky's illusory dispute-resolution system is unconscionable. Western Sky has rigged the loan process to ensure that consumers are unaware when they take out a loan that

the dispute-resolution mechanism is a sham. When consumers first apply for a Western Sky loan, they are not allowed to see the arbitration agreement until after they provide highly sensitive personal and financial data and learn that their loan has been accepted. And, when the agreement is finally presented, it's a boilerplate, non-negotiable document rife with confusing, inconsistent, and downright impossible terms. *Jackson*, 764 F.3d at 778. Worse, the contract promises one thing—fair and impartial arbitration under the watchful eye of a sovereign Tribal Nation—and delivers something else entirely—a sham system that "deprives consumers of a fair opportunity to assert claims and defenses against" Western Sky and its debt collectors. *See* Br. for the Fed. Trade Comm'n as Amicus Curiae, *Jackson v. Payday Fin. LLC*, 764 F.3d 765 (7th Cir.) (No. 12-2617), 2013 WL 5306136, at *31.

Western Sky's sham system has no business being enforced. The Seventh Circuit in *Jackson* and the Eleventh Circuit in *Inetianbor* have both condemned (and refused to enforce) Western Sky's scam.

II. After courts began pulling the plug on Western Sky's scheme, the company tweaked its agreement by adding the option that the sham system could be administered by a legitimate arbitration provider. But it changed nothing about the system itself—the agreement still requires arbitration conducted by a nonexistent "authorized representative" of the Tribe, under still-imaginary Tribal

consumer dispute rules, and still forbids any arbitrator from applying federal or state law. The only difference is that this whole charade may now be formally administered by a legitimate arbitration provider.

This is pure window-dressing. It is a "basic precept" of arbitration law that any arbitration proceeding must follow the rules of the contract, regardless of who administers the arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010). This precept dooms Western Sky's bid to legitimatize its scam because any arbitration administrator—even a legitimate one—would be required to administer the dispute-resolution system set out in the contract, and the system set out in the contract is a sham. *See id.* at 683. A legitimate administrator cannot save what is, and remains, a sham dispute-resolution system, designed with one goal in mind: "to prey on financially distressed consumers," while "shielding" Western Sky and its affiliates from state and federal law. *Moses*, 781 F.3d at 94 (Davis, J., concurring in the judgment in part and dissenting in part).

Parties that agree to arbitration "agree to trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 303 (4th Cir. 2002) (internal quotation marks omitted). "They do not agree to forego" entirely "their right to have their dispute fairly resolved." *Id.* But under Western Sky's tribal-arbitration agreement, fair resolution before an

unbiased, neutral decisionmaker is a pipe dream. The FAA requires that courts police, not reward, a company's use of an illegal arbitration agreement to gain an impermissible advantage. Because the agreement here does just that, it cannot be enforced.

STANDARD OF REVIEW

This Court reviews "a district court order compelling arbitration de novo." *Seney v. Rent-A-Center, Inc.*, 738 F.3d 631, 633 (4th Cir. 2013); *see also Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F.3d 200, 204 (4th Cir. 2004).

ARGUMENT

I. Western Sky's tribal-arbitration agreement is unenforceable.

A. Western Sky's arbitration agreement establishes a sham dispute-resolution system.

Western Sky's tribal-arbitration contract requires an arbitration process that does not exist. The contract provides that arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules." JA155. But while the contract promises "a process conducted under the watchful eye of a legitimate governing tribal body," it delivers no such thing, for a proceeding subject to tribal oversight "simply is not a possibility." *Jackson*, 764 F.3d at 779. There is no "representative" of the tribe "authorized" to conduct arbitration, nor are there any consumer dispute rules—facts that Delbert essentially conceded below. *See* Dkt. No. 26 at 25–

26; Dkt. No. 31 at 14–15. As several courts have already concluded, the arbitration process the contract requires is a "sham system unworthy even of the name arbitration," *Hooters*, 173 F.3d at 940, and is unenforceable. *See, e.g., Jackson*, 764 F.3d at 779; *Inetianbor*, 768 F.3d at 1354.

1. *There are no legitimate arbitrators who are authorized representatives of the Tribe.* At this point in the ongoing Western Sky/CashCall/Delbert tribal-arbitration saga, it is accepted gospel that there are no "authorized representatives" of the Tribe who conduct arbitrations. In case after case, including this one, Western Sky and its affiliates have abandoned all efforts to show that the Tribe has any mechanism—let alone a legitimate, unbiased one—for selecting "authorized representatives" to act as arbitrators. *See, e.g.*, *Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303, 1309 (S.D. Fla. 2013) ("CashCall has . . . failed—despite numerous opportunities—to show that the Tribe is available through an authorized representative to conduct arbitrations."); *Jackson*, 764 F.3d at 777 ("The record clearly establishes . . . [that the] Tribe 'does not authorize Arbitration,'" and "'does not involve itself in the hiring of arbitrators.'"); Dkt. 26 at 25–26 (making no effort to show how an arbitration could occur before an "authorized representative" of the Tribe).

