No. _____

IN THE

Supreme Court of the United States

SEQUOIA CAPITAL OPERATIONS, LLC; TCV V, L.P.;

Petitioners,

v.

JESSICA GINGRAS, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED; ANGELA C. GIVEN, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an arbitration agreement contains a separate "delegation provision" that reserves for an arbitrator the authority to decide any disputes concerning arbitrability, does Section 2 of the Federal Arbitration Act require a court to decide any challenge to that provision's validity before the court may proceed to address whether the parties' underlying dispute is arbitrable?

CORPORATE DISCLOSURE STATEMENT

Petitioner Sequoia Capital Operations, LLC has no parent corporation and no publicly held corporation owns 10% or more of its stock.*

This lawsuit improperly names as a defendant "Technology Crossover Ventures." Technology Crossover Ventures is a trade name, not a legal entity. For purposes of this litigation, the correct legal entity that conducts business using this trade name is TCV V, L.P., a limited partnership organized under the law of Delaware. TCV V, L.P. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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* Plaintiffs' lawsuit improperly names Sequoia Capital Operations, LLC, which provides administrative and other services to various fund entities that provide startup capital for entrepreneurs, but does not currently own, and never has owned, any securities or otherwise invested in any other Defendant in this action. Sequoia Capital Operations, LLC reserves all rights with respect to its being named as a Defendant here.

RELATED PROCEEDINGS

United States District Court (D. Vt.):

Jessica Gingras, et al. v. Joel Rosette, et al., No. 5:15-cv-101 (May 13, 2015)

United States Court of Appeals (2d Cir.):

Jessica Gingras, et al. v. Think Finance, Inc., et al., Nos. 16-2019-cv (L); 16-2132-cv; 16-2135-cv; 16-2138-cv; 16-2140-cv (Con) (June 17, 2016)

TABLE OF CONTENTS

Page

QUESTION PRESENTED..i

CORPORATE DISCLOSURE STATEMENT ii

RELATED PROCEEDINGS iii

TABLE OF AUTHORITIES.....................................vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW..1

JURISDICTION 1

STATUTORY PROVISION INVOLVED..................1

INTRODUCTION..2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT................9

I. The Courts of Appeal Are Divided on When a Delegation Provision Can Be Disregarded...9

II. The Question Presented Will Determine Whether Arbitration Agreements with a Delegation Provision May Be Nullified Peremptorily, Thwarting Congressional Intent..11

III. The Second Circuit's Decision Conflicts with This Court's Decisions and Is Clearly Erroneous...14

CONCLUSION 19

TABLE OF CONTENTS
(continued)

Page

APPENDIX A: Opinion of the United States Court of Appeals, Second Circuit (April 24, 2019) 1a

APPENDIX B: Opinion and Order Regarding Cross Motions for Jurisdictional Discovery and Motions to Dismiss and to Compel Arbitration of the United States District Court, District of Vermont (May 18, 2016) 28a

APPENDIX C: Order Denying Petition for Rehearing / Rehearing En Banc of the United States Court of Appeal, Second Circuit (June 13, 2019) 112a

APPENDIX D: Plaintiffs' First Amended Complaint Filed in the United States District Court, District of Vermont (August 4, 2015) 114a

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) 12

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) 12

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) 15

CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012) 12

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 14

Granite Rock Co. v. Int'l Broth. Of Teamsters, 561 U.S. 287 (2010) 12

Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000) 16

Hall St. Assocs. L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008) 12

Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019) .... *passim*

Jones v. Waffle House, Inc., 866 F.3d 1257 (11th Cir. 2017) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., 867 F.3d 449 (4th Cir. 2017) 10

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 4, 16

Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010) .... *passim*

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 12

Volt Info. Servs., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989) 12

STATUTES

9 U.S.C. § 1 *et seq.* 1

9 U.S.C. § 2. .... *passim*

28 U.S.C. § 1254 1

PETITION FOR A WRIT OF CERTIORARI

Sequoia Capital Operations, LLC and TCV V, L.P. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 922 F.3d 112 and reproduced at App. 1a–27a. The opinion of the district court is not reported, but is available electronically at 2016 WL 2932163 and is reproduced at App. 28a–111a.

JURISDICTION

The court of appeals affirmed the district court's order denying the motions to compel arbitration on April 24, 2019. App. 27a. Petitioners timely filed a petition for rehearing / rehearing en banc on May 13, 2019, which the court of appeals denied on June 13, 2019. *Id.* at 113a. Petitioners timely filed this petition within 90 days of that order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, provides in § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such

> grounds as exist at law or in equity for the revocation of any contract.

INTRODUCTION

This case presents a straightforward question regarding whether courts can disregard a separate agreement to arbitrate a dispute—a so-called "delegation provision"—that reserves for an arbitrator the power to decide whether a parties' dispute is arbitrable. Section 2 of the Federal Arbitration Act ("FAA") provides that when parties enter into a written contract "to submit to arbitration an existing controversy arising out of such a contract," that agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That mandate extends to "agreement[s] to arbitrate threshold issues concerning the arbitration," known as "delegation provisions." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010). This Court has established and reiterated that, when parties agree to "arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy," "the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 68–70; *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (same).

Everyone agrees that the agreements to arbitrate at issue here contain delegation provisions which "clearly and unmistakably" provide that an arbitrator, rather than a court, is to resolve the gateway issue of whether each agreement to arbitrate is enforceable. *See* App. 21a, 62a–63a, 143a. And everyone agrees

that under Section 2 of the FAA and this Court's precedents, an agreement to arbitrate threshold issues must be enforced, "save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 23a; *see also Rent-A-Center*, 561 U.S. at 67 (each quoting 9 U.S.C. § 2).

Where the parties disagree—and where the federal courts of appeal have diverged—is how a delegation provision should be treated once a party asserts a challenge to its validity on a ground "at law or in equity for the revocation of any contract." The Fourth and Eleventh Circuits have concluded that in such circumstances, a court must actually adjudicate the merits of that challenge. The district court may then proceed to decide gateway issues of arbitrability for itself only after ruling that a delegation provision is invalid or otherwise not enforceable. In other words, in the Fourth and Eleventh Circuits, a court cannot bypass a delegation provision and decide gateway issues of arbitrability for itself unless it first decides—upon application of traditional rules of contract interpretation—that the delegation provision is not enforceable.

The Second Circuit, by contrast, ruled in this case that a court may set aside a plain delegation provision—and proceed to address whether the agreement to arbitrate the underlying dispute is enforceable—without first ruling on the validity of the delegation provision. As the Second Circuit held here, so long as a party seeking to avoid arbitration makes an *allegation* in its complaint that the delegation provision is "fraudulent," that allegation alone is "sufficient to make the issue of arbitrability one for a federal court." App. 22a. Under the Second Circuit's approach, the court need not, and does not, actually decide whether

the delegation provision is valid before proceeding to rule on arbitrability for itself. The court simply notes that a party seeking to avoid arbitration has asserted a challenge to the delegation provision.

The Second Circuit's decision creates a clear split of authority among the court of appeals as to when a court can bypass a delegation provision. Its holding that a mere *allegation* of invalidity is sufficient to discard a delegation provision—a separate agreement to arbitrate arbitrability—represents a return to the old judicial hostility to arbitration and a significant departure from this Court's repeated guidance that arbitration agreements are to be enforced as any other contracts and that any doubts regarding arbitrability must be resolved in favor of arbitration. *E.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

This Court's review is necessary to once again reaffirm that under the FAA, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Henry Schein*, 139 S. Ct. at 529.

STATEMENT OF THE CASE

1. This lawsuit arises out of consumer loans entered into by plaintiffs Jessica Gingras and Angela Given between 2011 and 2013 with Plain Green, LLC, "an online lending operation, which holds itself out as a 'tribal lending entity wholly owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, Montana.'" App. 4a–5a. Prior to receiving those loans, each plaintiff executed a loan agreement which provided for arbitration in the event of a dispute concerning the loans. *Id.* at 5a.

Relevant here, that arbitration agreement also contained a delegation provision, by which the parties agreed that gateway issues, including whether the agreement to arbitrate is enforceable, would be decided by an arbitrator. As the court of appeals recounted:

> One such provision is a delegation clause whereby the parties agree that "any Dispute … will be resolved by arbitration in accordance with Chippewa Cree tribal law." The agreement defines a "Dispute" as "any controversy or claim between" the borrower and the lender, "based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law." "Dispute" includes "any issue concerning the validity, enforceability, or scope" of the loan agreement itself or the arbitration provision specifically.

Id. (citations omitted).

Notwithstanding the arbitration agreement—and the separate agreement to arbitrate arbitrability contained within it—plaintiffs brought this putative class action lawsuit against Plain Green in the District of Vermont, alleging that the loan agreements violate, *inter alia*, Vermont and federal law. *Id.* at 6a. Plaintiffs also named as defendants various Plain Green executives, entities (and executives thereof) that serviced the loans made by Plain Green, and entities which were merely investors in defendant Think Finance, Inc., a company that provides a technology platform that serviced third-party lenders, including Plain Green. Petitioners Sequoia Capital Operations,

LLC and TCV V, L.P. are members of that final category of investor defendants.[1] *Id.* at 6a–7a.

In their operative complaint, plaintiffs did not dispute that they had executed an arbitration agreement containing the aforementioned delegation clause. Instead, they alleged that the "arbitration agreement is unenforceable because it is unconscionable, its purpose has been frustrated, and it is fraudulent." *Id.* at 139a. They further alleged, without elaboration, that "[t]he delegation provision of the Purported Arbitration Agreement is also fraudulent," including its "attempt[] to include within the scope of the arbitration agreement 'any issue concerning the validity, enforceability, or scope of this loan or the Agreement to Arbitrate.'" *Id.* at 143a.

2. In response to the complaint, all defendants, including the petitioners, moved to compel arbitration pursuant to the loan agreements. *Id.* at 8a. As part of that motion, defendants argued that pursuant to the delegation clause, any question regarding the enforceability or validity of the arbitration agreement had been reserved for the arbitrator to decide. *Id.* at 61a–62a. Plaintiffs opposed, arguing that the "purported arbitration agreement [and the delegation clause specifically] is unenforceable as, among other things 'unconscionable' and 'fraudulent.'" *Id.* at 56a.

The district court rejected defendants' arguments regarding the delegation clause and denied their motions in full. On the question of who should decide the

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[1] In fact, Sequoia Capital Operations, LLC is even further removed, as it is a management company that advised funds that invested in the technology platform; Sequoia Capital Operations, LLC made no such investments itself.

enforceability of the agreement to arbitrate, the district court acknowledged the language in the delegation clause reserving "any issue concerning the validity, enforceability or scope of this loan or the Agreement to Arbitrate" for the arbitrator. *Id.* at 56a. The court nonetheless concluded that the delegation provision could be ignored because plaintiffs "attacked the arbitration clause directly and the delegation clause specifically." *Id.* at 64a. As the court explained, by virtue of having alleged that the "delegation clause itself is unconscionable," the plaintiffs had raised a "separate attack on the arbitration clause [that] satisfies the majority's test in *Rent-A-Center*." *Id.* "Since Plaintiffs have made a specific attack on the delegation clause as unconscionable, the court, not the arbitrator, must determine whether the arbitration clause is valid." *Id.*

Having dispensed with the delegation provision by noting plaintiffs' "attack" on it, the district court proceeded to decide for itself whether plaintiffs' claims were arbitrable. The district court concluded that plaintiffs had alleged sufficient facts to call into question the validity of the arbitration agreement altogether, and therefore denied the defendants' motion to compel arbitration in full. *Id.* at 68a.

3. The Second Circuit affirmed that ruling. Like the district court, the Second Circuit observed that "on its face," the delegation "clause appears to give the arbitrator blanket authority over the parties' disputes." *Id.* at 21a. But, also like the district court, the Second Circuit refused to enforce that delegation provision because the plaintiffs' complaint alleged that it was unenforceable. *Id.* at 21a–22a.

In pertinent part, the Second Circuit's decision began by quoting this Court's directive in *Rent-A-Center* that "if a party challenges the validity under 9 U.S.C. § 2 of the precise agreement to arbitrate at issue, the federal court must *consider the challenge* before ordering compliance with that agreement under § 4." *Id.* at 21a (alterations omitted) (emphasis added) (quoting *Rent-A-Center*, 561 U.S. at 71). Rather than "consider[ing] the challenge," however, the Second Circuit instead simply noted that a challenge had been made, observing that "[p]laintiffs mount a convincing challenge to the arbitration clause itself," citing plaintiffs' complaint as the only support for this observation. *Id.* Because plaintiffs had alleged in their complaint "that 'the delegation provision of the Purported Arbitration Agreement is also fraudulent,'" the Second Circuit concluded that plaintiffs had made an attack "sufficient to make the issue of arbitrability one for a federal court." *Id.* (alteration omitted). A mere allegation that the delegation provision was "fraudulent" was thus grounds for the court to bypass the delegation provision altogether and proceed to address for itself the enforceability of the underlying agreement to arbitrate.

The Second Circuit also rejected in a footnote defendants' argument that the district court's refusal to actually adjudicate Plaintiffs' challenge to the validity of the delegation provision conflicts with this Court's recent unanimous decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). The Second Circuit wrote that *Schein* considered "an exception to the threshold arbitrability question—the so-called 'wholly groundless' exception—not a challenge to the validity of an arbitration clause itself,"

and thus, in the Second Circuit's view, this Court's decision in *Schein* is irrelevant to the instant action. App. 22a n.3.

The Second Circuit proceeded to address for itself whether the arbitration agreements, as a whole, were enforceable. Because it concluded that they were not, the Second Circuit affirmed the denial of defendants' motions to compel arbitration. *Id.* at 26a–27a. Petitioners timely filed a petition for panel rehearing / rehearing en banc, which the Second Circuit denied. *Id.* at 113a.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeal Are Divided on When a Delegation Provision Can Be Disregarded

By ruling that a delegation provision can be disregarded anytime a party merely alleges that it is unenforceable, the Second Circuit created a circuit split with the Fourth and Eleventh Circuits.

This Court has instructed that it does not suffice to simply *allege* that an agreement to arbitrate is unenforceable; rather, a party seeking to avoid an agreement to arbitrate must *show*, "upon such grounds as exist at law or in equity," that the provision is not enforceable. *Rent-A-Center*, 561 U.S. at 70 (quoting 9 U.S.C. § 2). Consistent with that guidance, both the Fourth and Eleventh Circuits have held that a court's role under *Rent-A-Center* is not merely to check a box that a delegation provision—a separate agreement to arbitrate the issue of arbitrability—has been "attacked," but to address and rule on its enforceability when that has been properly put in issue.

In *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449 (4th Cir. 2017), the Fourth Circuit held that *Rent-A-Center* mandates a two-step process to address this issue: "[W]e first must decide whether [the party] lodged a challenge against the delegation provision …, in particular. Second, if we conclude that [the party] specifically challenged the enforceability of the delegation provision, *we then must decide whether the delegation provision is unenforceable* 'upon such grounds as exist at law or in equity.'" *Id.* at 455 (emphasis added) (quoting 9 U.S.C. § 2).

The Eleventh Circuit, too, has held that a court may only proceed to review the enforceability of an agreement to arbitrate as a whole if the court first "determine[s] that the delegation clause is itself invalid or unenforceable." *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1264 (11th Cir. 2017) (quoting *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331, 1335 (11th Cir. 2016)). As the Eleventh Circuit explained, "before deciding whether the district court was correct to deny the motion to compel arbitration, we must determine whether we can address Jones's challenge to the delegation provision, and, if so, whether the provision was valid and enforceable." *Id.* at 1264; *see also id.* at 1264–67 (after concluding that party challenged validity of delegation provision specifically, analyzing whether delegation provision at issue was enforceable and ruling that it was).

The Second Circuit here bypassed that second step when it did not "decide" whether the delegation provision is enforceable. Instead, the Second Circuit held that it was enough that the plaintiffs had merely

alleged that the delegation provision was unenforceable, without ever actually considering and ruling on the merits of that challenge. As the Second Circuit explained, by alleging in their complaint "that 'the delegation provision of the Purported Arbitration Agreement is also fraudulent,'" plaintiffs had made a "specific attack on the delegation provision … sufficient to make the issue of arbitrability one for a federal court." App. 21a–22a (alteration omitted).

In light of the Second Circuit's decision, there is now a clear split among the federal courts of appeal as to whether, under the FAA, a court must actually adjudicate a challenge to the validity of a delegation clause before disregarding it, or if a party's allegation of invalidity alone suffices. In the Fourth and Eleventh Circuits, such challenges must be resolved by a court applying traditional rules of contract construction before a delegation provision can be bypassed. But, in the Second Circuit—where many agreements to arbitrate are considered by the federal courts—all that a party seeking to avoid a delegation provision has to do in order to bypass a delegation provision is allege that it is unenforceable. This Court should grant certiorari to resolve that conflict.

II. The Question Presented Will Determine Whether Arbitration Agreements with a Delegation Provision May Be Nullified Peremptorily, Thwarting Congressional Intent

Whether a delegation provision can be disregarded anytime a litigant simply alleges that it is not enforceable is also an important question that impacts any arbitrable dispute that is subject to a delegation provision.

This Court has recognized repeatedly that the FAA "was designed to allow parties to avoid the 'costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts,'" thereby "reversing centuries of judicial hostility to arbitration agreements." *E.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–511 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 2, (1924)); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (same); *Granite Rock Co. v. Int'l Broth. Of Teamsters*, 561 U.S. 287, 302 (2010) (same); *Hall St. Assocs. L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (same); *Volt Information Services, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (same). To ensure that Congress' policy choice is respected, this Court has not hesitated to step in when lower courts fail to enforce parties' arbitration agreements in accordance with longstanding contract law, including agreements to submit disputes regarding arbitrability to an arbitrator. *E.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) (vacating lower court's order that refused to enforce delegation provision); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 76 (2010) (reversing order declining to enforce delegation provision); *see also American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012); *AT&T Mobility*, 563 U.S. at 339 (each reiterating that lower courts should enforce arbitration agreements according to their terms).

To permit a delegation provision to be bypassed in this manner whenever a party simply *claims* it is not enforceable—as happened here—harkens back to the old judicial antipathy to arbitration that Congress

overrode in enacting the Federal Arbitration Act and that this Court has been at pains to eradicate in its contemporary jurisprudence. Indeed, if a party to an arbitration agreement can ask courts to decide issues of arbitrability when the agreement contains a clear and unmistakable delegation provision simply by alleging that there is a ground for "attacking" that provision, delegation provisions will be effectively nullified altogether.

Under the decision in this case, any party who seeks to avoid an arbitration agreement and proceed in federal court can now be expected to allege in a complaint or include a sentence in a brief asserting that there is some ground for "attacking" the delegation provision. Once a party does so, under the approach taken by the Second Circuit here, it will be for a court and not an arbitrator to decide whether a dispute is arbitrable or an agreement to arbitrate is enforceable. App. 21a–22a.

That result cannot be squared with the FAA's mandate to treat arbitration agreements as equivalent to other contracts. Indeed, no court would properly rule that an ordinary contract can be simply disregarded merely on the basis of one party's mere allegation that it is not enforceable. And yet, that was the result here with respect to the separately enforceable delegation provision in the plaintiffs' lending agreements. This Court's review is necessary to ensure that Congress' goals in enacting the FAA and this Court's own jurisprudence upholding the enforceability of agreements to arbitrate are not erased.

III. The Second Circuit's Decision Conflicts with This Court's Decisions and Is Clearly Erroneous

Not only did the Second Circuit create a circuit split when it accepted as dispositive plaintiffs' allegation that the delegation clause was unenforceable, that decision also directly conflicts with this Court's decisions in *Rent-A-Center* and *Schein*. This Court should review this case to correct that significant—and troubling—error.

The Second Circuit itself recognized "[w]hen an agreement 'clearly and unmistakably' delegates the issue of arbitrability to the arbitrator, we will enforce it." App. 21a. That is mandated by this Court's decision in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010).

Here, no one disputes that there is a delegation provision in the agreements to arbitrate at issue that "clearly and unmistakably" provides that an arbitrator is to resolve the gateway issue of whether the agreements to arbitrate are enforceable. The agreements provide that "any Dispute" regarding, *inter alia*, "'the validity, enforceability, or scope' of the loan agreement itself or the arbitration provision specifically," "will be resolved by arbitration." App. 5a. This language "clearly and unmistakably" provides that an arbitrator is to decide whether the agreements to arbitrate are valid and enforceable. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Indeed, the delegation clauses at issue here are strikingly similar to those upheld as enforceable in *Rent-A-Center*. *See Rent-A-Center*, 561 U.S. at 68, 69 & n.1 (concluding that clause providing for arbitrability of "'any dispute relating to the … enforceability … of this Agreement [to arbitrate] including, but not limited to

any claim that all or any part of this Agreement is void or voidable,'" to "clearly and unmistakably" give the arbitrator authority to decide whether the agreement to arbitrate was enforceable (ellipses in original)).

The next question, then, is whether the delegation provision should be enforced. This Court has addressed how that inquiry is to proceed. A delegation provision is a separate "'agreement to arbitrate a gateway issue'" concerning arbitrability. *See Schein*, 139 S. Ct. at 529 (quoting *Rent-A-Center*, 561 U.S. at 70). Just as a party may not challenge the validity of an arbitration agreement by challenging the validity as a whole of the contract of which it is a part, a party also may not challenge the validity of a delegation provision by challenging the validity of the more general agreement to arbitrate of which it is a part. *See Schein*, 139 S. Ct. at 530; *Rent-A-Center*, 561 U.S. at 70–71. This is the "severability rule" mandated by § 2 of the FAA and this Court's precedents. *See id.*; *see also generally Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445, 449 (2006) (challenge to "validity of contract as a whole" "must go to the arbitrator" under this rule).

This Court has reiterated this rule on multiple occasions, most recently in *Schein*. As this Court explained there: "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." 139 S. Ct. at 529. "That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Id.* Once the parties agree to submit questions of arbitratbility to an arbitrator, "a court possesses no power to decide the arbitrability issue." *Id.*

Rent-A-Center, *Schein,* and their progeny thus dictate that a delegation provision must be enforced, separate and apart from the agreement to arbitrate of which it is a part, "save upon such grounds as exist at law or in equity for the revocation of any contract." *Rent-A-Center*, 561 U.S. at 70 (quoting 9 U.S.C. § 2). That is, a delegation provision must be enforced pursuant to the FAA unless there is a specific ground for refusing to enforce *that* "precise" delegation provision. *See Rent-A-Center*, 561 U.S. at 71. Any doubts on this issue, as with arbitrability generally, must be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

For Congress' mandate to have teeth, a party cannot be permitted to avoid a delegation provision by merely *alleging* that it is "fraudulent" or is otherwise unenforceable. Rather, if the enforceability of a delegation provision, specifically, is put in issue, a court should then address that issue and rule on it. This Court recognized that fundamental principle in *Rent-A-Center*: "If a party challenges the validity under § 2 of the precise agreement to arbitrate, *the federal court must consider the challenge* before ordering compliance with that agreement." 561 U.S. at 71 (emphasis added); *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (noting the Supreme Court's "prior holdings that the party resisting arbitration bears the burden of *proving* that the claims at issue are unsuitable for arbitration") (emphasis added).

The Second Circuit took an opposite approach, though, when it recognized that the delegation provision "appears to give the arbitrator blanket authority

over the parties' disputes," including as to whether the agreements to arbitrate are enforceable, but then declined to enforce that delegation provision or even *rule* that it was unenforceable. Rather, the Second Circuit stated only that the complaint *alleges* that "'the delegation provision of the Purported Arbitration Agreement is also fraudulent.'" App. 21a–22a. But, while the court made this observation after reciting plaintiffs' complaint allegations, the court did not actually rule on whether the delegation provision is unenforceable because it is "fraudulent" or for any other reason.[2] Nor did Plaintiffs present a properly supported legal argument that the delegation provision, specifically, was "fraudulent."

In so ruling, the Second Circuit issued an opinion directly contrary to this Court's pronouncements in *Rent-A-Center* and *Schein* that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract," including when "the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Schein*, 139 S. Ct. at 529; *Rent-A-Center*, 561 U.S. at 70–71. While the Second Circuit summarily ruled that *Schein* has "no bearing on this case," App. 22a n.3, *Schein* reiterates the bedrock principles of federal arbitration law that "courts must enforce arbitration contracts according to their terms" and that an agreement to arbitrate a

[2] Worse, that referenced allegation, in fact, is not focused on the enforceability of the delegation provision, in particular, but concerns the underlying loan transactions and certain features of the agreement to arbitrate as a whole. *See* App. 143a (making allegations about "Defendants' widespread fraudulent practices" and provisions for review of an award, including speculation concerning Defendants' alleged "control" of tribal law).

"gateway" issue such as arbitrability is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," 139 S. Ct. at 529.

Schein also reinforces the rule from *Rent-A-Center* that a court must enforce a delegation provision in accordance with Section 2 of the Federal Arbitration Act because "'the FAA operates on this additional arbitration agreement just as it does on any other.'" *Schein*, 139 S. Ct. at 529 (quoting *Rent-A-Center*, 561 U.S. at 70). That is, regardless of the merits of the parties' dispute regarding arbitrability, the delegation provision must be separately enforced "save upon such grounds as exist at law or in equity" to revoking that agreement, specifically. *See* 9 U.S.C. § 2; *see also Schein*, 139 S. Ct. at 529.

The Second Circuit's decision turns those precedents on their head. This Court should grant certiorari to correct that error.

CONCLUSION

The Court should grant the petition for writ of certiorari.

September 11, 2019

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos.16-2019-cv (L); 16-2132-cv; 16-2135-cv; 16-2138-cv; 16-2140-cv (Con)

JESSICA GINGRAS, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, ANGELA C. GIVEN, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

THINK FINANCE, INC., TC LOAN SERVICE, LLC, KENNETH E. REES, FORMER PRESIDENT AND CHIEF EXECUTIVE OFFICER AND CHAIRMAN OF THE BOARD OF THINK FINANCE, TC DECISION SCIENCES, LLC, TAILWIND MARKETING, LLC, SEQUOIA CAPITAL OPERATIONS, LLC, TECHNOLOGY CROSSOVER VENTURES, JOEL ROSETTE, OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER OF PLAIN GREEN, TED WHITFORD, OFFICIAL CAPACITY AS A MEMBER OF PLAIN GREEN'S BOARD OF DIRECTORS, TIM MCINERNEY,

Defendants-Appellants.

August Term, 2016
Argued: May 12, 2017
Decided: April 24, 2019

Appeal from the United States District Court
for the District of Vermont
No. 15-cv-101 – Geoffrey W. Crawford, *Judge*.

Before: LEVAL, HALL, and CHIN, *Circuit Judges*.

Plaintiffs Jessica Gingras and Angela C. Given borrowed money from Plain Green, LLC, an online lending operation owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation in Montana. The terms of their loan agreements provide for interest rates well in excess of caps imposed by Vermont law. Gingras and Given sued, alleging violations of Vermont and federal law. They seek an injunction against tribal officers in charge of Plain Green and an award of money damages against other Defendants.

Some Defendants moved to dismiss, arguing that tribal sovereign immunity barred the suit. All Defendants moved to compel arbitration under the terms of the agreements. The district court (Geoffrey W. Crawford, *Judge*) denied both motions. We hold that tribal sovereign immunity does not bar this suit because Plaintiffs may sue tribal officers under a theory analogous to *Ex parte Young* for prospective, injunctive relief based on violations of state and substantive federal law occurring off of tribal lands. We further hold that the arbitration clauses of the loan agreements are unenforceable and unconscionable.

AFFIRMED.

COLLEEN SINZDAK, Hogan Lovells US LLP, Washington, DC (Morgan L. Goodspeed, Neal Kumar Katyal, Hogan Lovells US LLP, Washington, DC; Richard J. Zack, Matthew B. Homberger, Pepper Hamilton LLP, Philadelphia, PA, *on the brief*), *for Defendants-Appellants Joel Rosette, Ted Whitford, and Tim McInerney*.

LEWIS S. WIENER, Sutherland Asbill & Brennan LLP, Washington, DC (Kymberly Kochis, Sutherland Asbill & Brennan LLP, New York, NY; Ritchie E. Berger, Dinse Knapp McAndrew, Burlington, VT; Stephen D. Hibbard, Jones Day, San Francisco, CA; Todd R. Geremia, Jones Day, New York, NY; Stephen D. Ellis, Ellis Boxer & Blake PLLC, Springfield, VT; Richard L. Scheff, David F. Herman, Montgomery McCracken Walker & Rhoads LLP, Philadelphia, PA; Thomas Hefferon, Sabrina Rose-Smith, Matthew Sheldon, Goodwin Procter LLP, Washington, DC, *on the brief*), *for Defendants-Appellants Think Finance, Inc., TC Decision Sciences, LLC, Tailwind Marketing, LLC, TC Loan Service, LLC, Technology Crossover Ventures, Kenneth E. Rees, and Sequoia Capital Operations, LLC*.

MATTHEW B. BYRNE, Gravel & Shea PC, Burlington, VT (Kathleen M. Donovan-Maher, Steven J. Buttacavoli, Anne F. O'Berry, Steven L. Groopman, Berman DeValerio, Boston, MA, *on the brief*), *for Plaintiffs-Appellees*.

Jeffrey R. White, Julie Braman Kane, American Association for Justice, Washington, DC, as *amicus curiae* in support of Plaintiffs-Appellees.

Scott L. Nelson, Allison M. Zieve, Public Citizen Litigation Group, Public Citizen, Inc., Washington, DC, as *amicus curiae* in support of Plaintiffs-Appellees.

HALL, *Circuit Judge*:

The federal government and many states have laws designed to protect consumers against predatory lending practices. In this case, we must determine what happens when those laws conflict with the off-reservation commercial activities of Indian tribes. In so doing, we probe the boundaries of tribal sovereign immunity and hold that, notwithstanding tribal sovereign immunity, federal courts may entertain suits against tribal officers in their official capacities seeking prospective, injunctive relief prohibiting off-reservation conduct that violates state and substantive federal law. We also consider the specific lending agreements between these Plaintiffs and these Defendants and hold that the agreements' arbitration clauses are unenforceable and unconscionable.

I.

Payday loans are ostensibly short-term cash advances for people who face unexpected obligations or emergencies. The loans are typically for small sums that are to be repaid quickly—in anywhere from several weeks to a year. "Typically, online lenders charge fees and interest that, when annualized, result in interest rates far in excess of legal limits or typical borrowing rates, often exceeding 300%, 500%, or even 1,000%." Vermont Attorney General's Office, *Illegal Lending: Facts and Figures*, at 1 (Apr. 2014). Many states endeavored to curb such lending practices through usury laws that set caps on interest rates. For example, Vermont laws prescribe a maximum interest rate of 24% per annum. *See* Vt. Stat. Ann. tit. 9, § 41a.

A.

This suit involves payday loans made by Plain Green, LLC, an online lending operation, which holds

itself out as a "tribal lending entity wholly owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, Montana." J. App. 150. The borrowers are Plaintiffs-Appellees Jessica Gingras and Angela Given, who are Vermont residents. In July 2011, Gingras borrowed $1,050 at an interest rate of 198.17% per annum. She repaid that loan and borrowed an additional $2,900 a year later, this time with an interest rate of 371.82%. She has not repaid the second loan. Also in July 2011, Given borrowed $1,250 at a rate of 198.45%. Given paid off that loan in July 2012 and, within a few days of repayment, took out another loan for $2,000 at a rate of 159.46%. She also borrowed $250 in May 2013 at a rate of 376.13%, which she repaid quickly, and in July 2013 borrowed $3,000 at a rate of 59.83%. Given has not repaid the most recent loan.

To receive their loans, Gingras and Given were required to sign loan agreements. Those loan agreements provide for arbitration in the event of a dispute between the borrower and Plain Green. One such provision is a delegation clause whereby the parties agree that "any Dispute . . . will be resolved by arbitration in accordance with Chippewa Cree tribal law." *Id.* 114– 15. The agreement defines a "Dispute" as "any controversy or claim between" the borrower and the lender, "based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law." *Id.* 115. "Dispute" includes "any issue concerning the validity, enforceability, or scope" of the loan agreement itself or the arbitration provision specifically. *Id.* A separate provision of the agreement vests authority to decide the validity of a class action lawsuit waiver and class-wide arbitration waivers in Chippewa Cree tribal court, not in an arbitrator. *Id.* 265.

