No. 19-331

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

BRIEF IN OPPOSITION

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INTRODUCTION

Two Silicon Valley venture capital firms, Sequoia Capital Operations, LLC ("Sequoia") and Technology Crossover Ventures ("TCV"), participated in an illegal loan sharking scheme that specifically targeted unsuspecting low-income borrowers. Although their usurious behavior violated RICO's unlawful debt provisions, Sequoia and TCV ask this Court to ignore the inherent unfairness of their actions and rely on equity to enforce arbitration agreements to which they were not even a party. Both the Second Circuit Court of Appeals and the District of Vermont refused to enforce these unconscionable agreements. This Court should refrain from disturbing the well-reasoned opinions of these courts and should deny Sequoia's and TCV's petition.

First, the petition's central claim that the decision below conflicts with this Court's decisions is erroneous. Both the district court and the court of appeals recognized the governing legal principles established by this Court's opinions. In applying that settled law, they correctly decided and adequately explained their decisions. The Second Circuit did not simply ignore that the arbitration agreements had delegation clauses. Instead, the court held that Ms. Gingras and Ms. Given, Respondents and Plaintiffs below, made a "specific attack on the delegation provision" and ruled that their challenge was "convincing." Pet. App. 21a-22a. In challenging the delegation clause, Plaintiffs alleged and presented evidence that Think Finance, the company operating the payday loan enterprise, dictated the content of Chippewa Cree law and ensured that it would be favorable to the participants in the enterprise and their predatory loan practices. The law that Think Finance wrote and incorporated in

its arbitration agreements rendered the delegation clause as well as the arbitration agreements as a whole unconscionable because it preordained the outcome of any decision by an arbitrator on both arbitrability and the merits.

In issuing its opinion, the Second Circuit was not obligated to discuss any of this evidence. In fact, the court of appeals could have simply entered judgment without saying anything. While the Second Circuit did not discuss *all* of the bases which Plaintiffs offered for invalidating the delegation clause, the court discussed some of them. It held that because the arbitration agreements, including their delegation clauses, were designed to avoid state and federal law, they were unenforceable. It also held that the agreements were substantively unconscionable under Vermont law because they provided an illusory arbitration forum. In arriving at this holding, the court cited the uncontested evidence provided by Plaintiffs.

Second, review by this Court is unwarranted because the courts of appeals have uniformly applied the Court's decisions with respect to delegation clauses in arbitration agreements. There is no circuit split.

Third, the amount of explanation the court of appeals must provide in ruling on a delegation clause does not present an important issue for this Court.

Finally, there are alternative grounds to affirm the Second Circuit's opinion that are not raised by the question presented. For instance, the district court held that the plain language of the arbitration agreements did not give the arbitrator authority to rule on class wide cases. Accordingly, this Court should deny certiorari, stop Sequoia's and TCV's attempt to delay, and allow Ms. Given and Ms. Gingras to proceed to trial.

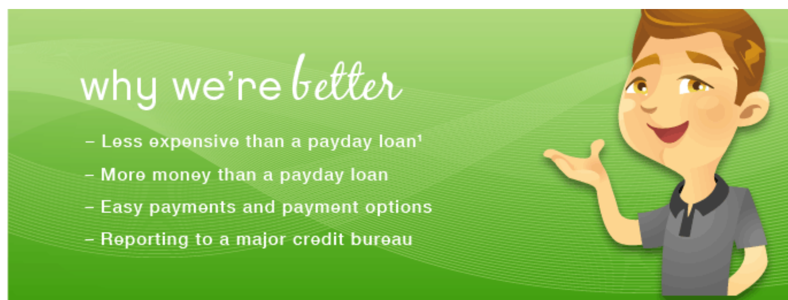
STATEMENT OF THE CASE

A. Factual Background.

In their First Amended Complaint ("Complaint"), Plaintiffs Jessica Gingras and Angela Given explain how they fell victim to a sophisticated loan sharking operation that was specifically designed to ensnare unsuspecting victims. Pet. App. 118a, ¶21. Ms. Gingras and Ms. Given visited a bright and cheerful website that promised to help them secure a loan. *Id.* This website informed visitors that with an easy online application they could obtain an answer within a matter of seconds:

Id.

The website proclaimed that the loan was a better option than a payday loan:



Id. 119a, ¶22.

However, the cheerful cartoon characters did not tell the whole story. *Id.* 119a, ¶23. The reality of the Defendants' operation was far different from what these shiny, innocent-looking characters suggested.[1] *Id.* Plaintiffs allege that the loan sharking enterprise called "Plain Green" was created when Kenneth Rees, the mastermind of this illegal scheme, had his former business, ThinkCash, Inc. ("ThinkCash"), shut down by federal regulators. *Id.* Rees was undeterred by this setback and sought a new way to prey on unsuspecting borrowers. *Id.* Rees believed that tribal immunity was the answer. *Id.* So, Rees and his rebranded company, Think Finance, approached the Chippewa Cree Tribe of the Rocky Boy's Reservation ("Chippewa Cree" or the "Tribe") with a deal. *Id.* Rees and Think Finance would provide everything 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.* In return, the Tribe would receive 4.5% of the enterprise's revenues. *Id.*; 162a-169a at 164a.

Two Silicon Valley venture capital firms, Sequoia and TCV, became embroiled in this unlawful enterprise. Pet. App. 147a, ¶154. Plaintiffs allege that both Sequoia and TCV provided money to fuel the illegal Plain Green loan sharking operation. *Id*. After Plaintiffs filed their Complaint, they uncovered facts

[1] "Defendants" refers to Think Finance, Inc. ("Think Finance"), TC Loan Services, LLC, TC Decision Sciences, LLC, Tailwind Marketing, LLC, Sequoia Capital Operations, LLC, Technology Crossover Ventures, Kenneth E. Rees, Joel Rosette, Ted Whitford, and Tim McInerney. Rosette, Whitford, and McInerney are collectively referred to as the "Tribal Defendants." Only Sequoia and TCV seek review of the court of appeals' decision in this Court. The other Defendants did not seek review of the court of appeals' decision.

indicating that these venture capital firms did more than just provide financial backing for the Plain Green enterprise; they each had representatives that served on Think Finance's Board of Directors. CA 2 J.App. 277-78, ¶¶ 1-4.

B. The Fraudulent Enterprise.

Plaintiffs allege that prior to launching Plain Green in 2011, Rees created ThinkCash, which was a payday lender that operated over the internet. Pet. App. 122a, ¶37. To avoid state and federal limits on interest rates, ThinkCash used a model known in the money lending industry as "rent-a-bank." *Id.* ¶ 38. Under this scheme, ThinkCash marketed, funded, and collected loans, and performed other functions for borrowers throughout the country. *Id.* Although ThinkCash was the actual lender, the nominal lender was a now-dissolved bank based in Delaware called First Bank of Delaware ("FBD"). The participants in this "rent-a-bank" scheme attempted to rely on some ill-defined federal bank preemption to evade state laws that prohibited extortionate interest rates. Pet. App. 123a, ¶¶39-41. In 2008, federal regulators initiated an enforcement action to thwart this practice. *Id*. ¶40. This enforcement action culminated in a consent order that required FBD to end its relationship with ThinkCash. *Id.* ¶41. After FBD's shareholders voted to dissolve the bank in 2012, the United States Department of Justice announced that FBD would pay a $15 million civil penalty for its participation in "rent-a-bank" schemes. Pet. App. 123a, ¶41.

After federal regulators intervened, Kenneth Rees rebranded his company as Think Finance and moved on to a scheme that the money lending industry called "rent-a-tribe." Pet. App. 121a, 123a, ¶¶38, 42-44. The

"rent-a-tribe" scheme attempted to take advantage of tribal immunity in the same way that ThinkCash attempted to take advantage of federal banking-law preemption. Pet. App. 123a, ¶¶42-44.

