Nos. 15-1170 & 15-1217

In the United States Court of Appeals for the Fourth Circuit

JAMES HAYES, *et al.*,
Plaintiff-Appellant-Cross-Appellee,

v.

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

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

RESPONSE/REPLY BRIEF OF JAMES HAYES, ET AL.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Delbert seeks to enforce an agreement mandating a tribal-arbitration process that does not exist: It provides that arbitration "*shall* be conducted by the Cheyenne River Sioux Tribal Nation *by* an authorized representative *in accordance* with its consumer dispute rules." But, as Delbert now concedes (at 22, 9 n.3), "the possibility of [tribe]-run arbitration" is nonexistent; the Tribe "does not have consumer dispute rules." The contract, in other words, is a "sham from stem to stern." *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 779 (7th Cir. 2014). It "contemplates a process conducted under the watchful eye of a legitimate governing tribal body," but delivers no such thing—a proceeding under tribal oversight "simply is not a possibility." *Id.*

Undeterred, Delbert urges this Court (at 25) to "order arbitration" anyway, on the theory that the contract's central requirement of a tribal forum is just a default mechanism. And even if the contract requires tribal participation, Delbert argues, those provisions should be ignored, severed, or rewritten. The Federal Arbitration Act (FAA), in Delbert's view, "dictates" that consumers "must arbitrate all of their disputes"—if not in tribal arbitration, then somewhere else. But, far from requiring arbitration here, the FAA prohibits it. The Act "ensure[s] that 'private agreements to arbitrate are enforced *according to their terms*.'" *Stolt-Nielsen S.A.*

v. AnimalFeeds Int'l Corp., 559 U.S. 662, 683-84 (2010). And the terms of this contract do not allow for unfettered arbitration before any forum—they instead require the Tribe's participation. Delbert may now wish this case involved a different agreement, but it does not. No part of the FAA can come to Delbert's aid. Parties may not "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." *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1357 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015) (Restani, J., concurring).

Because it cannot get around the words of the arbitration contract, Delbert spends most of its brief arguing that no American court has the authority to consider its illegal conduct. But tribal jurisdiction is not available for garden-variety disputes between non-tribal consumers and non-tribal debt collectors. Instead, it is reserved for cases involving core issues of "tribal integrity, sovereignty, self-government, or allocation of resources." *Jackson*, 764 F.3d at 786. Recognizing that the Seventh Circuit has already rejected each one of Delbert's arguments for tribal jurisdiction on indistinguishable facts, Delbert (at 61) asks this Court to create a circuit split and "reject *Jackson*." Because there "simply is no colorable claim that the courts of the Cheyenne River Sioux Tribe can exercise jurisdiction," *id.*, the Court should decline that invitation.

ARGUMENT

I. The Contract Requires Arbitration in an Exclusive and Nonexistent Forum and Is Therefore Unenforceable.

A. The Contract Exclusively Requires Tribal Arbitration.

We begin, unlike Delbert, with the contract's unedited text. The contract mandates that arbitration "*shall* be conducted by the Cheyenne River Sioux Tribal Nation *by* an authorized representative *in accordance* with its consumer dispute rules." JA155 (emphasis added). But there is no "representative" of the Cheyenne River Sioux Tribal Nation "authorized" to conduct arbitration, and there are no tribal "consumer dispute rules." As the Seventh Circuit recognized, that makes this contract a "sham from stem to stern." *Jackson*, 764 F.3d at 779. It "contemplates a process conducted under the watchful eye of a legitimate governing tribal body," but delivers no such thing—a proceeding subject to tribal oversight "simply is not a possibility." *Id.*

Delbert offers one main response. It contends that our interpretation of the contract (as requiring tribal participation) "radically *overcomplicates*" its meaning. Delbert Br. 19 (emphasis added). In Delbert's view, the contract—without expressly saying so—contemplates that tribal arbitration is merely a default mechanism, and that consumers remain free to arbitrate in other fora. Delbert Br. 19-20. In support of this theory, Delbert offers the following explanation:

1. A "subsequent paragraph" (below the one requiring arbitration by an authorized tribe member under the consumer dispute rules of the tribe) gives consumers the right, "[r]egardless of who demands arbitration, . . . to select . . . the American Arbitration Association . . . ; JAMS . . . ; or an arbitration organization agreed upon by [the borrower] and the other parties to the Dispute." Delbert Br. 20 (ellipses in original).

2. This paragraph permits the use of AAA and JAMS arbitrators because the "title of the section" is "Choice of Arbitrator" and the contract does not state "that paragraph headings should not be used in interpreting the terms of the contract." Delbert Br. 21.

3. This paragraph also allows parties to arbitrate "using AAA rules" or "JAMS rules" because it says that the arbitration "would be governed by the chosen arbitration organization's rules and procedures applicable to consumer disputes." Delbert Br. 20 (emphasis omitted).

