IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JAMES DILLON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:13-CV-897
	)	
BMO HARRIS BANK, N.A., et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on a renewed motion to dismiss in favor of arbitration filed by the defendant Generations Community Federal Credit Union. (Doc. 152). Generations moved to dismiss for improper venue and failure to state a claim, based on Mr. Dillon's failure to arbitrate, the exclusive application of Cheyenne River Sioux tribal law and jurisdiction, and a class action waiver. Generations has also moved for sanctions based on Mr. Dillon's allegedly vexatious challenge to the authenticity of the loan agreement. (Doc. 188).

For the reasons stated in *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016), the motion to dismiss will be denied. The contract Generations seeks to enforce, like the contract in *Hayes*, contains provisions that "convert a choice of law clause into a choice of no law clause" and that "flatly and categorically renounce the authority of the federal statutes to which [the defendant] is and must remain subject." *Hayes*, 811 F.3d at 675. It cannot be enforced.

The proffered Western Sky loan agreement here is identical in all relevant particulars to the Western Sky loan agreement in *Hayes*. (Doc. 106-1 at 4-9); 811 F.3d at 668-70. The agreement here applies the law of the Cheyenne River Sioux Tribe as its sole governing law, (Doc. 106-1 at 4, 6); sends all disputes to arbitration, (*id.* at 7); instructs the arbitrator to apply only tribal law, (*id.* at 8); and, most importantly, denies the applicability of all federal and state law to the agreement. (*Id.* at 6). Because these provisions are the same as in the loan agreement in *Hayes*, 811 F.3d at 668-70, the arbitration agreement here is unenforceable.

For the same reasons, it would be improper to dismiss based on the governing law provisions that exclusively apply tribal law to the agreement. These restrictions on governing law are the reason the arbitration provision is unenforceable. Likewise, severance of the errant provisions and enforcement of the arbitration provision would be inappropriate, since the agreement as a whole "represents an integrated scheme to contravene public policy." *See Hayes*, 811 F.3d at 676 (quotations and citation omitted).

In view of this holding, the Court need not decide whether Generations is entitled to enforce the arbitration provision or whether the arbitration agreement is unconscionable.

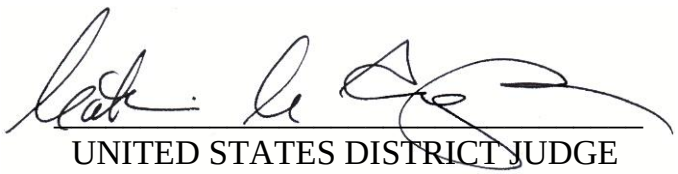
To the extent the motion to dismiss is based on the class action waiver, it is denied without prejudice. Generations is free to raise the class action waiver if Mr. Dillon moves for class certification or at summary judgment, at which point the Court will reconsider the matter with the benefit of more up-to-date briefing addressing, *inter alia*, the effect of *Hayes* on the purported class action waiver.

To the extent Generations asks the Court to strike any arguments in opposition to arbitration that were raised by Mr. Dillon after March 6, 2014, as a sanction, the motion is denied in the Court's discretion. Even assuming that Mr. Dillon's conduct is sanctionable, an issue the Court is not resolving here, the requested sanction would be inappropriate. To the extent Generations asks for attorneys' fees as a sanction, the motion remains under advisement.

It is **ORDERED** that:

1. The renewed motion to dismiss in favor of arbitration, (Doc. 152), is **DENIED**.
2. The motion for sanctions, (Doc. 188), is **DENIED in part** to the extent Generations asks the Court to strike Mr. Dillon's arguments in opposition to arbitration and otherwise remains under advisement.

This the 4th day of March, 2016.



UNITED STATES DISTRICT JUDGE