In March 2011, Rees and Think Finance approached the Chippewa Cree about forming a tribal entity to conduct an illegal scheme that would operate "on a nationwide basis through the internet." Pet. App. 130a, ¶78, 162a. As part of the negotiations, Rees and Think Finance prepared a term sheet that reflected the essentials of the transaction (the "Term Sheet"). Pet. App. 130a, ¶78, 162a-169a. When they created the Term Sheet and started the Plain Green enterprise, Rees and Think Finance were attempting to evade liability for violating various laws. Pet. App. 122a, ¶36; 131a, ¶82. According to the sworn affidavit of Neal Rosette, Plain Green's former CEO, which was uncovered after Plaintiffs filed their Complaint, "[t]he primary reason that Think Finance, Inc. was so interested in partnering with an Indian Tribe was to circumvent the various State laws governing interest rates on payday and other sub-prime loans." CA2 J. App. 87, ¶7.

As part of their negotiations with the Tribal Defendants, Rees and Think Finance dictated the content of Chippewa Cree law and ensured that the law would be favorable to them and their predatory loan practices. Pet. App. 130a, ¶79 *quoting* 162a. 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." Pet. App. 162a. The Term Sheet also required the Tribe to use "best efforts" to "[r]evise the Tribal Credit Transaction Code to provide for a broader array of lending products." Pet. App. 165a.

To further Defendants' illegal scheme, the Tribal Defendants restricted access to Chippewa Cree law by making it unavailable to the public through the internet and other means. Pet. App. 142a, ¶128. Organizations – like law school libraries – will not provide a copy of the Chippewa Cree law by remote access because the Tribal Defendants have not granted them the right to do so. *Id*; *see also* CA2 J. App. 79-81, ¶¶12-19.

C. The Purported Arbitration Agreement.

As part of the loan process, Defendants required all borrowers to sign a loan agreement that included an arbitration provision that would govern any disputes (the "Purported Arbitration Agreement" or "Agreement"). Pet. App. 139a, ¶118. Plaintiffs allege that this Agreement is unenforceable. Dist. Ct. Dkt 85 at 41-71. It contained a number of material misstatements, including that (1) Plain Green was the lender, (2) Chippewa Cree law governed the transaction, and (3) state law did not apply. Pet. App. 141a-142a, ¶124-126. Plaintiffs also allege that the Agreement failed to reveal that Plain Green was merely a front company created to allow Rees and Think Finance to hide behind the Tribe's immunity. *Id.* It did not disclose that Rees and Think Finance created the Chippewa Cree law that would permit Plain Green to make loans at rates that are illegal under state and federal law. *Id.*

Plaintiffs also allege that when Rees and Think Finance created the Plain Green enterprise, they controlled the drafting and implementation of the Purported Arbitration Agreement through their close association with Pepper Hamilton, the attorneys who drafted the Plain Green loan documents including the Purported Arbitration Agreement. Pet. App. 137a,

¶110. The district court agreed with Plaintiffs that the Purported Arbitration Agreement was unconscionable and unenforceable. Pet. App. 56a-68a.

The Agreement has a delegation clause that attempts to insulate Defendants' behavior from state or federal court review by shifting all disputes to either an arbitrator or a tribal court. Pet. App. 143a, ¶131. The Agreement also requires the application of Chippewa Cree law, which is the tribal law that Rees and Think Finance purchased through the Term Sheet:

> The arbitrator has the ability to award all remedies available under Tribal Law, whether at law or in equity, to the prevailing party, except that the parties agree that the arbitrator has no authority to conduct class-wide proceedings and will be restricted to resolving the individual Disputes between the parties. The validity, effect and enforceability of this waiver of class action lawsuit and class-wide arbitration, if challenged, are to be determined solely by a court of competent jurisdiction located within the Chippewa Cree Tribe, and not by the AAA, JAMS or an arbitrator. If the court refuses to enforce the class-wide arbitration waiver, or if the arbitrator fails or refuses to enforce the waiver of class-wide arbitration, the parties agree that the Dispute will proceed in Tribal court and will be decided by a Tribal court judge, sitting without a jury, under applicable court rules and procedures and may be enforced by such court through any measures or reciprocity provisions available. As an integral component of accepting this Agreement, you irrevocably

> consent to the jurisdiction of the Tribal courts for purposes of this Agreement.

CA2 J. App. 265.

The Code itself is riddled with provisions that only a loan shark could write. Not surprisingly, there is no interest rate limit. The Code also contains a "reverse preemption" clause. Contrary to well settled United States Supreme Court precedent, Section 10-8-101 of the Chippewa Cree Code declares that a ". . . Loan Agreement between any Creditor authorized by the Tribe to lend money and a Consumer shall be governed by this Code and the laws of the Tribe notwithstanding any federal or Tribal law to the contrary." CA2 J. App. 342. The "reverse preemption" clause is particularly pernicious because, pursuant to Section 10-3-601 of the Tribal Code, the only remedy allowed by the Chippewa Cree Code with respect to the arbitration agreement is to opt out within one business day. CA2 J. App. A323. Beyond, the one day opt-out, the code bars all other remedies. *Id.*

In a separate provision, the Purported Arbitration Agreement seeks to avoid federal court review by requiring that the tribal court confirm any arbitration award. The Agreement also requires any judicial decision maker to apply the law that Rees and Think Finance purchased through the rent-a-tribe scheme:

> APPLICABLE LAW AND JUDICIAL REVIEW OF ARBITRATOR'S AWARD: THIS AGREEMENT TO ARBITRATE IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE CHIPPEWA CREE TRIBE. The arbi-

> trator shall apply Tribal Law and the terms of this Agreement, including this Agreement to Arbitrate and the waivers included herein. The arbitrator may decide, with or without a hearing, any motion that is substantially similar to a motion to dismiss for failure to state a claim or a motion for summary judgment. The arbitrator shall make written findings and the arbitrator's award may be filed with a Tribal court. The arbitration award shall be supported by substantial evidence and must be consistent with this Agreement and Tribal Law, and if it is not, it may be set aside by a Tribal court upon judicial review.

CA2 J. App. 265

In several other places in the Agreement, Rees and Think Finance, with the cooperation of the Tribal Defendants, attempted to ensure that federal courts would never review any dispute and that the law Rees and Think Finance purchased would be used in any arbitration. For example, if a party to the Agreement attempts to opt out of arbitration, the Agreement states that the party will be opting in to an adjudication conducted by a Chippewa Cree tribal court using the Chippewa Cree law that was purchased by Defendants:

> IN THE EVENT YOU OPT OUT OF THE WAIVER OF JURY TRIAL AND ARBITRATION AGREEMENT, ANY DISPUTES SHALL NONETHELESS BE GOVERNED UNDER THE LAWS OF THE CHIPPEWA CREE TRIBE AND MUST BE BROUGHT WITHIN THE COURT SYSTEM THEREOF.

CA2 J. App. 263.

The venue clause of the Purported Arbitration Agreement also requires borrowers pursuing arbitration to confirm the enterprise's claim for tribal immunity and to waive any right to use any law other than the purchased Chippewa Cree law:

> LOCATION OF ARBITRATION: Any arbitration under this Agreement may be conducted either on Tribal land or within thirty (30) miles of your residence, at your choice, provided that this accommodation for you shall not be construed in any way (a) as a relinquishment or waiver of the sovereign status or immunity of the Tribe, or (b) to allow for the application of any law other than Tribal Law.

CA2 J. App. 264.

In other places, the Agreement expressly disclaims the applicability of both federal and state law: "The Lender may choose to voluntarily use certain federal laws as guidelines for the provision of services. Such voluntary use does not represent acquiescence of the Chippewa Cree Tribe to any federal law unless found expressly applicable to the operations of the Chippewa Cree Tribe offering such services." CA2 J. App. 263. It also states that: "Neither this Agreement nor the Lender is subject to the laws of any state of the United States." CA2 J. App. 263. The Agreement states that "[t]his Consumer Installment Loan Agreement (this [']Agreement[']) is subject solely to the exclusive laws and jurisdiction of the Chippewa Cree Tribe of the Rocky Boy Indian Reservation" and that "no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation." CA2 J. App. 258.