4. Although the same sentence also says that these rules apply only "to the extent that [they] do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate," this limitation "merely states that AAA or JAMS rules may not contradict CRST substantive law." Delbert Br. 20-21.

We think the Court can judge which interpretation is more "convoluted," Delbert Br. 21, but Delbert's theory, even on its own terms, is contradicted by the contract itself. Consider Delbert's starting premise—that the contract gives consumers a "right" to arbitrate before AAA or JAMS. Delbert Br. 20. That is not what the contract says. What it actually says is that "[r]egardless of who demands arbitration, you shall have the right to select any of the following arbitration organizations *to administer the arbitration*." JA155 (emphasis added).

This provision "does not allow a choice of arbitrator—only a choice of an arbitration administrator." *Parnell v. Western Sky Fin. LLC*, No. 14-cv-00024, at 76 (N.D. Ga. Apr. 28, 2014). As we explained in our opening brief (at 42-46), "administering" an arbitration is not the same as arbitrating it. An administrator may "oversee and manage" the administrative aspects of arbitration. But it must do so in accordance with the terms of the contract itself; it has no power to override the contract's requirements that any arbitration "*shall* be conducted by the Cheyenne River Sioux Tribal Nation *by* an authorized representative" and "*in accordance* with its consumer dispute rules," and that any "arbitrator must apply the terms of this Arbitration agreement." JA155. Delbert offers no response to this—none—other than to omit the limiting "administer" language via ellipses.

Delbert's other main interpretative step is no more faithful to the contract. It claims that the contract "states" that parties may arbitrate "before AAA using AAA rules" or "before JAMS using JAMS rules." Delbert Br. 20. Again, that is not what the contract says. It says that other provider's rules and procedures will only apply "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." JA155. Those limitations are not empty words. For example, enforcing AAA's rule that an arbitrator must be AAA-approved would violate the contract's

command that the arbitrator be "an authorized representative" of the Tribe—an obvious "express term" of the contract. JA155. Delbert's only response to this problem is also to ignore it; Delbert claims that its contract "merely states that that AAA or JAMS rules may not contradict CRST substantive law"—omitting (again) the key limiting phrase "or the express terms of this Agreement to Arbitrate." Delbert Br. 20.[1]

Nor do Delbert's other interpretations fare any better. Delbert's argument that the tribal arbitration clause's "prefatory language 'except as provided below' . . . directly shows that tribal arbitration is not the sole method of arbitration permitted," Delbert Br. 21 (emphasis omitted), divorces that language from its immediate context. But the more complete text of that provision is: "You agree that any Dispute, except as provided below, will be resolved by Arbitration. . . ." JA155. The phrase "except as provided below" modifies disputes, not the method

[1] The contract repeats this crucial limitation multiple times. It states (at JA156) that the "[t]he arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement." And in the very next sentence, it again says that "[t]he arbitrator must apply the terms of this Arbitration agreement." Delbert says nothing (how could it?) about these statements.

of arbitration: It exempts from arbitration altogether disputes that the contract elsewhere states need not be arbitrated.[2]

And, far from trumping the plain language that pervades the contract, Delbert's reliance (at 21) on the title of one of the contract's sections—"Choice of Arbitrator"— doesn't even describe the content of that section. Unlike its title, the paragraph describes the timing, notice, and process requirements for "[a]ny party to a dispute" who "inten[ds] to arbitrate." JA155. It says nothing about who may serve as an arbitrator or the how the arbitrator may be selected.

The upshot: Delbert has now abandoned any pretense that its contract delivers what it promises: an arbitration process "conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules." JA155. But the novel contract interpretation Delbert now presses into service—one in which consumers are (and always were) freed from any tribal participation in the arbitration process—is no less fanciful. The contract, by its terms, contemplates no such thing: 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 contract requires that a different set of rules applies. No

[2] Those are small claims disputes, exempted by the contract's small claims exception, and disputes where the consumer has chosen to opt out of arbitration, pursuant to the contract's opt-out provision. JA156.

theory of the FAA authorizes courts to enforce arbitration agreements contrary to "the intent of the parties," as "determined by the objective meaning of the words used." *Inetianbor*, 768 F.3d at 1353 (internal quotation marks omitted). Delbert's decidedly atextual interpretation of the contract should be rejected.

B. The Contract Cannot Be Ignored, Severed, or Rewritten.

Falling back, Delbert offers up a grab bag of alternative arguments for why this Court should still "order arbitration." Delbert Br. 25. All fail.

First, Delbert contends that, "[e]ven if" the contract can't be read to allow for arbitration "before well-respected organizations like AAA or JAMS," the presumption in favor of preemption nevertheless compels an interpretation "that favors arbitration." Delbert Br. 25-26. Nonsense. Courts may not "use policy considerations as a substitute for party agreement." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 303 (2010). Here, the contract is clear—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—and so the FAA's pro-arbitration policy plays no role. As the Supreme Court has explained, the presumption in favor of arbitration operates only insofar as it is *consistent with* the parties' contract, but Delbert asks this Court to apply it "without regard to the

wishes of the contract parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). The policy cannot create an agreement to arbitrate where there is none.