The loan agreements also provide that Chippewa Cree tribal law governs the loan agreement and any dispute arising under it. An arbitrator, whom the borrower may select from the American Arbitration Association ("AAA") or JAMS, "shall apply Tribal Law" and any arbitral award must "be supported by substantial evidence and must be consistent with [the loan agreement] and Tribal Law." *Id.* Chippewa Cree tribal courts are empowered to set aside the arbitrator's award if it does not comply with tribal law. *See id.*

The agreements' command to apply tribal law also includes provisions stating "[n]either this Agreement nor the Lender is subject to the laws of any state of the United States," *id.* 263, and the agreements are "subject solely to the exclusive laws and jurisdiction of the Chippewa Cree Tribe of the Rocky Boy Indian Reservation" such that "no other state or federal law or regulation shall apply," *id.* 258. To the extent that AAA or JAMS policies and procedures conflict with tribal law, tribal law prevails.

The loan agreements allow borrowers to opt out of arbitration, but only if they exercise that option within sixty days of receiving the loan. If a borrower opts out, the agreements provide that their only recourse is to sue under tribal law in tribal courts. Neither Gingras nor Given opted out.

B.

Gingras and Given allege that the loan agreements violate Vermont and federal law. The loans originated from Plain Green, LLC. Plain Green's Chief Executive Officer is Defendant Joel Rosette; two members of Plain Green's Board of Directors, Ted Whitford and Tim McInerney, are also defendants. Gingras and

Given sued all three, whom we refer to as the Tribal Defendants, in their official capacities for prospective declaratory and injunctive relief.

The suit also names as defendants Think Finance, Inc. and its former President, Chief Executive Officer, and Chairman of the Board, Kenneth Rees. Plain Green employs Think Finance and its subsidiaries, Defendants TC Decision Sciences, LLC, Tailwind Marketing, LLC, and TC Loan Service, LLC, to service Plain Green loans. Defendants Sequoia Capital Operations, LLC and Technology Crossover Ventures provide funding for the lending operation.

Plaintiffs allege that Think Finance and the Tribe agreed on various terms for the loans, including charging annual interest rates between 60% and 360% and establishing a maximum loan amount of $2,500. They allege that this arrangement was created to "circumvent" the "stringent laws [that] have been enacted to prescribe how loans can be made and to prevent lenders from preying on indigent people," and to "take advantage of legal doctrines, such as tribal immunity, to avoid liability for their actions" in violating various federal and state lending laws. *Id.* 29.

C.

Gingras and Given brought this class action in the District of Vermont, seeking, among other relief, an order barring Defendants from continuing their current lending practices. Relevant to this appeal, the Tribal Defendants moved to dismiss, arguing that they are entitled to tribal sovereign immunity. The district court disagreed and denied their motion. It concluded that tribal sovereign immunity does not bar suit against the Tribal Defendants in their official capacities for prospective, injunctive relief under a theory analogous

to *Ex parte Young*, 209 U.S. 123 (1908). Specifically, the district court read the Supreme Court's decision in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), to condone that form of action to vindicate violations of state law. *See Gingras v. Rosette*, No. 15-cv-101, 2016 WL 2932163, at *4–7 (D. Vt. May 18, 2016).

All Defendants also moved to compel arbitration pursuant to the loan agreements. The district court denied those motions. It concluded that the arbitration agreements are unconscionable and unenforceable because they insulate Defendants from claims that they have violated state and federal laws. *See id.* at *13–18. In particular, it held that because the agreements apply tribal law exclusively and restrict all arbitral awards review solely by a tribal court, the neutral arbitral forum is illusory. All Defendants timely appealed.

II.

We first ensure that we have appellate jurisdiction of this interlocutory appeal. The district court denied two types of motions relevant to this appeal: motions to compel arbitration and motions to dismiss. Appellate jurisdiction over the motions to compel arbitration is easy enough—we exercise appellate jurisdiction under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 16(a)(1)(C).

As for the portion of the Tribal Defendants' motion to dismiss based on the denial of tribal sovereign immunity, we have jurisdiction over that appeal, too. Interlocutory review under the collateral order doctrine is available when an order "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and

[is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). As is the case here, denials of tribal sovereign immunity at the motion to dismiss stage conclusively determine the immunity question, and that question is one completely separate from the merits of the action. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007). Like Eleventh Amendment immunity, foreign sovereign immunity, and qualified immunity, tribal sovereign immunity is immunity from suit, not merely immunity from liability. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1050 (11th Cir. 1995) ("Tribal sovereign immunity would be rendered meaningless if a suit against a tribe asserting its immunity were allowed to proceed to trial."). Thus, because denial of that immunity is "effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand*, 437 U.S. at 468, we have jurisdiction over this interlocutory appeal.

III.

We review *de novo* the district court's legal conclusions in denying the Tribal Defendants' motion to dismiss based on tribal sovereign immunity. *See Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001). We review the district court's factual findings for clear error. *Id.*

Indian tribes occupy a unique space in our constitutional structure. They are "domestic dependent nations" that, on one hand, "exercise inherent sovereign authority," but, on the other hand, are "subject to plenary control by Congress." *Bay Mills*, 572 U.S. at 788 (internal quotation marks omitted). Indian tribes are "separate sovereigns pre-existing the Constitution,"

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978), and possess all core aspects of sovereignty, at least until Congress says otherwise, *see Bay Mills*, 572 U.S. at 788.

One of the "core aspects of sovereignty" that tribes enjoy is the "common-law immunity from suit." *Id.* (quoting *Santa Clara Pueblo*, 436 U.S. at 58). That immunity extends even to suits arising from a tribe's commercial activities off Indian lands. *See Kiowa*, 523 U.S. at 760. Absent waiver or an unequivocal abrogation of tribal sovereign immunity by Congress, tribes are shielded from liability. *See Santa Clara Pueblo*, 436 U.S. at 58. Although the origins and the "wisdom" of the tribal sovereign immunity doctrine have been questioned, *see Kiowa*, 523 U.S. at 758; *Bay Mills*, 572 U.S. at 815 (Thomas, *J.*, dissenting); *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 148–49 (Hall, *J.*, dissenting), its existence is settled law, and apply it we must.

The Tribal Defendants here argue that because Plain Green is an "arm of the Tribe," they are entitled to immunity from all state law claims as well as Plaintiffs' federal RICO claim. We disagree and hold that under a theory analogous to *Ex parte Young*, tribal sovereign immunity does not bar state and substantive federal law claims for prospective, injunctive relief against tribal officials in their official capacities for conduct occurring off of the reservation.

A.

We consider in the first instance whether Plain Green is an "arm of the tribe," such that tribal sovereign immunity theoretically shields its officers. Plaintiffs contend that it is not because, as we have said, "a tribe has no legitimate interest in selling an opportunity to

evade state law." *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 114 (2d Cir. 2014). Plaintiffs thus argue that Plain Green is a "fraudulent enterprise" that cannot be shielded by a purchased cloak of immunity. Appellee Br. at 21.

We need not definitively answer this question, however, because Plaintiffs have not sued Plain Green. Rather, they have sued several of Plain Green's officers in their *official* capacities on a theory analogous to *Ex parte Young*. It is sufficient for us, therefore, to assume that Plain Green and its officers would ordinarily be immune save for some common law exception, waiver, or congressional abrogation. As the district court did, we proceed on that understanding.

B.

Tribal sovereign immunity notwithstanding, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973). The Tribal Defendants here engaged in conduct outside of Indian lands when they extended loans to the Plaintiffs in Vermont. But, as the Supreme Court has said, there is a difference between demanding that tribes comply with a law and having the means available to force them to do so. *See Kiowa*, 523 U.S. at 755.

Accordingly, Plaintiffs here rely on an exception to sovereign immunity first announced in *Ex parte Young*, 209 U.S. 123. *Ex parte Young* permits plaintiffs seeking prospective, injunctive relief to sue state government officials for violations of federal law. *Id.* at 133. Given that tribal immunity arises from tribes' statuses as sovereigns, it is unremarkable that they

too can be sued for prospective, injunctive relief based on violations of federal law. The question before us, however, is whether Plaintiffs can sue tribal officials, in their official capacities, for prospective, injunctive relief to bar violations of *state* law. We hold that they can.

The first and most obvious justification for our affirmative answer to this question is that the Supreme Court has already blessed *Ex parte Young*-by-analogy suits against tribal officials for violations of state law. In *Bay Mills*, the Supreme Court considered Michigan's lawsuit against the tribe for opening a casino outside Indian lands. 572 U.S. at 785. The Court held that the federal Indian Gaming Regulatory Act ("IGRA") did not abrogate tribal sovereign immunity, and thus Michigan's suit was barred. *Id.* The Court made clear, however, that Michigan could still "resort to other mechanisms, including legal actions against the responsible individuals" to vindicate violations of Michigan state law. *Id.* In exploring the limits of tribal sovereign immunity for conduct beyond Indian land, the Supreme Court recognized that "Michigan could bring suit against *tribal officials* or employees (rather than the Tribe itself) seeking an injunction." *Id.* at 796 (emphasis added); *see Santa Clara Pueblo*, 436 U.S. at 59. We think this plain statement that tribal officials can be sued to stop unlawful conduct by a tribe definitively resolves the issue here.[1]

[1] We join the Eleventh Circuit in so holding. *See Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015) ("[T]ribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands.").

The Tribal Defendants disagree and offer three arguments why the Supreme Court did not intend to say what it did. None is persuasive.

First, the Tribal Defendants argue that the Supreme Court's extended discussion of alternative remedies available to Michigan was dicta—dicta that accidentally overruled its "canonical" decision in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). But the *Bay Mills* opinion makes clear that the availability of *Ex parte Young*-type actions for violations of state law was both necessary to the holding and perfectly consistent with *Pennhurst*.

In considering whether the IGRA abrogated tribal sovereign immunity, the Court noted that Congress intended to fix a hole in the law that prevented states from suing over gaming violations *on* Indian lands. *Bay Mills*, 572 U.S. 790–93. It held that the IGRA did not abrogate tribal sovereign immunity for gaming violations occurring *off* Indian lands, however, because states already had other ways to vindicate state gaming law violations there. *Id.* at 794–95. The petitioners in *Bay Mills* also asked the Court to revisit its decision in *Kiowa*, which extended tribal sovereign immunity to off-reservation commercial activity. *Id.* at 791. The Court declined, largely on *stare decisis* grounds. It noted that "[a]dhering to *stare decisis* is particularly appropriate here given that the State, as we have shown, has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges." *Id.* at 799 n.8.

Three distinct opinions in *Bay Mills* recognized the availability of *Ex parte Young* actions for violations of state law. *Id.* at 796; *id.* at 809 (Sotomayor, *J.*, concurring) (rejecting the dissent's "concern that, although tribal leaders can be sued for prospective relief,"

(citing majority op.), Tribes' purportedly growing coffers remain unexposed to broad damages liability." (citing dissenting op.)); *id.* at 822–24 (Thomas, *J.*, dissenting). The ability to sue tribal officials for violations of state law, then, was critical to the Court's analysis and necessary to its holding.

Bay Mills also did not upset decades of immunity jurisprudence, as the Tribal Defendants contend. It is true that in *Pennhurst*, the Supreme Court declined to extend the *Ex parte Young* rationale to suits seeking to hold state officials accountable for violations of that state's laws. 465 U.S. at 106. The Court said that "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Id.* at 105 (quoting *Ex parte Young*, 209 U.S. at 160). Indeed, for a suit seeking an injunction against an official for violating his own state's laws,

> the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against the state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

Id. at 106.

That case and others subsequently declining to hold state officials accountable for violations of their own state laws raise real concerns about federal courts infringing on state sovereignty. But this case does not.

There is a minimal intrusion on sovereignty if federal courts are available as forums for enforcing violations of a state's law against tribal officials because tribes cannot empower their officials to violate state law the way a state can interpret its own laws to permit a state official's challenged conduct. *See Mescalero Apache*, 411 U.S. at 148–49. Put differently, concerns of sovereignty oblige the federal courts not to instruct a state official how to conform her conduct to her own state law and not to instruct a tribal official how to conform his conduct to his own tribal law. There are no concomitant sovereignty concerns, however, that prevent the federal courts from instructing a tribal official how to conform that official's conduct to either state or federal law. The *Bay Mills* Court's recognition that tribal officials may be sued for violations of state law thus stands in harmony with *Pennhurst*.

The majority in *Bay Mills* acknowledged that its holding was anything but novel. In discussing how Michigan could seek an injunction against tribal officials for violating Michigan law, the Court cited *Santa Clara Pueblo* and said "[a]s this Court has stated before, analogizing to *Ex parte Young*, tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Bay Mills*, 572 U.S. at 796 (citation omitted). *Bay Mills* was not a wayward departure from, but rather a clear demarcation of, the outer limits of tribal sovereign immunity.

The Tribal Defendants offer a second reason why we should marginalize *Bay Mills*'s observation: the Supreme Court must have intended to authorize only *individual* capacity suits against tribal officials who violate state law. We see no basis to give *Bay Mills* such a cramped reading. The majority opinion states

that "Michigan could bring suit against tribal officials or employees (rather than the tribe itself) . . . ." *Id.* It makes little sense that the Supreme Court would take care to distinguish between tribal officials and employees, on the one hand, and the Tribe itself, on the other, if the Court did not intend that there be a difference. That passage is most logically read to mean that official capacity suits are available against tribal officials, individual capacity suits are also available to be brought, and tribal sovereign immunity bars only suits against the Tribe itself.

In addition, the Tribal Defendants' proffered reading makes little sense because the only material difference between individual and official capacity suits for prospective, injunctive relief is that a judgment against the latter is enforceable against future successive officers whereas judgments against the former are not. *See, e.g.*, *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017). From an efficiency perspective, it is impractical to require a new lawsuit and a new injunction each time a tribal official is replaced. We will not impose such a requirement here.

Finally, the Tribal Defendants urge us to construe *Bay Mills* as authorizing only *states* to sue tribal officials for prospective, injunctive relief based on violations of state law and not as authorizing *individuals* to bring those same suits. Yet "there is no warrant in [the Supreme Court's] cases for making the validity of an *Ex parte Young* action turn on the identity of the plaintiff." *Va. Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 256 (2011). The Supreme Court in *Bay Mills* faced a suit brought by a state. It therefore makes sense that it would speak in terms of Michigan being able to sue, without reference to individuals. Official capacity suits, however, have long

been available to private parties. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–92 (1949); *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177, 183–84 (1938); *see also Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 929 (D.C. Cir. 2012) (permitting official-capacity suits of travel officials by private parties under analogy to *Ex Parte Young*). States often rely on private parties to act as "private attorneys general" to enforce state law. *See, e.g.*, Vt. Stat. Ann. tit. 9, § 2461 (authorizing private enforcement of the Vermont Consumer Protection Act). We see no reason to depart from that tradition now.

Our holding balances the competing interests of tribes and states as separate sovereigns. Absent this mechanism for a state to enforce its laws against out-of-state tribal officials, the state and its citizens would seemingly be without recourse. Tribes and their officials would be free, in conducting affairs outside of reserved lands, to violate state laws with impunity. Given the unique geographic and political position of Indian tribes, allowing such conduct by tribes is especially fraught. The Constitution vests original jurisdiction in the Supreme Court for states to sue other states (a relinquishment of sovereignty originating from the Constitutional Convention, in which, regrettably, Indian tribes were not allowed to participate), *see* U.S. Const. art. III, § 2, cl. 2, but it provides no parallel avenue for disputes between states and tribes. An *Ex parte Young*-type suit protects a state's important interest in enforcing its own laws and the federal government's strong interest in providing a neutral forum for the peaceful resolution of disputes between domestic sovereigns, and it fairly holds Indian tribes acting off-reservation to their obligation to comply with generally applicable state law.

C.

Apart from arguing that the *Ex parte Young*-like theory is unavailable for violations of state law, the Tribal Defendants also take issue with the application of *Ex parte Young* for alleged violations of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq*. We hold that Plaintiffs' RICO claims may proceed.

As the Tribal Defendants acknowledge, *Ex parte* law. We have said, however, that the federal law und *Young* suits are available for alleged violations of federal er which a plaintiff seeks the injunction must provide the plaintiff with a private right of action, and the law must apply substantively to the tribe. *See Garcia*, 268 F.3d at 88. The Tribal Defendants contend that Plaintiffs' RICO claim fails on both counts. We disagree.

First, as the Tribal Defendants concede, binding Circuit precedent compels us to hold that RICO authorizes private rights of action for injunctive relief. *See Chevron Corp. v. Donzinger*, 833 F.3d 74, 137 (2d Cir. 2016) (holding that "a federal court is authorized to grant equitable relief to a private plaintiff who has proven injury to its business or property by reason of a defendant's violation of [18 U.S.C.] § 1962").

Second, we hold that in these circumstances, RICO applies substantively to the Tribe. The Tribal Defendants argue that government entities like the Tribe, and "arms of the Tribe" like Plain Green, are not subject to RICO liability because they are incapable of forming the *mens rea* necessary to commit a predicate act. They argue that specific intent to defraud is an element of the predicate acts of mail and wire fraud,

and thus the payday lending entity cannot be subject to RICO liability.

Some district courts (and at least one treatise) endorse a rule that government entities, and their officers sued in their official capacities, cannot ordinarily be sued under RICO. *See, e.g.*, *Frooks v. Town of Cortlandt*, 997 F. Supp. 438, 457 (S.D.N.Y. 1998); *Nu-Life Constr. Corp. v. Bd. of Educ. of the City of N.Y.*, 779 F. Supp. 248, 251 (E.D.N.Y. 1991); Gregory P. Joseph, *Civil RICO: A Definitive Guide* § 11A, at 109–13 (4th ed. 2015). At least as to suits for prospective, injunctive relief, their reasoning is not persuasive. We agree with the Third Circuit that courts exempting municipalities from RICO liability on the ground that they are incapable of forming a RICO *mens rea* have failed to furnish a defensible explanation for their conclusion, *see Genty v. Resolution Trust Corp.*, 937 F.2d 899, 909 (3d Cir. 1991), particularly given that private corporations are routinely held liable for damages under RICO.

It appears that the reasoning in these and other decisions has less to do with the inability of a public entity to form a criminal intent than with concern over the appropriateness of imposing the burden of punitive damages on taxpayers based on misconduct of a public official. For example, while the Ninth Circuit in *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991), summarily asserts that "government entities are incapable of forming a malicious intent," it relies on the fact that "the taxpayers[] will pay if Lancaster's RICO claim is successful," and, in light of RICO's treble damages provisions, be "made liable for extraordinary damages as a result of the actions of a few

dishonest officials." *Id.* at 404. This outcome, the court observes, would offend "public policy."[2] *Id.*

But concern for the inappropriateness of saddling the taxpayers with the financial burden of punitive damages imposed on a government entity is plainly not implicated where, as here, the relief sought is an injunction and not money damages. Accordingly, we hold that Plaintiffs' RICO claim applies substantively to the Tribal Defendants in this case.

IV.

We turn next to the motions of all the Defendants to compel arbitration. The district court denied these motions, concluding that the dispute belongs instead in federal court because the loan agreements effectively insulate Defendants from claims that they have violated federal and state law. *See Gingras*, 2016 WL 2932163, at *18. We affirm the district court's ruling.

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[2] Furthermore, the Supreme Court's ruling in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), on which *Lancaster* and other decisions rely, did not base its analysis on the inability of municipalities to form "criminal" or "willful" intent. Rather, in holding that Congress did not intend for punitive damages to be available under § 1983, the Court relied on the fact that "municipal immunity from punitive damages was well established at common law by 1871," such that Congress would have explicitly stated its intention to displace that common law doctrine if it intended to do so. *Id.* at 263. The Court cited state common law holdings, which were in most cases explained in terms of avoiding an undue financial burden on taxpayers, although in some cases based on the inability of municipalities to form "criminal" or "willful" intent necessary to support punitive damages. But *Newport* did not adopt that rationale. It was merely mentioned as the justification some states had given for not allowing punitive damages against municipalities. *See id.* at 260–66.

A.

The first question is who decides arbitrability, a question we review *de novo* to determine "whether the issue of arbitrability is for the court or for the arbitrator." *Bell v. Cendant Corp.*, 293 F.3d 563, 565 (2d Cir. 2002).

Parties to an arbitration agreement can, of course, "agree to arbitrate 'gateway' questions of 'arbitrability.'" *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85 (2002)). When an agreement "clearly and unmistakably" delegates the issue of arbitrability to the arbitrator, we will enforce it. *See id.* at 69 n.1 (internal quotation marks omitted).

Defendants argue that the agreements unambiguously require the parties' disagreements to be arbitrated. The agreements refer "any dispute" to "binding arbitration" and define "Dispute" to include "any issue concerning the validity, enforceability, or scope of . . . the Agreement to Arbitrate." J. App. 114–15. Although on its face this clause appears to give the arbitrator blanket authority over the parties' disputes, several issues give us pause. These include provisions governing class actions, such as this, and the actual scope of the arbitrator's authority, given the broad authority of tribal courts to set aside the arbitrator's award. *See id.* 116.

In any event, "[i]f a party challenges the validity under [9 U.S.C.] § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4." *Rent-A-Center*, 561 U.S. at 71. Plaintiffs mount a convincing challenge to the arbitration clause itself. Their complaint alleges that "[t]he

delegation provision of the Purported Arbitration Agreement is also fraudulent." J. App. 55. That specific attack on the delegation provision is sufficient to make the issue of arbitrability one for a federal court. *See Rent-A-Center*, 561 U.S. at 71; *see also* 9 U.S.C. § 2. The district court was correct to decide it, and we properly consider it on appellate review.[3]

B.

We next ask whether the arbitration agreements are enforceable. The Federal Arbitration Act ("FAA") expresses a preference for enforcing arbitration clauses, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Unconscionability is one such ground. Under Vermont law, a contract provision may be unenforceable where the provision is procedurally unconscionable, substantively unconscionable, or both. *See Glassford v. BrickKicker*, 35 A.3d 1044, 1048–49 (Vt. 2011). We review *de novo* the district court's denial of the motions to compel arbitration. *Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265, 269 (2d Cir. 2015).

This case, and the tribe-payday lending partnership it challenges, is not unique. Courts across the country have confronted transparent attempts to deploy tribal sovereign immunity to skirt state and federal consumer protection laws. *Bay Mills*, 572 U.S. at 825 (Scalia, J., dissenting). Part of this scheme involves

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[3] Defendants would have us believe that the Supreme Court's recent decision in *Henry Schein, Inc. v. Arthur & White Sales, Inc.*, 139 S. Ct. 524 (2019), requires a different outcome. But *Schein* dealt with an exception to the threshold arbitrability question—the so-called "wholly groundless" exception—not a challenge to the validity of an arbitration clause itself. *See id.* at 529–31. As such, *Schein* has no bearing on this case.

crafting arbitration agreements like the ones here, in which borrowers are forced to disclaim the application of federal and state law in favor of tribal law (that may or may not be exceedingly favorable to the tribal lending entity). Like the Fourth and Seventh Circuits, we are not sold. We hold that the agreements here are both unenforceable and unconscionable. *See Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016); *Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014).

First, we conclude that the arbitration agreements are unenforceable because they are designed to avoid federal and state consumer protection laws. Similar to the agreement in *Hayes*, Plaintiffs' agreements here require the application of tribal law only and disclaim the application of state and federal law.[4] *See* J. App. 116–17. The arbitration mechanism in these agree-

[4] Defendants point to the arbitration agreements' definition of "disputes" to argue that, unlike the agreement in *Hayes*, these agreements do not explicitly disclaim federal law. That definition provides that a dispute includes claims based on a "federal or state constitution, statute, ordinance, regulation, or common law." J. App. 115. But it is far from clear what import this provision provides given that two pages later the agreements specifically state that "[n]either this Agreement nor the Lender is subject to the laws of *any state* of the United States." *Id.* 117 (emphasis added). Further, and despite the lack of a similar provision in the arbitration agreement explicitly disclaiming the application of federal law, the loan agreements themselves insist that the borrower "acknowledge[s] and consent[s] to be bound to the terms of this Agreement, consent[s] to the sole subject matter and personal jurisdiction of the Chippewa Cree Tribal Court, and further agree[s] that *no other state or federal law or regulation* shall apply to this Agreement, its enforcement or interpretation." *Id.* 109 (emphasis added). At best, then, Defendants can claim that the agreements intentionally obfuscate, as opposed to explicitly disclaim, the application of federal law.

ments purports to offer neutral dispute resolution but appears to disallow claims brought under federal and state law. And the Supreme Court has made clear that arbitration agreements that waive a party's right to pursue federal statutory remedies are prohibited. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–36 (2013). By applying tribal law only, arbitration for the Plain Green borrowers appears wholly to foreclose them from vindicating rights granted by federal and state law. We agree with the Fourth Circuit that "[t]he just and efficient system of arbitration intended by Congress when it passed the FAA may not play host to this sort of farce." *Hayes*, 811 F.3d at 674.

Defendants' argument that tribal law perhaps incorporates, or can be supplemented with, some federal law or Montana law does not save the agreements. It is altogether unclear what that incorporation or supplementation would look like. Tribal law is generally unavailable outside of the reservation, and Plaintiffs plausibly allege that any tribal law that would be applied has been carefully tailored to protect Plain Green's interests. *See* J. App. 73 ("[The Tribe agreed to] adopt a finance code that is acceptable to all parties and provide for the licensing of an arm of the tribe to engage in consumer lending."). Tribal law provides no guarantee that federal and state statutory rights could be pursued, much less vindicated, in this arbitral forum.

Second, we conclude that the arbitration agreements are substantively unconscionable under Vermont law because the arbitral forum for which they provide is illusory. While the agreements provide for arbitration to be conducted by an AAA or JAMS arbitrator at a location convenient for the borrower, the mechanism of tribal court review hollows out those protections.

Rather than the sharply limited federal court review of the arbitrators' decisions as constrained by the FAA, the review by tribal courts under these agreements hands those courts unfettered discretion to overturn an arbitrator's award. *See id.* 116 (any arbitral award "may be set aside by the tribal court upon judicial review"). Ultimately, the tribal court is directed to interpret its own law—alleged to be completely one-sided in favor of the tribe—which effectively insulates the tribe from any adverse award and leaves prospective litigants without a fair chance of prevailing in arbitration. *See Jackson*, 764 F.3d at 778–79 (applying Illinois law).

Adding to the unconscionability of arbitrating under these terms are the allegations of corruption in tribal government. Not only have several tribal officers pleaded guilty to federal corruption crimes, but an FBI and Interior Department investigation uncovered tribal judges who felt intimidated enough to rule for the Tribe when they otherwise may not have. *See* J. App. 279–81. Requiring non-tribal plaintiffs to be subject to an illusory arbitration reviewed *in toto* by a tribal court with a strong interest in avoiding an award adverse to the lender is unconscionable.

Nor do the opt-out provisions save the agreements. Plaintiffs must opt out within 60 days of entering the agreement, which is unlikely for unsophisticated payday loan borrowers who may well be stuck in a cycle of debt and require a stream of new loans to pay off old loans. Further, opting out merely puts plaintiffs in tribal court—the same hostile forum in which they would end up after arbitration.

C.

Finally, we must determine whether any clause ought to be severed from the agreements. Under the FAA, "an arbitration provision is severable from the remainder of the contract" unless there is a separate challenge "directed specifically to the agreement to arbitrate." *Rent-A-Center*, 561 U.S. at 71. We are well aware of our obligation to "rigorously enforce arbitration agreements according to their terms," *United Bhd. of Carpenters & Joiners of Am. v. Tappan Zee Constructors, LLC*, 804 F.3d 270, 274 (2d Cir. 2015) (internal quotation marks omitted), but Plaintiffs mount a specific, separate challenge to the arbitration clause. That that challenge overlaps with the challenges to the balance of the loan agreement does not change our analysis.

And as the district court recognized, Plaintiffs' substantive challenges to the loan agreements are based on federal and state consumer protection laws. The challenge to the arbitration provisions is based on unconscionability, which we have analyzed above. We find no basis therefore to sever any particular provision of the arbitration agreement because, given the pervasive, unconscionable effects of the arbitration agreement interwoven within it, nothing meaningful would be left to enforce.

V.

Plain Green is a payday lending entity cleverly designed to enabled Defendants to skirt federal and state consumer protection laws under the cloak of tribal sovereign immunity. That immunity is a shield, however, not a sword. It poses no barrier to plaintiffs seeking prospective equitable relief for violations of federal or state law. Tribes and their officers are

not free to operate outside of Indian lands without conforming their conduct in these areas to federal and state law. Attempts to disclaim application of federal and state law in an arbitral forum subject to exclusive tribal court review fare no better. The judgment of the district court is affirmed.[5]

[5] The district court correctly concluded that, because an *Ex parte Young*-style suit is limited to prospective injunctive relief, it does not permit the type of constructive trust remedy for unjust enrichment also sought here by Plaintiffs. *See Gingras*, 2016 WL 2932163, at *5, *26 n.26; *see also Edelman v. Jordan*, 415 U.S. 651, 665–66 (1974) ("equitable restitution" remedy impermissible under *Ex parte Young* because it effectively constituted a money judgment). A further question may be whether an injunction barring the Tribe from recovering the principal of its loans might cross the same line, either on the theory that the lent money belongs to the Tribe, or that such injunctive relief "transfers" from the tribe's coffers an asset (the receivable), which is effectively equivalent to money. Without expressing any view, we note this issue for the district court's consideration at some appropriate point. As Plaintiffs' demands include injunctive relief that undoubtedly falls within the protected scope of *Ex parte Young*, the question whether an injunction barring recovery of the principal of a loan is outside the scope allowed by *Ex parte Young* might be deferred to a later stage in the proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Case No. 5:15-cv-101

JESSICA GINGRAS AND ANGELA C. GIVEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

JOEL ROSETTE, TED WHITFORD, TIM MCINERNEY, THINK FINANCE, INC., TC LOAN SERVICE, LLC, KENNETH E. REES, TC DECISION SCIENCES, LLC, TAILWIND MARKETING, LLC, SEQUOIA CAPITAL OPERATIONS, LLC AND TECHNOLOGY CROSSOVER VENTURES,

Defendants.

OPINION AND ORDER RE: CROSS MOTION FOR JURISDICTIONAL DISCOVERY AND MOTIONS TO DISMISS AND TO COMPEL ARBITRATION
(Docs. 43, 64, 65, 66, 67, 76, 77)

Plaintiffs have filed a class action against individuals and companies involved in an online lending venture operated by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation in Montana (the Tribe). They claim that the "payday" loans offered by Plain Green, LLC violate federal and state law because of the usurious interest rates (between 198 and 376% annually) and other unlawful features of the loans such as the lender's automatic access to the consumer's bank account to facilitate repayment.

All Defendants have filed motions to dismiss or to compel arbitration. (Docs. 64, 65, 66, 67, 76, 77.) Also pending is Plaintiffs' Motion for Jurisdictional Discovery on the issues of subject-matter jurisdiction and arbitration. (Doc. 43.) The court heard argument on all of the pending motions on December 16, 2015. Plaintiffs filed Supplemental Authority and Supplemental Documents on January 18, 2016 (Doc. 107) and April 8, 2016 (Doc. 114), at which time the court took the motions under advisement.

Background

The facts as they appear in Plaintiff's 43-page First Amended Complaint ("FAC") (Doc. 18) may be summarized as follows.[1]

Plaintiffs are Vermont residents who have borrowed money from Plain Green, LLC. Plain Green holds itself out as a "tribal lending entity wholly owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation." (Doc. 18 ¶ 2.) The reservation is located in Montana.