The Purported Arbitration Agreement also prevents any arbitration organization designated to conduct any arbitration under the Agreement from applying rules that would interfere with the result dictated by the law that Rees and Think Finance purchased. The Agreement states: "The policies and procedures of the selected arbitration firm applicable to consumer transactions will apply provided such policies and procedures do not contradict this Agreement to Arbitrate or Tribal Law. To the extent the arbitration firm's rules or procedures are different than the terms of this Agreement to Arbitrate, the terms of this Agreement to Arbitrate will apply." CA2 J. App. 264.

D. Rees And Think Finance Continued To Exert Control Over The Tribe.

After filing the Complaint, Plaintiffs uncovered more facts that suggest that Rees and Think Finance directed the internal affairs of the Tribe. CA2 J. App. 78. According to a sworn affidavit of former Plain Green CEO Neal Rosette, Think Finance directed the ouster of Ken Blatt-St. Marks ("St. Marks"), Chairman of the Tribe's Business Committee, after St. Marks questioned the division of Plain Green's profits. CA2 J. App. 88, ¶¶9-10. Mr. Rosette stated in his affidavit:

> After Chairman St. Marks' remarks, Think Finance Inc. met with tribal council members and told them that Chairman St. Marks needed to be removed from office or Think Finance Inc. would pull out of the business arrangement. Think Finance, Inc. specifically instructed the tribal council members to impeach Chairman St. Marks. I have personal knowledge of this because it was revealed to me by John "Chance" Houle prior to Chairman St. Marks being impeached the

> first time. After Mr. Houle revealed that information to me, Chairman St. Marks was impeached.

CA2 J. App. 88, ¶10; *see also* CA2 J. App. 279, ¶8.

In March 2013, the Business Committee fired St. Marks, but the United States Department of the Interior found that the Tribe had to reinstate him because he was protected by federal whistleblower statutes. CA2 J. App. 57, ¶143. According to an anonymous witness interviewed by the Department of the Interior, "the Business Committee removed Blatt-St. Marks as Chairman to continue to hide their wrongdoings." CA2 Supp. App. 16; *see also* CA2 J. App. 279, ¶8. The witness also reported that "every single one of the Business Committee members have taken something, i.e. money, equipment, vehicles." *Id.*

Plaintiffs allege numerous other facts indicating that the leadership of the Tribe is in substantial turmoil and flux. Pet. App. 144a-146a. There is a large investigation into bribery at the Tribe, and several former officials have been convicted of, or pled guilty to, embezzlement and bribery. Pet. App. 144a, ¶132-35. For example, John Chance Houle ("Houle"), the former Chairman of Plain Green, pled guilty to several federal felonies, including theft from a tribal organization, embezzlement, and income tax evasion. Pet. App. 144a, ¶135. Houle signed the Term Sheet on behalf of the Tribe and Plain Green. Pet. App. 162a. Neal Rosette, Plain Green's former CEO, and Billi Anne Raining Bird, Plain Green's former CFO and CEO, were involved in a separate fraudulent kickback scheme. Pet. App. 145a, ¶138-139. After the Complaint was filed, they both pled guilty to federal felonies related to the kickback scheme. *See* CA2 J. App. 278, ¶6.

Plaintiffs allege that the corruption and instability extended to the Chippewa Cree Tribal Judiciary. Pet. App. 145a. In his dispute with the Business Committee, St. Marks fired the Tribe's Chief Judge and several other trial judges. Pet. App. 145a, ¶140. An interview of a former Chippewa Cree tribal judge conducted by the Federal Bureau of Investigation and the Office of the Inspector General for the United States Department of the Interior demonstrates that the Chippewa Cree judiciary is neither independent nor functional. CA2 J. App. 279. The former judge stated that when he was deciding whether to issue a TRO related to the removal of St. Marks, "he feared retaliation from both sides at the time – the Business Committee and St. Marks – because both could do harm to him job-wise." CA2 J. App. 279, ¶9; CA2 J. App. 281. The judge said that "the removal of St. Marks as Chairman should never have been effective because the Business Committee violated the CCT [Chippewa Cree Tribe] Constitution." CA2 J. App. 281. However, this judge entered the order removing St. Marks even though he thought it was improper and unconstitutional because he feared retaliation. *Id.*

E. Discovery in the Think Finance Bankruptcy Reveals Think Finance's Control over the Tribe and Sequoia's and TCV's Participation.

In October 2017, Think Finance filed for federal bankruptcy protection in the Northern District of Texas. *In re Think Finance*, No. 17-33964 (N.D. Tex.). During the bankruptcy proceeding, Plaintiffs uncovered more damaging evidence against the Defendants. For example, Billi Anne Raining Bird, a former CEO and CFO of Plain Green, testified that Plain Green was a "rent-a-tribe scheme" because the Tribe had no

role in the "underwriting, origination, servicing or marketing, or collection of loans." Resp. App. 11a. She also testified that Think Finance actually drafted the Chippewa Cree Transaction Code. According to Ms. Raining Bird, Think Finance told the tribe, "[T]his is what we need in place and I guess if we wanted the business then we adopt the code that they – that was placed in front of us – or them, the Tribe." Resp. App. 7a. The Arbitration Agreement required any decision maker to apply this Chippewa Cree Transaction Code in ruling on the validity of the delegation provision.

The facts uncovered during the Think Finance bankruptcy proceeding also revealed that Think Finance founded the Native American Financial Services Association ("NAFSA"). *See, e.g., Commonwealth of Pa v. Think Finance, Inc.*, No. 2:14-cv-7139-JCJ, No. 293-3 (August 14, 2019 E.D. Pa.) App. 2747.[2] Mr. Rees repeatedly reported this fact to the Think Finance Board of Directors, which included representatives from Sequoia and TCV. Think Finance and other payday lenders paid the vast majority of the costs associated with the NAFSA. Resp. App. 17a ¶ 213. Think Finance's "Chief Integrity Officer," Martin Wong, also drafted the NAFSA model code and gutted several arbitration provisions that would have provided protection for consumers. *See* Resp. App. 25a ("Martin has been an invaluable source of assistance on this journey.") & 34a. This NAFSA model code was the basis for the Chippewa Cree Transaction Code that Think Finance forced the Tribe to adopt. The edits to

[2] Relying on the same evidence, the Commonwealth of Pennsylvania has complied a statement of facts detailing the essentials of this vast loan sharking scam. *Commonwealth of Pennsylvania v. Think Finance, Inc.*, No. 2:14-cv-7139-JCJ, No. 293-3 (August 14, 2019) (E.D.Pa); *see also id.*, No. 296 (November 18, 2019) (finding dispute of material fact existed).

the unconscionability section continued until there was nothing left to it in the relevant version of the Chippewa Cree Transaction Code.

Think Finance also hired and paid lawyer David Bernick to pursue litigation on behalf of purported tribal lenders in the Southern District of New York and the Second Circuit. *Id.* 17a ¶ 213. At that time, the State of New York was attempting to enforce its usury laws against these purported tribal lending entities. Resp. App. 17a ¶ 212. The lawyer that Think Finance hired sought a preliminary injunction against the State of New York to prevent it from enforcing its laws. Kenneth Rees wrote memoranda regarding this litigation to Think Finance's Board of Directors, which included representatives from Sequoia and TCV: "We are waiting on tenterhooks to learn the outcome of the challenge against New York." Resp. App. 18a ¶ 215. Despite Think Finance's best efforts, both the Southern District of New York and the Second Circuit held that state law, not tribal law, applied. *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't Fin. Servs.*, 974 F. Supp. 2d 353 (S.D.N.Y. 2013) *aff'd* 769 F.3d 105 (2d Cir. 2014). Rees reported the district court opinion to the Board of Directors (including Sequoia and TCV), complaining of the "unexpectedly negative tone of the judge's decision in the New York case. . . ." Resp. App. 19a ¶ 218. After the Second Circuit affirmed the denial of the preliminary injunction, Think Finance stopped funding the litigation and the nominal plaintiffs voluntarily dismissed their case. Even though Think Finance was aware of the *Otoe* decisions, the Plain Green enterprise continued to issue loans to borrowers at illegal interest rates. It also denied that any state or federal laws applied to its lending activities directed at consumers with no connection to the tribe or its reservation.