In fact, the Tribe has publicly refused to play any role whatsoever in this arbitration scheme. As one Tribal official put it, the Tribal "governing authority

does not authorize Arbitration" and the Tribal Court "does not involve itself in the hiring of an arbitrator." *Jackson*, 764 F.3d at 770 n.10 (quoting letters from tribal Judge Mona R. Demery). Indeed, Western Sky and its affiliates have conceded that the "authorized representative" of the Tribe promised by the contract is purely a fiction. *See Williams v. CashCall, Inc.*, — F. Supp. 3d —, 2015 WL 1219605, at *4 (E.D. Wis. Mar. 17, 2015) ("CashCall acknowledges that the arbitral forum and associated procedural rules set forth in Ms. Walker's loan agreement are not available.").

Even if the Tribe did authorize representatives to serve as arbitrators, the contract is designed "to ensure partiality" in the selection process. *Jackson*, 764 F.3d at 779. Although the agreement requires an "authorized representative" of the Tribe to conduct any arbitration, it fails to define what this term means—leaving Western Sky and its affiliates free to rig the game. How might that happen? In *Hooters*, this Court condemned an agreement that gave the company "unrestricted control" over the arbitrator selection process by requiring selection "from a list of arbitrators created exclusively by Hooters." 173 F.3d at 939. Under that arrangement, the company was "free to devise lists of . . . arbitrators who have existing relationships, financial or familial, with Hooters and its management." *Id.* at 939. As this Court put it, an arbitration agreement "that is crafted to ensure a

biased decisionmaker" has no other "possible purpose" than to "undermine the neutrality of the proceeding." *Id.* at 938.

Western Sky's agreement here is worse. It allows the company to cull an arbitrator from the Tribe, without placing any meaningful limits on who that arbitrator can be, a result that "violates the most fundamental aspect of justice, namely an impartial decisionmaker." *Id.* at 939 (quoting professor Dennis Nolan). Case in point: In one of the only reported arbitrations stemming from a Western Sky tribal-arbitration agreement, one consumer, Abraham Inetianbor, was forced to begin an arbitration under the agreement. *See Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303, 1305 (S.D. Fla. 2013). The result was a mockery. On June 21, 2013, the parties—a *pro se* Mr. Inetianbor and (a represented) CashCall—"attended a preliminary arbitration hearing" before the supposed arbitrator—Mr. Chasing Hawk. *Id.* at 1308. At the hearing, Mr. Inetianbor asked Mr. Chasing Hawk how he was selected "to be an arbitrator." *Id.* Mr. Chasing Hawk's reply: "The Western Dakota owner." *Id.* When Mr. Inetianbor pressed again, asking "[s]o the owner of Western Sky asked you to be an arbitrator for this case?" Mr. Chasing Hawk responded, "Yes because I've been on the Tribal Council for 20 years." *Id.* It gets worse. Mr. Chasing Hawk also confirmed that his daughter worked at Western Sky, and Mr. Chasing Hawk admitted that he was not a lawyer, had no formal training as an arbitrator, and was selected by Martin Webb

(Western Sky's owner) solely because he was a Tribal Elder. *Jackson*, 764 F.3d at 771.

To sum up: When CashCall was sued by a Florida consumer for violating federal and state debt collection laws, it forced the consumer into an arbitration conducted by a lone "arbitrator" (1) who was "personally selected by Martin Webb, the man who owns and operates [Western Sky itself]," (2) who "den[ied] any preexisting relationship with either party in the case," yet then admitted that "his daughter worked for" Western Sky, (3) who "is not an attorney and has not been admitted to practice law in either South Dakota or the court of the [Tribe]," and (4) did not have "any training as an arbitrator and the sole basis of his selection was because he was a Tribal Elder." *Jackson*, 764 F.3d at 770–71 (internal quotation marks omitted).

Reviewing Mr. Inetianbor's proceeding, courts have had no difficulty seeing through the scam. The arbitrator selection was "a purely subjective selection by only one of the parties" and was "not methodized in any reasonable sense of the word." *Jackson*, 764 F.3d at 771. "No arbitration could ever stand" under this process, nor "could it satisfy the concept of a method of arbitration available to both parties." *Id.*

Truth to tell, it could have been even worse. There is nothing in this agreement that would prevent Delbert from selecting Martin Webb as an

arbitrator. Webb is a member of the Tribe. He is also the owner of Western Sky. If all that's required is longstanding membership in the Tribe, *i.e.*, "tribal elder" status, then what's to stop him from qualifying? *Cf. Hooters*, 173 F.3d at 939 ("In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list.").