Plain Green operates its lending business over the internet. It has no physical place of business in Vermont or any property or employees in Vermont. Instead, borrowers reply to an internet site and apply for credit through an online application process. (*Id.* ¶ 21.) Within the banking industry, these loans are commonly called "payday loans" because they are frequently marketed as loans sufficient to tide the borrower over until the next paycheck. Plain Green employs subsidiaries of Think Finance, Inc. to market, administer, and collect its loans. (*Id.* ¶ 57.)

[1] Additional factual allegations are recited as necessary in the discussion below.

Plaintiffs borrowed relatively small sums of money from Plain Green for periods of up to one year. Frequently one loan would follow close on the heels of the repayment of the previous loan.

In July 2011, Plaintiff Jessica Gingras borrowed $1,050 from Plain Green at a rate of 198.17%. She repaid this loan with interest. During July and August 2012, she borrowed a total of $2,900 at a rate of 371.82%. She has not repaid the second loan. (*Id.* ¶¶ 48-50.)[2]

Plaintiff Angela Given borrowed $1,250 from Plain Green in July 2011. She completed repayment a year later. The annual interest rate was 198.45%. (*Id.* ¶ 60.) Within a few days, in July 2012, she borrowed $2,000. She completed repayment a year later in July 2013 at an annual interest rate of 159.46%. (*Id.* ¶ 61.) She also borrowed $250 in May 2013 which she repaid within a few weeks at an annual interest rate of 376.13%. In July 2013, she borrowed $3,000 at 59.83%. She has not completed repayment of the most recent loan.

Plaintiffs allege that the high interest rates violate Vermont's usury laws which permit a maximum rate of interest of 24%. *See* 9 V.S.A. § 41a. The loan agreements contain other provisions which Plaintiffs say violate state and federal law, including the provision for automatic access to the borrower's bank account in violation of the Electronic Funds Transfer Act, 15 U.S.C. § 1693k(1). (Doc. 18 ¶¶ 181-195.)

Plaintiffs have not sued Plain Green. Instead, they have sued Joel Rosette, who is the Chief Executive

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[2] In addition to loans taken out from Plain Green, Jessica Gingras borrowed $1,200 from FBDLoans in March 2000. This loan was transferred to ThinkCash (a company operated by Kenneth Rees) and later transferred to Plain Green. (*Id.* ¶ 47.)

Officer of Plain Green, and Ted Whitford and Tim McInerney (the "Tribal Defendants"), who are members of Plain Green's Board of Directors. All three are sued in their official capacity for declaratory and injunctive relief only pursuant to the authority expressed in *Ex Parte Young*, 209 U.S. 123 (1908).

Plaintiffs have also sued Think Finance, Inc. ("Think Finance" or "TF") and its former President, Chief Executive Officer, and Chairman of the Board Kenneth Rees. Think Finance is a Delaware corporation. Kenneth Rees is a citizen of Texas. The PAC alleges that these defendants developed a plan to make loans through a tribal entity in order to take advantage of tribal immunity from state banking laws. (Doc. 18 ¶ 80.) They control the operations of Plain Green. They dictated the terms of the Tribe's finance code. In Plaintiffs' view, Plain Green is a shell company created by Think Finance and Mr. Rees in order to provide a layer of legal protection for a lending business which the Federal Trade Commission and state banking regulators have determined to be illegal. (*See id.* ¶ 3; *see also id.* ¶ 37 ("Plain Green's very existence is an effort to avoid liability.").) Plaintiffs allege that the tribal law relevant to this lending business and the tribal courts with potential jurisdiction over any dispute have been subverted by the money generated by Plain Green.

The next group of defendants are subsidiaries of Think Finance which perform various tasks in connection with the payday lending operation. These include TC Decision Sciences, LLC, Tailwind Marketing, LLC, and TC Loan Service, LLC. (These defendants, together with Think Finance, Inc., are referred to as the "Think Defendants.")

Finally, Plaintiffs have sued two of the financial institutions which they claim provide the funding for loans made by Plain Green. These are Sequoia Capital Operations, LLC (Sequoia) and Technology Crossover Ventures (TCV).[3]

Both of the loan agreements between Plain Green and Plaintiffs contain arbitration clauses. The clauses are detailed and cover several pages of the parties' loan agreements.[4] The arbitration provisions require the borrowers to submit any dispute to binding arbitration, including disputes with "related third parties." (Doc. 13-5 at 50.) The borrower may opt out of the arbitration provision within 60 days of the receipt of loan funds. (*Id.* at 49.) The borrower may select the procedures of the American Arbitration Association or JAMS and the arbitration may occur on the reservation or within 30 miles of the borrower's residence at the choice of the borrower. Plain Green will bear the cost of the arbitration including the filing fee and the arbitrator's costs. Each side pays its own attorneys fees. The arbitrator may award attorneys fees to the prevailing party.

The arbitrator is required to apply Chippewa Cree tribal law to the dispute. He or she is not authorized

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[3] At the December 16, 2015 hearing, counsel for TCV remarked that "Technology Crossover Ventures" does not exist, and that Plaintiffs presumably intended to name "TCV V" as a defendant. The court treats TCV V as the defendant in question, and refers to it as "TCV." Counsel for Sequoia Capital Operations, LLC remarked that that entity is an operations organization that makes no investments, and that Plaintiffs presumably intended to name Sequoia Capital. The court treats Sequoia Capital as the defendant in question, and refers to it as "Sequoia."

[4] The FAC incorporates the agreements by reference. (*See* Doc. 18 ¶ 118.)

to hear class-wide claims. He or she must refer any dispute over class arbitration to a tribal court of the Chippewa Cree Tribe. The arbitrator must make written findings to support an award. Any award must be supported by substantial evidence and must be consistent with the loan agreement. The tribal court has authority to aside an award if these conditions are not met. The arbitration agreement and the loan agreement as a whole are subject to tribal law and are not subject to the laws of any state.

Analysis

I. Subject-Matter Jurisdiction

The pending motions to dismiss or to compel arbitration invoke almost all of the categories of defenses outlined in Fed. R. Civ. P. 12(b). The court begins with Rule 12(b)(1)—the defense of lack of subject-matter jurisdiction.[5] "A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court 'lacks the statutory or constitutional power to adjudicate it . . . .'" *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.À.R.L.*, 790 F.3d 411, 417 (2d Cir. 2015) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). A court lacks constitutional power to adjudicate a case

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[5] The various motions to compel arbitration raise an issue that is also of great importance, but the court's first obligation is to satisfy itself that it has jurisdiction. *See Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.,* 764 F.3d 210, 213 (2d Cir. 2014) (addressing jurisdiction prior to arbitrability); *Bergman v. Spruce Peak Realty, LLC,* 847 F. Supp. 2d 653 (D. Vt. 2012) (noting that, "[o]rdinarily, subject matter jurisdiction must 'be established as a threshold matter'" (quoting *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-95 (1998))).

where "the plaintiff lacks constitutional standing to bring the action." *Id.*

"The plaintiff bears the burden of 'alleg[ing] facts that affirmatively and plausibly suggest that it has standing to sue.'" *Id.* (alteration in original) (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011)). "In resisting a motion to dismiss under Rule 12(b)(1), plaintiffs are permitted to present evidence (by affidavit or otherwise) of the facts on which jurisdiction rests." *Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004). "[C]ourts generally require that plaintiffs be given an opportunity to conduct discovery on these jurisdictional facts, at least where the facts, for which discovery is sought, are peculiarly within the knowledge of the opposing party." *Id.*

Plaintiffs assert the following five bases for federal subject-matter jurisdiction: (1) federal question jurisdiction under 28 U.S.C. § 1331; (2) diversity jurisdiction under 28 U.S.C. § 1332; (3) class action jurisdiction under 28 U.S.C. § 1332; (4) jurisdiction under RICO, 18 U.S.C. § 1965; and (5) jurisdiction under the Federal Consumer Financial Law, 12 U.S.C. § 5481. (Doc. 85 at 28.) Plaintiffs assert federal-question jurisdiction on the basis of claims arising under the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. §§ 5531(a) and 5536(a), the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45, and the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693k(1). They also assert a civil RICO claim pursuant to 18 U.S.C. § 1962(c).

The Tribal Defendants seek dismissal under Rule 12(b)(1) asserting that: (1) the action is barred by tribal sovereign immunity, and (2) the Plaintiffs lack Article III standing. Plaintiffs argue that tribal

immunity and subject-matter jurisdiction are distinct concepts. They also assert that they have Article III standing.

A. Tribal Sovereign Immunity

The first issue is whether tribal sovereign immunity is a jurisdictional question at all. Plaintiffs assert that *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), stands for the proposition that tribal immunity and federal subject-matter jurisdiction are entirely separate concepts. The court disagrees. In *Bay Mills,* the Supreme Court observed that no provision of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., limited the grant of jurisdiction under the general federal-question statute, 28 U.S.C. § 1331. *Bay Mills,* 134 S. Ct. at 2029 n.2. But that observation related to the initial question of whether federal-question jurisdiction existed, not the subsequent question of whether tribal sovereign immunity might destroy subject-matter jurisdiction. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 28 (1st Cir. 2000) (noting that a federal court can address tribal sovereign immunity only after it confirms that subject-matter jurisdiction exists).

Courts in the Second Circuit have held that Rule 12(b)(1) is a proper vehicle for invoking tribal sovereign immunity. *See Garcia v. Akwesasne Hous. Auth.,* 268 F.3d 76, 84 (2d Cir. 2001) (analyzing tribal sovereign immunity as an issue of subject-matter jurisdiction); *City of New York v. Golden Feather Smoke Shop, Inc.,* No. 08-CV-3966(CBA), 2009 WL 705815, at *2 (E.D.N.Y. Mar. 16, 2009) ("'[A] motion to dismiss based on tribal immunity is appropriately examined under Fed. R. Civ. P. 12(b)(1).'" (quoting *Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc.,* 221 F. Supp. 2d 271, 276 (D. Conn. 2002))). Decisions

from outside the Second Circuit—some post-dating *Bay Mills*—are in accord.[6] The court therefore analyzes the Tribal Defendants' sovereign-immunity claim in the Rule 12(b)(1) context.

"Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Bay Mills,* 134 S. Ct. at 2030 (internal quotation marks omitted). "Among the core aspects of sovereignty that tribes possess . . . is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' *Id.* (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978)). Tribal immunity applies to suits brought by States as well as those brought by individuals. *Id.* at 2031. Tribal immunity also applies "for suits arising from a tribe's commercial activities, even when they take place off Indian lands." *Id.* (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751 (I 998)).[7]

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[6] *See Piston v. Garcia,* 791 F.3d 1104, 1111 (9th Cir. 2015) (tribal sovereign immunity is "quasi-jurisdictional" and may be decided under Rule 12(b)(1)); *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy ex rel. C.M.B.,* 786 F.3d 662, 670 (8th Cir. 2015) ("Tribal sovereign immunity is a 'jurisdictional threshold matter.' (quoting *Harmon Indus., Inc. v. Browner,* 191 F.3d 894, 903 (8th Cir. 1999))); *Furry v. Miccosukee Tribe of Indians of Fla.,* 685 F.3d 1224, 1228 (11th Cir. 2012) ("Tribal sovereign immunity is a jurisdictional issue."); *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.,* 585 F.3d 917, 920 (6th Cir. 2009) (dismissal for lack of jurisdiction proper if entity enjoyed tribal sovereign immunity); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 28 (1st Cir. 2000) ("[T]ribal sovereign immunity is jurisdictional in nature . . . .").

[7] Four dissenting Justices in *Bay Mills* opined that *Kiowa* was wrongly decided and has led to "inequities" and "mounting consequences." *Bay Mills,* 134 S. Ct. at 2045-46 (Thomas, J., dissenting). Notably, the dissenters gave one example of particular interest in this case, stating: "payday lenders (companies that lend consumers short-term advances on paychecks at interest

Generally, a plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." *Chayoon v. Chao,* 355 F.3d 141, 143 (2d Cir. 2004) (per curiam).

The answer to the Tribal Defendants' sovereign-immunity claim stems from an exception to the general rule stated in *Chayoon.* As individuals sued for injunctive and declaratory relief in their official capacity, the Tribal Defendants are subject to suit by analogy to *Ex Parte Young.* The Supreme Court has recognized the application of the doctrine to tribe members. *See Bay Mills,* 134 S. Ct. at 2035 (under analogy to *Ex Parte Young,* tribal immunity does not bar suit "for injunctive relief against *individuals,* including tribal officers, responsible for unlawful conduct"); *Santa Clara Pueblo,* 436 U.S. at 59.

The Second Circuit in *Garcia* noted two important "qualifications" limiting a plaintiff's ability to obtain injunctive relief when she invokes the *Ex Parte Young-type* exception. First, any law under which a plaintiff seeks injunctive relief "must apply substantively" to the tribe. *Garcia,* 268 F.3d at 88. An example of a circumstance in which a law does not "apply substantively" to a tribe is when the law specifically exempts "an Indian tribe" from its prohibitions. *See id.* (citing 42 U.S.C. § 2000e(b)). Second, a plaintiff "must have a private cause of action to enforce the substan-

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rates that can reach upwards of 1,000 percent per annum) often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality." *Id.* at 2052.

tive rule." *Id.* The Tribal Defendants assert that Plaintiffs' federal claims fail on both counts. However, the court does not read the "qualifications" articulated in *Garcia* as components of the jurisdictional analysis. The court treats the Tribal Defendants' arguments on these points as necessary below.[8]

The Tribal Defendants argue that Plaintiffs seek more than prospective injunctive or declaratory relief, and actually seek money damages from the Tribal Defendants—a remedy not available under the *Ex Parte Young-type* exception. (*See* Doc. 66 at 19 n.5.) The FAC does indeed assert (apparently without excepting the Tribal Defendants) that "funds should be returned to the people who fell victim to Defendants' illegal scheme"; and further requests an "[e]quitable surcharge seeking return of all interest charged above a reasonable rate and any financial charges associated with the loan" and also "[a] constructive trust over funds obtained illegally." (Doc. 18 at 42–43.) The court concludes that, to the extent the FAC seeks money damages against the Tribal Defendants, that relief is unavailable.[9]

Finally, the Tribal Defendants assert that the *Ex Parte* Young-type exception applies only to violations of federal law, and that as a result all of Plaintiffs' state-law claims fail. (Doc. 66 at 23.) *Ex Parte Young*

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[8] Similarly, the court addresses below the Tribal Defendants' assertion that Plaintiffs' EFTA claim is time-barred, as well as Defendants' argument that RICO's civil remedies provision does not authorize equitable relief.

[9] As a practical matter, Plaintiffs claim that only a tiny percentage of the revenues generated by Plain Green remain with the Tribe. The term sheet outlining the discussion of revenues allocates 5% to the Tribe. The rest goes to Think Finance and other non-tribal companies. (Doc. 18-1.)

is itself "inapplicable in a suit against state officials on the basis of state law." *Pennhurst State Sch. & Hosp. v. Haldeman,* 465 U.S. 89, 106 (1984). Thus under the *Ex Parte Young* doctrine, "a federal court's grant of injunctive relief against a state official may *not* be based on violations of state law." *Dube v. State Univ. of N.Y.,* 900 F.2d 587, 595 (2d Cir. 1990) (citing *Pennhurst,* 465 U.S. at 106). Extending that reasoning to tribal cases, the court in *Frazier v. Turning Stone Casino* held that *Ex Parte Young* "only allows an official acting in his official capacity to be sued in a federal forum to enjoin conduct that violates *federal* law." 254 F. Supp. 2d 295, 310 (N.D.N.Y. 2003) (emphasis added).

Frazier might have been persuasive authority prior to the Supreme Court's decision in *Bay Mills.* But in *Bay Mills* the Supreme Court stated that, if a tribe were to set up an off-reservation casino, the state "could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license." 134 S. Ct. at 2035. That is because "a State, on its own lands, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory," and because, when not on Indian lands, tribal officials "are subject to any generally applicable state law." *Id.* at 2034. Thus, as other courts have recognized, *Bay Mills* establishes that "tribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex Parte Young* when their conduct occurs outside of Indian lands." *Alabama v. PCI Gaming Auth.,* 801 F.3d 1278, 1290 (11th Cir. 2015).[10]

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[10] Even prior to *Bay Mills,* the Supreme Court had held that sovereign immunity did not prevent suit to enjoin off-reservation violations of state law by individual tribe members. *Puyallup*

Plaintiffs assert that "the activities of the Plain Green enterprise occurred outside the reservation." (Doc. 85 at 32.) The Tribal Defendants disagree (at least in part), maintaining that the loan agreements at issue were formed on the Tribe's reservation. (Doc. 66 at 32.) In support of that argument, the Tribal Defendants cite 2 *Williston on Contracts* § 6:62 (4th ed.): "[I]f the acceptance is not made simultaneously with the offer, and is made in a different place, . . . the place of the contract is the place where the last act necessary to the completion of the contract is done . . ." The Tribal Defendants then rely on the following assertion in Joel Rosette's affidavit: "The act triggering the release of a loan to a borrower is Plain Green's final assessment of the consumer's loan application. Plain Green undertakes this final determination from its office," which is on the Tribe's Reservation. (Doc. 66-1 ¶¶ 6, 9.)

The Tribal Defendants do not explain why the "final assessment" of a consumer's loan application is an "acceptance" in the language of contract-formation. In any case, even if the contract was formed on the Tribe's reservation, a substantial part of the events giving rise to Plaintiffs' claims occurred outside the reservation.[11] The Second Circuit made a similar observation in *Otoe-Missouria Tribe of Indians v. New York State Department of Financial Services,* concluding that the plaintiff-tribes in that case (which were also involved in making short-term internet loans) had "provided insufficient evidence to establish that they are likely to succeed in showing that the internet loans should

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Tribe, Inc. v. Dep't of Game of State of Wash., 433 U.S. 165, 171 (1977).

[11] The court reaches the same conclusion in its analysis of the venue issue, *infra.*

be treated as on-reservation activity." 769 F.3d 105, 115 (2d Cir. 2014).

As the court observed in *Otoe-Missouria:*

> Much of the commercial activity at issue takes place in New York. That is where the borrower is located; the borrower seeks the loan without ever leaving the state, and certainly without traveling to the reservation. Even if we concluded that the loan is made where it is approved, the transaction . . . involves the collection as well as the extension of credit, and that collection clearly takes place in New York. The loan agreements permit the lenders to reach into the borrowers' accounts, most or all of them presumably located in New York . . . .

Id. Here, the circumstances are similar and the Tribal Defendants have presented no more evidence than the tribes in *Otoe-Missouria.* Thus, at least for the purposes of the motions to dismiss, the result predicted in that case is the same in this one: the relevant conduct occurred outside of Indian lands. The Tribal Defendants may thus be subject to suit under the *Ex Parte Young* analogy.

Finally, the Tribal Defendants assert that nothing in *Bay Mills* authorizes suits *by private citizens* based on violations of state law. (Doc. 92 at 16.) It is true that Plaintiffs in this case are private citizens, whereas in *Bay Mills* and *PCI Gaming* the plaintiffs were States. But *Bay Mills* does not explicitly limit the application of the *Ex Parte Young* analogy to suits brought by States. In fact, the Court stated that, "[u]nless federal law provides differently, Indians going beyond reservation boundaries are subject to *any generally applicable*

slate law." Bay Mills, 134 S. Ct. at 2035 (internal quotation marks omitted; emphasis added). That plain language includes state laws that may be enforced by private citizens. *See* Am. Indian Law Deskbook § 7:4 (noting that tribal officer-capacity suits under *Bay Mills* are a "potential remedy for states *and other parties"* (emphasis added)).[12]

Ultimately, tribal sovereign immunity may limit the shape and nature of the relief against the Tribal Defendants, but it is not a complete bar to a lawsuit against them.

B. Standing

The Tribal Defendants, joined by the Think Defendants and TCV, contend that Plaintiffs lack standing because they have not yet incurred injury or damages and because they do not seek redress for injuries they have sustained personally. (Doc 66 at 24-27)[13] Plaintiffs respond that they continue to owe money on unlawful loans and suffer reputational harm through credit reporting of non-payment. The court agrees with Plaintiffs that the FAC contains sufficient allegations to support individualized standing for each Plaintiff. There is little dispute that both borrowed money on terms which would violate Vermont's usury laws. (*See* Doc. 91 at 12, Amicus brief filed by the Office of the Vermont Attorney General.) Whether Plain Green is subject to these laws is in dispute, but

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[12] These conclusions make it unnecessary to consider the Vermont Attorney General's argument (Doc. 91 at 4) that Plain Green is not a tribal entity or an "arm of the Tribe" to which tribal immunity might apply in the first place.

[13] The Think Defendants and TCV incorporate the Tribal Defendants' standing argument. (Doc. 65 at 20; Doc. 76 at 26.)

Plaintiffs' status as people alleging injury through violations of state law is not.

Defendants' arguments that no injury is sustained because a person has an outstanding loan balance which has not been reduced to judgment or otherwise affected her interests is contrary to the allegations of the FAC, which the court accepts as true at this stage of the case. The specific relief sought by Plaintiffs demonstrates their direct, personal stake in the dispute. They seek declaratory relief under statutes including the Vermont Consumer Fraud Act. Such relief could relieve them of any future repayment obligation. They seek repayment of any interest collected above a legal rate. And they seek an injunction shielding them from future collection efforts. (Doc. 18 at 43.) As these claims make clear, Plaintiffs' interest in the subject matter of this lawsuit and the clear potential for relief in their individual cases confers standing for purposes of Article III.

II. Personal Jurisdiction

The next step is to consider Rule 12(b)(2): whether the court has personal jurisdiction over each of the Defendants. The Tribal Defendants, Mr. Rees, Sequoia, and TCV all assert that the court lacks personal jurisdiction over them. (Doc. 66 at 32; Doc. 67-2 at 16; Doc. 77-1 at 4; Doc. 76 at 14.) As with the subject-matter jurisdiction issues, the personal-jurisdiction issues require some relatively extensive analysis.

"On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendants." *Dodge v. Manchester Police Dept,* No. 5:13-CV-228, 2014 WL 4825632, at *4 (D. Vt. Sept. 25, 2014). "In the absence of jurisdictional discovery, the court presumes the

truth of the complaint's allegations and construes the complaint in the light most favorable to the plaintiff." *Id.* "A plaintiff must make a *prima facie* showing of jurisdiction." *Id.*

Personal jurisdiction may be either general or specific in nature. Plaintiffs do not contend that any of the defendants has a presence in Vermont which would support general jurisdiction for all purposes. They argue that the specific acts alleged in the FAC give rise to personal jurisdiction for purposes of claims arising out of those acts.

The exercise of personal jurisdiction over non-resident defendants raises issues of due process because of the potential unfairness of compelling these parties to defend actions in distant jurisdictions. The Due Process Clause of the Fourteenth Amendment limits the assertion of personal jurisdiction in diversity cases. In federal question cases, similar protection is afforded by the Due Process Clause of the Fifth Amendment. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.,* 484 U.S. 97, 104 (1987).

Within the structure of the Federal Rules of Civil Procedure, the permissible scope of effective service is co-extensive with the limits of personal jurisdiction. As amended in 1993, Fed. R. Civ. P. 4(k) provides for service and therefore the exercise of personal jurisdiction over persons subject to the jurisdiction of state courts of general jurisdiction and "when authorized by a federal statute." A variety of federal statutes, including the RICO statute, provide for nationwide service of process. *See* 18 U.S.C. § 1965. The extension of personal jurisdiction in these federal question cases remains subject to the constitutional limits of due process.

With this background in mind, the questions the court must answer in resolving the personal jurisdiction issues in this case are:

1. Would Defendants be subject to personal jurisdiction in the courts of general jurisdiction in Vermont under principles of due process expressed in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945)?

2. Alternatively, does the provision for nationwide service of process in the RICO statute support the court's exercise of personal jurisdiction over Defendants?

3. Does the exercise of the jurisdiction over the state-law claims fall within the doctrine of pendent personal jurisdiction?

A. Officials of Plain Green—the Tribal Defendants

Plaintiffs have sued three tribal members who play important roles in Plain Green. These are Mr. Rosette, the chief executive officer, and Ted Whitford and Tim McInerney, two board members. All three are residents of Montana. They serve as proxies in this case for Plain Green, and suit is filed against them in their official capacity to avoid the defense of tribal sovereign immunity. *See supra; see also Bay Mills,* 134 S. Ct. at 2035 (recognizing the application of *Ex Parte Young* to suits against tribal leaders).

The FAC alleges that Mr. Rosette is "responsible for all operations of Plain Green." (Doc. 18 ¶ 6.) As CEO, he "is responsible for and can stop the illegal activity described in this Complaint." (*Id.*) Mr. Whitford and Mr. McInerney are board members. The FAC alleges that the board of directors "has the power to fire the

CEO of Plain Green and appoint a new CEO who will comply with the law," (*Id.* ¶¶ 7, 8.)

Personal jurisdiction over state or tribal officials in an *Ex Parte Young* case raises special issues in "minimum contacts" analysis. Is the court considering the contacts between Vermont and the individuals, or the contacts between the state and Tribe and Vermont? *See* Tracy O. Appleton, Note, *The Line Between Liberty and Union: Exercising Personal Jurisdiction Over Officials From Other States,* 107 Colum. L. Rev. 1944 (Dec. 2007). The lower courts have differed on this issue, and it has not been resolved by the Supreme Court. *See Leroy v. Great W United Corp.,* 443 U.S. 173, 180-81 (1979) (by-passing issue in order to resolve case on non-constitutional pounds).

One line of authority looks to contacts between the forum and the defendant state or tribe. In *Great Western United Corp. v. Kidwell,* the Fifth Circuit held that specific jurisdiction existed in Texas over an Idaho official because of the effects of Idaho regulations on business conducted in Texas. 577 F.2d 1256, 1267-68 (5th Cir. 1978), *rev'd on other grounds sub nom., Leroy v. Great W. United Corp.,* 443 U.S. 173 (1979); *see also Ass'n for Molecular Pathology v. U.S. Patent and Trademark Office,* 669 F. Supp. 2d 365 (S.D.N.Y. 2009), *aff'd in part, rev'd in part,* 653 F.3d 1329 (Fed. Cir. 2011) (holding that state university officials in Utah were subject to suit in New York due to the actions of a university foundation in seeking to enforce patents in the forum state). In these cases, whether an individual official had personal contact with the forum state was not necessary to a determination that the court had jurisdiction. Personal jurisdiction for officials sued in a representative capacity arose from the conduct of their state or agency.

The Second Circuit considered these issues in *Grand River Enterprises Six Nations, Ltd. v. Pryor,* 425 F.3d 158 (2d Cir. 2005), *cert. denied,* 549 U.S. 951 (2006). In *Pryor,* parties challenging the action of 30 state attorneys general in reaching a master settlement in the nationwide cigarette litigation of the 1990s filed suit in New York. The Second Circuit held that personal jurisdiction over state officials was present as a result of the trips they or their representatives made to New York City to negotiate the settlement. The decision followed traditional "minimum contacts" analysis in predicating personal jurisdiction on physical presence of the named defendants within the forum state. Had the master settlement agreement been negotiated in Chicago, the federal courts in New York State would have had no basis for jurisdiction over the state attorneys general from other states. Although the effects of the master settlement agreement would still have been felt in New York State (and every other state which joined in the settlement), personal jurisdiction over state officials would not be present except as a result of the contacts of individuals with the forum state.

Plaintiffs make no claim that the Tribal Defendants ever visited Vermont or communicated with anyone in Vermont. Instead, they rely on Plain Green's contacts with Vermont. They allege that Plain Green operated a website which advertised loans across the United States, including Vermont. Once Plaintiffs replied to the advertisement from their homes in Vermont, Plain Green sent them a series of emails and a loan application. Following approval of the loan, Plain Green transferred the loan principal to their bank accounts in Vermont. These frequent contacts would have been sufficient to subject Plain Green to personal jurisdiction in Vermont at least for causes of action, like this

one, which arise out of the particular contacts and resulting loan transaction. *See Chloe v. Queen Bee of Beverly Hills, LLC,* 616 F.3d 158 (2d Cir. 2010) (interne sales of handbags from California to New York residents satisfies minimum contacts requirements); *Blue Compass Corp. v. Polish Masters of Am.,* 777 F. Supp. 4, 5 (D. Vt. 1991) (California defendant who advertised his business in at least one national magazine and obtained one Vermont customer had sufficient contacts with Vermont to support personal jurisdiction).

But Plain Green's contacts with Vermont are not vicariously attributed to its officials any more than directors of a corporation are subject to suit personally in any forum where the actions of the corporation satisfy the minimum contacts test. *See Dumont v. Corr. Corp. of Am.,* No. 2:14-cv-209, 2015 WL 3791407, at *5 (D. Vt. June 17, 2015) (citing cases). In following *Pryor,* the court rules that the absence of contacts between Vermont and the Tribal Defendants means that these Defendants would not be subject to suit in a Vermont state court of general jurisdiction. The first of the two potential bases for personal jurisdiction is not present.

The court turns now to the question of whether the grant of nationwide service within the RICO statute provides a second basis for personal jurisdiction. Section 1965(a) of Title 18 provides for suit in any district court in which a defendant "resides, is found, has an agent, or transacts his affairs." Section 1965(b) permits a suit for civil remedies to be filed in "any district court of the United States in which it is shown that ends of justice require that other parties residing in any other district be brought before the court . . . ."

The Second Circuit has never interpreted these provisions to provide for nationwide personal jurisdiction over any defendant named in a RICO complaint. In *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.,* 138 F.3d 65 (2d Cir. 1998), the court held that § 1965(a) by its express terms required traditional "minimum contacts" within the forum state for at least one defendant. Section 1965(b) permits other defendants to be brought in from distant jurisdictions upon a showing of necessity despite the absence of minimum contacts. "There is no impediment to prosecution of a civil RICO action in a court foreign to some defendants if it is necessary, but the first preference, as set forth in § 1965(a), is to bring the action where suits are normally expected to be brought." *PT United,* 138 F.3d at 71-72. This restrictive reading has withstood the test of time, and is still the law in this Circuit. *See Pincione v. D'Alfonso,* 506 Fed. App'x 22 (2d Cir. 2012).

In the context of this case, § 1965(a) and (b) require that at least one Defendant meet the minimum contacts test before parties not otherwise subject to suit in Vermont can be sued here. None of the three Tribal Defendants meet "minimum contacts" tests in Vermont. Unless the presence of other defendants triggers the "ends of justice" provision of § 1965(b), the absence of contact between the Tribal Defendants and Vermont places them outside the scope of the nationwide jurisdiction permitted under certain circumstances by the RICO statute.

B. Kenneth Rees and the Think Defendants

Plaintiffs allege that Mr. Rees and the companies which lie controls performed the actual work of Plain Green, including making the loans provided to Plaintiffs. Assuming this to be true for purposes of the motions to dismiss, the role of Rees and the Think

Defendants in providing the leadership, underwriting, marketing, and servicing for the Plain Green loans subjects them to personal jurisdiction. They cannot avoid personal jurisdiction for these actions by acting in the name of Plain Green. If, as Plaintiffs allege, these Defendants were the critical actors in making loans on illegal terms to Vermont residents, then they are subject to personal jurisdiction for claims arising out of the acts they performed.

The use of the internet is an important factor in analyzing the minimum contacts test for Rees and the Think Defendants. Although Mr. Rees has visited Vermont rarely and never for reasons related to Plain Green, (*see* Doc. 67-1 ¶ 9), the Think Defendants have entered the Vermont marketplace by creating a website which is accessible to any Vermont consumer with an internet connection. The Second Circuit has recognized that this degree of "interactivity"—the direct connection between an internet business located at a great remove from the forum state and its customers within the forum state—is a factor which supports a finding of minimum contacts. *See Best Van Lines, Inc. v. Walker,* 490 F.3d 239, 252 (2d Cir. 2007) (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.,* 952 F. Supp. 1119 (W.D. Pa. 1997)).