Before the *Otoe* decisions, Think Finance had planned to cash out its investors (including Sequoia and TCV) in an initial public offering. *Id.* 16a ¶ 210. To succeed in its IPO, Think Finance undertook the euphemistically named "tribal restructure" to reduce the appearance of its complete control over the Tribes. *Id.* 13a-16a ¶¶ 201-211.

After the district court issued its decision in the *Otoe* case, Think Finance cancelled its IPO and segregated its illegal tribal lending business from its state licensed lending. *Id.* 19a ¶ 218. Rees discussed the change with the Board of Directors (including Sequoia and TCV). Think Finance spun-off its state licensed payday lending business into a new company, Elevate Credit. *Id.* 20a-23a ¶ 220-227. In the Think Finance bankruptcy proceeding, the Creditors' Committee has filed a pleading alleging that Think Finance fraudulently conveyed tens of millions of dollars to its shareholders, including Sequoia and TCV. *In re Think Finance*, No. 17-33964, Dkt. 1510, at ¶ 43 (N.D. Tex. September 20, 2019).

F. Rule 15 Statement.

Supreme Court Rule 15 requires Ms. Given and Ms. Gingras to identify in their brief in opposition "any perceived misstatements of fact or law." The parties have fundamental disagreements over the facts. In Ms. Given's and Ms. Gingras's view, much of what is said in the Petition is incorrect. Sequoia and TCV have made at least the following misstatements:

- "Plaintiffs brought this putative class action against Plain Green." Pet. at 5.

  Response: Plaintiffs have not sued Plain Green. Rather, Plaintiffs allege that Plain

Green was a RICO enterprise. *See* Pet. App. 114a-117a, 130a, ¶ 76.

- "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." Pet. at 2.

  Response: Plaintiffs do not agree. Plaintiffs devoted an entire section of their Second Circuit brief to arguing the opposite. *See, e.g.* Resp. CA Br. at 79 in Second Circuit ("The Delegation Clause Does Not Clearly And Unmistakably Delegate The Issue Of Arbitrability To The Arbitrator.") In fact, the courts below agreed with Plaintiffs' position on the issue or addressed it. Pet. App. 61a-63a, 21a-22a.

- "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." Pet. at 3.

  Response: The quoted statement is not an accurate description of the Second Circuit's opinion, which determined that the delegation provision is unenforceable. *See infra* at 20-24.

- Sequoia and TCV identify a part of the agreement that they believe constitutes the "delegation clause." Pet. at 5.

  <u>Response</u>: Plaintiffs do not agree that Sequoia and TCV have correctly identified the actual delegation clause. Other portions of the arbitration agreement deal with the power of the arbitrator to decide disputes. In particular, the phrase ". . . the parties agree that the arbitrator has no authority to conduct class-wide proceedings . . ." means the arbitrator has no power to decide class wide disputes. *See infra* at 28-29.

- Sequoia and TCV claim that other Defendants merely "serviced the loans made by Plain Green." Pet. at 5.

  Response: Plaintiffs do not agree. This contention is contrary to the core allegations of the Amended Complaint, the evidence provided to the district court, and the evidence that has been uncovered in the bankruptcy court in the Northern District of Texas. Pet. App. 119a, ¶23; 126a, ¶¶54-56, 58; 128a-133a, ¶¶69-71, 77-91; *see supra* at 14-17. In fact, the Amended Complaint expressly alleges that "Defendant 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 operations . . ." Pet. App. 135a, ¶101 (emphasis added).

- Sequoia and TCV contend that they are merely "investors" in Think Finance. Pet. at 5-6

  Response: Plaintiffs do not agree. Sequoia and TCV had representatives on Think Finance's Board of Directors and were involved in the management of Think Finance. CA2 J. App. 277-280. Additional evidence developed in the Think Finance bankruptcy supports Plaintiffs' contention that Sequoia and TCV were much more than investors. *See supra* at 14-17.

ARGUMENT

I. PETITIONERS' FACTBOUND CLAIM THAT THE SECOND CIRCUIT ERRED IN APPLYING THIS COURT'S PRECEDENT DOES NOT MERIT REVIEW.

Petitioners' principal submission in this Court is that the Second Circuit's decision conflicts with decisions of this Court requiring enforcement of "delegation" clauses. These clauses are provisions in arbitration agreements that clearly and unmistakably provide that issues of arbitrability will be decided by an arbitrator—unless the delegation clause is itself unenforceable. The court of appeals, however, expressly acknowledged this principle and the decisions of this Court establishing it. Petitioners disagree with the Second Circuit's application of these settled principles to the facts of this case, but under this Court's Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10. The Second Circuit correctly stated the law and then ruled

on the validity of the delegation clause with a factual record of corruption and legal arguments supporting a holding of invalidity. Petitioners' factbound claim that the lower court erred does not justify review.

First, the Second Circuit correctly stated the law: "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.'" Pet. App. 21a *quoting Rent-A-Center*, 561 U.S. 63, 71 (2010). Petitioners must agree that this is a proper statement of the law because they quote exactly the same sentence as the proper statement of the law. Pet. at 8 *quoting Rent-A-Center*, 561 U.S. at 71.

Second, despite Sequoia's and TCV's claim, the Second Circuit actually *ruled* on the delegation clause. Earlier in its opinion, the court of appeals noted the district court's detailed discussion of the Arbitration Agreement, including the delegation clause. *See* 8a *citing Gingras v. Rosette*, No. 15-cv-101, 2016 WL 2932163, at *13-*18. In the paragraph Petitioners scrutinize, the court of appeals also said that the "specific attack on the delegation provision is sufficient to make the issue of arbitrability one for a federal court." Pet. App. 21a-22a. The court of appeals then *held* that "Plaintiffs mount a convincing challenge to the arbitration clause itself," a statement that in context plainly referred to the delegation clause. Pet. App. 21a. It also held that the "district court was correct to decide it, and we properly consider it on appellate review." *Id.* The "it" was Plaintiffs' specific attack on the delegation clause. These statements unambiguously indicate that the court was affirming the district court's invalidation of the delegation clause.

Third, the record in the district court and the court of appeals contained more than the allegations of the Amended Complaint. While Plaintiffs alleged that the delegation clause was fraudulent in their Amended Complaint, they also supplied detailed argument and evidence concerning the delegation clause. Plaintiffs used over 16 pages of their brief in the Second Circuit to attack the delegation clause specifically. Resp. CA Br. at 79-96. In their brief, Plaintiffs argued that the plain text of the delegation clause did not clearly and unmistakably delegate the issue of arbitrability to the arbitrator in class wide cases. *Id.* at 80-81 (discussing the language ". . . the parties agree that the arbitrator has no authority to conduct class-wide proceedings. . ."). Plaintiffs also argued that Chippewa Cree law did not empower arbitrators to decide whether disputes are arbitrable. *Id.* at 81-82. In addition, Plaintiffs argued that the delegation clause is unconscionable because it is illusory. *Id.* at 87-89. The law that Think Finance wrote preordained the outcome of both the arbitrator's decision on arbitrability and the merits. The combination of Section 10-8-101 and 10-3-601 of the Chippewa Cree Code mean that the only way to avoid an arbitration agreement is to opt out in one day. CA2 J. App. 323, 342. Under these sections, Chippewa Cree law preempted all other remedies, including those remedies in the Federal Arbitration Act. Plaintiffs argued that the delegation clause was fraudulent because it relies on a tribal court that had been corrupted and intimidated into issuing rulings that it knew were legally wrong. Resp. CA Br. at 89-92.

To support their arguments, Plaintiffs cited to significant evidence of corruption in the core of the judicial systems of the Chippewa Cree. Resp. CA Br. at 58-62, 75, 87, 89-94 *citing* CA2 J. App. 73, 75, 263, 280-85, 293-313, 342, CA2 Supp. App. 13-31, 94-133.

These documents included joint FBI and Department of Interior investigations, interviews with tribal members, affidavits from former Plain Green officers, and guilty pleas from former Plain Green officers. Petitioners never even attempted to rebut this evidence.