* * * *

More than forty years ago, the Supreme Court cautioned that "[a]ny tribunal permitted by law to try cases and controversies not only must be unbiased but must also avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 148 (1968). The FAA does not "authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another." *Id.* Because Western Sky's agreement requires arbitration in front of a lone tribal arbitrator, free from any guarantee of independence or neutrality, it fails this most basic requirement. By establishing a dispute-resolution system that, on its best day, forces a consumer to litigate before a biased tribal elder, Western Sky and its affiliates have breached their obligations under the FAA.

2. *There are no tribal consumer dispute rules.* The absence of any neutral decisionmaker is not the only structural problem with this "arbitration" agreement. It also requires any arbitration to proceed under the Tribe's "consumer

dispute rules"—which, by our count, at least six courts have held "do not exist." *See Inetianbor*, 768 F.3d at 1354; *Inetianbor*, 962 F. Supp. 2d at 1309; *Jackson*, 764 F.3d at 776; *Parnell v. Western Sky Financial LLC*, No. 14-cv-00024, at 75 (N.D. Ga. April 28, 2014); *Williams*, 2015 WL 1219605, at *4; *Heldt*, 12 F. Supp. 3d at 1190. And, as with the lack of an authorized arbitrator, Western Sky-affiliated companies have now conceded the point. *See, e.g.*, *Williams*, 2015 WL 1219605, at *4 ("CashCall acknowledges that the arbitral forum and associated procedural rules set forth in Ms. Walker's loan agreement are not available."); *Inetianbor*, 962 F. Supp. 2d at 1309 ("CashCall conceded that, while the Tribe has rules concerning consumer relations—e.g., usury statutes—it does not have any consumer dispute rules.").

An arbitration agreement that specifies a set of governing rules that do not exist or cannot be known is no agreement at all. As the Seventh Circuit explained in *Jackson*, "it hardly frustrates the FAA" to refuse enforcement of an arbitration agreement that "contemplates a proceeding for which the entity responsible for conducting the proceeding has no rules, guidelines, or guarantees of fairness." 764 F.3d at 779. Were it otherwise, a party could "manipulate what [was] purported to be a fair arbitration process" by selecting a "proceeding according to nonexistent rules" and then stacking the deck with a partial arbitrator. *Id.* at 781.

That's why courts across the country—including this one—have declined to enforce arbitration agreements when the arbitration rules that supposedly apply

are "unascertainable" because they can change at any time. *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 759 (7th Cir. 2001); *see Floss v. Ryan's Family Steak Houses, Inc.*, 2011 F.3d 306, 315–16 (6th Cir. 2000); *Hooters*, 173 F.3d at 939. That there are "no rules, guidelines, or guarantees of fairness" here means, simply, that there "was no prospect 'of a meaningful and fairly conducted arbitration.'" *Jackson*, 764 F.3d at 779.

The agreement's fictional rules create another problem: By selecting rules that don't exist, and by attempting to enforce these rules, knowing they are a sham, Western Sky and its affiliates have breached their contractual duty of good faith and fair dealing. *See Restatement (Second) of Contracts* § 205 (1981). In *Hooters*, this Court considered a specified set of rules that were unknowable—they could be unilaterally and silently changed at any point, 173 F.3d at 939—and determined that Hooters acted in bad faith by evading "the spirit of the bargain" and abusing its "power to specify terms." *Id.* at 940 (quoting *Restatement (Second) of Contracts § 205* cmt. a). When a party "agree[s] to settle disputes in arbitration," this Court explained, she agrees to the "prompt and economical resolution of her claims" and can "legitimately expect that arbitration would not entail procedures so wholly one-sided as to present a stacked deck." *Hooters*, 173 F.3d at 940. But where an agreement's (unilaterally-imposed) rules and procedures fail this basic standard, the "faithfulness to an agreed common purpose and consistency with the justified

expectations of the other party" is frustrated. *Id.* (quoting *Restatement (Second) of Contracts § 205* cmt. a). In other words, a consumer who has bargained for a specific kind of arbitration but gets a sham is entitled to "cancel the agreement." *Id.* at 940.[8]

Western Sky's bait-and-switch here comes nowhere close to meeting its duty of good faith and fair dealing. The consumers "did not agree to arbitration under any and all circumstances, but only to arbitration under carefully controlled circumstances—circumstances that never existed." *Jackson*, 764 F.3d at 781. Instead of selecting established and ascertainable arbitration rules, it specified the Tribe's "consumer dispute rules" that do not exist—a scenario that, predictably, handed Western Sky and its affiliates every opportunity to stack the deck against the consumer. And Western Sky and its constellation of debt collectors have doubled down on this strategy. The companies continue to bind consumers to the non-existent tribal "consumer dispute rules" even after admitting their nonexistence. *Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303, 1309 (S.D. Fla. 2013). "By promulgating this system," Western Sky and its affiliates have "so

[8] To be sure, Hooters breached its duty of good faith in part by "failing to perform its contractual duty" to promulgate fair rules governing the arbitration procedure. 173 F.3d at 940. But the "covenant of good faith" is "implied in every contract," and imposes a broad set of obligations governing both a party's "performance" and "enforcement" of the contract. *Id.* The lesson from *Hooters* is that a party cannot induce another to agree for the "prompt and economical resolution" of claims through a fair-minded and unbiased system and then pull the rug out from underneath that agreement and those expectations. *Id.*

skewed the process in [their] favor that [borrowers] ha[ve] been denied arbitration in any meaningful sense of the word." *Hooters*, 173 F.3d at 941. "To uphold the promulgation of this aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution." *Id.* This Court should not do so.