Turning to the specific allegations, the FAC alleges that Mr. Rees "personally designed and directed the business activity described in the Complaint." (Doc. 18 ¶ 10.) After federal regulators shut down his former business known as ThinkCash, Inc., Mr. Rees renamed the business Think Finance, Inc. With a new identity in hand, he approached the Tribe and offered to "provide everything the Tribe needed to run a successful payday loan enterprise if the Tribe would let them use the concept of tribal immunity to stymie state

and federal regulators." (*Id.* ¶ 23.) The Tribe created Plain Green in order to join with Mr. Rees and Think Finance in the payday lending business. (Doc. 18-1 (Term Sheet for Think Finance-Chippewa Cree Transaction).)

The FAC charges Rees and the Think Defendants with using their control over Plain Green to violate state and federal law. These include seeking to avoid state usury limits; blocking access to information about borrowers' accounts; and misrepresenting the nature of the Plain Green loans to credit reporting agencies. (Doc. 18 ¶¶ 32-35.) In Plaintiffs' words, "[d]efendants Rees and Think Finance intentionally and willfully dominated and still dominate the operations of Plain Green. Other than the sovereignty that they attempted to purchase, Rees and Think Finance provided everything that the enterprise needed to operate." (*Id.* ¶ 80.)

These allegations are neither conclusory nor implausible. They are factually detailed—at least as detailed as is possible without the advantages of discovery. They include a description of a similar business venture involving Mr. Rees and the First Bank of Delaware which was dissolved following an FDIC enforcement action and consent decree concerning similar practices. (*Id.* ¶¶ 38-40.) They are consistent with similar allegations in a case brought by the Pennsylvania Attorney General's office against Think Finance, Inc. and other parties in the Eastern District of Pennsylvania. *See Pennsylvania v. Think Finance, Inc.,* No. 14-cv-7139, 2016 WL 183289 (E.D. Pa. Jan. 14, 2016).

The critical issue for a determination of the court's personal jurisdiction over Rees and the Think Defendants is whether their activities satisfy the minimum contacts test. Defendants assert that Mr. Rees has had few personal contacts with Vermont, owns no property

in the state, and has not visited since 1999 and then for non-business reasons. But a personal, physical presence in the state is not required to satisfy the minimum contacts test. Plaintiffs allege that Mr. Rees and the companies which he controls developed a nationwide, illegal lending scheme which resulted in predatory loans to Vermont residents. According to the FAC, the actions he took in other states led to predictable results in Vermont and other states where borrowers responded to the website and took out loans. This is typical of jurisdiction based on "minimum contacts" arising from activities in one state which is directed into others. *See Calder v. Jones,* 465 U.S. 783 (1984) (employees of a national publication subject to personal jurisdiction for libel claim in the forum where the results of targeted intentional conduct were felt).

The same analysis applies to the Think Defendants. According to the FAC, all of these companies joined in developing, marketing, and operating the loan operation. As designed by Mr. Rees and as executed by his companies, the loans were made over the internet to residents of many states, including Vermont. They were marketed through Plain Green in order to skirt state consumer protections. The affiliated corporations which provided specific services such as marketing and underwriting expected their efforts to result in loans made in states including Vermont. The misconduct alleged by Plaintiffs is entirely intentional and directed into Vermont (as well as many other states). That Rees and the Think Defendants might have to respond in court to defend their practices in a state like Vermont where they enabled Plain Green to lend money is hardly surprising or unfair.

The court concludes that Plaintiffs have made plausible allegations sufficient to support a determi-

nation of minimum contacts for purposes of personal jurisdiction for the specific claims made in this case against Rees and the Think Defendants. As the court's discussion indicates, they could have been sued on these claims in the Vermont state courts on the basis of their actions in developing the payday loan which they operated through Plain Green and which they directed into Vermont. Such conduct satisfies both the minimum contacts test and the related requirement of due process that the exercise of personal jurisdiction meet general standards of fairness.

C. Sequoia Capital and Technology Crossover Ventures

The court has an insufficient basis for making a ruling about minimum contacts and due process requirements with respect to Sequoia and TCV because Plaintiffs allege very little about their respective roles in the Plain Green operation. As the following discussion of personal jurisdiction under RICO makes clear, however, they are potentially subject to suit as additional defendants subject to the court's jurisdiction in the interests of justice. *See* 18 U.S.C. § 1965(b). The court returns to the question of personal jurisdiction over Sequoia and TCV in the course of its RICO analysis below.

D. Nationwide Jurisdiction Under RICO

Because the court has determined that Rees and the Think Defendants are subject to personal jurisdiction, it returns to the question of whether 18 U.S.C. § 1965(b) permits the Tribal Defendants to be sued in Vermont. The Second Circuit has interpreted § 1965(b) to permit the exercise of jurisdiction over parties who do not meet the minimum contacts test so long as at least one other defendant meets the test and the

exercise of jurisdiction is required by the "ends of justice." *PT United,* 138 F.3d at 71 n.5. The standard is one of necessity and of last resort. "There is no impediment to prosecution of a civil RICO action in a court foreign to some defendants if it is necessary, but the first preference, as set forth in § 1965(a), is to bring the action where suits are normally expected to be brought. Congress has expressed a preference in § 1965 to avoid, where possible, haling defendants into far flung fora." *Id.* at 71-72.

The court concludes that the ends of justice fairly require jurisdiction in Vermont against the Tribal Defendants pursuant to 18 U.S.C. § 1965(b). Several reasons support this conclusion. First, the impact of this lawsuit on the Tribal Defendants is modest. There is no claim against them for money damages. They are being asked only to cease violating federal and state consumer protections. This court has no jurisdiction over Plain Green and understands that Plaintiffs seek only injunctive relief against its officials in the form of an order requiring them to obey state and federal laws that regulate lending in Vermont.

Second, it is not clear that there is another forum in which all defendants can be sued (except pursuant to § 1965(b)). Only the Tribal Defendants are citizens of Montana. The other parties and Mr. Rees are from different states. While the record is not fully developed on this point, no party has offered an alternative forum in which personal jurisdiction is present for all parties.

Third, there is nothing inherently unfair or unjust about requiring representatives of a lender doing business in Vermont to appear to defend their practices in this state. These Defendants are already ably represented by highly qualified counsel. The payday

lending business gives every indication of being a highly lucrative business which can afford to appear through counsel in the states in which it operates.

Finally, there is the issue of the viability of the RICO claims. "Ends of justice" RICO jurisdiction can only be exercised if the allegations state a viable RICO claim. *See 7 W 57th St. Realty Co., LLC v. Citigroup, Inc.,* No. 13 Civ. 981(PGG), 2015 WL 1514539, at *7 n.2 (S.D.N.Y. Mar. 31, 2015) (citing cases). For the reasons discussed in detail below, the court concludes that the FAC states viable RICO claims against the Tribal Defendants. This case qualifies as one in which 18 U.S.C. § 1965(b) extends the personal jurisdiction of the federal court to RICO claims against the Tribal Defendants, who would not otherwise be subject to suit in Vermont. Once the Tribal Defendants are before the court on this basis, the doctrine of pendent personal jurisdiction permits the court to hear the other claims against them which arise from state law or federal statutes other than RICO.

The court cannot reach the same conclusion as to Sequoia and TCV. For the reasons discussed below, the court concludes that the FAC fails to state a viable RICO claim against those Defendants. Absent RICO jurisdiction over those Defendants, the court reiterates its observation that there is an insufficient basis for making a ruling about minimum contacts and due process requirements with respect to them because Plaintiffs allege very little about their respective roles in the Plain Green operation. The court, will, however, exercise its discretion to permit discovery on the question of personal jurisdiction over Sequoia and TCV. *See Dorchester Fin. Sec., Inc. v. Banco BRJ, SA,* 722 F.3d 81,84 (2d Cir. 2013) (per curiam) (court may permit discovery in aid of Rule 12(b)(2) motion).

III. Arbitration and Arbitrability

The court comes now to the question raised by all Defendants: does this dispute belong in arbitration instead of in court? Each Defendant asserts that the dispute must go to arbitration. (Doc. 64 at 2; Doc. 66 at 27-31; Doc. 67-2 at 23; Doc. 77-1 at 8-10; Doc. 76 at 26-30.) Plaintiffs maintain that the purported arbitration agreement is unenforceable as, among other things, "unconscionable" and "fraudulent." (*See* Doc. 85 at 48-78.)

Neither Plaintiff made use of the "opt out" provision during the first 60 days following receipt of her loan. Both seek to apply state and federal consumer loan protections to this case. Neither wishes to go to arbitration. And both seek to serve as class representatives. For these reasons, the first issue for the court is to determine whether Plaintiffs are bound by the arbitration clause and the related choice-of-law clause. The questions which must be answered are:

1. What law governs the issue of arbitrability?

2. Does tribal law govern the enforceability of the arbitration clause with respect to issues of unconscionability?

3. Can individual borrowers in Vermont who are not normally subject to tribal law become subject to tribal law through their consent to an arbitration clause?

4. Is the tribal law, including its enforcement through the arbitration clause, unenforceable on grounds of unconscionability?

5. Are there other reasons raised by Plaintiffs which prevent enforcement of the arbitration clause?

6. Are all Defendants subject to the arbitration clause?

The court begins with the question of the law that governs.

A. What law governs?

The parties agree that the Federal Arbitration Act, 9 U.S.C. § 1 et seq., (the "FAA") applies to the parties' dispute. This case concerns two transactions in interstate commerce, conducted over the internet between a lender located on an Indian reservation in Montana and borrowers in Vermont. Section 2 of the FAA provides for the enforceability of arbitration clauses which appear in contracts subject to the Act "save upon such grounds as exist at law or in equity for the revocation of any contract." This "savings clause" requires the court to turn to state law (or possibly tribal law) to resolve claims of unconscionability and the other grounds for avoidance of contracts. *Littlejohn v. TimberQuest Park at Magic, LLC,* 116 F. Supp. 3d 422, 430 (D. Vt. 2015) (claims of unconscionability "are matters arising under state substantive law"); *see also Cap Gemini Ernst & Young, US., L.L.C. v. Nackel,* 346 F.3d 360, 365 (2d Cir. 2003) (per curiam) ("[Q]uestions of contractual validity relating to the unconscionability of the underlying arbitration agreement must be resolved first, as a matter of state law, before compelling arbitration pursuant to the FAA.").

"[G]enerally, a choice-of-law clause in a contract will apply to disputes about the existence or validity of that contract." *Motorola Credit Corp. v. Uzan,* 388 F.3d 39, 50 (2d Cir. 2004). In this case, the arbitration agreement includes a provision requiring the application of Chippewa Cree tribal law to any dispute, including

disputes over arbitrability.[14] In considering whether to follow the Chippewa Cree law as it relates to enforcement of arbitration provisions, the court is guided by several considerations. All of these favor the application of Vermont law—the law of the forum—instead of tribal law to this limited question.

The primary obstacle to the adoption by contract of the Chippewa Cree law of arbitration is that no court has ever been able to determine what that law is or where it can be found. In a series of cases cited by Defendants, other federal trial courts rejected claims that the Chippewa Cree law concerning the arbitrability of claims against non-signatories provided a different rule of decision than the laws of the forum state because plaintiffs were unable to produce evidence of a different rule under tribal law.[15] In those cases,

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[14] Both arbitration agreements include the following choice-of-law provision:

> This Agreement and the Agreement to Arbitrate are governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Chippewa Cree Tribe. We do not have a presence in Montana or any other state of the United States of America. Neither this Agreement nor the Lender is subject to the laws of any state of the United States.

(Doc. 13-5 at 52.)

[15] *See Gunson v. BMO Harris Bank, NA.,* 43 F. Supp. 3d 1396, 1400 (S.D. Fla. 2014) ("Luckily, the Court need not delve into the nuances of tribal or Delaware law, as Gunson has not demonstrated that there is a conflict with Florida law."); *Booth v. BMO Harris Bank, N.A.,* Civil Action No. 13-5968, 2014 WL 3952945, at *4 n.4 (E.D. Pa. Aug. 11, 2014) ("Plaintiff has not alleged that any true conflict exists, and according to [the defendants] no conflict does exist because the applicable tribal law allows estoppel."); *Graham v. BMO Harris Bank, NA.,* No. 3:13cv1460(WWE), 2014 WL 4090548, at *5 (D. Ct. July 16, 2014) ("To the extent that plaintiffs maintain that tribal law may apply to this controversy,

plaintiff-borrowers sought to invoke tribal law on a question of arbitrability. They were unable to demonstrate any difference between the law of the forum state and tribal law because there was no source of tribal law (with the limited exception of the *Booth* case in which counsel represented that tribal law allowed for the doctrine of estoppel).

This case is no different. Although Defendants seek to apply the Chippewa Cree law concerning arbitration, they cannot direct the court to any specific provisions of that law. In an extended footnote, the Tribal Defendants argue that "Chippewa Cree law provides a standard for evaluating unconscionability, which may be supplemented by Montana or federal law." (Doc. 92 at 18 n.13.) Although they refer to the *Gunson* decision, that is a decision in which the judge rejected a similar claim due to a lack of showing of the substance of Chippewa Cree law. *Gunson v. BMO Harris Bank, NA.,* 43 F. Supp. 3d 1396, 1400 (S.D. Fla. 2014).

The Tribal Defendants also cite section 10-3-602 of the Tribal Lending Code which bars arbitration clauses which are "oppressive, unconscionable, unfair, or in substantial derogation of a Consumer's rights." (Doc. 92-1 at 11.) This section adopts the standards of the American Arbitration Association ("AAA") as presumptive proof that an arbitration clause does not violate the Lending Code. The rules and standards promulgated by the AAA provide neutral procedures which govern the arbitration hearing itself. These

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the Court notes that plaintiffs have not demonstrated a conflict with Connecticut law on estoppel. In fact, plaintiffs state that they do not take a position on the applicability of any foreign law but only point out that defendants have not addressed the issue in their memoranda.").

standards do not define "unconscionability" or otherwise provide rules of decision for when a decision is subject to arbitration. The reference to AAA standards provides no insight into the substantive content of the tribal law.

The denunciation of oppressive and unconscionable arbitration clauses in the tribal lending law tells the court nothing about what those terms might be. Section 10-3-602 of the tribal finance code represents a potential starting point. It is an invitation to regulators or tribal courts to develop a body of law defining the content of "unconscionability." But Defendants offer no evidence that such a body of law exists.

The court intends no disrespect to the tribal law or to the judges of the tribal courts of the Tribe. The entry of the Tribe into payday lending appears to be relatively recent. The use and enforcement of arbitration provisions under tribal law do not appear to have been a topic which the tribal lawmakers had reason to consider in the past. The parties have not directed the court to any prior decisions by the tribal courts on the enforcement of agreements to arbitrate. At least on the record provided to the court through the parties' memoranda, Chippewa Cree law is almost entirely silent on questions of arbitrability of disputes.

The absence of a body of tribal law means that a reference to tribal law within the contract does little to establish the terms of the parties' agreement. If this body of law is uncertain or not yet developed, the reference to it fails to add anything to the parties' agreement. In the absence of evidence of the content of tribal law, the court reaches two conclusions. The first is that it cannot enforce the contractual choice-of-law provision because neither the court nor the parties have been able to determine the content of the tribal

law. The court cannot adopt by reference an unknown body of law.

The second is that the only remaining choice for substantive rules of decision about unconscionability and the enforcement of the arbitration clause is Vermont law. There is no viable alternative. But additionally, as the brief submitted by the Vermont Attorney General makes clear, Vermont has a strong interest in the issues of consumer protection raised in this case. The two plaintiff-borrowers are Vermont residents. They entered into the loan agreements from their homes in Vermont. They seek to vindicate banking rules under Vermont law as well as federal law. The choice of Vermont law concerning the potential unconscionability of the arbitration clauses is neither surprising nor inherently unfair.

B. Who decides whether the claims made in this case are subject to arbitration?

The parties disagree over whether the court or the arbitrator have the authority to decide whether the claims of unlawful lending practices are subject to arbitration. Most commonly, the validity of an arbitration agreement is an issue for determination by the courts. *See AT&T Techs., Inc. v. Commc'ns Workers of Am.,* 475 U.S. 643, 649 (1986). Delegation of such questions to the arbitrator herself is permitted on the basis of clear and unmistakable evidence that the parties have chosen to give such questions to an arbitrator. *See Rent-A-Center, W, Inc. v. Jackson,* 561 U.S. 63, 69 n.1 (2010). In this case, Defendants rely upon language in the arbitration agreement which indicates that the question of arbitrability has been delegated to the arbitrator. Specifically, they direct the court's attention to the definition of "disputes" subject to arbitration which includes the following

provision: "A Dispute [subject to arbitration] includes . . . any issue concerning the validity, enforceability or scope of this loan or the Agreement to Arbitrate." (Doc. 13-5 at 50.)

In response, Plaintiffs argue that the delegation clause does not really place the arbitrator in charge with respect to issues concerning arbitrability. Disputes concerning any claim for class-wide arbitration are reserved to "a court of competent jurisdiction located within the Chippewa Cree Tribe, and not by the arbitrator." (Doc. 13-5 at 51.) Since the claim in this case is a class-wide claim, the arbitrator is without authority to consider the scope of his or her authority as an arbitrator. Plaintiffs also contend that Defendants have failed to provide proof of the content of Tribal law concerning arbitration, including the extent of the arbitrator's authority to invalidate an arbitration agreement pursuant to § 2 of the FAA. They also point to the inherent conflict within the arbitration provisions between the authority of the arbitrator and the broad scope of review and appellate supervision to be exercised by the tribal court over any arbitration award.

The court agrees with Plaintiffs that issues concerning the validity of the arbitration clause should be decided by the court for two reasons.

First, the arbitration clause does not explicitly delegate authority on this subject to the arbitrator. Questions related to the arbitrability of class action claims are sent instead to the tribal court. More broadly, all decisions by the arbitrator are subject to plenary review by the tribal court. The arbitration provisions include a statement—remarkable in the context of arbitration law—that "[t]he arbitration award will be supported by substantial evidence and must be consistent with

this Agreement and applicable law or may be set aside by the tribal court upon judicial review." (Doc. 13-5 at 51.)[16] This provision removes much of the arbitrator's independent authority to make binding determinations on any issue, including legal issues concerning the scope of the arbitration agreement. It effectively refers these questions to the tribal court which has broad authority to review for legal and factual error. The arbitrations conducted pursuant to this agreement more closely resemble bench trials with a right of appellate review rather than binding arbitrations.

Second, Plaintiffs' challenge to the arbitration provision is separate and distinct from their attack on the payday loan agreement. The challenge to the payday loan agreement is one of illegality. Plaintiffs allege that the exceedingly high interest rates and related loan terms violate substantive restrictions on consumer lending imposed at the state and federal levels. The challenge to the arbitration clause is different. Plaintiffs allege that the tribal law and the tribal court system have been corrupted by large investors from outside the reservation. The claim is plausible for purposes of federal pleading standards since Plaintiffs have alleged a variety of facts which bring into question the independence and objectivity of the tribal legal system. (The court makes no determination on this issue on a motion to dismiss, but the claim—still unproven—is sufficient to support discovery and, potentially, proof of these allegations at trial.)

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[16] It is difficult to imagine what this means in practice. It appears to anticipate that a record of the proceedings will be kept and the transcript reviewed for evidentiary support of the outcome. It also contemplates written findings of fact and conclusions of law since a one-line award could not be reviewed by the tribal court for consistency with tribal law.

This separate attack on the arbitration clause satisfies the majority's test in *Rent-A-Center.* Plaintiffs have attacked the arbitration clause directly and the delegation clause specifically. In paragraph 131 of the FAC, Plaintiffs allege that "[tlhe delegation provision of the Purported Arbitration Agreement is also fraudulent." (Doc. 18 ¶ 131.) Plaintiffs identify the right of review in the tribal courts of any decision by the arbitrator as a basis for invalidity because Defendants "had the ability to control the Tribe's law and presumably could control actions taken by the tribal court. As a result, any review by the tribal court would be nothing more than a sham." (*Id.*) Unlike the attack on the contract as a whole which the Supreme Court identified as subject to arbitration in *Rent-a-Center,* this is a focused claim that the delegation clause itself is unconscionable.

Since Plaintiffs have made a specific attack on the delegation clause as unconscionable, the court, not the arbitrator, must determine whether the arbitration clause is valid. It is hard to see how the outcome could be different. If Plaintiffs are able to prove that the tribal legal system, both with respect to its law and to its judiciary, are subject to improper influence and control by Defendants, then delegating the question of arbitrability to the very system under attack is unlikely to result in a fair evaluation of Plaintiffs' claim that the tribal justice cannot fairly evaluate claims of its own shortcomings. It is an elementary principle of justice that no one should serve as the judge in their own cause. *Nemo index in causa sua.*

C. Have Plaintiffs identified a sufficient basis for a decision by the court that the arbitration award is unconscionable?

Payday lending over the internet by lenders located on Indian reservations has increased sharply in recent years.[17] Arbitration agreements very similar to the one in this case have become common. Such agreements typically require arbitration which is governed by tribal law and conducted in a manner which permits the tribe to exert influence or control over the outcome. Such arbitration agreements commonly require the application of tribal law in a manner calculated to defeat state and federal consumer protections. Appellate courts hearing these cases have become increasingly candid in refusing to enforce the arbitration clauses because these clauses represent an obvious effort to deprive consumers of legal protections from unlawful lending and collection practices.

In *Hayes v. Delbert Services Corp.,* 811 F.3d 666 (4th Cir. 2016), the Fourth Circuit struck down an arbitration clause on facts relatively similar to those in this case. The lender—Western Sky—was an online lender owned by a member of the Cheyenne River Sioux Tribe. Its offices were located on the Cheyenne River Indian Reservation in South Dakota. As in this case, Western Sky issued short-term, extremely high interest loans over the internet. Western Sky stopped issuing loans following FTC enforcement action and numerous private lawsuits. *See FTC v. Payday Fin. LLC,* 989 F. Supp. 2d 799, 822 (D.S.D. 2013) (disgorgement of

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[17] *See Illegal Lending: Facts and Figures* (Report by Vermont Attorney General's Office, Apr. 23, 2014), at 5, *available at* http://ago.vermont.gov/assetstfiles/Consumer/Illegal_Lending/Illegal%20Lending%20Report%20April%202014.pdf (noting that, increasingly, online lenders claim affiliation with Indian tribes).

profits in the amount of $417,740). Before going out of business, Western Sky assigned its loan service and collection work to Delbert Services Corp. Delbert sought dismissal of a borrower's action complaining of illegal loan collection activities by relying upon the arbitration clause in the loan agreement.

In a strongly worded decision, the Fourth Circuit held that an arbitration agreement which attempts to preclude a consumer's recourse to federal consumer law protecting borrowers rendered the arbitration provision invalid and unenforceable. The offending provision, like the arbitration language at issue in this case, stated that the arbitration agreement shall be governed by tribal law. The court recognized that the FAA favors arbitration as a legitimate exercise of the right to form private contracts. However, said the court:

> [R]ather than use arbitration as a just and efficient means of dispute resolution, Delbert seeks to deploy it to avoid state and federal law and to game the entire system. Perhaps in the future companies will craft arbitration agreements on the up-and-up and avoid the kind of mess that Delbert is facing here.

Hayes, 811 F.3d at 676.

The facts of the *Hayes* case differ in some respects from this case. Delbert—a debt collector—was not located on an Indian reservation or in some other way subject to tribal law. The arbitration clause required arbitration by an authorized representative of the tribe subject to the borrower's right to select AAA, JAMS, or another arbitration organization to "administer the arbitration." *Id.* at 670. The arbitration

clause stated that "no United States state or federal law applies to this Agreement." *Id.*

The present case is a little different. The arbitration is not merely administered but actually conducted by an AAA or JAMS arbitrator at a location convenient for the borrower. There is no express disclaimer of all federal law although there is such language with respect to state law. But these differences are minor and do not reach the heart of the *Hayes* decision, which is that an arbitration agreement crafted to preclude federal and state consumer protections is unenforceable as unconscionable. As in *Hayes,* the arbitration clause states that it is governed by the Indian Commerce Clause and "the laws of the Chippewa Cree Tribe." (Doc. 13-5 at 52.)[18] By its express terms, therefore, the arbitration clause authorizes the arbitrator—bound by her oath to implement the terms of the parties' contract—to follow a body of law which Plaintiffs claim does not include basic federal and state protections against predatory loan practices because it was drafted in order to avoid such regulation.

The Western Sky arbitration agreement fared no better before the Seventh Circuit. In *Jackson v. Payday Financial, LLC,* 764 F.3d 765 (7th Cir. 2014), *cert. denied,* 135 S. Ct. 1894 (2015), the appellate panel refused to enforce what it termed an "illusory" arbitration clause which required arbitration before a tribal elder or three members of the tribal council with the borrower's participation by phone or videoconference. *id.* at 768. In sharply critical terms, the court held

[18] The reference to the Indian Commerce Clause is an irrelevancy which is repeated in many of the tribal lending agreements. That clause is a grant of legislative authority to Congress to regulate commerce "with the Indian Tribes." It has nothing to do with the authority of tribes to enact their own laws.

the agreement to be unconscionable both because it referred to arbitration procedures on the reservation which did not exist and because it was drafted to ensure partiality. *id.* at 779.

In the present case, the referral to AAA or JAMS arbitration avoids the criticism that the arbitration forum does not really exist. But the same fundamental criticism applies. By incorporating the tribal financial law and making all arbitrations reviewable by the tribal court on both the law and the facts, the defendants have effectively insulated themselves from claims that they have violated state and federal lending laws. Those are Plaintiffs' claims, in any event, and Plaintiffs are entitled to an opportunity to prove that they are true.

IV. Forum Non Conveniens, Venue, and Indispensable Parties

Having determined that Defendants are properly before the court and that Plaintiffs have alleged facts which could render the arbitration clause unenforceable, the court turns to remaining issues related to the court's authority to hear this case. These are the claims of forum non conveniens, venue (Rule 12(b)(3)), and absence of indispensable parties (Rule 12(b)(7)).

A. Forum Non Conveniens

The Tribal Defendants argue that, if the court declines to enforce the arbitration agreements, the court should enforce the agreements' forum-selection clauses and dismiss the case under the doctrine of forum non conveniens. (Doc. 66 at 31 n.20.) Mr. Rees joins in that argument. (Doc. 67-2 at 23.) Forum non conveniens allows a court to dismiss a case when "the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation

in the place where brought and let it start all over again somewhere else." *Grammenos v. Lentos,* 457 F.2d 1067, 1074 n.5 (2d Cir. 1972). However, "since the enactment of 28 U.S.C. § 1404(a), 'the federal doctrine *of forum non conveniens* has continuing applicability only in cases where the alternative forum is abroad.'" *Saunders v. Morton,* 269 F.R.D. 387, 400 (D. Vt. 2010) (quoting Am. *Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994)). No party proposes a foreign jurisdiction where this case should be brought; thus forum non conveniens does not apply.

The Tribal Defendants' request is, apparently, that the case be transferred to the District of Montana. Transfer "[f]or the convenience of parties and witnesses" and "in the interest of justice" is authorized under 28 U.S.C. § 1404(a), but Defendants raise no real "convenience" argument. Their objections to the presence of the case in this district as opposed to some other court are either related to personal jurisdiction or arbitrability. The court has already rejected dismissal on these grounds. The court will not dismiss the case on forum non conveniens grounds or transfer the case under § 1404.

B. Venue

Venue in this case is predicated on 18 U.S.C. § 1965 and the general venue statute at 28 U.S.C. § 1391(b)(2). Either is a sufficient basis for venue in this court. Section 1965(a) authorizes a civil RICO suit to be filed in any district in which the defendant "transacts his affairs." Section 1391(b)(2) authorizes venue in any district where "a substantial part of the events or omissions giving rise to the claim occurred." Plaintiffs' allegations—that as a result of the actions of Rees and the Think Defendants, Plain Green entered into multiple illegal loan transactions with Plaintiffs—satisfies

either standard. Venue is proper in the District of Vermont.

C. Indispensable Parties

The Tribal Defendants seek dismissal under Rules 12(b)(7) and 19 because Plaintiffs have not brought suit against Plain Green or the Tribe itself. They argue that since the FAC seeks to declare Plain Green's lending model to be illegal, the lawsuit cannot proceed in the absence of Plain Green and the Tribe which formed it. On that theory, since Plain Green and the Tribe enjoy sovereign immunity, the claims against the other Defendants must be dismissed. Plaintiffs respond that the doctrine of *Ex Parte Young* permits suit against tribal officials and satisfies concerns about the effect of this court's ruling on an absent defendant.

The short answer to the claim of indispensable party is that the presence of the Tribal Defendants in this case satisfies the requirements of Rule 19. The essential purpose of the *Ex Parte Young* doctrine is to permit suits for injunctive relief against entities such as state agencies which would otherwise be subject to sovereign immunity. In the case of tribes, the courts have long recognized that tribal interests may be adjudicated through *Ex Parte Young*. *See Bay Mills, supra.* The application of *Ex Parte Young* to suits against tribal officials extends to claims arising under state as well as federal law. *See Puyallup Tribe, Inc. v. Dep't of Game of State of Washington,* 433 U.S. 165 (1977) (tribal officials subject to suit to enjoin violations of state law).

V. Plausibility and "Group Pleading"

The Think Defendants contend that Plaintiffs have failed to allege plausibly that the Think Defendants

have engaged in unlawful conduct, and that Plaintiffs' "group pleading" allegations are insufficient to state a claim against TC Loan Service, TC Decision Sciences, and Tailwind Marketing. (Doc. 65 at 2.) Thus, before considering the motions to dismiss in the context of individual causes of action, the court considers the plausibility of Plaintiffs' allegations under principles expressed in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

Many of the allegations in the case are undisputed. All parties agree that Plaintiffs took out a series of loans from Plain Green at interest rates greatly in excess of the 24% maximum allowed by Vermont's usury law. The parties agree that Think Finance, Inc, provided services and support which enabled the Tribe to form Plain Green and enter into the internet-lending business. (Doc. 18-1.) In exchange for its participation, the Tribe would receive approximately 5% of cash revenue generated by the loans. (*Id.*) Plain Green entered into loan agreements with borrowers which permitted electronic access to the borrowers' accounts. These allegations are entirely plausible since they are undisputed.

Where the parties disagree most sharply is over the issue of whether Defendants are engaged in an illegal business. Defendants view Plain Green as a sovereign entity exempt from state usury requirements. There is no limit on interest rates under the law of the Tribe. For many years, banks operating in the United States have avoided state usury laws by establishing themselves in states such as South Dakota and Delaware which do not have usury restrictions.[19] Through the

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[19] *See* Mark Furletti, *The Debate Over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards,* 77 Temp. L. Rev. 425, 443 (2004) (reporting that in 2003, South

doctrine of federal preemption, banks providing credit card services and other loans have avoided the effects of state law. (*See* Doc. 18 ¶ 38.)[20] Defendants seek similar treatment for Plain Green through tribal immunity. Whether this argument succeeds presents a mixed question of law and fact. Factual issues may include the claim that the tribal lending law and the courts that enforce it are corrupt or that the law does not exist in important areas. The principal legal issue concerns the conflict of tribal law and Vermont consumer protections in the context of loans made through the internet. These issues do not raise questions about the plausibility of the pleadings.

A second area where the parties disagree concerns the role of Mr. Rees and the Think Defendants in the Plain Green loan business. The FAC alleges that Mr. Rees "personally designed and directed the business activity described in this Complaint." (Doc. 18 ¶ 10.) The FAC describes this business activity as an "illegal scheme" and "a new way to prey on unsuspecting people." (*Id.* ¶ 23.) The FAC describes Mr. Rees as the former President and CEO (and current Chairman of the Board) of Think Finance and the current CEO of Elevate Credit, Inc. He is alleged to maintain a "controlling interest and operational role in Think Finance." (*Id.* ¶ 10.) Plaintiffs allege that Mr. Rees and Think Finance "created the whole [Plain Green] enter-

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Dakota, Delaware, and four other states were home to national banks holding approximately 70% of all credit card debt in the United States.).

[20] *See also Marquette Nat 7 Bank of Minneapolis v. First of Omaha Serv. Corp.,* 439 U.S. 299, 313 (1978) (under the National Bank Act, 12 U.S.C. § 85, bank located in Nebraska could charge out-of-state credit-card customers the lending rate allowed by Nebraska).

prise and ran its operation through an assortment of subsidiaries and affiliates like Defendants Tailwind Marketing, TC Loan, and TC Decision Sciences." (*Id.* ¶ 101.)