Second, Delbert points to the fact that AAA and JAMS have "accepted arbitrations dealing with this exact same arbitration clause" as evidence that the "arbitral forum is available." Delbert Br. 27 (emphasis omitted). But AAA and JAMS often "accept" arbitration demands that later turn out to be invalid. *E.g.*, *New England Cleaning Servs., Inc. v. Am. Arbitration Ass'n*, 199 F.3d 542 (1st Cir. 1999). All "acceptance" means is that the "Claimant" has "met the filing requirements by filing a demand for arbitration." *AT&T Mobility LLC v. Bernardi*, No. C 11-03992 CRB, 2011 WL 5079549, at *8 (N.D. Cal. Oct. 26, 2011). But, because both providers derive their authority to conduct arbitrations from the contract, neither may choose to "disregard[] or modif[y] unambiguous contract provisions." *Choice Hotels Int'l, Inc. v. SM Prop. Mgmt., LLC*, 519 F.3d 200, 207 (4th Cir. 2008) (internal quotation marks omitted); *Morrison v. Circuit-City Stores, Inc.*, 317 F.3d 646, 678 (6th Cir. 2003) (arbitrator may not depart from the "agreed-upon procedures" found in the parties' contract). In any event, Delbert's "examples" come primarily from cases in which district courts "ordered" the parties to AAA or JAMS arbitration without following the contract's language. *See* Delbert Br. at 23-24 (listing cases).

That doesn't justify this Court's own departure from the contract's controlling language—which makes clear that there is *no way* to compel arbitration consistent with "the contractual rights and expectations of the parties." *Stolt-Nielsen*, 559 U.S. at 682 (internal quotation marks omitted).

Third, Delbert claims that the contract's "Severance Provision" requires "that the parties arbitrate all of their disputes" even if "any part" of the contract is "not enforceable." Delbert Br. 38. But that is not how severability works. A contractual severability provision is "but an aid to construction, and will not justify a court in declaring a clause as divisible when, considering the entire contract, it obviously is not." *Moffat Tunnel Imp. Dist. v. Denver & S.L. Ry. Co.*, 45 F.2d 715, 731 (10th Cir. 1930). A lone illegal clause in an otherwise enforceable contract may justify severance—as, for example, in *In re Checking Account Overdraft Litigation MDL No. 2036*, where the Eleventh Circuit severed an unenforceable cost-and-fee shifting provision from the general agreement to arbitrate. 685 F.3d 1269, 1283 (11th Cir. 2012). But where a particular clause "pervade[s] the arbitration agreement such that enforcing the arbitration provision without the [offending clause] would be impossible or would render the arbitration provision ineffectual," severability is inappropriate. *Id.* (internal quotation marks omitted).

In this contract, the "selection of the Tribe as the exclusive arbitral forum pervades the entire arbitration agreement." *Inetianbor*, 768 F.3d at 1352. In all, nearly every paragraph of the arbitration contract—at least seven out of ten—includes a reference to the Tribe. This setup led the Eleventh Circuit to hold that "the forum selection provisions are not severable from the general agreement to arbitrate." *Id.* Indeed, to conclude otherwise would "undermin[e] the express, repeated intent of the parties to arbitrate subject to [tribal participation]." *Id.*

Fourth, Delbert offers but one response to our explanation that the contract cannot be enforced under the FAA because it requires consumers to prospectively waive their substantive statutory rights. Delbert responds that the arbitration contract somehow *allows* consumers to vindicate their rights because tribal law recognizes some "common law causes of action in such areas as contract and tort law" and "CRST Tribal Court cases are often published in the Indian Law Reporter." Delbert Br. 42 n.15 (internal quotation marks omitted). But the contract states (at JA161) that "no United States state or federal law" will apply, and so, by its terms, it "forbid[s] the assertion of certain statutory rights." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). That the Tribe might permit *other* causes of action does not matter—it is blackletter law that a "substantive waiver" of

federally protected rights "will not be upheld." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009).[3]

Finally, Delbert's only response to our claim that the contract is unconscionable is that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), "prohibits" the application of an unconscionability defense. Delbert Br. 42. Not so. *Concepcion* bars courts from applying the unconscionability doctrine in a way that "stands as an obstacle to the accomplishment of the FAA's objectives," 131 S. Ct. at 1748, or interferes with a "fundamental attribute[] of arbitration." *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 180 (4th Cir. 2013) (internal quotation marks omitted). Needless to say, arbitration before a nonexistent tribunal is not a fundamental attribute of arbitration, so invalidating a contract that requires such a scheme does not conflict with the FAA. And *Concepcion* does not exempt arbitration