Plaintiff's arguments on appeal, moreover, were thoroughly grounded in the record of the district court proceedings. Plaintiffs had specifically challenged the delegation clause in response to the Motions to Compel Arbitration in the district court. Dist. Ct. Dkt. 85 at 57-63. The attack in the district court relied on the same basic facts and evidence that Plaintiffs later relied on in the court of appeals. Dist. Ct. Dkt. 85 at 4, 54-55. Even before that, Plaintiffs' Complaint had specifically alleged that the delegation clause was unenforceable. Pet. App. 143a, ¶131.

Plaintiffs' challenge to the delegation clause far exceeded what is required by *Rent-A-Center* for attacking delegation clauses. *Rent-A-Center* looked to an opposition to a motion to compel to determine whether there was a specific challenge to a delegation clause. *Rent-A-Center, Inc. v. Jackson*, 561 U.S. 63, 72-73 (2010). Other courts of appeals have likewise recognized *Rent-A-Center*'s holding that a specific attack on a delegation clause can be made in an opposition to a motion to compel arbitration. *Parm v. Nat'l Bank of Calif.*, 835 F.3d 1331, 1335 n.1 (11th Cir. 2016); *see also Hayes*, 811 F.3d 666, 671 n.1 (4th Cir. 2016); *Parnell v. CashCall, Inc.*, 664 Fed. Appx. 841, 844 (11th Cir. Nov. 21, 2016).

The Second Circuit addressed some, but not all, of Plaintiffs' arguments and evidence in its decision. The Second Circuit held that the "arbitration agreements"—including the delegation clause—"are unenforceable because they are designed to avoid federal and state consumer protection laws." Pet. App. 23a

citing CA2 J. App. 116-17. The Second Circuit also held that the "arbitration agreements are substantively unconscionable under Vermont law because the arbitral forum for which they provide is illusory." Pet. App. 24a. The Second Circuit noted that the forum would have to apply the law that Think Finance wrote to serve its own ends. The Second Circuit also discussed the allegations and evidence that showed that there was corruption and intimidation of the Chippewa Cree judiciary. The court cited Plaintiffs' allegations and evidence (including the FBI and Department of the Interior investigations) cited in the Joint Appendix. Pet. App. 25a *citing* CA2 J. App. 279-281.

These same reasons also applied to arbitration agreement as whole and rendered it as well as its delegation clause unenforceable. But the *Rent-A-Center* Court only held that an attack on the delegation clause must be specific. It did not hold that the reasons for invalidating the delegation clause must be *unique* to it. *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 226 (3rd Cir. 2018) *citing Rent-A-Center*, 561 U.S. at 74.

II. THERE IS NO CIRCUIT SPLIT.

Petitioners' search for a circuit split suffers from a fundamental misunderstanding of a court of appeals' obligation to the parties. Petitioners conflate what a court of appeals must consider with what it must write.

There is no circuit split because all circuits agree on what the relevant law is. *Gingras v. Rosette*, 922 F.3d 112, 126 (2d Cir. 2019); *MacDonald*, 883 F.3d at 226; *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Asssur. Co.*, 867 F.3d 449, 455

(4th Cir. 2017); *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1264 (11th Cir. 2017); *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d at 1334; *Hayes v. Delbert Serv. Corp.*, 811 F.3d at 671 n 1 (all cases citing *Rent-A-Center*). The courts of appeals all agree that *Rent-A-Center* provides the relevant law and standards for deciding a challenge to the delegation clause, and that *Rent-A-Center* requires that when a delegation clause clearly and unmistakably delegates arbitrability to an arbitrator, a court must enforce the delegation clause unless it is specifically challenged and the court finds it unenforceable.

The courts of appeals also are in agreement that when a party specifically challenges a delegation clause, the *basis* for that challenge need not be distinct from the party's challenge to the arbitration agreement as a whole: The delegation clause may be invalid for reasons that are the same as or similar to the reasons the agreement as a whole is unenforceable. *See MacDonald*, 883 F.3d at 226; *see also Minnieland*, 867 F.3d at 455–56 (holding delegation clause unenforceable for reasons also applicable to arbitration agreement as a whole); *cf. New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) (holding that FAA did not require enforcement of delegation clause for the same reason it did not require enforcement of arbitration agreement as a whole).

Sequoia's and TCV's claim that there is a circuit split rests on a misunderstanding of the obligation of the circuit court when it rules. A court of appeals need not even issue an opinion. "There is no requirement in law that a federal appellate court's decision be accompanied by a written opinion." *Forman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983); *see also* Fed. R. App. P. 36. In the Second Circuit, many decisions

flow from summary orders. Second Circuit Local Rule of Procedure 32.1.1. When appellate courts consider or decide issues about a delegation clause, they do not have the burden of providing an extensive explanation of their reasoning or, in fact, any explanation. *Taylor v. McKeithen*, 407 U.S. 191, 194 n4 (1972)("We, of course, agree that courts of appeals should have wide latitude in the decisions of whether or how to write opinions.").

Courts of appeals provide differing levels of explanation every day when they confront all types of legal issues. The same is true with opinions on delegation clauses. For example, in *Hayes*, the Fourth Circuit said only: "We find, however, that Hayes and his co-plaintiffs have challenged the validity of that delegation with sufficient force and specificity to occasion our review." 811 F.3d at 671, n. 1. Later Fourth Circuit panels have had no issue with *Hayes*'s relegation of its explanation to a terse footnote, even though the subsequent panels provided more extensive explanations in their opinions. *Minnieland*, 867 F.3d at 456 (*citing Hayes* with approval). The differing levels of explanation provided by the courts of appeals do not signal any sort of disagreement on the law.

In this case, the court of appeals did more than the law required; it provided a detailed explanation of its reasoning when it affirmed the district court. This Court should not be concerned that two Silicon Valley hedge funds are disappointed in the Second Circuit's explanation. They will never be satisfied with any explanation of why what they thought was a foolproof legal strategy to avoid responsibility for their illegal loan sharking scheme suddenly collapsed. All that law requires is consideration and decision, not explanation. There is no conflict among the circuits.

III. THE PETITION'S CHALLENGE TO THE ADEQUACY OF THE SECOND CIRCUIT'S EXPLANATION OF ITS HOLDING THAT THE DELEGATION CLAUSE IS UNENFORCEABLE DOES NOT INVOLVE AN IMPORTANT ISSUE.

This Court's rules state that: "A petition for certiorari will be granted only for compelling reasons." S. Ct. R. 10. Indeed, this Court will only consider conflicts "with the decision of another United States court of appeals on the ***same important matter***." S. Ct. R. 10(a) (emphasis added).

The issue here does not rise to the level of an important matter. The Court has better things to do than weigh in on the level of explanation that a court of appeals must give in dismissing an attempt by a non-party to enforce an arbitration agreement with a delegation clause as obviously infected by fraud and unconscionability as this one.

IV. THIS CASE IS A POOR VEHICLE FOR CONSIDERING THE ISSUE PETITIONERS SEEK TO PRESENT.

A. There Are Several Alternative Bases for Resolving the Arbitration Issues.

Notably absent from the petition is any reference to the fact that Sequoia and TCV did not sign the arbitration agreement, while the Defendants that are parties to the agreement have abandoned any efforts to overturn the Second Circuit's ruling. Sequoia and TCV not only failed to apprise the Court of this fact, but also omit to mention that Plaintiffs argued below that Sequoia and TCV could not take advantage of the Arbitration Agreements because they had no agreement with Plaintiffs. Resp. CA Br. at 96-103.

Plaintiffs also argued that Sequoia and TCV did not meet the legal test for third parties to force compliance with an arbitration agreement. Resp. CA Br. at 96-103. Sequoia's and TCV's participation in a nationwide RICO loan sharking scheme undermines any claim that they have to equitably estop the Plaintiffs. The absence of any equitable basis for enforcement of the agreement by these parties may make the Court's consideration of the issue here irrelevant. Thus, any resolution of the question presented will not resolve or seriously advance the case.