3. Delbert's bid to empower a (non-existent) arbitrator to decide whether the agreement is enforceable is absurd. Delbert argued before the district court that any challenges to its sham arbitration process must be arbitrated under that very same process. *See* Dkt. No. 26 at 28. This argument is absurd.

The arbitration contract provides that disputes about the "validity, enforceability, or scope" of the contract itself shall be arbitrated under the same terms that govern other disputes—that is, they must be arbitrated by an authorized representative of the Tribe (which doesn't authorize representatives to arbitrate) and under the Tribe's nonexistent consumer dispute rules. JA155. But this mandate is, of course, impossible to fulfill. A delegation clause cannot be used to avoid claims entirely. But that is precisely what Delbert would have here: In its view, the threshold issue of whether the arbitration process provided by the contract even exists must be decided by the same sham system that does not provide arbitration in the first place. This Court should not allow such a charade.

B. Western Sky's sham system requires consumers to prospectively waive their substantive federal statutory rights.

Thirty years ago, the Supreme Court first observed that an arbitration agreement could not be enforced if, by its terms, it "prospective[ly] waive[d]" a "party's right to pursue statutory remedies." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (warning that "we would have little hesitation in condemning" such an agreement). This oft-repeated lesson boils down to the following: An arbitration agreement that "forbid[s] the assertion of certain statutory rights" cannot be enforced under the FAA. *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (the FAA's "effective vindication" exception to the enforceability of arbitration agreements "would certainly cover" this type of arbitration agreement); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) ("[A] substantive waiver of federally protected civil rights will not be upheld."); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 289 (4th Cir. 2007) ("While statutory claims are arbitrable unless Congress has specifically provided otherwise, agreements to arbitrate statutory claims may nonetheless be unenforceable if the terms of the agreement prevent the plaintiff from effectively vindicating his statutory rights."). The agreement here straightforwardly violates this rule.

For starters, as we have already explained, the arbitration process is a sham—it would be impossible to obtain relief for any federal or state law claims in

Western Sky's tribal-arbitration system because it would be impossible to arbitrate *any* claims in that system. It simply doesn't exist. That alone justifies invalidating Western Sky's agreement—an agreement that "waive[s] access to a neutral forum" would "surely . . . violate the law" because it leaves a party "at the mercy of the [company's] good faith." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997); *see also Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) (requiring that, to be enforceable, an arbitration contract must provide "an adequate and accessible substitute forum in which to resolve . . . statutory rights").

But, even if arbitration in accordance with the contract were possible, the agreement, as written, prohibits a consumer from arbitrating any federal or state law claims. In a section (within the arbitration agreement) titled "**Applicable Law and Judicial Review**," Western Sky's agreement states that it "SHALL BE GOVERNED BY THE LAW OF THE CHEYENNE RIVER SIOUX TRIBE." JA156. It goes on to require that "[t]he arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement," while prohibiting any arbitrator from applying "any law other than the law of the Cheyenne River Sioux Tribe of Indians." JA162–63. Were there any doubt, the agreement also contains a separate clause that asserts that "no United States state or federal law" will apply. JA161. In short, the agreement clearly, and repeatedly,

prohibits any federal and state law from applying in an arbitration—an "as written" prospective waiver that violates *Mitsubishi Motors* and the FAA itself. *See Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005) (arbitration provision "unenforceable as written" where it "purport[s] to limit" substantive statutory rights).

Indeed, courts facing much less have "not hesitate[d]," *Mitsubishi Motors*, 473 U.S. at 637 n.19, to strike down the offending agreement. In *Graham Oil Co. v. ARCO Prods.*, 43 F.3d 1244 (9th Cir. 1994), for example, the court refused to enforce an arbitration agreement that "purport[ed] to forfeit certain important statutorily-mandated rights or benefits." *Id.* at 1247. There, the arbitration agreement contained a much more limited prospective waiver of statutory rights—it expressly waived a party's right to seek certain damages and fees under federal law and shortened the limitations period for bringing a claim—yet the court held that the arbitration agreement "violate[d] federal law" because it compelled a party "to surrender important statutorily-mandated rights." *Id.* at 1248; *see also Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir. 2002) ("It is certainly possible that the existence of large arbitration costs could preclude a litigant from effectively vindicating her federal statutory rights in the arbitral forum." (internal quotation marks and alteration omitted)); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d

1054, 1062 (11th Cir. 1998) (invalidating arbitration contract that permitted the arbitrator to award only contractual damages, not statutory damages).