[3] Delbert's claim (at 40) that this Court can't reach the "waiver of statutory rights argument" or the unenforceability argument more generally because we "failed to challenge" the delegation clause simply mischaracterizes the record below. *See* Opp'n Def.'s Mot. Dismiss First Am. Compl. [Dkt. 30], *Hayes v. Delbert Servs. Corp.*, No. 3:14-cv-258 (JAG), at 29 (E.D. Va. Sept. 5, 2014) (expressly arguing that "the 'Delegation Clause'" is invalid); *id.* at 25, 30 (arguing that the nonexistence of a tribal arbitrator and arbitral rules means that no "dispute resolution mechanism exists" to challenge the illegal conduct). In any case, "once a federal claim is properly presented, a party can make any argument in support of that claim." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Here, the arguments Delbert contends are waived are all made "in support of" the overarching claim that, under the FAA, this contract is unenforceable.

agreements from unconscionability law. Nor could it. Section 2 of the FAA explicitly permits courts to decline to enforce arbitration contracts based on generally applicable contract defenses—including unconscionability. 9 U.S.C. § 2. Courts remain free to police unconscionable contracts—as the Seventh Circuit did in nearly identical circumstances, *see Jackson*, 764 F.3d at 777-79—a point that Delbert ignores entirely.[4]

C. FAA § 5 Cannot Salvage the Contract.

Shifting gears, Delbert contends (at 29-39) that § 5 of the FAA requires this Court to rewrite Western Sky's arbitration contract to eliminate the references to tribal participation in the arbitration process and then compel the parties to arbitrate under the newly drafted version. Section 5 (in relevant part) says that

> if for any . . . reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire.

9 U.S.C. § 5. In Delbert's view, these words mean that a "substitute" arbitrator "'shall' be appointed whenever the arbitral forum [named in the contract] is

[4] Delbert's claim that the unconscionability defense was waived is flat-out wrong. *See* Opp'n Def.'s Mot. Dismiss First Am. Compl. [Dkt. 30], *Hayes v. Delbert Servs. Corp.*, No. 3:14-cv-258 (JAG), at 30 (E.D. Va. Sept. 5, 2014) (arguing that the contract is both "procedurally unconscionable" and "substantively unconscionable").

unavailable." Delbert Br. 32 (internal quotation marks omitted) (claiming that the language of § 5 is "plain and clear"). Not so.

Section 5's words do not authorize freewheeling arbitrator appointments whenever a designated forum is unavailable. To the contrary: A new arbitrator may be appointed only when there is a "*lapse* in the naming of an arbitrator." 9 U.S.C. § 5 (emphasis added). And, as courts have made clear, "lapse" means a "lapse in time" or a lapse "in the filling of a vacancy on a panel of arbitrators," or some other "mechanical breakdown in the arbitrator selection process" like an "impenetrable deadlock over the appointment of arbitrators" that prevents the parties from "naming arbitrators" themselves. *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.*, 689 F.3d 481, 491-92 (5th Cir. 2012) (internal quotation marks omitted); *accord In re Salomon Inc. S'holders' Derivative Litig.*, 68 F.3d 554, 560 (2d Cir. 1995); *Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324, 1327-28 (9th Cir. 1987).

But where, as here, the contract establishes an "exclusive arbitration forum," § 5 plays no role. *BP Exploration*, 689 F.3d at 491 n.7 (internal quotation marks omitted). That is why the Fifth Circuit recently dismissed the idea that § 5 allows expansive court-driven arbitrator appointments any time a forum is unavailable. *Id.* at 491-92. A "lapse" in the "naming of arbitrators," the court explained, is

"different from the situation where the arbitration agreement contains a forum selection clause" that "becomes 'unavailable' for some reason." *Id.* at 491 n.7. In the latter situation, a court "may not appoint substitute arbitrators and compel arbitration" because doing so would "circumvent[] the parties' designation of an exclusive arbitration forum." *Id.* (internal quotation marks omitted).

This rule carries the day here. The arbitration contract states that any arbitration "shall be conducted by . . . an authorized representative" of the Tribe "in accordance with [the Tribe's] consumer dispute rules." JA155. Reviewing this precise language, the Eleventh Circuit called it an "express statement that the Tribe will be the arbitrator" and held that it is "tantamount to designating the forum as the exclusive arbitral forum, even if the word 'exclusive' is not used." *Inetianbor*, 768 F.3d at 1351. And, as detailed above, the "selection of the Tribe as the exclusive arbitral forum pervades the entire arbitration agreement." *Id.* at 1353. Where an arbitration contract "select[s] not just the rules of procedure, but also the arbitral forum"—which is then "referenced throughout the arbitration agreement"—and that forum becomes unavailable, a "substitute arbitrator [under] § 5 cannot be appointed." *Id.*

Delbert's longwinded attack (at 31-35) on what it terms the "integrality exception" to § 5 both misses the point and mischaracterizes the law. Refusing to

sanction, under the guise of § 5, complete contractual "do-overs" whenever the agreed-upon exclusive arbitral forum becomes unavailable (especially in cases where that unavailability is by design) honors § 5's limited purpose. Under § 4 of the FAA—which permits parties to seek to compel arbitration pursuant to an agreement to arbitrate in federal court—parties do not have a "right to compel arbitration of any dispute at any time" under any rules; instead, they only have a "right to obtain an order directing that 'arbitration proceed in the manner provided for in [the parties'] agreement.'" *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (quoting 9 U.S.C. § 4) (emphasis omitted, alteration in original). Accepting Delbert's reading of § 5 would gut § 4's statutory command by authorizing a court to replace one arbitration agreement wholesale for another.