Rees and the Think Defendants describe their role in less colorful terms. Mr. Recs describes himself as a former Chairman of the Board of Think Finance from September 2005 until May 2015 and a former President and CEO of TC Loan Service during the same period. (Doc. 67-1, Affidavit of Kenneth Rees, ¶¶ 2-3.) He denies having been a majority shareholder and as of the date of his affidavit in September 2015, did not have an "operational role" in Think Finance. The Think Defendants are described as companies providing services through "the usual relationship between a lender and its service providers." (Doc. 65 at 3.) One might recall the words of the police officer, "Nothing to see here, folks. Move along."

Determining which side is right is beyond the scope of a motion to dismiss. But in weighing plausibility, the court finds the FAC to be a plausible and coherent account of otherwise inexplicable facts. No defendant offers a reason why Think Finance would join with a tribe in Montana to form an internet lending business except as a means of avoiding financial regulation under the flag of sovereign immunity. There may be other reasons, but they do not appear on this record.

The Tribal Defendants offer no reason why their tribe would form an internet lender in exchange for a 4.5% share of revenue. One plausible reason is that by adopting a tribal lending code tailored to the needs of Think Finance and Mr. Rees, they could offer some measure of immunity from state regulation. It may be that the adoption of the tribal lending law in 2013 had no connection with the confidential "Term Sheet for

Think Finance-Chippewa Cree Transaction" signed in 2011. Such a proposition appears unlikely since the second paragraph of the term sheet calls for the Tribe to "adopt a finance code that is acceptable to all parties and provide for the licensing of an arm of the tribe to engage in consumer lending." (Doc. 18-1 at 1.) In short, whether Plaintiffs can prove their allegations is a question for another day, but the allegations are specific and plausible in their description of a plan to avoid financial regulation of consumer lending.

The court also finds that the claim of "group pleading" does not require dismissal of the case. The FAC contains specific allegations against Tailwind Marketing and TC Decision Sciences. Tailwind Marketing provides approved borrowers for Plain Green. (Doc. 18 ¶ 89.) TC Decision Sciences provides "customer service, verification and collections of customer accounts" for Plain Green. (*Id.* ¶ 90.) Both are controlled by Mr. Rees and Think Finance. There is no uncertainty about the allegations against these two companies which would support dismissal.

VI. Substantive Claims

We have arrived, at last, in the world of Rule 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 570); *see also* Fed. R. Civ. P. 8(a)(2). Dismissal is appropriate when "it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Conopco, Inc. v. Roll Int'l,* 231 F.3d 82, 86 (2d Cir. 2000). In addition to considering the pleadings, the court may refer to "statements or documents incorporated into the complaint by reference"

and to "documents possessed by or known to the plaintiff and upon which [she] relied in bringing the suit." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87, 98 (2d Cir. 2007). Applying that standard, the court addresses below the motions to dismiss specific substantive claims.

A. Consumer Financial Protection Act (Count One)

Defendants are correct in their claim that the Consumer Financial Protection Act ("CFPA"), 12 U.S.C. § 5481 et seq., does not provide for a private cause of action, Although reported cases on this issue are scarce, the structure and specific provisions of the CFPA makes it clear that Congress did not intend to create a private cause of action. It is Congressional intent which determines whether a statute, otherwise silent on the point, authorizes private lawsuits. *See M.F. v. State of NY. Exec. Dep't Div. of Parole,* 640 F.3d 491, 495 (2d Cir. 2011) (analysis focuses on congressional intent). The CFPA is explicit in the creation of a new federal agency, the Bureau of Consumer Financial Protection, which acts as both the rulemaking body and the federal enforcement agency for federal consumer laws previously entrusted to multiple agencies. *See* 12 U.S.C. § 5491(a) ("There is established in the Federal Reserve System, an independent bureau to be known as the 'Bureau of Consumer Financial Protection', which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."). The Bureau has broad authority to file civil actions in federal court to enforce the provisions of the federal consumer protection laws. *Id.* § 5564.

The CFPA contains no express authority for its enforcement through private lawsuits. It authorizes

enforcement actions by state attorneys general and state regulators. *Id.* § 5552. But it is entirely silent regarding private remedies. Legislative silence on such an issue is most frequently regarded by courts as an expression of legislative intent to exclude private remedies. *See Bellikoff v. Eaton Vance Corp.,* 481 F.3d 110, 116 (2d Cir. 2007) (courts "cannot ordinarily conclude that Congress intended to create a right of action when none was explicitly provided"). Courts in this circuit have held that the CFPA creates no private right of action. *See Nguyen v. Ridgewood Sav. Bank,* Nos. 14-CV-1058 (MKB), 14-CV-3464 (MKB), 14-CV-3989 (MKB), 2015 WL 2354308, at *11 (E.D.N.Y. May 15, 2015) ("Plaintiffs provide no statutory basis, and the Court can find none, for finding a private right of action under these provisions of the statute, which outlines duties, authorities and enforcement powers of the CFPB.").

The absence of a private remedy is unsurprising because the CFPA's primary purpose is to place responsibility for enforcing many different federal consumer protection statutes with a single newly formed regulator. 12 U.S.C. § 5492. The CFPA itself contains few new substantive protections. Plaintiffs direct the court's attention to one: section 5533 which provides in part that "[s]ubject to rules prescribed by the Bureau, a covered person shall make available to a consumer, upon request, information . . . concerning [any consumer transaction]." *Id.* § 5533(a). To date the Bureau has not issued rules to implement this provision. The obvious intent of the provision is to prompt the adoption of a detailed regulatory system for placing information about a financial transaction in the hands of the consumer. The court sees no indication that this provision was enacted in order to create a new private right to sue for damages

whenever information is withheld by an entity subject to the CFPA.

For these reasons, the court concludes that the CFPA does not create a new private cause of action. Count One of the FAC is DISMISSED.

B. Federal Trade Commission Act (Count Two)

For similar reasons, it has long been settled that the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., does not authorize a private cause of action. Like the CFPA, the FTCA creates an enforcement agency and delegates specific powers to the agency to define the scope of unfair methods of competition through its rule-making authority, to conduct administrative hearings to punish and prevent unfair practices, and to file civil actions for violations of its rules and orders. 15 U.S.C. §§ 57a and 57b. The Second Circuit has long held that this grant of authority to the federal agency does not also create a private cause of action. *See Alfred Dunhill Ltd. v. Interstate Cigar Co.,* 499 F.2d 232, 237 (2d Cir. 1974) ("[T]he provisions of the Federal Trade Commission Act may be enforced only by the Federal Trade Commission. Nowhere does the Act bestow upon either competitors or consumers standing to enforce its provisions."); *see also Naylor v. Case & McGrath, Inc.,* 585 F.2d 557, 561 (2d Cir. 1978).

Since the FTCA does not authorize a private cause of action, Count Two of the FAC is DISMISSED.

C. Electronic Funds Transfer Act (Count Three)

In contrast to the CFPA and FTCA, the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693 et seq., creates individual rights and provides a private remedy. The EFTA specifically authorizes private

lawsuits, including class action lawsuits as ruled appropriate by the courts hearing those cases. 15 U.S.C. § 1693m. Congress included a specific statement of purpose for the statute at section 1693: "It is the purpose of this title to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems. The primary objective of this title, however, is the provision of individual consumer rights." *Id*. § 1693(b). Section 1693m authorizes lawsuits for damages in the federal courts. The provision specifically contemplates class actions to the extent ruled appropriate by individual courts. *Id.* § 1693m(a).

The specific claim is that Defendants violated § 1693k(1) by conditioning the extension of short-term credit to Plaintiffs on their authorization of electronic fund withdrawals from their accounts as the mandatory method of making repayment. (Doc. 18 ¶¶ 182-193.) Such conduct would violate the EFTA and related regulations. Defendants contend, however, that Plaintiffs' claims under the EFTA are too late and are foreclosed by the language of the loan agreement.[21]

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[21] The Tribal Defendants also assert that the EFTA does not apply substantively to the Tribe (or to them, by extension) because tribal sovereigns "are not expressly included among the 'persons' or entities subject" to the EFTA, (Doc. 66 at 20 n.7.) Section 1693k prohibits conduct by "person[s]." The EFTA itself does not define "person," but the regulations implementing the EFTA define "person" as "a natural person or an organization, including a corporation, government agency, estate, trust, partnership, proprietorship, cooperative, or association." 12 C.F.R. § 1005.2(j). That broad interpretation is entitled to deference, and—for reasons similar to those discussed below regarding "persons" suable under RICO—the court concludes that the Tribal Defendants may be sued under the EFTA.

Defendant Rees argues that he cannot be held vicariously liable for the actions of the lender.

1. Statute of Limitations

The EFTA provides a one-year statute of limitations for private lawsuits. 15 U.S.C. § 1693m(g). Plaintiffs do not dispute that they filed suit in May 2015—more than a year after the loans at issue were made. But the limitations period is subject to equitable tolling. *Apostolidis v. JP Morgan. Chase & Co.,* No. 11-CV-5664(JFB)(WDW), 2012 WL 5378305, at *7 (E.D.N.Y. Nov. 2, 2012). Plaintiffs contend that equitable tolling is appropriate in this case. (Doc. 85 at 83.)

Equitable tolling is a fact-specific doctrine. Plaintiff Gingras offer no reason for the application of equitable tolling to her claim. Plaintiff Given, on the other hand, claims that Plain Green blocked access to her account during the limitations period and that there are other facts which would support tolling the limitations period so as to preserve her claim.

The EFTA claim of Plaintiff Gingras is DISMISSED as beyond the statute of limitations. The court cannot rule on the timeliness of Plaintiff Givens' EFTA claim because she has raised facts which may support a determination that her claim is timely.

2. Conditioning the Loan on Electronic Fund Withdrawals

The loan agreements signed by Plaintiffs include two ways in which the loan may be funded and repaid. The first is by electronic fund authorization. Funding by electronic transfer ("as soon as the next business day") is conditioned on ACH Authorization (electronic withdrawal from the customer's account). (Doc. 13-5 at 31.) Funding by postal mail ("up to 7 to 10 days" in the

language of the loan agreement) is conditioned on payments by money order or certified check. (*Id.*)

Plaintiffs allege that the choice offered to consumers between funding "as soon as the next business day" which is conditioned on electronic fund authorization and the much longer process offered for people electing to pay by mail is a false choice. Defendants respond that since electronic fund authorization was not the *only* way to obtain a loan, the EFTA does not apply.

The court sees this issue as fact-specific and not one which can be resolved through a motion to dismiss. It is possible that Plaintiffs are correct that Defendants have so obstructed the choice of repayment by check with delay ("up to 7 to 10 days" plus the expiration of a "right of rescission") that the option is a false choice. Given the nature of the loan itself—immediate cash at very high interest rates—it seems unlikely that Defendants ever funded a loan to any borrower with repayment by check. It remains for discovery and for fact-finding to determine if the loan agreement is drafted so as to skate around the restrictions of EFTA.

3. Mr. Rees's Role

Mr. Rees contends that Plaintiffs seek to hold him vicariously liable for the actions of Plain Green. The court reads the FAC differently. Plaintiffs seek to hold Mr. Rees liable for any EFTA violation because they claim that he developed the entire scheme, including the alleged violation of EFTA, and is responsible as the principal in an unlawful business arrangement. This is an issue which cannot be resolved on a motion to dismiss.

The EFTA claim of Plaintiff Gingras only is DISMISSED because she does not assert that her claim is subject to equitable tolling or for some other

reason timely. The motion to dismiss the EFTA claim of Plaintiff Given is DENIED.

D. Vermont Consumer Fraud Act (Count Four)

In contrast to the FTCA, the Vermont Consumer Fraud Act ("VCFA"), 9 V.S.A. § 2451 et seq., provides a private cause of action. Section 2461(b) of Title 9 authorizes suits for damages including attorneys' fees and punitive damages. A violation of the FTCA is one of the potential bases for liability under the VCFA. In defining "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce"—which may form the basis for liability—the Vermont legislature stated: "It is the intent of the Legislature that in construing [this provision,] the courts of this State will be guided by the construction of similar terms contained in Section 5(a)(1) of the Federal Trade Commission Act . . . ." *Id.* § 2453(b).

In effect, the VCFA provides a state-law private remedy for violations of the FTCA (as well as for claims of fraud in businesses beyond the scope of the FTCA). In the setting of this case, the VCFA restores the claims which the court dismissed under the FTCA for lack of a private cause of action. *See Vt. Mobile Home Owners' Ass'n, Inc. v. Lapierre*, 131 F. Supp. 2d 553, 558 (D. Vt. 2001) (court applying VCFA would be guided by the construction given to the FTCA). The FTC itself has filed enforcement actions in other states against other payday lenders which seek to avoid regulation by locating themselves on Indian reservations. *See, e.g., FTC v. AMG Servs., Inc.,* No. 2:12-CV-00536-GMN, 2014 WL 910302, at *6 (D. Nev. Mar. 7, 2014) (holding, in case where FTC alleged violations of the FTCA, the Truth in Lending Act, and the EFTA, that "the FTC Act is a federal statute of general applicability that . . . grants the FTC authority to

regulate arms of Indian tribes, their employees, and their contractors"). These claims are similar to the claims made by the private plaintiffs in this case. The determination of the FTC that internet lending of this nature violates the FTCA is a strong indication that these practices also violate the VCFA.

Although the VCFA follows the FTCA in many respects, it is not limited to federal violations. As the amicus brief submitted in this case by the State of Vermont through the Vermont Attorney General's Office demonstrates, Vermont has enacted its own measures which define unfair and deceptive actions for purposes of the VCFA. These include 9 V.S.A. § 2481w(b), which addresses loans by unlicensed lenders and loans with interest rates in excess of Vermont's usury limits of 12-24%. *See* 8 V.S.A. § 2201 (requiring lenders to be licensed) and 9 V.S.A. § 41a(b) (setting interest rate limits).

Vermont consumer law specifically identifies internet lenders as subject to state regulation. 8 V.S.A. § 2233(b). In a 2014 report, the Vermont Attorney General's Office describes the harm caused by unlicensed, high-interest loans.[22] In the case of Plain Green, the Vermont attorney general sent a cease and desist letter which failed to change the company's lending practices. (Doc. 91 at 3.)

The court therefore rejects the Tribal Defendants' contention (Doc. 66 at 43) that Plaintiffs have failed to allege any unfair or deceptive acts.

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[22] *See Illegal Lending: Facts and Figures* (Report by Vermont Attorney General's Office, Apr. 23, 2014), at 3, *available at* http://ago.vermont.gov/assets/files/Consumer/Illegal_Lending/Illegal%20Lending%20Report%20April%202014.pdf.

Mr. Rees argues that any potential liability is vicarious and not based upon actionable conduct by him. The short answer is two-fold:

1. Plaintiffs have alleged Rees was a critical participant in an unlawful plan. Mr. Rees provided the leadership and experience in the payday lending business. Plaintiffs allege that he is the principal architect of the business built around Plain Green. (Doc. 18 ¶ 23 (describing Mr. Rees as "the mastermind of this illegal scheme").) There could have been little doubt that the business was one of doubtful legality. *See Bay Mills,* 134 S. Ct. at 2052 (Thomas, J., dissenting) (noting "questionable legality"). Internet lenders providing loans at these interest rates and on these terms are the subject of suit and enforcement action by prosecutors and regulators. *See* Indictment, *United States v. Hallinan,* No. 2:16-er-130-ER-1 (E.D. Pa. Mar. 31, 2016) (charges against individuals involved in alleged "rent-a-tribe" payday lending scheme); Indictment, *United States v, Tucker,* No. 1:16-cr-91-PKC (S.D.N.Y. Feb. 8, 2016) (same).[23]

2. At the stage of the motion to dismiss, the court accepts the allegations described above as true. Plaintiffs have come forward with detailed, plausible allegations of wrongdoing. Whether these can be proved is an issue for another day. The motion to dismiss fails because the FAC contains plausible allegations that Mr. Rees developed Plain Green, negotiated the term

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[23] The Office of the Vermont Attorney General says that it "specifically sent a cease-and-desist letter to Plain Green Loans, LLC . . . advising the company to immediately cease making and collecting on all loans made to Vermont Customers." (Doc. 91 at 3.)

sheet which governs the business arrangements, and enabled the alleged violations of Vermont law to occur.

E. Unjust Enrichment (Count Seven)

In Count Seven, Plaintiffs allege that "Defendants have been unjustly enriched by their continued possession of funds illegally taken from people in financially challenged positions." (Doc. 18 ¶ 224.) Mr. Rees argues that Plaintiffs have failed to state a claim for unjust enrichment. (Doc. 67-2 at 49.)[24]

In Vermont, [a] claim for unjust enrichment requires that (1) a benefit was conferred on defendant; (2) defendant accepted the benefit; and (3) it would be inequitable for defendant not to compensate [plaintiff] for its value." *Unifund CCR Partners v. Zimmer,* 2016 VT 33, ¶ 21.[25] "Unjust enrichment applies if in light of the totality of the circumstances, equity and good conscience demand' that the benefitted party return that which was given." *Kellogg v. Shushereba,* 2013 VT 76, ¶ 22, 194 Vt. 446, 82 A.3d 1121 (quoting *Gallipo v. City of Rutland,* 2005 VT 83, ¶ 41, 178 Vt. 244, 882

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[24] The Think Defendants and the Tribal Defendants do not appear to join this argument. Rees argues that Count Seven only recites the bare elements of a claim without any factual allegations. (Doc. 67-2 at 49; Doc. 77-1 at 21.) The court rejects that argument because Count Seven explicitly incorporates by reference all of the factual allegations in the FAC. (Doc. 18 ¶ 223.)

[25] These are the elements for what has also been termed a claim on a contract "implied in law." *Mount Snow Ltd. v. ALLI, the Alliance of Action Sports,* No. 1:12-cv-22-jgm, 2013 WL 4498816, at *8 (D. Vt. Aug. 21, 2013). A separate claim, for "contract implied in fact," requires different elements, including "mutual intent to contract and acceptance of the offer." *Id.* Plaintiffs raise the former claim here, and the court therefore rejects TCV's contention (Doc. 76 at 21) that Plaintiffs must prove "mutual intent."

A.2d 1177). "The common remedy for unjust enrichment is imposition of a constructive trust, where the person with the legal title cannot enjoy the beneficial interest without violating the rules of honesty and fair dealing." *Mueller v. Mueller,* 2012 VT 59, ¶ 29, 192 Vt. 85, 54 A.3d 168 (internal quotation marks omitted).[26]

Rees asserts that the FAC fails to allege that he received or accepted any benefit from Plaintiffs. He contends that Plaintiffs obtained a loan from *Plain Green* and repaid those loans to *Plain Green.* (Doc. 67-2 at 49.) Plaintiffs say that they have alleged that Rees received a benefit as an investor-owner of Think Finance, which retains 95% of the revenue from the lending operation. (Doc. 85 at 139.)

The court concludes that the FAC adequately alleges that Rees benefitted from Plain Green's transactions with Plaintiffs. The FAC alleges that he is a substantial investor in Think Finance, and that Think Finance retained almost all of the revenue produced from Plain Green's lending operation. That is a sufficient "benefit" for the purposes of unjust enrichment. *See Powell v. H.E.F. P'Ship,* 793 F. Supp. 91, 92-93, 96 (D. Vt. 1992) (declining to dismiss unjust enrichment claim against major lender for its role in allegedly fraudulent development project); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. d ("Restitution is concerned with the receipt of benefits that yield a measurable increase in the recipient's wealth. Subject to that limitation, the benefit that is

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[26] As described above, Plaintiffs' remedies against the Tribal Defendants are limited to prospective injunctive or declaratory relief. That would rule out the constructive trust remedy for any unjust-enrichment claim.

the basis of a restitution claim may take any form, direct or indirect.").

Rees further contends that unjust enrichment does not apply where the parties have entered into an express contract, and that Plaintiffs in fact did enter into contracts—namely, the loan agreements with Plain Green. (Doc. 67-2 at 50.) The Vermont Supreme Court has recognized that "it can hardly be equitable to impose a contract on the parties that completely undermines the contractual relationships that the parties themselves have created." *DJ Painting, Inc. v. Baraw Enters., Inc.* 172 Vt. 239, 245, 776 A.2d 413, 419 (2001); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 2(1) ("A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment."). However, Plaintiffs have plausibly alleged that the loan agreements are not valid because they are unlawful, as part of a plan to avoid financial regulation. If Plaintiffs prove that, then relief under an unjust enrichment theory is not foreclosed. *See* Restatement (Third) of Restitution and Unjust Enrichment § 32.

F. Civil RICO Claims (Counts Five and Six)

Plaintiffs allege that Defendants are liable under the federal RICO statute, 18 U.S.C. § 1961 et seq., because they took part in "collection of unlawful debt" as well as "racketeering" activities. *See* 18 U.S.C. § 1962(c) ("It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful

debt.").[27] "The requirements of section 1962(c) must be established as to each individual defendant." *DeFalco v. Bernas,* 244 F.3d 286, 306 (2d Cir. 2001). There are multiple elements required to state a RICO claim; and Defendants raise challenges related to almost every element.[28]

1. Equitable Relief is Available in Private RICO Actions

As against the Tribal Defendants, Plaintiffs seek only equitable relief for the alleged RICO violations. (Doc. 18 ¶¶ 207, 215.) The Tribal Defendants argue that RICO's civil remedies provision, 18 U.S.C. § 1964, authorizes recovery for money damages only—not equitable relief. (Doc. 66 at 21.) It is true that 18 U.S.C. § 1964(c) authorizes recovery of damages without mentioning injunctive relief. But the court disagrees with the Tribal Defendants' narrow reading of the relief available in private RICO actions.

The Tribal Defendants concede that the Second Circuit has not expressly decided whether equitable relief is available in private RICO actions. (Doc. 66 at

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[27] Plaintiffs' two RICO counts both appear to be claims under § 1962(c): one claim premised on an alleged pattern of racketeering activity (Count Five), and one claim premised on alleged collection of unlawful debt (Count Six). Plaintiffs assert (Doc. 85 at 108) that the FAC alleges a RICO conspiracy under § 1962(d), but also concede that the FAC does not contain a count alleging such a conspiracy. The court accordingly limits its analysis to § 1962(c).

[28] Some elements—for example, that Plain Green is an "enterprise" or that it is engaged in or affects interstate commerce—are not challenged by any Defendant. The discussion that follows is organized according to the elements that are contested, with analysis of each individual Defendant's argument on each of those elements.

21)[29] Other circuits have reached differing conclusions on the issue.[30] District courts within the Second Circuit are also divided.[31] For largely the reasons stated by Judge Kaplan in *Chevron Corp. v. Donziger,* 974 F. Supp. 2d 362 (S.D.N.Y. 2014), this court concludes that equitable relief is available in private RICO actions. The court must read the subsections of § 1964 together, and that reading reveals that subsections (b) and (c) "provide remedies in addition to, and not in place of, the remedies provided for in Section 1964(a)." *Donziger,* 974 F. Supp. 2d at 569.

2. "Persons" Suable under RICO

The Tribal Defendants assert that RICO does not apply substantively to the Tribe (or to them, by

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[29] In dicta, the Second Circuit has expressed "doubts as to the propriety of private party injunctive relief' under RICO. *Trane Co. v. O'Connor Sec.,* 718 F.2d 26, 28 (2d Cir. 1983). *See also Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482, 489 n.20 (2d Cir. 1984) ("It . . . seems altogether likely that § 1964(c) as it now stands was not intended to provide private parties injunctive relief."), *rev'd on other grounds,* 473 U.S. 479 (1985).

[30] *Compare Religious Tech. Ctr. v. Wollersheim,* 796 F.2d 1076, 1080-89 (9th Cir. 1986) (concluding that RICO's legislative history forecloses injunctions for private plaintiffs), *with Nat'l Org. for Women, Inc. v. Scheidler,* 267 F.3d 687, 695 (7th Cir. 2001) (concluding that "the text of the RICO statute, understood in the proper light, itself authorizes private parties to seek injunctive relief'), *rev'd on other grounds,* 537 U.S. 393 (2003).

[31] *Compare Chevron Corp. v. Donziger,* 974 F. Supp. 2d 362, 568-70 (S.D.N.Y. 2014) (concluding that equitable relief is available in private RICO actions), *with Am. Med. Ass'n v. United Healthcare Corp.,* 588 F. Supp. 2d 432, 446 (S.D.N.Y. 2008) ("Based upon the weight of Second Circuit authority and Congress's failure to address the issue within the statutory language itself, this Court will not infer that the right to injunctive and declaratory relief exists for private litigants under Section 1964 of RICO.").

extension) because tribal sovereigns "are not expressly included among the 'persons' or entities subject" to RICO. (Doc. 66 at 20 n.7.) Section 1962(c) applies to "person[s]." The statute defines "person" to include "any individual *or entity* capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (emphasis added). That broad definition contains no specific exemption for tribes. *Cf.* 42 § 2000e(b) (specifically excluding Indian tribes from the definition of "employer" for the purposes of Title VII of the Civil Rights Act).

According to one prominent treatise, governmental entities "are not subject to RICO liability as defendants." Gregory P. Joseph, *Civil RICO: A Definitive Guide* § 11(A). "There is some disparity in the case law as to whether governmental entities should be deemed not to be 'persons' or should be recognized as 'persons' but simply immune ones." *Id.* For most purposes, "[t]he result is the same: they cannot successfully be sued." *Id.* The Tribal Defendants' argument, however, requires a decision on the precise rationale.[32]

The court concludes that, for the purposes of RICO, tribes are "persons" but that they enjoy immunity. This follows from the natural reading of the broad definition of "person" in § 1961(3)—it includes *any* "entity" capable of holding an interest in property. Sovereign governments like state governments are governmental entities. Entity, *Black's Law Dictionary*

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[32] In many contexts, it may be sensible to conclude that it is unnecessary to determine the precise rationale for immunity because, absent immunity, a successful RICO claim against a governmental entity could heap duplicative financial harm on taxpayers who might already have been harmed. *See id.* That concern plays no role in this case, however, because the Tribal Defendants cannot be liable for money damages.

(10th ed. 2014). It follows that tribal governments are also "entities." And there is no dispute that such entities are capable of holding an interest in property.

As discussed above, tribes enjoy immunity. But, as also discussed above, the immunity of tribal officials in their official capacity is limited by the analogy to *Ex Parte Young*. The court therefore concludes that tribal officials in their official capacity may be sued for injunctive relief for conduct occurring outside of Indian lands that violates 18 U.S.C. § 1962.

3. Mens Rea

The mens rea requirement in RICO is coextensive with the mens rea requirement found in the predicate crimes. *United States v. Biasucci,* 786 F.2d 504, 512 (2d Cir. 1986). The Tribal Defendants contend that Plaintiffs cannot establish the requisite mens rea for a RICO violation. (Doc. 66 at 46.) Plaintiffs maintain that the Tribal Defendants' argument is "irrelevant" and "based on several incorrect premises." (Doc. 85 at 127-28.)

The Tribal Defendants' argument might be persuasive if the rationale for the Tribe's immunity were that, as a governmental entity, the Tribe is incapable of forming the mens rea necessary for a predicate RICO act. Some courts have indeed rested on similar rationales. *See Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.,* 940 F.2d 397, 404 (9th Cir. 1991) (RICO claims failed because "government entities are incapable of forming a malicious intent"); *Andrade v. Chojnacki,* 65 F. Supp. 2d 431, 449 (W.D. Tex. 1999) (same; quoting *Lancaster*)*; see also* Gregory P. Joseph, *Civil RICO: A Definitive Guide* § 11(A) ("Most courts reason that state and local governments are immune from RICO liability because they are incapable of

forming the mens rea necessary to commit a predicate act." (collecting cases)). That rationale, however, is unpersuasive. As the Third Circuit has observed, it "does not distinguish adequately those situations where municipal corporations are indeed held liable for the tortious or criminal acts of [their] officials, even where such acts require a malicious, willful or criminal intent." *Genty v. Resolution Trust Corp.,* 937 F.2d 899, 909 (3d Cir. 1991).

The Tribal Defendants also contend that the FAC fails to allege that any of them "intended to defraud the Plaintiffs as required by the mail and wire fraud statutes." (Doc. 66 at 48 n.36.) According to the Tribal Defendants, the FAC alleges that Mr. Rees and Think Finance entered into agreements with the Tribal Defendants' *predecessors,* not the Tribal Defendants themselves. (*See id.* (citing FAC ¶ 209).) That argument, however, ignores the fact that the Tribal Defendants are sued in their official capacity—as the individual official representatives who, according to the FAC, have authority to stop the allegedly illegal conduct. The "intent" to be analyzed is the intent of the entity that the Tribal Defendants represent.

4. Injury; Causation

To establish a RICO claim, a plaintiff must prove, among other things, that she suffered "an injury to business or property." *DeFalco v. Bernas,* 244 F.3d 286, 305 (2d Cir. 2001). The Tribal Defendants argue that Plaintiffs cannot demonstrate that they have suffered any such injury. (Doc. 66 at 45.) Mr. Rees argues the same. (Doc. 67-2 at 34.) The court rejects those arguments for the same reasons that it concludes that Plaintiffs have constitutional standing: they have a direct, personal stake in the dispute. They explicitly claim that they paid excessive interest. (Doc.

18 ¶ 115.) Their claims demonstrate their interest in the subject matter of this lawsuit and the clear potential for relief in their individual cases.

The "by reason of language in § 1964(c) "require[s] a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP,* 806 F.3d 71, 86 (2d Cir. 2015) (alteration in original) (quoting *Holmes v. Sec. Inv'r Prot. Corp.,* 503 U.S. 258, 268 (1992)). The proximate cause requirement "mandates 'some direct relation between the injury asserted and the injurious conduct alleged' that is not 'too remote.' *Id.* (quoting *Holmes,* 503 U.S. at 268).

Mr. Rees contends that Plaintiffs have failed to allege that their harm was proximately caused by any alleged RICO violation. (Doc. 67-2 at 35.) He argues that [n]owhere in the FAC is it alleged that Plaintiffs or anyone else relied upon any misrepresentations by Rees in deciding to enter into the loans." (*Id.* at 36.) "And, nowhere in the FAC are there facts alleged demonstrating that it was a misrepresentation or fraudulent conduct by Rees that *caused* plaintiffs to suffer their injury." (*Id.*) Plaintiffs insist that, as borrowers of usurious debt, they meet the proximate cause test for RICO. (Doc. 85 at 133.)

Here, the FAC alleges that "Plaintiffs would not have had their bank accounts debited with illegal ACH transactions in excess of any legal amount of interest but for Defendants Rees and Think Finance establishing and running the corrupt enterprise of Plain Green." (Doc. 18 ¶ 115.) Of course, alleging but-for causation does not necessarily establish proximate causation. But the allegations of the FAC sufficiently claim a relation between the allegedly injurious conduct and

the injury that is not "too remote." The conduct at issue includes the alleged marketing and collection of usurious interest rates. The injury is the alleged payment of interest at excessive rates. That is a sufficiently direct relationship to satisfy proximate cause. Mr. Rees's argument that Plaintiffs have failed to allege reliance on any misrepresentation does not alter that conclusion and, as discussed below, fails to address the core of the scheme alleged in the FAC.

5. Enterprise; Distinctiveness

The FAC alleges that Plain Green is an "enterprise" within the meaning of 18 U.S.C. § 1961(4). (Doc. 18 ¶ 76.) That is a legal conclusion, not a factual allegation. But no Defendant challenges the "enterprise" element of Plaintiffs' RICO claim insofar as Plaintiffs claim that Plain Green is the "enterprise" at issue.