Western Sky's agreement—a document that categorically waives all federal and state statutory rights and remedies—must likewise be invalidated. "At a minimum, statutory rights include both a substantive protection *and* access to a neutral forum in which to enforce those protections." *Cole*, 105 F.3d at 1482. The agreement here jettisons both of these requirements. As the Seventh Circuit has explained, the Western Sky contract is "designed to lull the loan customer into believing that" any dispute would be resolved "under the aegis of a public body," the Cheyenne River Sioux Tribal Nation, when, in fact, "the intrusion" of the Tribe into the arbitration contract is nothing more than "an attempt to escape" federal and state lending laws. *Jackson*, 764 F.3d at 770, 781 (internal quotation marks omitted). Judges of this Court have echoed this concern. *See, e.g.*, *Moses*, 781 F.3d at 67 ("Courts that have considered loan agreements similar to the one at issue here have found that the . . . arbitration procedure specified is a sham from stem to stern." (internal quotation marks omitted)); *id.* at 94 (Davis, J., concurring in the judgment in part and dissenting in part). Under the agreement, no party can bring, let alone obtain relief for, a federal or state statutory claim, and no arbitrator hearing such a claim would be empowered under this agreement to decide it or award statutory relief. That is the definition of an agreement that "forbid[s] the

assertion of certain statutory rights," and it cannot be enforced under the FAA. *American Express*, 133 S. Ct. at 2310.

C. The agreement is unconscionable.

There is also little doubt that this arbitration agreement is unconscionable. In this Circuit, unconscionability "generally includes an absence of meaningful choice on the part of one of the parties"—what is frequently called procedural unconscionability—"together with contract terms which are unreasonably favorable to the other party"—what is often called substantive unconscionability. *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 292–93 (4th Cir. 1989) (approving of test set forth in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 455, 449 (D.C. Cir. 1965)); *see also Restatement (Second) of Contracts* § 208, cmt. d (1979) ("[G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms"). The contract here clearly meets this standard: Western Sky required borrowers to agree to its arbitration contract without modification, but only notified them of this requirement after the borrowers had already applied and been approved for a loan; the contract is replete with inconsistent, confusing, and flat-

out false terms; and it effectively deprives borrowers of the ability to bring claims against Western Sky or its affiliates.

Both the Federal Trade Commission and the Seventh Circuit have concluded that the arbitration contract is unconscionable. *See Jackson*, 764 F.3d at 778–79; Br. for the Fed. Trade Comm'n as Amicus Curiae ("FTC Amicus"), *Jackson v. Payday Fin. LLC*, 764 F.3d 765 (7th Cir.) (No. 12-2617), 2013 WL 5306136, at *25-*32. This Court should do the same.

1. *The agreement is procedurally unconscionable.* As the FTC has explained, this arbitration contract is a "boilerplate" contract of adhesion—borrowers must sign the contract to receive a loan, and they have no ability to modify its terms. FTC Amicus, 2013 WL 5306136, at *27. Moreover, borrowers don't even see the arbitration provisions "until *after* they apply for the loans"—that is, after they "submit loan applications . . . containing their social security numbers, bank account numbers, and other personal information" to Western Sky—"and learn that their loans have been approved." *Id.* at *22, *27 & nn.17, 20 (emphasis added). "By this point," borrowers "will have supplied [Western Sky] with highly sensitive personal and financial data and would understandably be wary of starting the process anew with another lender." *Id.* at *22 n.17. Thus, not only does Western Sky force all borrowers to sign the arbitration contract as a condition of receiving a loan, it waits to do so until borrowers have already invested so much in

their Western Sky application that they would be reluctant to switch to a different lender. Agreeing to arbitrate under these circumstances is not a meaningful choice.

But the procedural unconscionability of Western Sky's arbitration contract does not end there. As the Seventh Circuit explained in *Jackson*, several aspects of the contract itself demonstrate procedural unconscionability. *Jackson*, 764 F.3d at 778. First, although the contract requires arbitration "by an authorized representative" of the Cheyenne River Sioux Tribe "in accordance with its consumer dispute rules," JA162, there is no such representative, and there are no such rules. Therefore, it "was not possible for the Plaintiffs to ascertain the dispute-resolution processes and rules to which they were agreeing." *Jackson*, 764 F.3d at 778.

Second, the contract contains "inconsistent language," providing that the Cheyenne River Sioux Tribal Court has "sole subject matter and personal jurisdiction," JA152, but also requiring arbitration of all disputes, JA155. *Jackson*, 764 F.3d at 778 (internal quotation marks omitted). This conflict "made it difficult for borrowers to understand exactly what form of dispute resolution they were agreeing to." *Id.* (internal quotation marks and alterations omitted).