Indeed, the Seventh Circuit in *Jackson* has squarely rejected Delbert's reading of § 5. Its decision that § 5 could not save the contract was grounded not on any claimed "exception" to § 5. *Jackson*, 764 F.3d at 780-81. Rather, it held that there was no way to enforce the parties' agreement by its terms—with or without § 5's aid—because the parties "did not agree to arbitration under any and all circumstances, but only to arbitration under carefully constructed circumstances—

circumstances that never existed and for which a substitute cannot be constructed." *Id.* That conclusion applies with no less force here.

Delbert nevertheless invites this Court to blue-pencil fundamental parts of its contract, claiming that the Seventh Circuit's decision in *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013), requires that an arbitrator be appointed under § 5. Delbert Br. 31-32. That case, Delbert says, reads § 5 as authorizing a "judge" to "appoint an arbitrator when for 'any' reason something has gone wrong." Delbert Br. 31 (internal quotation marks omitted). But the Seventh Circuit itself has explicitly rejected the idea that *Green* (or any other § 5 case) compels the appointment of an arbitrator for this contract. *See Jackson*, 764 F.3d at 780. And other courts have similarly rejected Delbert's reading of *Green*. *See Inetianbor*, 768 F.3d at 1350.

The reason is clear: This arbitration contract is "distinctly different" from the one in *Green*. *Jackson*, 764 F.3d at 780. In *Green*, the Seventh Circuit applied § 5 because "the parties use[d]" a "detail-free arbitration clause[]." *Green*, 724 F.3d at 792-93. The clause "called for arbitration to be conducted in accordance with the National Arbitration Forum's procedures," but not "necessarily under its auspices." *Jackson*, 764 F.3d at 781. It was, in other words, a general agreement to arbitrate: "[S]horn of all detail as to the number or arbitrators, the identity of the arbitrators,

or the rules that the arbitrators were to employ" the *Green* arbitration clause still "made it clear" that the parties' intent—expressed through the terms of the contract—was "to submit their dispute to arbitration." *Id.*

That is "not at all" true with the contract here. *Id.* As the Seventh Circuit explained, this contract

> contains a very atypical and carefully crafted arbitration clause designed to lull the loan consumer into believing that, although any dispute would be subject to an arbitration proceeding in a distant forum, that proceeding nevertheless would be under the aegis of a public body and conducted under procedural rules approved by that body.

Id. True, "[t]he parties *might* have chosen arbitration even if they could not have had the arbitrator whom they had specified." *Id.* (emphasis in original). But the problem is "far more basic": Substituting a new arbitrator would leave the consumer "without a basic protection and essential part of his bargain—the auspices of a public entity of tribal governance." *Id.* "Under these circumstances," a court "cannot save the arbitral process simply by substituting an arbitrator." *Id.* at 780; *see also Inetianbor*, 768 F.3d at 1351 (this contract is "quite different" because it "evidences an intent to have a specific type of arbitration in a particular arbitral forum") (discussing *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000)).

In sum, there is no way to give effect to the parties' agreement here—which "require[s] some direct participation by the Tribe itself," *Inetianbor*, 768 F.3d at 1353—while at the same time allowing arbitration to proceed before AAA or JAMS "without tribal involvement." Delbert Br. 36. The only way to "choose arbitration without tribal involvement" would be to trade this entire contract in for a completely different one. Delbert Br. 36. But where an "arbitration agreement is unenforceable as written," neither parties nor courts may "salvage" the agreement by "rewrit[ing]" it and then claiming it is "acceptable." *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 304 (4th Cir. 2002). Because § 4 requires courts to enforce the contract "in accordance with the terms of the agreement," the "only way" to enforce this contract is to "compel arbitration before an authorized representative of the Tribe." *Inetianbor*, 768 F.3d at 1352. And because (as everyone now accepts) that is impossible, the contract is unenforceable.

* * * *

Declining Delbert's invitation to fundamentally rewrite this sham contract serves the overarching goals of the FAA. When the parties to an arbitration agreement have exercised their right to "structure their arbitration agreements as they see fit"—by "choos[ing] who will resolve specific disputes"—it "falls to courts and arbitrators to give effect to these contractual limitations." *Stolt-Nielsen*, 559 U.S.

at 683-84 (internal quotation marks omitted). And when doing so, courts must "not lose sight of the purpose of the exercise" in the first place: to "give effect to the intent of the parties." *Id.* at 684. Forcing parties to arbitrate under circumstances to which they didn't agree would violate this principle. Like the Seventh and Eleventh Circuits, this Court should refuse to reward Delbert (and other Western Sky affiliates) for its scheme to force consumers into a sham dispute resolution mechanism with no possibility of relief.