The district court alternatively held that the plain language of the arbitration agreement excluded the arbitrator from ruling on the arbitrability of class wide disputes, and the court of appeals noted that this limitation on the arbitrator's authority to resolve questions of arbitrability called into question the scope of any claimed delegation. Pet. App. 62a-63a & 21a. Rather than acknowledging this issue, Petitioners resort to claiming: "Everyone agrees that the agreements to arbitrate at issue here contain delegation provisions which 'clearly and unmistakably' provide that an arbitration, rather than a court, is to resolve the gateway issue of whether each agreement to arbitrate is enforceable." To be clear, Plaintiffs do not agree. Plaintiffs disputed this at the district court level and the court of appeals. *See* Dist. Ct. Dkt. 85 at 57 & CA Resp. Br. at 79. Other portions of the arbitration agreement deal with the power of the arbitrator to decide disputes. In particular, the phrase ". . . the parties agree that the arbitrator has no authority to conduct class-wide proceedings . . ." means the arbitrator has no power to decide class wide disputes. *See* CA 2 J. App. 265. The district court agreed with Plaintiffs' reading of the text of the arbitration agreement and the court of appeals, at a

minimum, left the issue open. Pet. App. 62a-63a & 21a.

Several other unresolved issues related to the invalidity of the delegation clause remain at the court of appeals and district court. *See* Resp. CA Br. at 79-96, Dist. Ct. Dkt 85 at 4, 54-63. In its opinion, the district court noted but did not rule on some of the arguments that Plaintiffs had made against the delegation clause. Pet. App. 62a. Prior to ordering arbitration, the district court would have to revisit these fact-based arguments and rule on them.

B. The Case is in a Procedurally Awkward Posture.

The district court has granted Plaintiffs leave to amend. Pet. App. 100a-101a. Sequoia and TCV did not appeal the district court's granting of leave to amend. The proceedings in this Court could be affected by the filing of a new complaint.

The facts discovered in the Think Finance bankruptcy provide more bases to invalidate the delegation clause. For example, as Ms. Raining Bird explained, Think Finance wrote the Chippewa Cree law that any arbitrator would have to apply in ruling on any dispute. Think Finance also insisted on the application of tribal law even after litigation it directed and sponsored showed that state law applied. Think Finance took these actions as Mr. Rees presented them to the Board of Directors, which included Sequoia and TCV. There are many more facts detailing the corruption that exists that remain protected by protective orders.

Neither the district court nor the court of appeals had an opportunity to review these facts as they were discovered after Plaintiffs filed the Amended Com-

plaint and briefed the issues to both courts. These facts (and others facts still obscured from public view by protective orders) would certainly inform the decision about the fraudulent nature of the delegation clause.

V. PETITIONERS' POSITION IN THE COURT BELOW IS INCONSISTENT WITH THEIR ARGUMENT IN THIS COURT.

It is possible that Sequoia and TCV will argue in reply that the district court and the court of appeal erred by not examining the facts more fully. Sequoia and TCV cannot argue this position because they took the opposite position below. In response to Plaintiffs' request for discovery resolving the arbitration issues, the Defendants said: "Plaintiffs request both pre-arbitration discovery and a jury trial on the issue of arbitrability. Plaintiffs fail to identify, however, any particular discovery they need to demonstrate that the arbitration agreements are unconscionable or any fact issues as to the making of the arbitration agreements." Dist. Ct. Dkt. 95 at 14 n 18 in *Gingras v. Rosette*, No. 5:15-cv-101 (December 9, 2015). When Plaintiffs presented both Additional Allegations and the evidence that supported those allegations (CA2 J. App. 277-313), Defendants urged the district court not to consider this evidence because the "[c]ourts, however, do not consider allegations raised for the first time in opposition." Dist. Ct. Dkt. 95 at 12 n.13. In response to evidence submitted about corruption in Chippewa Cree tribal judiciary, Appellants complained that "there are no allegations in the [First Amended Complaint] showing any such dispute." Dist. Ct. Dkt. 95 at 11. Sequoia and TCV joined the briefs of these other parties in their own reply briefs in the district

court. Dist. Ct. Dkt. 97 at 1 n.1; Dist. Ct. Dkt. 99 at 1 n.2.

Moreover, the issue of whether there should be a trial on the facts related to the arbitration agreements and delegation clauses is already back before the district court. An affiliate party has raised the issue of whether the validity of the arbitration agreement must be reexamined on a broader factual record. Haynes Investments, LLC Motion to Compel Arbitration, Dkt No. 57 at 11 in *Gingras v. Victory Park, LLC*, No. 5:17-cv-233 (D.Vt.) (October 25, 2019) ("Plaintiffs, as the party resisting arbitration, must produce admissible evidence sufficient to **prove** their defense(s) to arbitration.") (emphasis in original).

Until recently, Ms. Given and Ms. Gingras have been the only ones that have insisted on an examination of the facts. Since the Think Finance bankruptcy, the facts have only grown stronger that the entire enterprise is fraudulent. Sequoia and TCV have never contested the facts that Ms. Given and Ms. Gingras raise. The Court should deny the petition for certiorari and allow the case to proceed to trial.

Respectfully submitted,

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November 26, 2019

APPENDIX

APPENDIX A

[1] UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

Case No. 17-33964
(HDH) Volume 3

IN RE:

THINK FINANCE, LLC, ET AL

VIDEOTAPED EXAMINATION UNDER OATH OF
BILLI ANNE RAINING BIRD

BE IT REMEMBERED, the Videotaped Examination Under Oath of BILLI ANNE RAINING BIRD was taken by Mr. Steven Ellis, Attorney at Law, for the Debtor, at the Baldwin Court Reporting Offices, 306 3rd Avenue, Suite 202, Havre, Montana, on Friday, October 5, 2018, beginning at the hour of 10:26 AM. Reported by Stacy M. Baldwin, Registered Professional Reporter and Notary Public.

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BILLI ANNE RAINING BIRD

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* * *

[69] BY MR. GUZZO:

Q. Ms. Raining Bird, do you recognize this document?

A. Yes.

Q. And what is your understanding of what this document is?

A. This basically outlines like the basic agreement between the Tribe and all the other parties involved. This is like our initial proposal from Think Finance.

Q. Okay. And who created this document?

A. I believe they did, Think Finance.

Q. Okay. So it's your understanding that Think Finance actually typed the words on the page?

A. I'm pretty sure they did, yes.

MR. ELLIS: Objection, lack of foundation.

BY MR. GUZZO:

Q. Okay. Let me ask it this way, Ms. Raining Bird, you didn't type the words that appear on this term sheet, did you?

A. No.

Q. And is it your understanding that the words that were typed on this page were typed by [70] Think Finance?

A. Yes.

MR. ELLIS: Objection, foundation.

BY MR. GUZZO:

Q. Okay. And to your knowledge, no one at Plain Green or its attorney typed the words that appear on this term sheet; is that right?

A. No.

Q. Before the words actually appeared on the pages, how much of this had been negotiated and agreed to between Think Finance and the Tribe?

A. How much had been negotiated?

Q. Correct.

A. Actually, from the beginning, I don't think any of this was negotiable.

Q. Okay. So, would it be fair to say, that this was presented to the Tribe as a take-it-or-leave-it type deal?

A. Yes.

Q. And I want to draw your attention to the second paragraph on the first page. Do you see where it says that the Tribe will adopt a finance code that's acceptable to all parties?

A. Yes.

Q. Do you know if the tribe adopted a [71] financial code that was acceptable to Think Finance?

A. Yes.

Q. And before the code was adopted, would it would be fair to say, that the code was shared with and approved by Think Finance?

A. Yes.

Q. And do you know if Think Finance actually back drafted the Chippewa Cree transaction code?

A. Yes, they did.

Q. Do you know if the Tribe made any revisions to Think Finance's draft of the code?

A. If they did, they were very minimal.

Q. And why was that?

A. I meant, like you said, you know, this is what we need in place and I guess if we wanted the business then we adopt the code that they – that was placed in front of us – or them, the Tribe.