Finally, the contract repeatedly (and falsely) purports to be "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe," JA166, and contends that it is "governed" exclusively by "the laws of the" Tribe and "the

Indian Commerce Clause of the Constitution," JA154—an entirely "irrelevant constitutional provision" that grants Congress the power to regulate commerce with Indian tribes. *Jackson*, 764 F.3d at 778 (internal quotation marks omitted).

2. *The agreement is substantively unconscionable.* The Seventh Circuit also had no difficulty determining that because the "dispute-resolution mechanism" required by the arbitration contract is nothing more than "a sham and an illusion," the contract is substantively unconscionable. *Jackson*, 764 F.3d at 778–79 (internal quotation marks omitted). The contract assures borrowers that disputes will be resolved "under the watchful eye of a legitimate governing tribal body," and yet "a proceeding subject to such oversight simply is not a possibility." *Id.* at 779. "There simply [is] no prospect of a meaningful and fairly conducted arbitration" of borrowers' claims where the arbitrator is required to be a representative of a tribe that explicitly refuses to involve itself in arbitration, where the arbitration must be conducted under rules that do not exist, and where the contract explicitly prohibits arbitrators from applying state or federal law. *See id.* at 779 (internal quotation marks omitted).

To say the arbitration contract "unreasonably favor[s]" Western Sky would be an understatement. *See Carlson*, 883 F.2d at 292 (internal quotation marks omitted). In the words of the FTC, the whole purpose of the arbitration contract is to "depriv[e] consumers of a fair opportunity to assert claims and defenses against"

Western Sky. FTC Amicus, 2013 WL 5306136, at *31. Such a contract is unquestionably substantively unconscionable.

II. This Court should not salvage Western Sky's hopelessly flawed tribal-arbitration system by rewriting the agreement.

A. The reference to AAA and JAMS does not transform Western Sky's rigged process into a legitimate dispute-resolution system.

The district court agreed that the tribal arbitration required by the contract is a sham. The contract, the court explained, constituted a "double failure" because "the [Tribe] did not appoint authorized arbitrators nor did it have 'consumer dispute rules.'" JA268. Yet it nonetheless enforced the contract under the mistaken belief that it was somehow "save[d]" because it provides the option to have the sham arbitration administered by "well-recognized arbitration organizations and their procedures." JA268. That was error. A sham arbitration proceeding administered by a legitimate organization is still a sham.

To begin, an arbitration *administrator* is just that—an administrator. It "oversees and manages" the administrative aspects of arbitration. *See* Alan S. Gutterman, *Business Transactions Solutions* § 101:39 (2015) ("Such administration usually involves activities such as screening communications with the arbitrator, scheduling hearings, arranging for the filing and service of briefs and other documents, and collecting arbitrator compensation."); *see also* AAA Consumer Arbitration Rules, at 39 ("The Administrator's role is to manage the administrative

aspects of the arbitration."). But it does not supplant the agreement's requirements for or its limitations on the arbitration proceeding; an administrator must administer in accordance with the contract. *See Stolt-Nielsen*, 559 U.S. at 683; *Williams*, 2015 WL 1219605, at *5 ("Providing that an organization like the AAA or JAMS will administer an arbitration is not necessarily the same as providing that an arbitrator from that organization will conduct the arbitration.").[9]

Indeed, that rule comes directly from the FAA itself. Section 4 empowers a court to order the parties to arbitration only "in accordance with the terms of the agreement"—no more and no less. 9 U.S.C. § 4. And both an arbitration administrator and the arbitrator himself are similarly constrained by the agreement's terms and conditions. *See Stolt-Nielsen S.A.*, 559 U.S. at 683. To allow otherwise would undermine the "basic precept that arbitration is a matter of consent, not coercion." *Id.* at 681 (internal quotations omitted). "Whether

[9] The court in *Williams* was right about the distinction between an entity that administers an arbitration and one that conducts the arbitration. An arbitration is "conducted" by arbitrators themselves—a point Western Sky's agreement explicitly confirms, requiring that any arbitration "shall be conducted" by an "authorized representative" of the Tribe. 2015 WL 1219605, at *5; JA155. The court was wrong, however, to think that it could "solve th[e] problem" by simply rewriting the contract to allow for arbitration before the AAA or JAMS, under their consumer dispute rules, and conducted by one of their arbitrators. *Id.* That would defy the terms and conditions of the Western Sky agreement—something that is impermissible under both the contract itself and the FAA. *See Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 226 (4th Cir. 1994) ("Arbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated.").

enforcing an agreement to arbitrate or construing an arbitration clause," courts and arbitrators must—above all—"give effect to the contractual rights and expectations of the parties.'" *Id.* at 682 (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). That is why contractual requirements governing arbitration trump any rules or procedures the administrator would ordinarily apply. *See Choice Hotels Int'l, Inc. v. SM Prop. Mgmt., LLC*, 519 F.3d 200, 207 (4th Cir. 2008); *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831–32 (11th Cir. 1991); AAA Consumer Arbitration Rules R-1(c) ("The consumer and the business may agree to change these Rules."); JAMS Streamlined Arbitration Rules & Procedures R-2(a) (similar); JAMS Comprehensive Arbitration Rules & Procedures (similar).