II. This Case Does Not Belong in Tribal Court.

Not content with a dispute-resolution mechanism devised to eliminate any "prospect of a meaningful and fairly conducted arbitration," *Jackson*, 764 F.3d at 779 (internal quotation marks omitted), Delbert also insists that no state or federal court can pass on its illegal collection scheme. But its all-out push to free itself from state and federal oversight should be rejected, first and foremost, because no party in this case, not Delbert, nor any of the plaintiffs, is even arguably a member of the Cheyenne River Sioux Tribe. Tribal jurisdiction—including the derivative doctrine of tribal exhaustion—does "not extend to the activities of nonmembers of [a] tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981).

And without tribal jurisdiction, Delbert's twin reasons for sending this case to tribal court collapse: Tribal exhaustion requires a colorable jurisdictional claim

(there is none here), and a contractual forum-selection clause cannot, standing alone, confer tribal jurisdiction where none previously exists. Tribal jurisdiction is designed to regulate issues of "tribal integrity, sovereignty, self-government, or allocation of resources," *Jackson*, 764 F.3d at 786, not run-of-the-mill consumer disputes between private commercial debt collectors and American borrowers. The district court was right to reject Delbert's demand that this case be sent to tribal court, and this Court should affirm.

A. There Is No Colorable Argument that the Tribal Court Has Jurisdiction Over This Dispute.

Tribal exhaustion "requires that federal courts abstain from hearing certain claims relating to Indian tribes until the plaintiff has first exhausted those claims in a tribal court." *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 79 (2d Cir. 2001). But the doctrine only applies when there is a "colorable claim that the courts [of the tribe] can exercise jurisdiction over the [p]laintiffs." *Jackson*, 764 F.3d at 786. The burden rests entirely on the party asserting tribal jurisdiction, *see id.*, and it demands a showing that "that the present dispute involves questions of tribal self-governance or use of tribal resources," *id.* at 785. As we now explain, Delbert's claim fails to do so.

1. Tribal jurisdiction derives from the fact that "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory.'" *Montana*, 450 U.S. at 563 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). For certain core tribal matters, tribes retain "inherent sovereignty" to "exercise [their] tribal power" over disputes and parties. *Id.* at 564. These matters, as the Supreme Court has explained, include "the power to punish tribal offenders" and the rights to "determine tribal membership," "regulate domestic relations among members," and "prescribe rules of inheritance for members." *Id.* at 564. But "through their original incorporation into the United States as well as through specific treaties and statutes," the tribes have "lost many of the attributes of sovereignty." *Id.* at 563. As a result, the Supreme Court has held that 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." *Id.* at 564.

This framework has led the Supreme Court to repeatedly warn that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (observing that the tribes have lost any "right of governing every person within their limits except themselves") (emphasis and internal quotation

marks omitted). "By submitting to the overriding sovereignty of the United States," tribes "necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210.

The Supreme Court has, however, recognized two "circumstances in which tribes may exercise 'civil jurisdiction over non-Indians.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 329 (2008) (internal quotation marks omitted) (discussing what have "become known as the *Montana* exceptions"). First, a tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Second, a tribe may exercise "civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

These exceptions are "limited ones." *Plains Commerce*, 554 U.S. at 330 (internal quotation marks omitted). "Given *Montana*'s general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," a tribe's effort to regulate nonmembers—"especially" beyond the reservation's borders—is "presumptively invalid." *Id.* (internal

quotation marks omitted). And *Montana* "expressly limits" the power of tribes to regulate "the activities of nonmembers," *only* "to the extent necessary to protect tribal self-government and to control internal relations." *Id.* at 332 (internal quotation marks and alterations omitted). It therefore falls "on the tribe" to show that an "extension of tribal authority to regulate nonmembers on non-Indian fee land" is justified, but in no event may the exceptions be "construed in a manner that would swallow the rule or severely shrink it." *Id.* (internal citations and quotations omitted). In the more than thirty years since *Montana*, "with only one minor exception," the Supreme Court has "never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Id.* at 333 (internal quotation marks omitted).

2. Delbert's claim for tribal jurisdiction here hinges on the "first *Montana* exception." Delbert Br. 52. Delbert claims (at 51) that this dispute involves "a consensual commercial relationship" with "a tribal member" that "occurred on the Reservation" and (at 54) that it directly implicates a "fundamental sovereign right." This claim fails every element of the "limited" first *Montana* exception.