Q. Okay. And so were you concerned if that you didn't adopt Think Finance's code they would take the business to another tribe?

A. Yes.

Q. Okay. And I want to draw your attention now to the third paragraph, where it identifies the initial product that will be offered by Plain [72] Green, do you see that, it's on third paragraph?

A. Yes.

Q. Okay. How did the Tribe determine that the initial product would be an installment loan of $2,500?

A. How did the Tribe determine?

Q. Yeah, was that something that was –

A. No.

Q. – suggested by Think Finance?

A. Yes, the Tribe didn't determine the terms.

Q. Okay. And so do you know if this was the maximum loan amount used by Think Finance for its First Bank of Delaware product?

A. I believe it was, yes.

Q. Okay. And have you done any research about the minimum or maximum loan amounts as of March 2011?

A. Had I done any research?

Q. Yes.

A. No, I had not, and I did not, so, no.

Q. So, if I ask you what factors lead to the selection of the $2,500 loan amount, would it be fair to say, that essentially that was Think Finance's decision?

* * *

[137] right?

A. Yes.

Q. And then, Mr. Rosette asks Mr. Smith how to proceed; is that right?

A. Yes.

Q. And then, do you see where it says, where Mr. Smith says: When you receive complaints and correspondence like this, will you email them to legal@PlainGreen.com? Do you see that?

A. Yes.

Q. And then do you see where it says that Mr. Smith then says: That will initiate the process to get you into

our system, logged and assigned to the correct person. Do you see that?

A. Yes.

Q. And so, would it be fair to say, that Think Finance controlled or had access to the legal@plaingreenloans.com email address?

A. Yes.

Q. And during your time at Plain Green, to the best of your knowledge, Plain Green didn't have access to that account; is that right?

A. No.

Q. No, they did have access or –

A. No.

[138] Q. – or they did not have access?

A. No, we did not have access.

Q. Okay. And so, when a consumer emailed that address, it actually went to Think Finance not Plain Green; is that right?

A. Yes.

Q. And then Think Finance handled those complaints; is that right?

A. Yes.

Q. And was Plain Green provided with a copy of those complaints?

A. Yes.

Q. And so, how would Think Finance provide a copy of the complaint to Plain Green?

A. Well, through email, through Neal Rosette, Jr., and then they got the FTP site set up to where they could share the information online.

Q. But Think Finance was tasked with the responsibility of handling consumer complaints during your tenure at Plain Green, correct?

A. Not – I meant, yes, they drafted the letter regarding the complaint, depending on like the BBB letters, most of those became like a, you know, like a form letter that was sent out to [139] every consumer that we received a complaint from. But it just depends on where the letter came from. But they drafted the original letters and then we were responsible for, you know, sending out the letter from our office. They would send us, you know, all the letters and all the names of these people who need to receive letters.

Q. Okay. And so, this is my final line of questioning. Earlier you were asked about your understanding of the term rent a tribe, do you remember that?

A. Yes.

Q. And so, its your position that the relationship between Think Finance and Plain Green was a rent a tribe business model; is that right?

A. Yes.

MR. ELLIS: Object as to form.

BY MR. GUZZO:

Q. And I just want to quickly summarize, if we can real quick here. It would be your position that Plain Green had no meaningful input on the underwriting of the loans; is that correct?

A. No, we did not.

MR. ELLIS: Object as to form.

[140] BY MR. GUZZO:

Q. No, you did not have any meaningful input regarding underwriting; is that right?

A. No, we did not.

Q. And would that be the same answer for the origination of the loans?

A. Yes, same answer.

Q. And would that be the same answer for the servicing of the loans?

A. Yes.

MR. ELLIS: Object as to form.

BY MR. GUZZO:

Q. And would that be the same answer as to the marketing of the loans?

A. Yes.

MR. ELLIS: Same objection.

BY MR. GUZZO:

Q. And would that be the same answer for the collection of the loans?

A. Yes.

Q. And so, because Plain Green had no role in the underwriting, origination, servicing or marketing, or collection of the loans, that is why you would characterize it has as a rent a tribe scheme?

A. Yes.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

———

No. 14-cv-07139-JCJ

———

COMMONWEALTH OF PA,
by Attorney General JOSH SHAPIRO,

Plaintiff,

v.

THINK FINANCE, INC., *et al*.

Defendants.

———

CIVIL ACTION

———

CONFIDENTIAL

Filed Under Seal Pursuant to Confidentiality and Protective Order

———

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF THE PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANTS KENNETH REES AND NATIONAL CREDIT ADJUSTERS, LLC[1]

[1] The discovery record on which this Statement of Undisputed Facts is based consists primarily of documents produced in discovery by the various parties and deposition testimony. Most of the document production was electronically stored information.

* * *

201. By the end of 2012, in its internal communications among executive and with the three tribal lending entities, TF discussed the following 'concerns' regarding the tribal model:

- "Concern that although tribes have sovereign immunity, service providers (eg us) may have potential liability
- States may claim that the loans are illegal (even if tribal lenders have sovereign protections)
- States may claim that the tribe is not the 'true lender'

Documents produced by the Think Finance Defendants have the Bates-prefix "TF-PA." Those produced by the Victory Park Capital Defendants have the prefix "GPLP." Those produced by the Pennsylvania Attorney General have the prefix "PAOAG." Those produced by Kenneth Rees have the prefix "REES." Those produced by National Credit Adjusters have the prefix "NCA_PA." Documents have also been produced by various third-parties with prefixes "Haynes," "INTERCEPT," "Intercept_PA-Think," and "Wildstein." For ease of reference, Plaintiff has compiled an Appendix accompanying this filing containing all of the cited transcripts and documents. Citations in this Statement will be made to the page and line numbers of deposition transcripts; to the exhibit number of marked deposition exhibits; and to the Bates number of the first page of any additional discovery document, followed by the citation to the Appendix ("App."). Pin cites will be made to internal pagination when possible, to Bates numbers when not, and always to the Appendix. The Declaration of Iry Ackelsberg, filed with the Motion for Summary Judgment, contains further details as to how the Appendix was compiled.

* * *

• Recent cases have suggested potential liability." [308]

202. Included in the company's suggested responses to these concerns—which it characterized as "aiding and abetting" and "true lender" concerns[309]–were the following suggested changes to the program in order to "Improve optics": "No automatic end of day funding—require daily tribal" and "Eliminate guarantees to vendors from TF."[310]

203. As of 2013, TF's tribal lending model accounted for 89% of TF's overall revenue.[311]

204. In a PowerPoint presentation Defendant Rees prepared for an off-site executive meeting on March 28, 2013 on the topic "Direction and Focus",[312] Rees observed that the company's heavy reliance on its tribal products meant that "We Are Not Adhering to Our Diversification Strategy,"[313] and that "Industry Opponents" were putting pressure on ACH providers and targeting "tribal service providers."[314]

205. In this presentation, Rees described various steps the company should take in order to "Reduce

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[308] Exhibit P-149, TF-PA-369516, Strengthening the Tribal Model and Program Update Slides, December 20, 2012, at 3 (App. 1356).

[309] *Id.*

[310] *Id.* at 5 (App. 1358).

[311] Exhibit P-179, TF-PA-521098, Tribal Vision and Road Map, July 2013, at 5 (App. 1384).

[312] Exhibit P-399, TF-PA-759909 (App. 1617) (discussed in Cutrona Dep. 66:13-68:10 (App. 0532)).

[313] *Id.* at 3 (App. 1619).

[314] *Id.* at 4 (App. 1620).

Tribal Risks (Restructure)," including "increase tribal management and oversight," "reduce contractual roles for Think Finance" "improve deal optics," and "Exit high-risk states."[315] Regarding this last step, he noted that it was already "Done,"[316] referring to the No-State initiative described above.