The Tribal Defendants do contend, however, that Plaintiffs' RICO theory violates the "distinctiveness" requirement. (Doc. 66 at 47 n.35.) According to the Tribal Defendants, by suing them in their official capacities as officers and directors of Plain Green, Plaintiffs are functionally suing Plain Green. Thus, according to the Tribal Defendants, Plaintiffs have designated Plain Green as both the RICO defendant and enterprise, which the Tribal Defendants say is fatal to Plaintiffs' RICO theory. (*Id.*)

It is true that, "[u]nder section 1962(c), a defendant and the enterprise must be distinct." *DeFalco,* 244 F.3d at 307. However, Plaintiffs are suing the Tribal Defendants not solely as directors of Plain Green, but also as official representatives of the Tribe. (*See* Doc. 18 ¶ 209.) The Tribal Defendants concede that the Tribe and Plain Green are distinct entities. (Doc. 92 at 19 n.14.) The court concludes that the allegations

in the FAC do not violate RICO's distinctiveness requirement.

6. Management and Operation

A necessary element for liability under § 1962(c) is that the defendant "conduct[ed] or participate[d], directly or indirectly, in the conduct of [the] enterprise's affairs." 18 U.S.C. § 1962(c). Interpreting that provision, the Supreme Court has held that such conduct or participation requires that a defendant "participate in the operation or management of the enterprise itself." *Reyes v. Ernst & Young,* 507 U.S. 170, 185 (1993). Under that "operation or management" test, "participation" requires a defendant to have "some part in directing" the enterprise's affairs, and thus RICO liability for "participation" is "not limited to those with primary responsibility for the enterprise's affairs." *Id.* Liability under § 1962(c) is not limited to "upper management"; an enterprise may be "operated" "not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." *Id.* at 184. The court discusses whether each set of Defendants meets this test.[33]

a. Mr. Rees and the Think Defendants

Mr. Rees and the Think Defendants contend that the FAC does no more than allege that they provided *services* to the alleged enterprise, and that such allegations fall short of alleging their "operation or management." (Doc. 65 at 14; *see also* Doc. 67-2 at 46.) It is true that, in the term sheet, Think Finance

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[33] The Tribal Defendants raise no argument on this RICO element; presumably because, as directors of Plain Green, they would indisputably meet the operation or management test.

described what it brought to the deal with the Tribe as "services";

> TF will license its software to the Tribe pursuant to a software license agreement acceptable to the parties. TF will also provide risk management, application processing, underwriting assistance, payment processing, and ongoing customer service support coterminous with the software license agreement and market and/or identify access channels for consumer loans on the Tribe's behalf (jointly "Services").

(Doc. 18-1 at 1.) Plaintiffs note that the FAC explicitly asserts that Think Finance did more than provide "services." (*See* Doc. 18 ¶ 101 ("Defendants Rees and Think Finance hoped to avoid liability by falsely claiming that they only provided services to Plain Green, when in reality they created the whole enterprise and ran its operation through an assortment of subsidiaries and affiliates like Defendants Tailwind Marketing, TC Loan, and TC Decision Sciences.").) According to the Think Defendants, that allegation is merely conclusory. (Doc. 96 at 4.)

Evaluating the factual allegations in the FAC, the court concludes that Plaintiffs have plausibly alleged that Rees and Think Finance "participated" in the operation or management of the enterprise. The FAC alleges that Rees and Think Finance prepared the term sheet (Doc. 18 ¶ 78), which required the Tribe to "adopt a finance code that is acceptable to all parties and provide for the licensing of an arm of the tribe to engage in consumer lending" (*id.* ¶ 79).[34] The FAC

[34] Rees points out that he is not a party to the term sheet, nor is he a signatory to it. (Doc. 98 at 16.) Inspection of the term sheet

further asserts that Rees and Think Finance "intentionally and willfully dominated and still dominate the operations of Plain Green" and "provided everything that the enterprise needed to operate." (*Id.* ¶ 80.) Rees and Think Finance also "defined precisely the type of loan Plain Green would offer to customers and the terms on which the loan would be offered," (*id.* ¶ 83), and required the enterprise to enter into certain banking and attorney-client relationships (*id.* ¶¶ 85, 87). The court concludes that Plaintiffs have plausibly alleged that both Think Finance and Mr. Rees have played at least some part in directing the affairs of the enterprise.

The court cannot reach the same conclusion with respect to TC Loan Service, LLC, TC Decision Sciences, LLC, and Tailwind Marketing, LLC. The FAC alleges that Mr. Rees and Think Finance created those entities as subsidiaries (*id.* ¶ 99), and that Mr. Rees and Think Finance "control and dominate" them (*see id.* ¶¶ 89, 90). No allegations in the FAC describe those entities as having any role in directing the affairs of the enterprise. The court will accordingly DISMISS the RICO claim against those Defendants.

b. TCV and Sequoia

TCV and Sequoia each argue that the FAC fails to allege that they conducted or participated in the enterprise's affairs. (Doc. 76 at 22; Doc. 77-1 at 19.) The principal factual allegations against these two Defendants are as follows:

(Doc. 18-1) reveals that to be true, but does not foreclose the plausible allegation that Rees prepared the term sheet (or caused it to be prepared) for execution by the parties to that document.

> Defendants Sequoia and Technology Crossover Ventures provide money that is used to start the illegal lending process. They reap rewards through obtaining significant returns on the investment of their funds in the enterprise. Sequoia and Technology Crossover were fully aware of the practices of the enterprise and knew that the practices violated the law. Sequoia and Technology Crossover do not make investments without substantial due diligence into their investments, including legal review of the activities of their investment vehicle.

(Doc. 18 ¶ 154.) The FAC also asserts that Sequoia and TCV "executed a series of agreements that documented their relationship with Defendants Rees and Think Finance" but that "[t]hey have concealed these arrangements through confidentiality clauses in the agreements" and have refused to comment on their role in the RICO enterprise. (*Id.* ¶ 155.) None of those allegations describe TCV or Sequoia as having any role in directing the affairs of the enterprise.

Allegations that TCV and Sequoia provided financing to the RICO enterprise are not sufficient to show that they conducted or participated in the enterprise's affairs.[35] Allegations that TCV and Sequoia are "inves-

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[35] *See Alkhatib v. NY. Motor Grp. LLC,* No. CV-13-2337(ARR), 2015 WL 3507340, at *18 (E.D.N.Y. June 3, 2015) (bank did not satisfy operation or management test where its only alleged activities were "summarily granting the loan applications created by the dealership defendants, failing to investigate the plaintiffs' claims of fraud, and collecting the payments due under the allegedly fraudulent loans"); *Berry v. Deutsche Bank Tr. Co. Americas,* No. 07 Civ. 7634(WHP), 2008 WL 4694968, at *6 (S.D.N.Y. Oct. 21, 2008) ("Lending money to an enterprise does not establish a role in 'directing the enterprise's affairs.'"); *Rosner*

tors" (shareholders) in Think Finance, or obtained returns on those investments, are similarly insufficient. Neither would TCV and Sequoia be RICO "participants" just because they were "fully aware" of Plain Green's practices. *See Rosner v. Bank of China,* 528 F. Supp. 2d 419, 423, 431 (S.D.N.Y. 2007) (despite allegations that bank "knew about the fraudulent scheme and its role in the fraudulent scheme," bank's provision of banking services did not qualify as participation in a RICO enterprise); *Dep't of Econ. Dev. v. Arthur Andersen & Co.* (*U.S.A.*)*,* 924 F. Supp. 449, 468 (S.D.N.Y. 1996) ("One can 'knowingly participate' in fraud without having 'some part in directing the affairs of the enterprise.').

Plaintiffs argue that *Sumitomo* and *Rosner—cited* in the footnote above—actually support their position. The court disagrees, in *Sumitomo,* the plaintiff, Sumitomo Corporation, sued two major banks, alleging that they participated in a scheme to defraud Sumitomo "by structuring certain transactions so that they appeared to be normal copper transactions without disclosing other related transactions that transformed these transactions into bank loans of which plaintiff was unaware." *Sumitomo,* 2000 WL 1616960, at *1. The "enterprise" in that case was a former Sumitomo employee, Hamanaka, and each of the two banks. The court recognized that merely providing

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v. Bank of China, 528 F. Supp. 2d 419, 431 (S.D.N.Y. 2007) (Bank of China's alleged provision of banking services that aided in the perpetration of a fraudulent scheme did not qualify as participation in a RICO enterprise); *Sumitomo Corp. v. Chase Manhattan Bank,* No. 99 Civ. 4004 (JSM), 2000 WL 1616960, at *1 (S.D.N.Y. Oct. 30, 2000) ("[M]erely providing financing to a RICO enterprise did not constitute participation in the affairs of the enterprise." (citing *Schmidt v. Fleet Bank,* 16 F. Supp. 2d 340, 347 (S.D.N.Y. 1998))).

financing to a RICO enterprise would not constitute "participation" in the affairs of the enterprise, but held that the complaints sufficiently alleged "participation" because "it is the fraudulent financing operation which is itself the RICO enterprise, and the complaints sufficiently allege the particular defendant's participation in its affairs." *Id.* Here, the FAC does allege a fraudulent financing operation (Plain Green), but that operation extends financing to consumers like Plaintiffs. TCV and Sequoia are not themselves alleged to be the RICO "enterprise"; nor are they alleged to directly make loans to consumers.

Rosner is similarly unpersuasive. The court in that case referenced an earlier related *action—Commodity Futures Trading Commission v. International Financial Services* (*New York*), *Inc.*, 323 F. Supp. 2d 482 (S.D.N.Y. 2004)—in which Sociedade Comercial Sin Lap Limitada (Siu Lap) was a defendant held liable for fraudulently and without authorization engaging in transactions in foreign currency futures contracts.[36] Siu Lap's role in the fraudulent scheme involved funding codefendant International Financial Services, Inc. *See Rosner*, 528 F. Supp. 2d at 422. That was not Siu Lap's only role,[37] but even assuming it was, Siu Lap was held liable not under RICO, but under the Commodity Exchange Act (CEA). *Int'l Fin. Servs.,* 323

[36] The claims against Siu Lap were not resolved in the 2004 decision. The court had entered default judgment against Siu Lap in 2002. *See* Order of Default Judgment, *Int'l Fin. Servs.,* No. 1:02-cv-5497-GEL (S.D.N.Y. Aug. 15, 2002), ECF No. 19.

[37] Siu Lap also "hired inexperienced currency traders as independent contractors, grouped the traders by their ethnicity, and encouraged them to solicit customers from their respective ethnic communities." *Id.* The independent contractors then misled customers. *See id.*

F. Supp. 2d at 485. Plaintiffs do not explain how Siu Lap's liability under the CEA has any bearing on the "operation or management" element that appears in RICO.

Plaintiffs say they have "additional allegations" (not appearing in the FAC) regarding TCV and Sequoia's "participation" in the affairs of the enterprise. (Doc. 85 at 101, 107; Doc. 85-1.) Plaintiffs assert that TCV General Partner John Rosenberg has served on the Think Finance Board since 2009. (Doc. 85-1 ¶ 1.) Plaintiffs also say that Sequoia General Partner Michael Goguen previously served as a director of Think Finance. (*Id.* ¶ 3.) Plaintiffs allege that both Rosenberg and Goguen were "fully aware" of the Plain Green enterprise (*id.* ¶¶ 1, 3), and that they both "directed the strategy that Think Finance followed, including its domination and control of Plain Green" (*id.* ¶¶ 2, 4).

TCV and Sequoia both contend that Plaintiffs' reliance on allegations not appearing in the FAC is procedurally improper. (Doc. 97 at 12; Doc. 99 at 8.) The court agrees. *See Sherman v. Ben & Jerry's Franchising, Inc.,* No. 1:08-CV-207, 2009 WL 2462539, at *8 (D. Vt. Aug. 10, 2009) (supplementary allegations that did not appear in the Amended Complaint were improper because "parties may not amend the complaint through supportive memoranda" (citing *Wright v. Ernst & Young UP,* 152 F.3d 169, 178 (2d Cir. 1998))). The court's analysis is limited to the FAC as it stands currently.

However, since the court is permitting discovery as to TCV and Sequoia's minimum contacts with Vermont, the court will also permit Plaintiffs to discover facts related to the "additional allegations." To defeat a jurisdiction-testing motion after such discovery, Plaintiffs will be required to aver "facts that, if

credited by the trier, would suffice to establish jurisdiction" over TCV and Sequoia. *Dorchester,* 722 F.3d at 85 (quoting *Ball v. Metallurgie Hoboken-Overpelt, S.A.,* 902 F.2d 194, 197 (2d Cir. 1990)). Meanwhile, the court will defer ruling on any of the claims against Sequoia and TCV.

7. Racketeering

Under RICO, "racketeering activity" includes "any act which is indictable under . . . [18 U.S.C.] section 1341 (relating to mail fraud), [or] section 1343 (relating to wire fraud)." 18 U.S.C. § 1961(1)(B). "A complaint alleging mail and wire fraud must show (1) the existence of a scheme to defraud, (2) defendant's knowing or intentional participation in the scheme, and (3) the use of interstate mails or transmission facilities in furtherance of the scheme." *S.Q.K.F.C., Inc. v. Bell Atl. TriCon Leasing Corp.,* 84 F.3d 629, 633 (2d Cir. 1996). Defendants argue that Plaintiffs have failed to state a racketeering claim for a variety of reasons.

a. Scheme to Defraud

"The mail and wire fraud statutes do not define 'scheme to defraud,' but it has been described as a plan to deprive a person 'of something of value by trick, deceit, chicane or overreaching.' *United States v. Autuori,* 212 F.3d 105, 115 (2d Cir. 2000) (quoting *McNally v. United States,* 483 U.S. 350, 358 (1987)). "It is characterized by a departure from community standards of 'fair play and candid dealings.' *Id.* (quoting *United States v. Ragosta,* 970 F.2d 1085, 1090 (2d Cir. 1992)). "[M]ateriality of falsehood" is an element of a scheme to defraud. *Neder v. United States,* 527 U.S. 1, 25 (1999).

Plaintiffs' theory is that Mr. Rees and Think Finance "had a plan or scheme to defraud thousands

of people in a financially challenged position by extending loans at illegally high and extortionate interest rates, while at the same time claiming that the business was legitimate and in compliance with the law." (Doc. 18 ¶ 101.) According to Plaintiffs, Rees and Think Finance used Plain Green and the Tribal Defendants as "intermediaries" and Tailwind, TC Loan, and TC Decision Sciences as "subsidiaries and affiliates" to advance the scheme. (*Id.*) The FAC outlines alleged misrepresentations in furtherance of the alleged scheme as including: (1) that Plain Green was the lender; (2) that Chippewa Cree law governed; (3) that the lender was not subject to any state or federal laws; (4) that Plain Green loans are less expensive than a payday loan; (5) that Plain Green charges low fees. (Doc. 18 ¶¶ 106, 107, 124, 125, 126.) According to the FAC, those alleged misrepresentations appear on Plain Green's website and in the arbitration agreements. (*See id.*)

The parties devote considerable energy to discussing whether those five statements are true, whether they are material, and whether they are sufficiently specific under Rule 9(b). All of those arguments distract from the real question. *Representations* that Think Green's business model is legal or that it offers a good deal are not at the core of the alleged scheme. Rather, the alleged plan—as the court understands it—was to avoid financial regulation of consumer lending. That is the alleged "falsehood" at issue; the court need not focus on any specific alleged false statements. *See United States v. Woods,* 335 F.3d 993, 999 (9th Cir. 2003) (concluding that the Supreme Court in *Neder* "addressed the materiality of misrepresentation, not the specificity"), *cert. denied,* 540 U.S. 1025 (2003). As the court concluded above, the allegations of the FAC

are specific and plausible in their description of such a plan.

b. Fraudulent Intent; Participation in Scheme

Mr. Rees and Think Finance contend that the FAC fails to allege that they had any fraudulent intent. (Doc. 65 at 16; Doc. 67-2 at 42.) Plaintiffs do not dispute that they need to plead fraudulent intent, but assert that such intent may be alleged generally under Rule 9(b), and that the FAC alleges Think Finance's direct knowledge and also that it had motive and opportunity. (Doc. 85 at 114.)

Although Rule 9(b) permits intent to be alleged generally, Plaintiffs must still "allege facts that give rise to a *strong* inference of fraudulent intent." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.,* 385 F.3d 159, 179 (2d Cir. 2004) (quoting *Moore v. PaineWebber, Inc.,* 189 F.3d 165, 173 (2d Cir. 1999)). "The requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Shields v. Citytrust Bancorp, Inc.,* 25 F.3d 1124, 1128 (2d Cir. 1994).

The court concludes that the FAG pleads sufficient facts to give rise to a strong inference of fraudulent intent. The FAC alleges that Rees, the Think Defendants, and the Tribal Defendants had motives to commit the alleged fraud. According to the FAC, federal regulators had shut down Rees's former "rent-a-bank" internet payday business. (Doc. 18 ¶¶ 23, 37-41.) Rees's new venture, Think Finance, is allegedly a different kind of law-avoidance scheme that uses a

"rent-a-tribe" model. (*Id.* ¶ 42; *see also id.* ¶ 82.) Thus, as the FAC puts it, the motive for Rees and the Think Defendants was to find a business model that would be profitable and that would avoid the legal issues that doomed the previous "rent-a-bank" model. According to the FAC, the Tribe (represented by the Tribal Defendants) also had a motive: it would receive 4.5% of the revenues from the operation. (*Id.* ¶ 23.) The opportunity for Rees, the Think Defendants, and the Tribal Defendants arose in March 2001 when, according to the FAC, Rees and Think Finance approached the Tribe regarding formation of a tribal entity to conduct an internet-lending operation. (*Id.* ¶ 77.)

Mr. Rees contends that the FAC fails to allege that he "participated" in any mail or wire fraud. (Doc. 67-2 at 38.) He asserts that a RICO claim against him "cannot be based on allegations that *the enterprise* simply engaged in acts of mail fraud, wire fraud, or the collection of unlawful debt." (Doc. 98 at 22 (emphasis added).) Citing *Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1175 (2d Cir. 1993), Rees argues that "[c]onclusory allegations that Rees somehow controlled the individual Tribal Defendants to take unspecified actions do not suffice." (Doc. 67-2 at 40)

It is true that "[t]he focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise, which are proscribed by section 1962(d) [RICO's conspiracy provision]." *United States v. Persico,* 832 F.2d 705, 714 (2d Cir. 1987). But the FAC alleges that Rees (and Think Finance), "through their control over" the Tribal Defendants, wired money into and out of Plaintiffs' bank accounts (Doc. 18 ¶¶ 53, 54, 68, 69, 100), and used the mail to collect payments and communicate with other parts of

the Plain Green enterprise (*id.* ¶ 100). The FAC includes more than just bare allegations that Rees was in "control"—it alleges that he (and Think Finance) actually designed the system under which the wire and mail transactions occurred. (*See* Doc. 18 ¶¶ 23, 81.)[38] If that is not an allegation of "participation," it is hard to imagine what might be.

c. Use of Mails or Wires

The Tribal Defendants contend that the FAC "wholly fails" to establish their liability under a mail fraud theory, and that the FAC "fails to state how the mails were used to further the scheme to defraud." (Doc. 66 at 50 & n.37.) The PAC does indeed allege relatively few facts about the mail; perhaps the most detailed factual allegation is that Defendants Rees and Think Finance "use[d] the mail to collect payments and communicate with other parts of the Plain Green enterprise." (Doc. 18 ¶ 100.) Plaintiffs have clarified that they do not allege that any misstatements were communicated through the mail, but allege mail fraud "solely based on it advancing the fraudulent scheme." (Doc. 85 at 22 n.2.) Therefore, "a detailed description of the underlying scheme and the connection therewith of the mail and/or wire communications, is sufficient to satisfy Rule 9(b)." *In re Sumitomo Copper Litig.,* 995 F. Supp. 451, 456 (S.D.N.Y. 1998). The court concludes that Plaintiffs have alleged a connection between the scheme and the mails. The

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[38] Rees describes as "ludicrous" and "incredible" any allegation that he personally deposited funds into or withdrew funds from Plaintiffs' accounts. (Doc. 98 at 16.) The court does not read the FAC as alleging that, but instead as alleging that he designed a system under which such transactions would occur. (*See* Doc. 18 ¶ 10 (alleging that Rees "personally designed and directed the business activity described in this Complaint").)

court therefore rejects the Tribal Defendants' argument that the FAC is insufficiently detailed with respect to the allegations of mail fraud.

Plaintiffs assert that they allege wire fraud "based both on Defendants' fraudulent statements and based on the wiring being merely incidental to a larger fraudulent scheme." (Doc. 85 at 22 n.2.) For the reasons stated above, the court concludes that the inquiry need not focus on the five alleged misrepresentations that Plaintiffs say were transmitted over wires. However, Plaintiffs have alleged a detailed description of the scheme, and have also alleged a connection between the scheme and the wires.

8. Collection of Unlawful Debt

Section 1962(c) of Title 18 identifies "collection of unlawful debt" as one of the specific offenses which may give rise to civil liability under the RICO statute. Unlawful debt is defined as a debt:

> (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C. § 1961(6). To state a claim for collection of an unlawful debt, Plaintiffs must allege that:

> [1] the debt was unenforceable in whole or in part because of state or federal laws relating to usury, [2] the debt was incurred in connection with the "business of lending money . . . at a [usurious] rate," . . . [3] the usurious rate was at least twice the enforceable rate . . . [4] as a result of the above confluence of factors, it was injured in its business or property.

Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n, 840 F.2d 653, 666 (9th Cir. 1988) (alterations and omissions in original) (quoting *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank,* 755 F.2d 239, 248 (2d Cir. 1985)).

a. Unenforceable Debt

The Tribal Defendants assert that there was no "unlawful debt" in this case because the Tribe's governing law imposes no interest rate cap. (Doc. 66 at 52.)[39] The Tribal Defendants further contend that no state usury laws can be enforced against them because doing so "would amount to an improper state regulation of on-reservation activity in contravention of well-established preemption and infringement principles." (*Id.*)

The court rejects the Tribal Defendants' arguments. For the reasons stated above, the court has concluded that, at least on the present record, the relevant conduct occurred *outside* of the Tribe's lands. *See Otoe-Missouria,* 769 F.3d at 115. The interest rates charged may not have violated Chippewa Cree law, but under *Bay Mills* the Tribal Defendants can be sued for injunctive relief if their off-reservation commercial activities violate state law.

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[39] TCV joins this argument. (Doc. 76 at 22.)

b. Business of Lending Money at a Usurious Rate

The Think Defendants contend that the FAC fails to allege that any Defendant was in the "business of lending money at a usurious rate." (Doc. 65 at 19.) According to the Think Defendants, the only entity alleged to be in the "business" of lending money is the alleged RICO enterprise (and non-party) Plain Green. (*Id.* at 19 n.9.) Plaintiff's argue that they do not have to show that every defendant lent money because RICO only requires that a defendant "conduct or participate, directly or indirectly" in the enterprise's affairs. (Doc. 85 at 96.) In their reply, the Think Defendants return to the refrain that Plaintiffs have failed to satisfy *Reve's* "operation and management" test. (Doc. 96 at 7.) For the reasons stated above, the court agrees that TC Loan Service, LLC, TC Decision Sciences, LLC, and Tailwind Marketing, LLC do not satisfy the "operation and management" test, but that Mr. Rees and Think Finance do.

Mr. Rees and Think Finance also assert that the FAC fails to allege that they themselves acted to "collect" any unlawful debt.[40] Think Finance relies on *Durante,* in which the Second Circuit—tracking the

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[40] Rees and the Think Defendants assert that the proper definition of "collection" for purposes of § 1962(c) is "to induce in any way any person to make repayment thereof." *United States v. Pepe,* 747 F.2d 632, 674 (11th Cir. 1984). Plaintiffs object that the Think Defendants are inappropriately seeking to add an additional "inducement" element onto RICO. (Doc. 85 at 95.) Plaintiffs argue that, in any case, they have alleged that the Think Defendants "induced" repayment. (*Id.* at 96.) To the extent that there is an "inducement" element, the court concludes that it is alleged in the FAC by the allegations that funds were actually electronically collected directly from Plaintiffs' bank accounts. (*See* Doc. 18 ¶¶ 30, 54, 69, 100.)

language of § 1962(c)—listed as an element that "the individual defendants participated in the conduct of the affairs of the enterprise *through collection of unlawful debt." Durante,* 755 F.2d at 248 (emphasis added). Rees contends that a RICO claim against him "cannot be based on allegations that *the enterprise* simply engaged in acts of mail fraud, wire fraud, or the collection of unlawful debt." (Doc. 98 at 22 (emphasis added).) Thus, both Rees and Think Finance argue that the FAC fails to allege that they *individually* took any actions constituting collection of unlawful debt. Plaintiffs insist that "[t]here is no requirement that each defendant personally lend any money, only that they participate, *directly or indirectly."* (Doc. 85 at 96)[41]

As noted above, "[t]he focus of section 1962(c) is on the individual [acts] engaged in by a defendant, rather than the collective activities of the members of the enterprise, which are proscribed by section 1962(d) [RICO's conspiracy provision]." *Persico,* 832 F.2d at 714. For largely the same reasons stated above regarding racketeering, the court concludes that the FAC adequately alleges that Rees and Think Finance participated in the collection of allegedly unlawful debt. The FAC alleges that Rees and Think Finance designed the system under which borrowers would be

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[41] Plaintiffs also assert that they have alleged that Rees and Think Finance "took many acts that were designed to induce the repayment of an unlawful debt." (Doc. 85 at 93.) Referring to the allegations that Rees and Think Finance controlled the Tribal Defendants (Doc. 18 ¶¶ 54, 69), Plaintiffs maintain that the FAC does allege that Rees and Think Finance "collected unlawful debt multiple times from both Jessica Gingras and Angela Given." (Doc. 85 at 94, 96.)

charged allegedly usurious interest rates. That is plainly an allegation of "participation."

c. Twice the Enforceable Rate

This element does not appear to be in dispute. The FAC alleges that the rates charged were between 198 and 376% annually—well in excess of twice the rate enforceable under Vermont law.

d. Injury to Business or Property

For the reasons discussed above, the FAC alleges the requisite injury.

Conclusion

All Defendants' motions to compel arbitration (Docs. 64, 66, 67, 77, 76) are DENIED.

The Tribal Defendants' Motion to Dismiss (Doc. 66) is GRANTED IN PART and DENIED IN PART. On all counts against the Tribal Defendants, Plaintiffs can obtain only prospective injunctive or declaratory relief. Counts One and Two are DISMISSED. Count Three is DISMISSED as to Plaintiff Gingras; but remains as to Plaintiff Givens. The Vermont state-law claims (Counts Four and Seven) survive against the Tribal Defendants. The RICO claims (Counts Five and Six) remain in the case. The unjust enrichment claim (Count Seven) also remains.

The Think Defendants' Motion to Dismiss (Doc. 65) is GRANTED IN PART and DENIED IN PART. Counts One and Two are DISMISSED. Count Three is DISMISSED as to Plaintiff Gingras, but remains as to Plaintiff Givens. The VCFA claim (Count Four) remains against the Think Defendants. The RICO claim (Count Six) as against TC Loan, TC Decision, and Tailwind Marketing is DISMISSED, but remains as against Think Finance. The Think Defendants have

not sought dismissal of the unjust enrichment claim (Count Seven), so that claim remains against them.

Kenneth Rees's Motion to Dismiss (Doc. 67) is GRANTED IN PART and DENIED IN PART. Counts One and Two are DISMISSED. Count Three is DISMISSED as to Plaintiff Gingras, but remains as to Plaintiff Givens. The VCFA claim (Count Four) remains against Mr. Rees. The RICO claims (Counts Five and Six) remain against Mr. Rees. The unjust enrichment claim (Count Seven) remains.

TCV and Sequoia's Motions to Dismiss (Docs. 76, 77, respectively) are DENIED without prejudice, and may be renewed following discovery on the issue of personal jurisdiction.

Plaintiffs' Motion for Jurisdictional Discovery (Doc. 43) on the issues of subject-matter jurisdiction and arbitration is MOOT.

Dated at Rutland, in the District of Vermont, this 18 day of May 2016.

/s/ Geoffrey W. Crawford
Geoffrey W. Crawford, Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket Nos: 16-2019 (L),
16-2132 (Con), 16-2135 (Con),
16-2138 (Con), 16-2140 (Con)

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of June, two thousand nineteen.

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JESSICA GINGRAS, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, ANGELA C. GIVEN, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

THINK FINANCE, INC., TC LOAN SERVICE, LLC, KENNETH E. REES, FORMER PRESIDENT AND CHIEF EXECUTIVE OFFICER AND CHAIRMAN OF THE BOARD OF THINK FINANCE, TC DECISION SCIENCES, LLC, TAILWIND MARKETING, LLC, SEQUOIA CAPITAL OPERATIONS, LLC, TECHNOLOGY CROSSOVER VENTURES, JOEL ROSETTE, OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER OF PLAIN GREEN, TED WHITFORD, OFFICIAL CAPACITY AS A MEMBER OF PLAIN GREEN'S BOARD OF DIRECTORS, TIM MCINERNEY,

Defendants-Appellants.

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ORDER

Appellants, Sequoia Capital Operations, LLC, and Technology Crossover Ventures, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Docket No. 1:15-cv-101

JESSICA GINGRAS AND ANGELA C. GIVEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

JOEL ROSETTE, TED WHITFORD, TIM MCINERNEY, THINK FINANCE, INC., TC LOAN SERVICE, LLC, KENNETH E. REES, TC DECISION SCIENCES, LLC, TAILWIND MARKETING, LLC, SEQUOIA CAPITAL OPERATIONS, LLC AND TECHNOLOGY CROSSOVER VENTURES,

Defendants.

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Nature of Action

1. This is a class action for equitable relief against a payday lender that has taken advantage of people who are struggling financially by charging extortionate interest rates and engaging in illegal lending practices. The First Amended Complaint adds two RICO claims for racketeering and for collection of an unlawful debt and a claim for unjust enrichment.

2. Plain Green, LLC ("Plain Green") purports to be a "tribal lending entity wholly owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation." (https://www.plaingreenloans.com). The officers and directors of Plain Green are sued in their official capacity for equitable relief. *See Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014).

3. Plain Green was created after existing payday lenders approached the Chippewa Cree Tribe of the Rocky Boy's Reservation (the "Tribe") and requested that the Tribe become involved in a payday lending scheme. In the United States, stringent laws have been enacted to prescribe how loans can be made and to prevent lenders from preying on indigent people. By involving the Tribe in the payday lending scheme, the lenders hoped to circumvent these laws and take advantage of legal doctrines, such as tribal immunity, to avoid liability for their actions. After its creation, Plain Green engaged in and continues to engage in a series of predatory loan practices that violate the law and that have injured numerous people who are struggling financially.

Parties

4. Jessica Gingras is a citizen of Vermont who took out payday loans from Defendants.

5. Angela Given is a citizen of Vermont who took out payday loans from Defendants.

6. Defendant Joel Rosette is the Chief Executive Officer of Plain Green and is sued in his official capacity. Rosette is responsible for all operations of Plain Green. Article 7.6 of the current Articles of Organization of Plain Green, LLC grants Rosette the power "to manage the Company on a daily basis." Rosette also has the authority to "hire and terminate employees

when necessary." *Id.* As a result, Rosette is responsible for and can stop the illegal activity described in this Complaint. In his position as Chief Executive Officer, Rosette has the authority to prevent the credit reporting and illegal keeping of a loan balance for the Plaintiffs. Rosette is a citizen of Montana and not a citizen of Vermont.

7. Defendant Ted Whitford is a member of Plain Green's Board of Directors and is sued in his official capacity. The Board of Directors has the power to fire the CEO of Plain Green and appoint a new CEO who will comply with the law. Whitford is a citizen of Montana and not a citizen of Vermont.

8. Defendant Tim McInerney is a member of Plain Green's Board of Directors and is sued in his official capacity. The Board of Directors has the power to fire the CEO of Plain Green and appoint a new CEO who will comply with the law. McInerney is a citizen of Montana and not a citizen of Vermont.

9. Defendant Think Finance, Inc. ("Think Finance") is a Delaware corporation headquartered at 4150 International Plaza, Suite 400, Fort Worth, Texas 76109. It formerly had the name ThinkCash, Inc. Its principal place of business is outside the State of Vermont.