The "starting point" for any analysis of whether tribal jurisdiction over a nonmember exists under a *Montana* exception is "to examine the specific conduct the . . . claims seek to regulate." *Attorney's Process & Investigation Servs., Inc. v. Sac &*

Fox Tribe, 609 F.3d 927, 937 (8th Cir. 2010). In determining whether the activity of nonmembers implicates the sovereign power of the tribe (and thus can establish tribal jurisdiction), courts must consider whether the conduct in question occurred on the reservation. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 32 (1st Cir. 2000).

None of the claims in this case involve conduct occurring on-reservation. The complaint alleges that Delbert violated the Fair Debt Collection Practices Act when it "attempt[ed] to collect debt" illegally by "intentionally misrepresenting the identity of the creditor, failing to disclose that that the communication was from a debt collector, and misrepresenting the legal status of the debt." *See generally* First Am. Compl. [Dkt. 16], *Hayes v. Delbert Servs. Corp.*, No. 3:14-cv-258 (JAG), (E.D. Va. June 27, 2014). And the complaint also claims that Delbert violated the Telephone Consumer Protection Act by "making unauthorized, automated, and harassing phone calls" to the consumers' cell phones. *Id.* All of the conduct at issue in this case thus focuses on Delbert's Nevada-based activity aimed at consumers in Virginia.

Delbert doesn't dispute this, but argues instead that the focus should be on the consumers' "interactions with Western Sky," which "constituted on-Reservation activity" because the "last act of contract formation"—a "final audit

review"—took place on the Reservation. Delbert Br. 54-55. The Seventh Circuit, however, has expressly rejected this theory of "on-reservation activity." *See Jackson*, 764 F.3d at 782. "The question of a tribal court's *subject matter jurisdiction* over a nonmember," the court explained, "is tethered to the *nonmember's actions*, specifically the *nonmember's actions on the tribal land*." *Id.* at 782 n.42 (emphasis in original). Consumers who "did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents" cannot be held to have participated in activities "on the reservation." *Id.* at 782.

But Delbert's theory faces a larger problem: It has failed to explain how *its* status—as a nonmember of the tribe—can justify its bid to move this case into tribal court under the first *Montana* exception. Courts ousting parties from federal court in favor of tribal court have done so in cases where at least one of the parties to the dispute was at least arguably a member of the tribe. *See, e.g.*, *Ninigret*, 207 F.3d at 33 (suit involving off-reservation conduct was against "tribal housing authority"); *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 168 (5th Cir. 2014) (suit against "John Doe, a member of the Mississippi Band of Choctaw Indians"). That is no less true of Delbert's own proffered authority. *See Brown v. Western Sky Fin. LLC*, 84 F. Supp. 3d 467, 471 (M.D.N.C. 2015) (suit against Western Sky itself); *Heldt v. Payday Fin. LLC*, 13 F. Supp. 3d 1170, 1179 (D.S.D.

2014) (same). And, although Delbert rests its jurisdiction argument on the consumers' supposed commercial relationship with a tribe member, it fails to assert any such relationship on its own behalf.[5]

Instead, where (as here) a case arises "between two non-Indians" and involves "ordinary run-of-the mill" claims, "th[e] dispute is distinctively non-tribal in nature" and the *Montana* exception "does not apply." *A-1 Contractors v. Strate*, 76 F.3d 930, 941 (8th Cir. 1996) (en banc), *aff'd*, 520 U.S. 438 (1997). The fact that one of the nonmember parties "wants to bring [the] suit in the tribal courts does not control." *Id.* To the contrary, as the Eighth Circuit explained, "*Montana* is very clear that tribal membership is of critical importance." *Id.* Delbert's status as a nonmember places everyone in this case "outside the reach of the tribe's inherent authority"—a necessary condition for the *Montana* exceptions. *Id.*

[5] Indeed, according to Delbert's own recitation of the facts, it is *at least* two degrees removed from any (even arguably) tribal entity. To wit: Western Sky sold the loans to WS Funding, LLC (a nonmember); WS Funding then sold the loans first to CashCall (also a nonmember), who then sold some of the loans to Consumer Loan Trust (also a nonmember). Then, Consumer Loan Trust assigned Delbert as its servicing and collection agent for those loans. Delbert Br. 5. Thus, even under Delbert's own description, the only consensual commercial relationship it has is with Consumer Loan Trust. The absence of any relationship with an even arguable tribe member is another reason why *Heldt* is distinguishable. *Heldt* sent claims to tribal court because the record contained agreements directly between the nonmember defendants and Western Sky. *Heldt*, 13 F. Supp. 3d at 1187.