What does this mean here? It means that the district court was not at liberty to simply ignore the agreement's mandatory limitations on both arbitrator and rules, which ensure that borrowers face a rigged dispute-resolution system in which to bring their claim. The district court ignored the fundamental principle of arbitration law—or, perhaps, just failed to read the contract. The court assumed that if AAA or JAMS administers an arbitration, it will be conducted by an arbitrator from AAA or JAMS, subject to the AAA or JAMS rules. *See* JA268. But that is not what the contract says. *First*, the agreement expressly provides that the arbitration "shall be conducted *by* the Cheyenne River Sioux Tribal Nation by an

authorized representative." JA162 (emphasis added). Considering identical language, the Eleventh Circuit held that there is "no other reasonable interpretation of the provision for arbitration 'by' the Tribe before an 'authorized representative' of the Tribe than one requiring some direct participation by the Tribe itself." *Inetianbor*, 768 F.3d at 1353.

The reference to AAA or JAMS rules does not alter this interpretation. The agreement states only that, if selected, the chosen arbitration organization's rules and procedures applicable to consumer disputes will apply only "*to the extent that those rules and procedures do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of the Agreement to Arbitrate*." JA162 (emphasis added). That is, the rules of the administrator apply only insofar as they have not been supplanted by the terms of the arbitration contract. And the "express terms" of the arbitration contract *require* "some direct participation by the Tribe itself." *Inetianbor*, 768 F.3d at 1353; *see also* JA162–63 (arbitration "*shall* be governed by the law of the Cheyenne River Sioux Tribe" and "*shall* be conducted . . . in accordance with [the Tribe's] consumer dispute rules" (emphasis added)); *see also* JA162 (providing that any "accommodation" for the consumer "*shall not* be construed in any way . . . to allow for the application of any law other than the law of the Cheyenne River Sioux Tribe" (emphasis added)).

By their terms, these provisions—ignored by the district court—apply to all arbitrations conducted under the contract. And they are mandatory. *See Daniel Int'l Corp. v. Occupational Safety & Health Review Comm'n*, 656 F.2d 925, 930 n.10 (4th Cir. 1981) (the word "shall" renders a provision "mandatory"); *see also Inetianbor*, 768 F.3d at 1352 ("[T]he only way to enforce the arbitration agreement 'in accordance with the terms of the agreement' is to compel arbitration before an authorized representative of the Tribe." (quoting 9 U.S.C. § 4)).

Parties may not, as the district court assumed, "choose arbitrators and dispute rules beyond those of the" Tribe simply by choosing AAA or JAMS to administer the arbitration. JA268. There can be no AAA or JAMS arbitrator, because the agreement does not allow it, and there can be no application of AAA or JAMS rules, because the agreement requires that a different set of rules applies. If that means the agreement is "unenforceable as written," then the end result is not that a court (or arbitration administrator) may "rewrite the arbitration clause" or "adhere to unwritten standards" in order to salvage it; it is that the agreement is unenforceable. *Murray*, 289 F.3d at 304–05. Although the FAA reflects a strong federal policy favoring arbitration, courts "will not elevate the federal policy above the intent of the parties, as determined by the objective meaning of the words used." *Inetianbor*, 768 F.3d at 1353 (internal quotations and citations omitted).

The arbitration contract in this case thus provides for an arbitration no different than the one the Seventh Circuit in *Jackson* held was "a sham from stem to stern." *Jackson*, 764 F.3d at 779. It merely allows a legitimate organization, like AAA or JAMS, to administer that sham arbitration. *See Parnell v. Western Sky Financial LLC*, No. 14-cv-00024, at 76 (N.D.Ga. April 28, 2014) ("The fact that the arbitration provision in the [contract] may allow the Parties to select the American Arbitration Association, JAMS, or another arbitration proceeding does not change" the unenforceability of the arbitration contract. "[T]he provision does not allow a choice of arbitrator—only a choice of an arbitration administrator.").

The parties' "recourse to well-recognized arbitration organizations" is therefore meaningless. JA268. If, as they are required to by law, AAA or JAMS attempts to conduct the arbitration according to the contract's requirements, they will find that no such arbitration can be conducted. *See infra*, at 24–33. But if they ignore the contract's express limitations—if they appoint their own arbitrator and apply their own rules—any decision they render would be void. *See Long John Silver's Restaurants, Inc. v. Cole*, 514 F.3d 345, 349 (4th Cir. 2008) ("An arbitration award may be vacated if it fails to draw its essence from the controlling agreement."); *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 226 (4th Cir. 1994) ("Arbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated."). To require the plaintiffs to

pursue an arbitration that is either impossible or illegal is to deny them any meaningful right to arbitrate their claims.