10. Defendant Kenneth E. Rees is the former President and Chief Executive Officer and current Chairman of the Board of Think Finance. He is currently the Chief Executive Officer of Elevate Credit, Inc. Mr. Rees maintains a controlling interest and operational role in Think Finance. He has personally designed and directed the business activity described in this Complaint. He is a citizen of Texas and not a citizen of Vermont.

11. Defendant TC Loan Service, LLC ("TC Loan") is a Delaware limited company located at 4150 International Plaza, Suite 400, Fort Worth, Texas 76109. Its principal place of business is outside the State of Vermont.

12. Defendant TC Decision Sciences, LLC ("TC Decision Sciences") is a Delaware limited liability company with offices at 4150 International Plaza, Suite 400, Fort Worth, Texas 76109. Its principal place of business is outside the State of Vermont.

13. Defendant Tailwind Marketing, LLC ("Tailwind Marketing") is a Delaware limited liability company with offices at 4150 International Plaza, Suite 400, Fort Worth, Texas 76109. Its principal place of business is outside the State of Vermont.

14. Defendant Sequoia Capital Operations, LLC ("Sequoia") is a Delaware limited liability company with its principal place of business at 3000 Sand Hill Road, Building 4, Suite 180, Menlo Park, California. Its principal place of business is outside the State of Vermont.

15. Defendant Technology Crossover Ventures ("Technology Crossover") is a Delaware corporation with offices at 528 Ramona Street, Palo Alto, California. Its principal place of business is outside the State of Vermont.

Jurisdiction and Venue

16. This Court has jurisdiction over this dispute pursuant to the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. §§ 5531(a) and 5536(a), and the Federal Trade Commission Act, 15 U.S.C. § 45 (the "FTC Act"). This Court has federal question jurisdiction under 28 U.S.C. § 1331. The Court also has jurisdiction because this case is brought under "Federal consumer financial law," 12 U.S.C. § 5565(a)(1). The

Court has jurisdiction over this action pursuant to 18 U.S.C. § 1965.

17. In addition, this Court has diversity jurisdiction because diversity of citizenship exists between Plaintiffs and Defendants and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332. Plain Green paid approximately $13 million to a loan servicer that participated in its payday loan scheme. These payments demonstrate that the amount of the payday loans is in excess of $13 million.

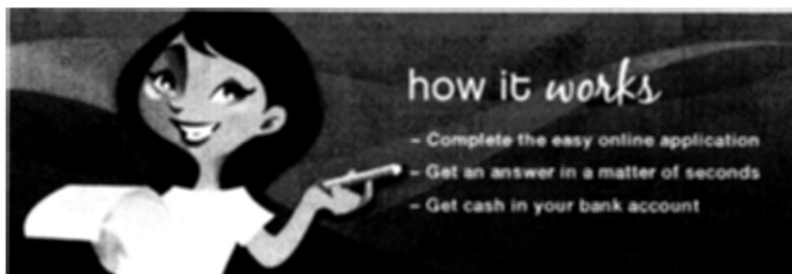
18. Additionally, this Court also has jurisdiction under the Class Action Fairness Act. 28 U.S.C. § 1332. The Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

19. This Court may enter a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2202.

20. Venue is proper in this Court under 18 U.S.C. § 1965 and 28 U.S.C. § 1391(b)(2).

Facts

21. Plaintiffs Jessica Gingras and Angela Given fell victim to a sophisticated loan sharking operation that was specifically designed by the Defendants to ensnare unsuspecting victims. Ms. Gingras and Ms. Given visited a bright and cheerful website, https://www.plaingreenloans.com, which promised to help them secure a loan. This website informs visitors that with an easy online application, they can obtain an answer within a matter of seconds:



22. The website proclaims that Plain Green is a better option than a payday loan:

23. However, the cheerful cartoon characters do not tell the whole story. The reality of Defendants' operation is far different than these shiny, innocent looking characters suggest. The Plain Green enterprise was created when Kenneth Rees, the mastermind of this illegal scheme, had his former business, ThinkCash, shut down by federal regulators. Rees was undeterred by this setback and sought a new way to prey on unsuspecting people. Rees believed that tribal immunity was the answer. So, Rees and his rebranded company, Think Finance, approached the Chippewa Cree Tribe with a deal. Rees and Think Finance would provide everything the Tribe needed to run a successful payday loan enterprise if the Tribe would let them use the concept of tribal immunity to stymie state and federal regulators. In return, the Tribe would receive 4.5% of the revenues.

The Payday Lending Industry

24. Payday lending takes advantage of people's need for money. While marketed as a short term loan for emergency cash, the loans are usually not short term at all. A typical borrower cannot repay the entire amount of the loan right away. Instead, to avoid default, the borrower will often roll the loan over into another loan or take out a loan from an alternative lender. As interest continues to accrue on these loans, borrowers get stuck in a vicious debt trap from which they cannot escape. More of the borrowers' limited resources are diverted to interest on the payday loans, and borrowers struggle to meet their basic needs, such as food, shelter, and medical care.

25. A typical payday loan has an extortionate interest rate of 200% or more. For example, Plain Green's website states that it lends at rates of 299.17 to 378.95% for first time borrowers. This type of loan causes people who are struggling financially to pay more in interest within one year than they originally borrowed in principal.

26. Payday lenders justify these exceptionally high interest rates by pointing to the allegedly short term nature of the loans and the supposedly higher risk profile of poor borrowers.

27. However, payday lenders, like Plain Green, do not examine the borrower's ability to repay the loan in a short period of time.

28. Instead, payday lenders, such as Plain Green, create a repayment plan that is designed to extend the repayment period so that the lender can obtain substantial amounts from the high interest payments.

29. The risk to payday lenders, like Plain Green, has been exaggerated because payday lenders take advantage of a variety of techniques to insure that they are repaid.

30. For example, Plain Green creates financial arrangements so that it has automatic access to a borrower's bank account and can withdraw money without further action from the borrower. Defendants require that borrowers agree to Automatic Clearing House ("ACH") withdrawals from their accounts before extending credit. This financial arrangement substantially reduces the risk of non-payment.

31. Plain Green also lends to people who have established periodic payments that are deposited into bank accounts, such as social security, disability, and veterans' benefits. After Plain Green has access to a borrower's bank account, it can simply remove these deposits from the account and insure that it is paid.

32. Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and McInerney use various contractual provisions to keep these usurious practices from review. These contract provisions include phony choice of law provisions and provisions claiming tribal immunity. These contractual provisions are unconscionable and unenforceable.

33. In some cases, Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and McInerney have blocked borrowers' access to their Plain Green accounts so that the borrowers cannot determine what they have paid. In these cases, these Defendants have refused to allow the borrowers to have access to the documents that purportedly create a binding contractual relationship between the borrowers and Plain Green.

34. Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and McInerney also misrepresent that their loans are intended to be short term loans. For example, the Defendants state that "Plain Green loans are designed to help you meet your emergency borrowing needs." Contrary to these representations, the loan repayment schedule is not designed to be a short term loan.

35. Rees and Think Finance through their control over Rosette, Whitford, and McInerney also misrepresent that their loans are legitimate loans by reporting loan information to credit rating agencies. When certain borrowers fail to make payments, even on illegal loans, these Defendants report the failure to make a payment as if it were a failure to make a payment on a legitimate loan.

Defendants' Efforts to Avoid Liability

36. Defendants have gone to great lengths to avoid any responsibility for their actions and have created structures to try to prevent the proper application of law.

37. In fact, Plain Green's very existence is an effort to avoid liability. Plain Green's predecessors in interest were not tribal entities. ThinkCash, Inc. (n/k/a Think Finance, Inc.) is a Delaware corporation. ThinkCash was formed in or around 2001 as a payday lender that operated over the Internet.

38. To avoid state limits on interest rates, ThinkCash used a lending model known in the money lending industry as "rent-a-bank." Payday lenders that were prohibited by state laws from making extortionate loans partnered with a bank so that the bank was the nominal lender. At the same time, the payday lender would market, fund, and collect the loan. The payday

lender also performed other lending functions. Because the banks were insulated from state laws by federal bank preemption, the payday lenders were able to use the rent-a-bank scheme to avoid state laws.

39. During this time, First Bank of Delaware ("FBD") developed a specialty in providing banking services to payday lenders. FBD developed a relationship with ThinkCash that enabled ThinkCash to offer high interest rate loans and represent itself as "ThinkCash by First Bank of Delaware."

40. ThinkCash and FBD continued this relationship despite enforcement and regulatory efforts to stop the activity. The FDIC instituted an enforcement action in 2008 that culminated in a consent order. That consent order required FBD to end its relationship with a number of entities that had used it in the rent-a-bank scheme, including ThinkCash.

41. FBD is no longer in business. In 2012, its shareholders voted to dissolve the bank. Soon thereafter, the United States Department of Justice announced a $15 million civil penalty to be paid by FBD.

42. After its "rent-a-bank" scheme ended, ThinkCash developed plans for another law avoidance scheme called "rent-a-tribe."

43. The concept behind the "rent-a-tribe" scheme is to take advantage of tribal immunity in the same way that ThinkCash attempted to take advantage of federal bank preemption. Under the scheme, the loans are made in the name of a lender affiliated with the tribe, but ThinkCash provides the marketing, funding, underwriting, and collection of the loans.

44. Using the "rent-a-tribe" scheme, ThinkCash exploits its customer base to generate future loans.

The first "rent-a-tribe" scheme that ThinkCash started involved Plain Green. ThinkCash transferred the existing ThinkCash loans and the ThinkCash customer database to Plain Green. In addition, ThinkCash designed the web platform used by Plain Green so that existing ThinkCash customers visiting the ThinkCash website would be routed automatically to the Plain Green website.

Jessica Gingras's Payday Loans from Plain Green

45. Jessica Gingras has taken out a number of payday loans, but has an incomplete record of those loans.

46. Defendants Rosette, Whitford, and McInerney have blocked Jessica Gingras's access to her Plain Green account. The following descriptions are based on her reconstruction of the loans from other information that is available to her and recently filed loan documents.

47. Jessica Gingras took out a payday loan from FBDLoans.com on March 16, 2000 in the amount of $1,200. She made a total of 30 payments. The payments were $97.09, except that the last payment was $137.15. She paid a total of $2,952.76. FBDLoans.com transferred her loan to ThinkCash. ThinkCash transferred her loan again to Plain Green.

48. Defendants Rosette, Whitford, and McInerney gave Jessica Gingras a payday loan on July 6, 2011 for $1,050. She made a total of 13 payments in the amount of $110.31. She paid a total of $1,434.03. The loan documents indicate that these Defendants charged her an annual percentage interest rate of 198.17%.

49. Defendants Rosette, Whitford, and McInerney gave Jessica Gingras a payday loan on July 24, 2012

for $500. She made two payments for $92.25 before she took out an additional loan for $2,400. She then made payments in the amount of $131.90. She paid a total of $4,801. The loan documents indicate that these Defendants charged her an annual percentage interest rate of 371.82%.

50. An outstanding balance remains on Ms. Gingras's loan. Ms. Gingras is suffering irreparable injury because if she pays off the loan, she is likely to never see her funds returned from Defendants because they have claimed and likely will claim tribal immunity. Moreover, Ms. Gingras is suffering irreparable injury because her loan continues to be reported to credit rating agencies as a legitimate and open loan. This reporting negatively impacts her ability to obtain financing from other lenders.

51. Ms. Gingras has suffered these injuries due to the illegal conduct of the Defendants described in this Complaint. A declaration that the loans are illegal and an injunction ordering Defendants to correct their statements concerning the legal nature of these loans and to stop defaming the credit of Ms. Gingras will alleviate the infliction of irreparable harm.

52. Defendants Rosette, Whitford, and McInerney required Jessica Gingras to agree to ACH withdrawals from her bank account before it would give her a loan. Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and McInerney had automatic access to her bank account and continued to withdraw money from her account even after they had recouped the principal and a reasonable amount of interest.

53. Jessica Gingras has never been to the Rocky Boy's Reservation. She applied for the loans at her

residence in Vermont. Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and McInerney wired the money into her account in Vermont.

54. Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and McInerney withdrew money from her account in Vermont by ACH withdrawal.

55. Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and McInerney negotiated the purported and fraudulent contract with Jessica Gingras in Vermont.

56. Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and McInerney directed their fraudulent representations to Jessica Gingras in Vermont.

57. None of Plain Green's loan activity actually occurs on the Rocky Boy's Reservation. Plain Green uses third parties to carry out all of the administrative tasks. The third party performs all of these tasks off of the reservation.

58. Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and McInerney have extended similar loans to thousands of people.

Angela Given's Payday Loans from Plain Green

59. Defendants Rosette, Whitford, and McInerney gave Angela Given a number of payday loans. Because they have blocked access to her Plain Green account, the following descriptions are based on Ms. Given's reconstruction of the loans from other information that is available to her and recently filed loan documents.

60. Defendants Rosette, Whitford, and McInerney gave Angela Given a payday loan on July 19, 2011 for $1,250. She made payments every two weeks for 26 weeks. She paid off the loan on July 19, 2012 with a final payment of $197.67. She paid a total of $2,968.75. The loan documents indicate that these Defendants charged her an annual percentage interest rate of 198.45%

61. Defendants Rosette, Whitford, and McInerney gave Angela Given a payday loan on July 24, 2012 for $2,000. The payments were $138.12 every two weeks. She made 14 payments and paid one lump sum in the amount of $1,801.73 on July 20, 2013. She paid a total of $3,735.41. The loan documents indicate that these Defendants charged her an annual percentage interest rate of 159.46%.

62. Defendants Rosette, Whitford, and McInerney gave Angela Given a payday loan on May 20, 2013 for $250. The payments were $56.43 every two weeks. She made three payments of $56.43. She paid off the loan with a lump sum payment of $203.50. She paid a total of $372.34. The loan documents indicate these Defendants charged her an annual percentage interest rate of 376.13%.

63. Defendants Rosette, Whitford, and McInerney gave Angela Given a payday loan on July 17, 2013 for $3,000. The payments were $119.68. She made 25 payments. With the 15th payment, she included an extra $600 toward the principal. She still had five payments remaining when she called Plain Green. The loan documents indicate that these Defendants charged her an annual percentage interest rate of 59.83%

64. Angela Given has taken out other loans from Defendants and their predecessors in interest. A

predecessor entity gave Angela Given's borrowing history and contact information to Plain Green for the purpose of evading the law.

65. Defendants Rosette, Whitford, and McInerney required Angela Given to agree to ACH withdrawals from her bank account before they would give her a loan. They had automatic access to Ms. Given's bank account and continued to withdraw money from her account even after they had recouped the principal and a reasonable amount of interest.

66. An outstanding balance remains on Ms. Given's last loan. Ms. Given is suffering irreparable injury because if she pays off the loan, she is likely to never see her funds returned from Defendants because they have claimed and will claim tribal immunity. Moreover, Ms. Given is suffering irreparable injury because her loan continues to be reported to credit rating agencies as a legitimate and open loan. This reporting negatively impacts her ability to obtain financing from other lenders.

67. Ms. Given has suffered these injuries due to the illegal conduct of the Defendants described in this Complaint. A declaration that the loans are illegal and an injunction ordering Defendants to correct their statements concerning the legal nature of these loans and to stop defaming the credit of Ms. Gingras will alleviate the infliction of irreparable harm.

68. Angela Given has never been to the Rocky Boy's Reservation. She applied for the loans at her residence in Vermont. Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and McInerney wired the money into her account in Vermont.

69. Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and

McInerney withdrew money from Ms. Given's account in Vermont by ACH withdrawal.

70. Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and McInerney negotiated the purported and fraudulent contract with Ms. Given in Vermont.

71. Defendants Rees and Think Finance through their control over Defendants Rosette, Whitford, and McInerney directed their fraudulent representations to Ms. Given in Vermont.

Additional Loans

72. On July 24, 2013, Patricia Aim Booth of Garnet Valley, Pennsylvania took a loan from Plain Green. The amount of the loan was $1,000. The annual percentage rate was 299.17%. In less than a year, Ms. Booth paid finance charges of $1,847.96. Ms. Booth's transactions were by ACH transfer.

73. On April 11, 2013, Christopher Anthony Grahm of Moodus, Connecticut took a loan from Plain Green. The amount of the loan was $1,200. The annual percentage rate was 277.20%. In a little over a year, Mr. Graham paid finance charges of $2,953.26. Mr. Graham's transactions were by ACH transfer.

74. On March 18, 2013, Lisa Flagg of Decatur, Georgia took a loan from Plain Green. The amount of the loan was $1,600. The annual percentage rate was 219.38%. In approximately a year and a half, Ms. Flagg paid finance charges of $3,659.09. Ms. Flagg's transactions were by ACH transfer.

75. On December 17, 2011, Jessica Parm of Lafayette, Georgia took a loan from Plain Green. The amount of the loan was $800. The annual percentage rate was 354.20%. In less than a year, Ms. Parm paid finance

charges of $1,693.97. Ms. Parm's transactions were by ACH transfer.

RICO

The Enterprise

76. Plain Green, Great Plains Lending, and Mobiloans are all enterprises within the meaning of 18 U.S.C. § 1961(4). As described below, Great Plains Lending and Mobiloans are also schemes to defraud that attempt to take advantage of tribal immunity by associating with Native American tribes.

77. In or around March 2001, Defendants Rees and Think Finance approached the Chippewa Cree Tribe of the Rocky Boy's Reservation about forming a tribal entity to conduct an illegal lending scheme over the Internet.

78. As part of those negotiations, Defendants Rees and Think Finance prepared a term sheet that reflected the essentials of the transaction (the "Term Sheet"). (Exhibit A.) The scope of the enterprise was to be "on a nationwide basis through the internet." *Id.* at 1.

79. The Term Sheet required that the Tribe adopt new law that would be favorable to Defendants Rees and Think Finance and the practice of illegal payday lending. The Term Sheet required that: "The Tribe will adopt a finance code that is acceptable to all parties and provide for the licensing of an arm of the tribe to engage in consumer lending." *Id.* at 1.

80. Defendants Rees and Think Finance intentionally and willfully dominated and still dominate the operations of Plain Green. Other than the sovereignty that they attempted to purchase, Rees and Think Finance provided everything that the enterprise needed to operate. They provided software to determine whether

a particular loan would be profitable. They provided "risk management, application processing, underwriting assistance, payment processing, and ongoing customer service support coterminous with the software license agreement and market[ing] and/or identif[ication of] access channels for consumer loans on the Tribe's behalf (jointly 'Services')".

81. In his positions as Chief Executive Officer and Chairman of the Board of Think Finance, Defendant Kenneth Rees intentionally and willfully dominated and still dominates the operations of Plain Green. He established the plan to create Plain Green. Defendant Rees also established the web of different companies designed to insulate Think Finance and himself from liability.

82. In public comments, Defendant Rees has stated that he closed his former company, ThinkCash, because of the burden of complying with various state laws regulating and banning payday lending. Rees created the Plain Green enterprise to take advantage of the doctrine of tribal immunity for the express purpose of trying to avoid these various state law restrictions.

83. Defendants Rees and Think Finance defined precisely the type of loan Plain Green would offer to customers and the terms on which the loan would be offered. They required the loans to be an installment loan with a maximum amount of $2,500 and a minimum repayment period of two months and a maximum repayment period of two years. *Id.* at 1.

84. The Term Sheet created by Rees and Think Finance dictated that Plain Green would charge interests rates that were illegal and usurious. The interest rates were to vary from an annual percentage rate of 60% to 360%. *Id.* at 1.

85. Defendants Rees and Think Finance required that Plain Green enter into a relationship with a U.S. bank to process loan transactions using the ACH system. In addition, they required that Plain Green develop the capacity to process remote checks. *Id.* at 2.

86. Defendants Rees and Think Finance also directed Plain Green to establish a reserve account to "deal with any regulatory issues, lawsuits or other controversies involving the Tribe or its lending activities." *Id.* at 2. Defendants Rees and Think Finance, however, did not allow Plain Green to control the account. Instead, the account was under the control of Jones & Keller, PC, a law firm that the Term Sheet required Plain Green to use. *Id.* at 3.

87. Defendants Rees and Think Finance also arranged for 99% of the loans made by Plain Green to be purchased within two days by a Cayman Islands loan servicing company, GPL Servicing, Ltd. ("GPL"). GPL was incorporated in February 2011, a month before Think Finance agreed to work with the Chippewa Cree Tribe. *Id.* at 2.

88. Defendants Rees and Think Finance established GPL in the Cayman Islands as an offshore haven for funds generated from the RICO enterprise. The Cayman Islands has a well-known reputation for being an offshore tax and financial haven.

89. Plain Green pays $100 for every approved borrower that Defendant Tailwind Marketing provides. Defendants Rees and Think Finance have said that Tailwind Marketing is one of their entities. Defendants Rees and Think Finance control and dominate Tailwind Marketing.

90. Plain Green pays $5 a month for each active account that TC Decision Sciences administers. TC

Decision Sciences provides services like customer service, verification, and collections of customer accounts for Plain Green. Defendants Rees and Think Finance control and dominate TC Decision Sciences.

91. The Term Sheet created by Rees and Think Finance required that Plain Green enter into an attorney client relationship. It stated that: "Pepper Hamilton, LLP ("Pepper") and Jones & Keller, PC ("J&K") shall be counsel to the Tribe." *Id.* at 3.

92. Defendants Rosette, Whitford, and McInerney entered into payday lending relationships with banks to process ACH transactions. Those bank relationships enabled Plain Green to process ACH transactions for Ms. Gingras and Ms. Given. The ACH transactions involved interstate commerce because they flowed through Defendants Rosette, Whitford, and McInerney in Montana, Plaintiffs in Vermont, other targets of the illegal lending scheme in Pennsylvania, Connecticut, and Georgia, and different intermediaries in different parts of the United States.

93. Plain Green operates a website at https://www.plaingreenloans.com. The website furthers the illegal financial transactions. The website allows individuals to enter information to execute ACH wire transfers to the individual and to debit the person's account in the purported repayment of the illegal debt. The website involves transactions in interstate commerce.

94. Defendants Rees and Think Finance have established relationships with other Native American Tribes, including the Otoe-Missouria Tribe of Indians located in Red Rock, Oklahoma and the Tunica-Biloxi Tribe of Louisiana.

95. The Otoe-Missouria Tribe maintains a payday lending website at the web address: www.greatplains lending.com. The lending front company is known as Great Plain Lending ("Great Plains").

96. The Tunica-Biloxi Tribe maintains a payday lending website at the web address: www.mobiloans.com. The lending front company is known as Mobiloans.

97. Great Plains and Mobiloans offer payday loans and other loans at interest rates that are more than double the legal limits set by states. For example, Great Plains states on its website, under the title "Easy, Affordable Payments": "With a Great Plains loan, you'll repay your loan with easy, affordable installment payments! Your terms can range from 4 to 15 months, depending on your loan amount, and there's no prepayment penalty. For example, a $500 loan at 448.78% APR, will have 12 biweekly payments of $101.29."

98. Mobiloans offers "lines of credit" that include fixed finance charges and transaction fees. The effective annual percentage rate for these loans is in the hundreds of percent a year.

99. Plain Green is distinct from Defendants Rees and Think Finance. Despite their actual control of the Enterprise, Defendants Rees and Think Finance have attempted to create the appearance of separate corporate forms and attempted to distance themselves from the enterprise through the execution of various legal documents. Defendants Rees and Think Finance have also created a number of different subsidiaries like Defendants Tailwind Marketing, TC Decision Sciences, and TC Loan, to isolate and decrease any legal liability they may face.

Racketeering Activity

100. Defendants Rees and Think Finance intentionally and willfully committed mail fraud and wire fraud through the use of ACH transactions to put money into Plaintiffs' and putative class members' bank accounts, by withdrawing funds from the accounts of Plaintiffs and putative class members while maintaining that those withdrawals were legitimate, by using the Internet to obtain consent to a fraudulent lending agreement and arbitration agreement, and by using the mail to collect payments and communicate with other parts of the Plain Green enterprise.

101. Defendant Rees and Think Finance had a plan or scheme to defraud thousands of people in a financially challenged position by extending loans at illegally high and extortionate interest rates, while at the same time claiming that the business was legitimate and in compliance with the law. To advance this scheme, Defendants Rees and Think Finance established intermediaries like the Plain Green enterprise and Defendants Rosette, Whitford, and McInerney to initiate wire transfers and mailings and to operate the website through which information was collected from the victims of the scheme and purported agreements were exchanged with targets of the scheme. Defendants Rees and Think Finance hoped to avoid liability by falsely claiming that they only provided services to Plain Green, when in reality they created the whole enterprise and ran its operation through an assortment of subsidiaries and affiliates like Defendants Tailwind Marketing, TC Loan, and TC Decision Sciences.

102. Defendants Rees and Think Finance intended to defraud the victims of the scheme.

103. The use of the mail and wires was reasonably foreseeable because the form documents that Defendant Rees and Think Finance created specifically called for the use of ACH transactions or mail to make payments on the illegal loans.

104. The racketeering activity is related and continuous. The thousands of ACH transactions served and continue to serve the central scheme created by Defendants Rees and Think Finance to make illegal loans at extortionate interest rates. The thousands of ACH transactions served the common scheme of evading state laws, defrauding people in financially challenged positions, and making profits. The scheme to evade state laws was carried out by Defendants Rees and Think Finance through their control and domination of Plain Green and an assortment of subsidiaries and affiliates like Defendants Tailwind Marketing, TC Loan, and TC Decision Sciences.

105. The use of the Plain Green website is also related and continuous. The website was used and is used to deceive the victims into believing that the transactions were and are legitimate and consistent with the law. The website collects personal data that is then used to take money from individuals who have fallen victim to the fraudulent scheme. The website transmits and transmitted the lending and arbitration agreements to potential victims through the wires.

106. The website also makes a number of misrepresentations. For example, the website creates the impression that the loans are a good option for short term financing by making the claim that the loans are "less expensive than a payday loan."

107. The website also makes a deceptive comparison between the interest rates paid to the Defendants

and the payment of various late fees, such as reconnect fees from utilities or overdraft fees from banks. The website compares its loans, which have repayment periods of months or years, to the reconnect and overdraft fees, which Defendants arbitrarily state have a 14 day repayment period. This is not an accurate comparison. The comparison makes the misleading claim that the interest rates charged by the Defendants are actually cheap. This is false and misleading.

108. Defendants Rees and Think Finance exercise control over and operate all elements of the website. Their software determines which loan requests generated through the website will be accepted by Plain Green and which loan requests will be declined.

109. Defendants Rees and Think Finance also perform the function of customer service, verification of accounts. and collection of debt on behalf of Plain Green.

110. Defendants Rees and Think Finance exercised control over the drafting of the lending and arbitration agreements through their close association with the attorneys drafting the documents. Defendants Rees and Think Finance did so in order to ensure that victims of Plain Green would opt for ACH transfers to accept money and then Defendants would be able to take money from the victims' bank accounts. Directing the targets of the fraudulent scheme to choose ACH transfers increases the chances of being able to take money from the targets of the scheme on a regular basis. With an authorization to take money from the bank accounts, Defendants Rees and Think Finance did not have to rely on the targets sending money to them. In addition, by creating an ACH authorization, Defendants Rees and Think Finance forced the targets of the fraudulent scheme to take many actions to stop

the transfers. The additional time needed to complete these tasks meant that Defendants Rees and Think Finance could extract additional periodic payments before their authorization was revoked.

111. The Term Sheet reflects the control that Defendants Rees and Think Finance had over the use of ACH transactions as part of the scheme to defraud and the control that they exercised over the process.

112. Defendants Rees and Think Finance used a lending agreement and an arbitration agreement as tools to further deceive Plaintiffs. They used both the website and the ACH transactions in conjunction with each other to further the enterprise and the fraudulent schemes.

113. The illegal activity started in or around March 2011 and has continued to the present. Plain Green has used the above described ACH system and website for over four years.

114. Had Defendants Rees and Think Finance not established and ran the corrupt enterprise of Plain Green, they would not have ensnared Plaintiffs in the illegal scheme and obtained Plaintiffs' personal information, including access to their bank accounts, through Plain Green's website.

115. Plaintiffs would not have had their bank accounts debited with illegal ACH transactions in excess of any legal amount of interest but for Defendants Rees and Think Finance establishing and running the corrupt enterprise of Plain Green.

116. Plaintiffs were injured when Defendants Rees and Think Finance chose to defraud them and collect extortionate and usurious interest rates far in excess of the legal limit. The withdrawal of money by

Defendants Rees and Think Finance, part of the Racketeering activity and itself a predicate act, caused Plaintiffs' injury.

117. Defendants Rees and Think Finance chose Plaintiffs as the intended targets for the enterprise and the racketeering activity. Defendants Rees and Think Finance targeted Plaintiffs because they met sophisticated underwriting criteria that showed they badly needed money in the short term, but could pay off small amounts over the long term. Defendants Rees and Think Finance used sophisticated computer algorithms to make that determination.

The Arbitration Agreement

118. Another device that Defendants Rees and Think Finance have employed to try to avoid legal liability is a purported arbitration agreement, *see* Exhibit B to Mot. to Dismiss, (the "Purported Arbitration Agreement"). To be clear, none of the Plaintiffs in this action can access any of the records relating to their loans from Plain Green, including any purported arbitration agreement with Defendants.

119. That Purported Arbitration Agreement is unenforceable because it is unconscionable, its purpose has been frustrated, and it is fraudulent.

120. The Purported Arbitration Agreement does not waive and attempts to preserve tribal immunity, and it claims to give all Defendants the ability to void any arbitration award by simply asserting tribal immunity after the fact. Thus, the Purported Arbitration Agreement provides a remedy that is entirely illusory.

121. For this reason alone, the Purported Arbitration Agreement is unconscionable. There are, however,

several additional indications that the agreement is unconscionable, including the following:

a. Because the monetary damages suffered by each Plaintiff and other members of the Class is small, the individual incentive to bring an action is extremely limited, particularly since payday loans target people who have few resources to bring a claim.

b. The doctrine of tribal immunity is a complicated legal doctrine with which the vulnerable people in this Class are unfamiliar.

c. The terms of the purported contract are not easily discovered on the Plain Green website. The terms of the Purported Arbitration Agreement change from when a person applies for the loan to when the terms are presented after the application process. The terms are presented on a take it or leave it basis with no possibility of negotiation.

d. The parties also have a great imbalance in negotiating leverage. Defendants have highly paid attorneys from Pepper Hamilton LLP and Hogan Lovells US LLP representing them in litigation. Plaintiffs lack the resources to hire such esteemed counsel.

e. When there is a hint of litigation, Plain Green cuts off access to the borrower's account, so that the borrower can no longer access the documents that purport to structure the relationship with Plain Green.

f. The Purported Arbitration Agreement has a provision for shifting costs. That provision effectively prohibits borrowers from making low dollar claims.

g. Defendants will only agree to have arbitration where the borrower resides if the borrower reaffirms that tribal immunity applies.

122. A dispute about who is the appropriate chief judge of the Tribe will frustrate the intent of the Purported Arbitration Agreement for a swift resolution. The Purported Arbitration Agreement states that arbitration procedures are simpler and more limited than court procedures. However, the Purported Arbitration Agreement requires that certain matters be resolved by tribal courts. Due to the corruption described below, there is no guarantee that Plaintiffs will receive fair, complete, simple, or final resolution from the tribal courts.

123. The Purported Arbitration Agreement is fraudulent and an important part of the scheme to defraud because it aims to deter victims from filing claims and to prevent federal court review of the illegal practices of the enterprise. The Purported Arbitration Agreements makes several material misstatements of fact.

124. First, the Purported Arbitration Agreement states that the Lender was Plain Green, LLC. The Term Sheet reveals that this statement is false. Plain Green only received 4.5% of revenues from 99% of the loans. Exhibit A at 2. Plain Green also did not provide any of the actual money that was loaned: "Hayes will arrange to provide funding to the Tribe to enable it to make each of the Loans." *Id.* at 1.