The importance of *some* direct tribal connection makes sense given that, to establish tribal jurisdiction, it must be shown how regulating the specific nonmember activity is "necessary to protect tribal self-government and to control internal relations." *Plains Commerce*, 554 U.S. at 332 (internal alterations and quotation marks omitted). Delbert offers no specific explanation for why this garden-variety illegal debt-collection case implicates the "tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* at 337. Instead, it hints that allowing this case to move forward in federal court would "prevent[] tribal member-owned businesses" from "having their business activities governed by their home jurisdiction's law." Delbert Br. 58-59. But a tribe's alleged interest in claims against its businesses, even if true (and here, the tribe is *not*—and never was—interested in arbitrating these claims), is not enough. As the Seventh Circuit explained, "a dispute in which the tribe takes an interest is markedly different from a dispute which 'impacts directly upon tribal affairs.'" *Jackson*, 764 F.3d at 785 n.47 (quoting *Ninigret*, 207 F.3d at 32). Delbert has made no showing that the present dispute involves questions of tribal self-governance or use of tribal resources.

* * * *

Taken together, the nonmember status of both parties, the absence of any on-reservation conduct, and the ordinary nature of this consumer dispute means only one thing: There is no colorable claim that the courts of the Cheyenne River Sioux Tribe can exercise jurisdiction over this case. Tribal exhaustion, therefore, is not required.

B. The Contractual Forum-Selection Clause Cannot Establish Tribal Jurisdiction.

Nor should this Court accept that the contractual "forum-selection clause" can somehow independently confer tribal jurisdiction over this case and force the claim to be heard in tribal court. As an initial matter, Delbert is barred from enforcing the clause by the contract's terms. The contract draws a clear limitation on who may enforce the non-arbitration provisions of the Western Sky loan agreement: only Western Sky, "a lender authorized by the laws of the Cheyenne River Sioux Tribal Nation . . . and any subsequent holder of this Note." JA152.

Delbert agrees (at 5) it is neither Western Sky nor a "subsequent holder" of the Note, and one would think (as the district court correctly did) that this should end the matter. After all, unlike the rest of the contract, the term "holder" is, "[f]or purposes of th[e] arbitration agreement," defined more broadly to include not just Western Sky or the subsequent holder, but also all "servicing" and "collection

representatives and agents" (a label that fits Delbert). JA155. Under the principle of *expressio unius est excusio alterius*, because the contract confers "holder" status on servicing and collection agents "[f]or purposes" of the arbitration agreement only, but not for anything else, that omission must be deemed intentional. *See Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 861 (4th Cir. 2000) (applying, in contract case, the principle that where particular language appears in one section, but is omitted in another, that omission should be deemed intentional).

Nonetheless, Delbert contends that its status as "holder" is "irrelevant" because the forum-selection clause "clearly binds" the borrowers, who consented to tribal court and so were "forbid[den]" from suing in federal court. Delbert Br. 44-45. No case supports this theory, and Delbert cites none. To the contrary, "the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions." *Ninigret*, 207 F.3d at 33. "[T]ribal courts are not courts of general jurisdiction," and so a tribal court's authority "to adjudicate claims involving nonmembers concerns its subject matter jurisdiction, not personal jurisdiction." *Jackson*, 764 F.3d at 783 (citing *Nevada v. Hicks*. 533 U.S. 353, 367 (2001)). A "nonmember's consent to tribal authority" is therefore "not sufficient" to "establish the jurisdiction of a tribal court" or require that a federal court dismiss a case and force the parties onto the

reservation. *Id.*; *see also Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986) (consent cannot "confer jurisdiction upon that court to hear a case if that court would not otherwise have jurisdiction over the suit").

It is for this reason that Delbert's other contract-based arguments—including its "estoppel" and "agency" theories—also fail. *See* Delbert Br. 45-47. Absent an issue of "tribal integrity, sovereignty, self-government, or allocation of resources," *Jackson*, 764 F.3d at 786, a contract cannot independently establish exclusive tribal jurisdiction. Tribal jurisdiction turns, in other words, not on what a contract says, but "on whether the actions at issue in the litigation are regulable by the tribe." *Nevada*, 533 U.S. at 367 n.8. The upshot: There is no tribal jurisdiction here and the forum-selection clause cannot create it. Consistent with the Seventh Circuit, the contract's forum-selection clause cannot be enforced.[6]

[6] Delbert's lengthy discussion of *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), (at 47-50) is irrelevant to this appeal. *Atlantic Marine* involved one party's convenience-based opposition to the enforcement of a forum-selection clause. 134 S. Ct. at 581. But this case does not implicate *Atlantic Marine*. The forum-selection clause here is unenforceable because the designated forum—the Cheyenne River Sioux Tribal Court—lacks any jurisdiction over the dispute. That is why the Seventh Circuit felt no need to address *Atlantic Marine* when it declined to enforce this forum-selection clause. The absence of tribal subject-matter jurisdiction, on its own, bars enforcement of the clause. *Jackson*, 764 F.3d at 776.

CONCLUSION

For these reasons, the district court's order compelling arbitration and dismissing the claims should be reversed, and the district court's decision that there is no basis for tribal court review should be affirmed.

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 7,308 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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October 16, 2015

CERTIFICATE OF SERVICE

I certify that on October 16, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/ Leah M. Nicholls
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October 16, 2015