Indeed, this Court has already expressed strong doubts about the enforceability of the very same arbitration contract that is at issue in this case. *See Moses v. Cashcall*, 781 F.3d 63, 67 (4th Cir. 2015) ("Courts that have considered loan agreements similar to the one at issue here have found that the . . . arbitration procedure specified is a sham from stem to stern." (internal quotation marks omitted)); *id.* at 94 (Davis, J., dissenting) ("I do not hesitate to observe the odiousness of [the company's] apparent practice of using tribal-arbitration agreements to prey on financially distressed consumers, while shielding itself from state actions to enforce consumer protection laws. . . . [But] this case does not call upon us to determine whether [the] arbitration agreement is unenforceable on its face."). But it did not rule on the issue because it was presented for the first time on appeal. *See id.* at 74, 87, 94. No similar barrier applies here.

B. Enforcing this agreement would invite a race to the bottom.

In *Hooters*, this Court warned that upholding a company's arbitration scheme so lacking in procedural and substantive fairness that it "denie[s] arbitration in any meaningful sense of the word" would "undermine, not advance, the federal policy favoring alternative dispute resolution." 173 F.3d at 941. Those words could easily have been written about the arbitration agreement here. Multiple federal appeals

courts have called the agreement a "sham," and members of this Court have lodged their own serious concerns. Enforcing this agreement, by ignoring almost every single provision save for a single inadequate reference to a legitimate arbitration administrator, invites companies to craft arbitration systems that aim for the floor. That disserves the interests of the FAA in promoting legitimate and fair alternatives for dispute resolution. *See Copper v. MRM Investment Co.*, 367 F.3d 493, 511–12 (6th Cir. 2004) (enforcing clearly illegal arbitration agreement would reward parties for inserting "deliberately illegal clauses" into arbitration agreements and "fail to deter similar conduct by others" (internal quotations omitted)).

Under the FAA, courts must police, not reward, a company's use of an illegal arbitration agreement. An arbitration agreement "does not, in the context of litigation, become [an] opening bid in a negotiation . . . over the agreement's unconscionable terms." *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 205 (3d Cir. 2010). Instead, where a company drafts the agreement, it is "saddled with the consequences of the [contract] as drafted." *Id.* And where an agreement's illegal provisions constitute the "primary" or "essential" purpose of the arbitration, *id.*, courts will not reward that illegality by enforcing a stripped-down version of the agreement. *See*, e.g.*, Graham Oil*, 43 F.3d at 1248–1249 (holding that multiple illegal provisions tainted the entire purpose of the arbitration agreement); *Paladino*, 134

F.3d at 1062 (holding that where the challenged provisions defeat basic remedial purposes of federal law, the arbitration agreement cannot be enforced); *Murray*, 289 F.3d at 303 (holding that an arbitration agreement was unenforceable because the agreement drafted by the employer "placed control over the selection of the single arbitrator for employment disputes in the hands of [the] employer").

Moreover, courts will not step in to save an arbitration agreement where the agreement's illegality demonstrates "a systematic effort to impose arbitration" designed "not simply as an alternative to litigation, but as an inferior forum that works to the [company's] advantage." *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 288 (3d Cir. 2004). The existence of a "multitude of unconscionable provisions in an agreement to arbitrate will" preclude enforcement of arbitration "if they evidence a deliberate attempt" to "impose an arbitration scheme designed to discourage" a party's "resort to arbitration or to produce results biased in the [company's] favor." *Id.* at 289.

This rule fits hand in glove with Western Sky's arbitration agreement. The contract at issue here "contains a very atypical and carefully crafted arbitration clause designed to lull the loan consumer" into believing that an arbitration proceeding would be conducted under "the aegis of a public body and conducted under procedural rules approved by that body," *Jackson*, 764 F.3d at 781. It failed to deliver on both counts, promising an arbitrator and rules "that never existed."

Id. And it leaves the consumer "without a basic protection and essential part of his bargain—the auspices of a public entity of tribal governance." *Id.* That set-up reveals unmistakably that Delbert and Western Sky are "not seeking a bona fide mechanism for dispute resolution," but rather are attempting "to impose a scheme that "would provide [them] with an impermissible advantage." *Nino*, 609 F.3d at 207 (internal quotation marks omitted). When an arbitration agreement's provisions "are so one-sided that their only possible purpose is to undermine the neutrality of the proceeding," *Hooters*, 173 F.3d at 938, the agreement must be struck down.

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,193 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Baskerville font.

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CERTIFICATE OF SERVICE

I certify that on June 29, 2015 the foregoing corrected brief was served on all parties or their counsel of record through the CM/ECF system.

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