125. Second, the Purported Arbitration Agreement represented that the agreement "shall be governed by the law of the Chippewa Cree Tribe." However, the Term Sheet reveals that "law of the Chippewa Cree Tribe" was bought and paid for by non-members of the Tribe and was not "law" at all. Under the Term Sheet,

Chippewa Cree law became whatever Rees and Think Finance dictated. Specifically, the Term Sheet stated that: "The Tribe will adopt a finance code that is acceptable to all parties and provide for licensing of an arm of the tribe to engage in consumer lending." *Id.* at 1. The Term Sheet further provided that the Tribe must "[r]evise the Tribal Credit Transaction Code to provide for a broader array of lending products." *Id.* at 3.

126. Third, the Purported Arbitration Agreement states that "[n]either this Agreement nor the Lender is subject to the laws of any state of the United States." This statement is false because the loans involve off reservation activity and are thus subject to state law.

127. Defendants Rees and Think Finance required that Defendants Rosette, Whitford, and McInerney adopt laws that were favorable to the Defendants Rees and Think Finance and the fraudulent scheme that they sought to perpetrate. Defendants Rosette, Whitford, and McInerney did adopt those laws.

128. Defendants Rosette, Whitford, and McInerney restricted access to the laws of the Chippewa Cree Tribe by not making the law available to the general public through the Internet or other means. Organizations – like law school libraries – will not provide a copy of the Chippewa Cree law by remote access because Defendants Rosette, Whitford, and McInerney have not granted them the right to do so.

129. Plaintiffs actually believed that the representations in the arbitration agreement and the lending agreement were true, including that their loans were legitimate "short term" loans, that Plain Green was the lender of the funds, and that Plain Green was a legitimate enterprise of the Chippewa Cree Tribe of the Rocky Boy's Reservation. Plaintiffs also actually

believed that their loans were legitimate and legal loans.

130. Plaintiffs relied on these representations by failing to take legal action against the responsible parties and continuing to make payments on the illegal loans.

131. The delegation provision of the Purported Arbitration Agreement is also fraudulent. That provision attempts to include within the scope of the arbitration agreement "any issue concerning the validity, enforceability, or scope of this loan or the Agreement to Arbitrate." Defendants planned that delegation provision to shield Defendants' widespread fraudulent practices from federal court review. Defendants furthered that plan by purporting to give the right to enforce an arbitration award to the tribal court. The Purported Arbitration Agreement states that: "The arbitrator will make written findings and the arbitrator's award may be filed with the tribal court. The arbitration award . . . may be set aside by the tribal court upon judicial review." By attempting to force any review of the arbitration into tribal court, Defendants Rees and Think Finance sought to prevent any federal court from reviewing any arbitration decision. By adding multiple steps prior to federal court review, Defendants Rees and Think Finance made any claim against them economically impossible to pursue and tried to ensure that no one could prevail against them. Through the terms of their arrangement with Defendants Rosette, Whitford, and McInerney, Defendants Rees and Think Finance had the ability to control the Tribe's law and presumably could control actions taken by the tribal court. As a result, any review by the tribal court would be nothing more than a sham.

Governance of the Tribe and Plain Green

132. The governance of the Tribe and Plain Green is in substantial flux and turmoil. Widespread corruption has gripped the Tribe. There is a large federal investigation into bribery at the Tribe, and several former tribal officials have been convicted of, or pled guilty to, embezzlement and bribery.

133. John Chance Houle (former Chairman of Plain Green), Tony James Belcourt, Tammy Kay Leischner, James Howard Eastlick, Mark Craig Leischner, and Haily Lee Belcourt were indicted in a 17 count indictment on April 18, 2013. The indictment relates to the spending of federal funds from the stimulus bill or the American Recovery and Reinvestment Act of 2009 ("ARRA"). At the time, Houle was also a member of the Chippewa Cree Business Committee, which purportedly runs the Tribe. Houle was recently sentenced to five and a half years in prison for his corruption.

134. In connection with that case, Tony James Belacourt, as an agent of the tribal government (CEO of the Chippewa Cree Construction Company), pled guilty to embezzlement of federal funds, Tammy Kay Leischner pled guilty to theft from an Indian Tribal Government receiving federal funds, and James Howard Easterlick pled guilty to the same offense.

135. In a separate case, John Chance Houle pled guilty to embezzling funds from the Chippewa Cree Rodeo Association. In yet another case, John Chance Houle pled guilty to theft from an Indian tribal organization, obstruction of justice, and impeding a grand jury investigation related to embezzlement and kickback schemes involving the ARRA and Chippewa Cree Rodeo Association funds. Finally, in a different case, John Chance Houle pled guilty to income tax evasion

related to the illegal money that he received from his various embezzlement and bribery schemes.

136. Interestingly, John Chance Houle signed the Term Sheet with Think Finance that established the Plain Green criminal enterprise.

137. The federal investigation is continuing.

138. The corruption extends to Plain Green. In an arbitration involving Plain Green, an arbitrator found that its former Chief Executive Officer, Neal Rosette, and its former Chief Operating Officer, Billi Anne Morsette, were involved in a fraudulent kick-back scheme with an entity called Encore Services, LLC ("Encore"). Encore manages payday lending business for the Tribe.

139. In the scheme, Encore charged a 15% management fee of all gross revenues of the tribal online lending business, but immediately sent 5% of those revenues to Rosette and Morsette. The purpose of the structure was to conceal the payments to Rosette or Morsette.

140. It is presently uncertain who is actually the head of both the Tribe and the Tribal Judiciary. Ken Blatt-St. Marks had been elected Chairman until the Business Committee dismissed him. Before he was removed, Blatt-St. Marks fired the acting Chief Judge Micelle Ereaux and unilaterally appointed Duane Gopher. In addition, Blatt-St. Marks also apparently terminated several other judges of the tribal courts.

141. Based on the actions with respect to the Chief Judge and other serious charges of embezzlement, the Business Committee removed Blatt-St. Marks on March 2, 2015.

142. Blatt-St. Marks won election for a fourth time on June 30, 2015, but it remains unclear if the Business Committee will attempt to remove him again.

143. The Tribe has apparently tried to remove Blatt-St. Marks in the past. In March 2013, the Business Committee fired him, but the United States Department of the Interior said that the Tribe had to reinstate him because he was protected by federal whistleblower statutes.

144. The question of who is actually running the Tribe and its judicial system is in flux and is not likely to be resolved in the near future.

Unlawful Debt

145. The debts incurred by Ms. Given and Ms. Gingras are unenforceable under Vermont law. The interest rates on the debt that they incurred exceed the Vermont limit under 9 V.S.A. § 41a. In fact, the interest charged was more than twice the interest rate allowed under Vermont law.

146. Other jurisdictions have limits on the amount of interest that a lender may charge. *See, e.g.,* Conn. Gen. Stat. § 36a-563; Md. Code Ann. Com. Law § 12-306; 209 Mass. Code Regs. § 26.01; N.C. Gen. Stat. § 53-173; N.H. Rev. Stat. Ann. § 399-A:12.

147. The interest rates charged to class members exceed the rate caps in these states by more than twice the legal limit.

148. Plain Green is in the business of lending money at a usurious rate. The Term Sheet demonstrates that Plain Green's entire existence is for the purpose of lending at usurious rates with the goal of avoiding state laws related to usury. Plain Green's

website demonstrates that it is continuing in the business of lending at usurious rates. The website states that Plain Green lends at rates of 299.17 to 378.95% for first time borrowers. The Plain Green website details how its other loans range from 60% to 378.95% based on the amount of money taken out.

149. Ms. Given and Ms. Gingras were injured in their property by the collection of unlawful debt in violation of 18 U.S.C. § 1962(c) in that Defendants took their money from them through ACH transactions to pay loans that were illegal under Vermont law.

150. Each of the Defendants was associated with the enterprise through the collection of unlawful debt as described below.

151. Think Finance created the entire enterprise and continues to run all aspects of the enterprise through a number of shell companies, including the companies listed below.

152. At the direction of Think Finance and Rees, TC Decision Sciences provides customer service, verification, and collections of customer accounts.

153. At the direction of Think Finance and Rees, Tailwind Marketing provides information on potential targets for the illegal lending scheme. As discussed above, Defendants Rosette, Whitford, and McInerney pay Tailwind Marketing a fee for each of the targets it provides to the enterprise.

154. Defendants Sequoia and Technology Crossover provide money that is used to start the illegal lending process. They reap rewards through obtaining significant returns on the investment of their funds in the enterprise. Sequoia and Technology Crossover were fully aware of the practices of the enterprise and knew

that the practices violated the law. Sequoia and Technology Crossover do not make investments without substantial due diligence into their investments, including legal review of the activities of their investment vehicle.

155. Defendants Sequoia and Technology Crossover executed a series of agreements that documented their relationship with Defendants Rees and Think Finance. They have concealed these arrangements through confidentiality clauses in the agreements. Sequoia and Technology Crossover have refused to comment on their role in the RICO enterprise when people have asked questions about it.

Class Allegations

156. Plaintiffs bring this action on behalf of themselves and as a class action under Fed. R. Civ. P. 23(a) and 23(b)(1), (b)(2), and (b)(3) on behalf of all members of the following Class:

All persons who took out payday loans from Defendants.

157. Plaintiffs do not know the exact number of class members because such information is in the exclusive control of Defendants. Based on information and belief and information obtained from publicly available sources, Plaintiffs believe that there are thousands of members of the Class as a whole. The exact number of class members and their identities is known or may be ascertained by Defendants.

158. The Class is so numerous that joinder of all members is impracticable.

159. There are questions of law and fact common to the Class, including:

a. Whether Defendants have a practice of investigating a borrower's ability to repay a loan before extending credit;

b. Whether Defendants set the periodic repayment amounts to maximize collection of interest on loans;

c. Whether the interest rates charged by Defendants violate the CFPA's prohibition on "unfair, deceptive, or abusive act[s] or practice[s]";

d. Whether Defendants' other payday lending practices violated the CFPA's prohibition on "unfair, deceptive, or abusive act[s] or practice[s]";

e. Whether Plain Green, LLC is an enterprise;

f. Whether Defendants Rees and Think Finance engaged and/or are engaging in a pattern of racketeering in violation of 18 U.S.C. § 1962(c);

g. Whether Defendants Rees, Think Finance, TC Loan, TC Decision Sciences, Tailwind Marketing, Sequoia, and Technology Crossover engaged and/or are engaging in the collection of an unlawful debt in violation of 18 U.S.C. § 1962;

h. Whether Defendants are liable to Plaintiffs and other class members for disgorgement or other equitable remedies and, if so, in what amount; and

i. Whether Defendants are liable to Plaintiffs and other class members for reasonable attorney's fees.

160. Plaintiffs are members of the Class. Their claims are typical of the claims of the Class, and they will fairly and adequately protect the interests of the Class.

161. Plaintiffs are represented by counsel who is competent and experienced in handling *Ex Parte*

Young cases, financial actions, and class action litigation.

162. The prosecution of separate actions by individual members of the Class would create a risk that adjudications with respect to individual members would, as a practical matter, be dispositive of the interests of the other members who are not parties to the individual adjudications, or it would substantially impair or impede the class members' ability to protect their interests.

163. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

164. A class action is superior to other methods for the fair and efficient adjudication of this controversy. The Class is readily definable and is one for which records should exist. Prosecution of class member claims as a class action will eliminate the possibility of repetitious litigation. Treatment of the controversy as a class action will permit a large number of similarly situated persons to adjudicate their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. This class action presents no difficulties in management that would preclude maintenance as a class action.

COUNT ONE

Consumer Financial Protection Act of 2010

165. Plaintiffs reassert and incorporate by reference each of the above paragraphs.

166. Defendants' extension of credit under the terms provided without examining the ability to repay

is a violation of the CFPA's prohibition on "unfair, deceptive, or abusive act[s] or practice[s]."

167. The exorbitant interest rates charged by Defendants combined with automatic access to and deduction from a consumer's bank account are a violation of the CFPA's prohibition on "unfair, deceptive, or abusive act[s] or practice[s]."

168. Defendants have falsely reported the status of consumer's illegal debts to credit rating agencies as if they were legitimate debts.

169. Defendants' representation of the loans as short term emergency loans is deceptive and false.

170. Defendants' representation of the loans as legitimate loans to credit rating agencies is deceptive.

171. Defendants' violations of the CPFA are ongoing.

172. As a result of Defendants' violations of the CFPA, Plaintiffs were damaged.

COUNT TWO

Federal Trade Commission Act

173. Plaintiffs reassert and incorporate by reference each of the above paragraphs.

174. The FTC Act bars the use of "unfair methods of competition."

175. Defendants' extension of credit under the terms provided without examining the ability of borrowers to repay is a violation of the FTC Act's prohibition on unfair methods of competition.

176. The exorbitant interest rates charged by Defendants combined with automatic access to a consumer's

bank account are a violation of the FTC Act's prohibition on unfair methods of competition.

177. Defendants' representation of the loans as short term emergency loans is deceptive and an unfair method of competition.

178. Defendants' representation of the loans as legitimate loans to credit rating agencies is deceptive and an unfair method of competition.

179. Defendants' violations of the FTC Act are ongoing.

180. As a result of Defendants' violations of the FTC Act, Plaintiffs were damaged.

COUNT THREE
Electronic Funds Transfer Act

181. Plaintiffs reassert and incorporate by reference each of the above paragraphs.

182. Defendants are "persons" as this term is defined in Section 1005.2(j) of Regulation E, 12 C.F.R. § 1005.2(j).

183. Section 913(1) of EFTA, 15 U.S.C. § 1693k(1), provides that no person may condition the extension of credit to a consumer on such consumer's repayment by means of preauthorized electronic fund transfers.

184. Section 1005.10(e)(1) of Regulation E, 12 C.F.R. § 1005.10(e)(1), provides that "[n]o financial institution or other person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers, except for credit extended under an overdraft credit plan or extended to maintain a specified minimum balance in the consumer's account."

185. The Official Interpretation of Regulation E, Section 1005.10(e)(1), 12 C.F.R § 1005.10(e)(1)-1, Supp. I, provides that creditors may not require repayment of loans by electronic means on a preauthorized recurring basis.

186. Under Section 918(c) of EFTA, 15 U.S.C. § 1693o(c), every violation of EFTA and Regulation E constitutes a violation of the FTC Act.

187. In numerous instances, in connection with offering payday loans to consumers, Defendants have conditioned the extension of credit on recurring preauthorized electronic fund transfers, thereby violating Section 913(1) of EFTA, 15 U.S.C. § 1693k(1), and Section 1005.10(e)(1) of Regulation E, 12 C.F.R § 1005.10(e)(1).

188. Defendants' violations of the EFTA are ongoing.

189. The Defendants conditioned the loans on the acceptance of ACH as the transaction method. If the loan recipient requested a paper check, the loan documents required the recipients to make a payment on the principal before receiving the principal.

190. One example from the loan documents shows how the economic disincentives worked. One loan was originated on July 16, 2013. Under the purported loan documents, the lender did not send the funds until after the "Right of Recission" expired five days later. Thus, the lender would have sent the check on July 24. The lending documents state that the borrower should allow 7 to 10 business days for delivery of the check. Thus, the check might arrive on August 5, 2013.

191. The borrower, on the other hand, was required to make the first payment on August 2, 2013. Allowing the same ten days for delivery, the borrower would

have to send the check on July 23, 2013, about two weeks before the borrower received the principal.

192. The purported lending documents also create significant penalties for a late payment. If the borrower misses a single payment under the documents, the borrower owes the entire balance. In addition, Defendants can take that entire balance immediately from a borrower's bank account by ACH transaction. Thus, under the lending documents, the borrower must pay Defendants a payment before he or she receives the loan principal or Defendants can take the entire amount of the loan from the borrower's bank account even before the borrower receives the funds that are purportedly being lent.

193. The choice is a false choice and in any event, the agreement conditions the borrower to accept transfers by ACH transfer, which is prohibited by the EFTA.

194. By engaging in the violations of EFTA and Regulation E set forth in this Complaint, Defendants have violated the FTC Act.

195. As a result of Defendants' violations of the EFTA, Plaintiffs were damaged.

COUNT FOUR
Vermont Consumer Fraud Act

196. Plaintiffs reassert and incorporate by reference each of the above paragraphs.

197. Under section 2481w of the Consumer Fraud Act, "it is an unfair and deceptive act and practice in commerce" for any lender to make a loan to a consumer unless that lender is in compliance with all provisions of 8 V.S.A. Chapter 73 (Licensed Lenders laws). In relevant part, 8 V.S.A. § 2201 requires that all lenders obtain a license from the Vermont Department of

Financial Regulation before loaning any money in Vermont. Any unlicensed lender providing payday loans to Vermont consumers is in violation of the CFA.

198. Defendants are not licensed lenders in Vermont.

199. It is a violation of the CFA to charge interest in excess of the legal rates set under 9 V.S.A. § 41a (generally 18-21% for the type of loan at issue here). *See* Consumer Protection Rule 104.05 (making any collection or attempt to collect interest in excess of the legally chargeable rate an unfair and deceptive act under section 2453(a) of the CPA).

200. Defendants' violations of the Vermont Consumer Fraud Act are ongoing.

201. Defendants charge interest in excess of the statutory maximum.

202. Defendants have falsely reported the status of consumers' illegal debts to credit rating agencies as if the debts were legitimate debts.

203. Defendants' representation of the loans as short term emergency loans is deceptive and false.

204. Defendants' representation of the loans as legitimate loans to credit rating agencies is deceptive and false.

205. Defendants' lending practices also violate the CFA's bar on deceptive and unfair business practices, including without limitation the mail and wire fraud described above, the creation of an enterprise to avoid the application of state law, the use of a front company to shield the true managers of the enterprise from liability, the use of economic incentives to force people to use ACH transactions to accept cash, the automatic deductions of funds from a personal account to make illegal and excessive interest deduction, and the use of

sophisticated data mining to find targets for the illegal schemes.

COUNT FIVE
RICO § 1962(c)

206. Plaintiffs reassert and incorporate by reference each of the above paragraphs.

207. This Count is against Defendants Rees and Think Finance for damages and against Defendants Rosette, Whitford, and McInerney for equitable relief

208. Plain Green is an enterprise engaged in and whose activities affect interstate commerce. Defendants Rees and Think Finance and Defendants Rosette, Whitford, and McInerney are associated with the enterprise.

209. Defendants Rees and Think Finance agreed to and did conduct and participate in the conduct of the enterprise's affairs through a pattern of racketeering activity and for the unlawful purpose of intentionally defrauding Plaintiffs. Defendant Rees and Think Finance agreed with the predecessors of Rosette, Whitford, and McInerney, official representatives of Plain Green and the Chippewa Cree Tribe.

210. Pursuant to and in furtherance of their fraudulent scheme, Defendants Rees and Think Finance and Defendants Rosette, Whitford, and McInerney committed multiple acts of wire fraud in violation of 18 U.S.C. § 1343 and mail fraud in violations of 18 U.S.C § 1341. These acts of wire fraud include the wires made into and out of the accounts of Plaintiffs in Vermont described in paragraphs 45 to 71, 85, and 92. The wire fraud occurred thousands of additional times on a nationwide basis to other borrowers around the country. The acts of wire fraud include the use of the

Internet to transmit the lending agreement and the arbitration agreements as described in paragraphs 105, 110, 112, and 118 to 131.

211. The acts set forth above constitute a pattern of racketeering activity pursuant to 18 U.S.C. § 1961(5).

212. Defendants Rees and Think Finance and Defendants Rosette, Whitford, and McInerney have directly and indirectly conducted and participated in the conduct of the enterprise's affairs through the pattern of racketeering and activity describe above, in violation of 18 U.S.C. § 1962(c).

213. As a direct and proximate result of Defendants Rees and Think Finance and Defendants Rosette, Whitford, and McInerney's racketeering activities and violations of 18 U.S.C. § 1962(c), Plaintiffs have been injured in their property in that they paid extortionate and illegal interest rates. Plaintiffs have also been injured in that their credit ratings have been damaged and their ability to obtain credit has been damaged.

COUNT SIX
RICO (Illegal Debt)

214. Plaintiffs reassert and incorporate by reference each of the above paragraphs.

215. This Count is against Defendants Rees, Think Finance, TC Loan, TC Decision Sciences, Tailwind Marketing, Sequoia, and Technology Crossover for damages and against Defendants Rosette, Whitford, and McInerney for equitable relief.

216. Defendants Rees, Think Finance, TC Loan, TC Decision Sciences, Tailwind Marketing, Sequoia, and Technology Crossover, as well as Defendants Rosette, Whitford, and McInerney, have collected an unlawful debt as that term is defined in 18 U.S.C. § 1961(6).

217. Defendants Rees, Think Finance, TC Loan, TC Decision Sciences, Tailwind Marketing, Sequoia, and Technology Crossover, as well as Defendants Rosette, Whitford, and McInerney, are associated with the enterprise.

218. Defendants Rees, Think Finance, TC Loan, TC Decision Sciences, Tailwind Marketing, Sequoia, and Technology Crossover, as well as Defendants Rosette, Whitford, and McInerney, knowingly and willfully participated in the conduct of the affairs of the enterprise through the collection of unlawful debt.

219. The debts incurred by Plaintiffs and other class members are unenforceable.

220. Plain Green is engaged in the business of lending money at usurious rates of more than twice the legal limit in several states, including without limitation the State of Vermont.

221. The usurious rates charged by Rees, Think Finance, TC Loan, TC Decision Sciences, Tailwind Marketing, Sequoia, and Technology Crossover, as well as Defendants Rosette, Whitford, and McInerney, were more than twice the enforceable limit.

222. As a result of the unlawful collection of illegal debt, Plaintiffs have been injured. Plaintiffs have been injured in their property in that they paid extortionate and illegal interest rates. Plaintiffs have also been injured in that their credit ratings have been damaged and their ability to obtain credit has been damaged.

COUNT SEVEN
Unjust Enrichment

223. Plaintiffs reassert and incorporate by reference each of the above paragraphs.

224. Defendants have been unjustly enriched by their continued possession of funds illegally taken from people in financially challenged positions.

225. In equity and good conscience, those funds should be returned to the people who fell victim to Defendants' illegal scheme.

Claims for Relief

WHEREFORE, Plaintiffs respectfully seek the following relief:

A. A declaration that Defendants have violated the Consumer Financial Protection Act of 2010;

B. A declaration that Defendants have violated the Federal Trade Commission Act;

C. A declaration that Defendants have violated the Vermont Consumer Fraud Act;

D. A declaration that Defendants have violated the Electronic Funds Transfer Act;

E. A permanent injunction barring Defendants from providing, collecting on, and servicing illegal loans;

F. A permanent injunction barring Defendants from conditioning loans on agreeing to ACH withdrawals;

G. Preliminary and temporary injunctive relief as the Court deems appropriate;

H. Equitable surcharge seeking return of all interest charged above a reasonable rate and any financial charges associated with the loan;

I. A constructive trust over funds obtained illegally;

J. For Defendants other than Rosette, Whitford, and McInerney, actual damages;

K. For Defendants other than Rosette, Whitford, and McInerney, tremble damages under 18 U.S.C. § 1964;

L. An order awarding attorneys' fees and costs; and

M. Any other relief the Court deems just and proper.

JURY DEMAND

Plaintiffs demand trial by jury of all issues so triable.

Dated: Burlington, Vermont
August 4, 2015

/s/ Matthew B. Byrne

Matthew B. Byrne, Esq.
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(802) 658-0220
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For Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Docket No. 1:15-cv-101

JESSICA GINGRAS AND ANGELA C. GIVEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

JOEL ROSETTE, TED WHITFORD, TIM MCINERNEY,

Defendants.

CERTIFICATE OF SERVICE

I, Matthew B. Byrne, Esq., attorney for Plaintiffs, certify that, on August 4, 2015, I served Plaintiffs' Amended Complaint electronically by e-mail on Andre D. Bouffard, Esq., abouffard@drm.com.

Dated: Burlington, Vermont
August 4, 2015

/s/ Matthew B. Byrne

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For Plaintiffs

EXHIBIT A

Term Sheet For Think Finance-Chippewa Cree Transaction

Parties

Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, Montana, or its Tribal entity to be known as "Plain Green, LLC" ("Tribe")

Think Finance, Inc, ("TF")

Haynes Investments, Inc. its successors and assigns ("Haynes")

GPL Servicing Ltd, a Cayman Islands company ("GPLS")

Transaction

TF will license its software to the Tribe pursuant to a software license agreement acceptable to the parties. TF will also provide risk management, application processing, underwriting assistance, payment processing, and ongoing customer service support coterminous with the software license agreement and market and/or identify access channels for consumer loans on the Tribe's behalf (jointly "Services").

The Tribe will adopt a finance code that is acceptable to all parties and provide for the licensing of an arm of the tribe to engage in consumer lending. The Tribe will also obtain a computer server and develop a call center to mu the software provided by TF and to enable the Tribe to provide call center services to customers.

The Tribe will implement underwriting criteria to approve loans that it decides to offer to consumers on a nationwide basis through the Internet. The initial product Will be an installment loan with a maximum

amount of $2,500 and a minimum repayment period of two months and a maximum repayment term of two years (a "Loan"). Interest rates on the loans will vary from an APR of 60% to 360% based upon the repayment history of the borrower and term of the loan. The Tribe will develop documentation for the lending process including an application, a loan agreement, an adverse action letter, and other related documents that comply with the federal consumer credit coda including the Truth In Lending Act, the Equal Credit Opportunity Act, and the Electronic Funds Transfer Act. The Tribe will enter into an agreement with a U.S bank to process loan transactions using the ACH system and will also develop the capability to process remote checks.

Haynes will arrange to provide funding to the Tribe to enable it to make each of the Loans. 'IF shall agree that the services provided by Haynes are exclusive as they relate to the Tribe and they shall not enter into any other relationship with the Tribe except as described herein.

GPLS may from time to time purchase participation interests in each Loan that meets agreed upon criteria within two business days of the funding of the Loan at 100% par value.

Mechanics

The Tribe shall establish an account at a U.S. financial institution that will enable it to fund loans made and to receive payments from customers on each business day. Haynes shall fund an account at such Institution with sufficient monies to fund one business day of Loans based upon average Loan volumes for the preceding month.

Reserve Account

The Tribe shall establish a reserve account at a U.S. financial institution under the control of its law firm that will be available solely to deal with any regulatory issues, lawsuits or other controversies involving the Tribe and its lending activities. Such reserve account shall be funded by Tribe and TF equally out of the income earned from the Loans until the account has a balance of not less than $50,000 which amount shall be replenished from time to time to the extent it is drawn upon.

Revenues

GPLS shall pay the Tribe 4.5% of cash revenue received on account of the Loans for which GPLS has acquired a participation interest each month and will advance to the Tribe as a prepayment on revenue, $50,000 each month for the first six months or until such time that the amount received exceeds $50,000. Additionally, the Tribe will be reimbursed for all out-of-pocket expenses.

GPLS shall pay a fee to Haynes equal to 1% of the cash revenue received on account of the Loans for which GPLS has acquired a participation interest each month.

For the 1% of the loan portfolio retained by the Tribe, the Tribe will receive 100% of the cash revenue minus 100% of the losses.

Other Matters

TF commits that it will train and utilize not less than 10 members of the Tribe as customer service representatives on the Tribe's reservation within nine months after lending activity has begun.

The Tribe commits that it will use its best efforts to have completed the following critical path items within the next 14 days:

1. Establish "Plain Green, LLC" (or an entity with some other agreed upon name)

2. Revise the Tribal Credit Transaction Code to provide for a broader array of lending products

3. Obtain a license pursuant to the Chippewa Cree Tribal Credit Transaction Code if required

4. Setup bank account for "Plain Green, LLC"

5. Setup ACH processing for "Plain Green, LLC"

6. Get SSL for URL

7. Obtain 2 separate originating and servicing addresses for Plain Green, LLC and GPLS.

Legal Representation

Pepper Hamilton LLP ("Pepper") and Jones & Keller, PC ("J&K") shall be counsel to the Tribe. All fees of Pepper (including a success fee) shall be paid by TF at the closing of the transaction (and will pay the fees in the event the transaction does not close), plus reimbursement for all costs.

J&K shall be paid as follows: an amount of $20,000 shall be wired by TF or Haynes to J&K's trust account on Thursday, March 10, 2011 which shall be applied by J&K in payment for all legal work performed by J&K (but not expense disbursements, if any, which shall be separately billed to TF or Haynes) during the week ending on March 18, 2011, and an additional amount of $7,500 shall be wired by Haynes to J&K's trust account which shall be applied by J&K in payment for all legal work performed by J&K provided that all action by the Tribe or on behalf of the Tribe

that is necessary to complete the items contemplated above for the Tribe to complete have been accomplished in all material respects by March 18, 2011.

In addition to the above legal fees, an amount of $50,000 for the payment of other tribal legal and professional fees, as well as set up, administration, travel, and supplies shall be wired by TF or Haynes to J&K's trust account on Thursday, March 10, 2011 which shall be transferred by J&K (1) to the Tribe or as directed by the Tribe or by the Board of Directors of the tribal entity known as Plain Green, LLC provided that all action by the Tribe or on behalf of the Tribe that is necessary to complete the items contemplated above for the Tribe to complete have been accomplished in all material respects by March 18, 2011, or otherwise at the direction of the Tribe (2) to Haynes as directed by Steven Haynes.

This term sheet does not set forth all the terms and conditions of the transaction described herein. Rather, it is only an outline, in summary format, of major points of understanding, which will form the basis of the definitive documentation.

Except for obligations in respect of the "Legal Representation" paragraph above, in this paragraph and in the immediately succeeding paragraph, this term sheet is not, and shall not be deemed to be, a binding agreement by any of the parties hereto to consummate the transaction described herein. Such agreement will arise only upon the execution and delivery by the parties hereto of definitive documentation satisfactory in form and substance to each of the parties and the fulfillment, to the satisfaction of the parties, of the conditions precedent set forth herein and in such definitive documentation. In the event the transaction described herein shall not have been

consummated on or before the day that is days after the date of this executed term sheet, this term sheet shall automatically terminate on such 45th day (unless extended in writing by the parties).

This term sheet and the terms set forth herein are confidential, and none of the parties shall disclose the terms of this term sheet, or the fact that negotiations amongst the parties are ongoing, to any third party, Including, without limitation, any other source of potential financing for the transaction described herein; provided, that the parties may provide a copy of this term sheet to their attorneys end financial advisors, in each case, for use only in connection with the proposed transaction and on a confidential basis.

Agreed to by the below signatories.

CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S INDIAN RESERVATION, MONTANA, or its Tribal entity to be known as "Plain Green, LLC"

By: /s/ [Illegible]

THINK FINANCE, INC.

By: ____________________

HAYNES INVESTMENTS, INC., its successors and assigns

By: /s/ [Illegible]

GPL SERVICING LTD., a Cayman Islands company

By: ____________________

Dated: March 11, 2011

Except for obligations in respect of the "Legal Representation" paragraph above, in this paragraph and in the immediately succeeding paragraph, this term sheet is not, and shall not be deemed to be, a binding agreement by any of the parties hereto to consummate the transaction described herein. Such agreement will arise only upon the execution and delivery by the parties hereto of definitive documentation satisfactory in form and substance to each, of the parties and the fulfillment, to the satisfaction of the parties, of the conditions precedent set forth herein and in such definitive documentation. In the event the transaction described herein shall not have been consummated on or before the day that is days after the date of this executed term sheet, this term sheet shall automatically terminate on such 45th day (unless extended in writing by the parties).

This term sheet and the terms set forth herein are confidential, and none of the parties shall disclose the terms of this term sheet, or the fact that negotiations amongst the parties are ongoing, to any third party; including, without limitation, any other source of potential financing for the transaction described herein; provided, that the parties may provide a copy of this term sheet to their attorneys and financial advisors, In each case, for use only in connection with the proposed transaction and on a confidential basis.

Agreed to by the below signatories.

CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S INDIAN RESERVATION, MONTANA, or its Tribal entity to be known as "Plain Green, LLC"

By: /s/ [Illegible]____________________

THINK FINANCE, INC.

By: /s/ [Illegible]____________________

HAYNES INVESTMENTS, INC., its successors and assigns

By: ______________________________

GBL SERVICING LTD., a Cayman Islands company

By: /s/ [Illegible]____________________

Dated: March 11, 2011