206. In this presentation, Rees also directed the following additional strategic "Refocus": "Accelerate growth of non-tribal business." [317]

207. One component of the tribal "restructure" Rees had in mind was to redesign the tribal share from being a percentage of GPLS revenue to a 51% share of "profit."[318] But in a communication to Richard Levy, the owner of VPC, concerning that proposed change, Rees assured Levy that the change would not change the substance of the parties' relative economic stake, but instead "should greatly change the 'optics' of the deal."[319]

208. In a May, 2013 communication with the lawyer representing Plain Green and MobiLoans, GC Cutrona requested a change in the contractual language defining the relationship between TF and the tribal entity, so that unreimbursed expenses would be listed rather than reimbursed expenses, explaining

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[315] *Id.* at 6 (App. 1622).

[316] *Id.* at 7 (App. 1623).

[317] *Id.* at 5 (App. 1621).

[318] TF-PA-055009, Email Jason Harvison to Ken Rees, March 7, 2013 (App. 2141) ("To reiterate what you want, you want the tribe to get 51% program share and adjust the license fees accordingly.").

[319] GPLP00058913, Email from Ken Rees to Richard Levy, March 29, 2013 (App. 2989-2990).

her reasoning as follows: "I understand this is a bit backwards but we are concerned (as are the other attorneys) that the perception that expenses are reimbursed will not be helpful in a true lender challenge.[320]

209. An April 2013 TF presentation entitled "Tribal Restructure," included a question and answer section: "Why do we need to restructure the model" and "[W]hat is the risk to the business?" The answer to these questions was: "States may argue that the tribe is not the 'true lender' due to TF's involvement."[321]

210. The tribal "restructure" initiative was also viewed by the TF executives as essential for their plan to take the company public with an IP0.[322]

211. In a memo to the TF board on June 18, 2013, Rees reported some progress on the strategic initiative intended to compliment the tribal "restructure," involving accelerating the growth in the company's non-tribal products, mentioning the launch of the Rise product that would take the place of the direct product, PayDay One.[323] In August, Rees further reported to the board that "we are working on making sure that we

[320] TF-PA-398605, Email from Sarah Cutrona, May 29, 2013 (App. 2297-2298).

[321] Exhibit P-185, TF-PA-611730, Tribal Restructure Slides and Transmittal Email, April 2013, at 19 (App. 1414).

[322] TF-PA-579753, Q1 2013 Pre-IPO Investors Memo/Opinion (App. 3069).

[323] TF-PA-672268, Memo from Ken Rees to Think Finance Board Members, June 18, 2013, at 1 (App. 2699).

can quickly and seamlessly migrate customers from the tribal sites to applicable Rise states if needed."[324]

212. On August 5, 2013, New York State sent cease-and-desist letters to online lenders, including Great Plain Lending, threatening "appropriate action to protect New York consumers."[325] In response, the Otoe-Missouria tribe filed suit against New York, seeking a preliminary injunction and "alleging that the State's effort to regulate Tribal lending is an affront to Plaintiffs' inherent sovereignty and violates the Indian Commerce Clause of the United States Constitution."[326]

213. TF, through its Chief Integrity Officer, Martin Wong, coordinated that litigation that was filed in the name of the Otoe-Missouria tribe and provided financing for it, through contributions made to the Native American Financial Services Association.[327]

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[324] TF-PA-514535, Memo from Ken Rees to Think Finance Board Members, August 14, 2013, at 4 (App. 2435).

[325] *Otoe-Missouria Tribe of Indians v. New York State Dept of Fin. Servs.,* 974 F. Supp. 2d 353, 356 (S.D.N.Y. 2013), *aff'd,* 769 F.3d 105 (2d Cir. 2014).

[326] *Id.* at 357.

[327] Rees Dep. 242:19-244:20 (App. 0081). The plan had been to file the action on behalf of each of TF's tribal partners, but by the time the attorneys were ready to file, only the Otoe tribe had agreed. *See* Exhibit P-198, TF-PA-607086, Email from Martin Wong to David Bernick, August 21, 2013 (App. 1423). Bernick's legal bill appears to have been split between TF and the MacFarlane Group, *see* Exhibit P-200, TF-PA-367337, Legal Bill and Transmittal Email (App. 1425), that being one of the organizations associated with Mark Curry, the online lender that was the intermediary between TF and the Otoe-Missouria Tribe. *See supra* ¶¶ 114-115.

214. On August 20, 2013, VPC notified Rees and Lutes that it was going to put a halt to all participation purchases from the tribal entities, but was persuaded by them to allow some loans to be made to some former customers.[328]

215. In his September 18, 2013 memo to the TF board, Rees noted, "We are waiting on tenterhooks to learn the outcome of the challenge against New York State," expressed the view that "many judges are more supportive of states' rights despite hundreds of years of case law regarding tribal sovereignty," and acknowledged newly hired Martin Wong for having "jumped into the fray by leading the litigation effort."[329]

216. In this same memo, Rees informed the Board that VPC had put a temporary halt to new tribal loans due to the "regulatory issues we've been facing."[330] He also expressed "frustration . . . at our inability to complete the tribal restructuring [due to] [t]he tribes . . . moving extremely slowly."[331] Summing up his view of the regulatory situation, he observed, "It is a very dangerous time for financial services industry as a whole when the primary regulatory agencies (CFPB and FDIC) are being run by activists . . . in pursuit of their anti-credit agenda."[332]

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[328] TF-PA-680466, Emails between Thomas Welch and Chris Lutes, August 20-21, 2013 (App. 2749-2751) (cc'ing Ken Rees and Richard Levy).

[329] TF-PA-513939, Memo from Ken Rees to Think Finance Board Members, September 18, 2013, at 1, 4 (App. 2428, 2431)

[330] *Id.* at 1-2 (App. 2428-2429)

[331] *Id.* at 2 (App. 2429).

[332] *Id.* at 3 (App. 2430).

217. On September 30, 2013, the district court in New York denied the request of the Otoe-Missouria for a preliminary injunction.[333]

218. On October 16, 2013, Rees reported this development to the board, and noted that "due to the unexpectedly negative tone of the judge's decision in the New York case GPLS has pulled back again until the appeal is resolved."[334] He expressed optimism regarding an appeal, but warned "that it doesn't really matter if we have a regulatory cloud over the company while it winds its way through the courts," and noted, "We will also need to discuss options for moving forward given the ongoing regulatory challenges related to the tribal products (and the upside from the non-tribal products)."[335] With regard to the non-tribal installment loan (Rise) that TF had recently launched, Rees reported that "the first direct mail campaign for Rise has hit and is delivering great volumes."[336]

219. In his December 11, 2013, memo to the TF board, Rees reported increasing growth of the Rise portfolio in the 14 states covered at that time, and introduced the possibility of a new direction for the company:

> As mentioned during the previous Board meeting we are evaluating a rather draconian organizational change that we are referring

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[333] *Otoe-Missouria Tribe of Indians v. New York State Dept of Fin. Servs.,* 974 F. Supp. 2d 353 (S.D.N.Y. 2013), *aff'd,* 769 F.3d 105 (2d Cir. 2014).

[334] TF-PA-711121, Memo from Ken Rees to Think Finance Board Members, October 16, 2013, at 2 (App. 2757).

[335] *Id.* at 3 (App. 2758).

[336] *Id.*

> to as "Project Exclaim." This would spin off several products (Rise, Sunny, and Elastic) to separate the tribal and non-tribal businesses. This will cause a fair amount of staff upheaval but is likely the right thing to do from the standpoint of potential liquidity events. I will propose the details (and discuss the implications) at the Board meeting on Friday.[337]

220. By January 2014, the "Project Exclaim" initiative was moving forward, as Rees reported to the board.[338] On the tribal side of the business, he had notified the three tribes of "our plans to split the company," and noted with approval "how Chris and his treasury team are managing the bank" and the "terrific job" that "Martin and his tribal litigation team did . . . with the appellate hearing."[339] At the same time, he reported that "the directors and leaders in the company are getting charged up about the work ahead and excited to be able to create a business without the regulatory overhang of the tribal business."[340]

221. On March 13, 2014, CFO Lutes explained the following two reasons for the impending spin-off:

> 1. We have always focused on having multiple products for regulatory diversification. Our tribal partners are in litigation with the state of NY and this could last for years. They have chosen

[337] TF-PA-724033, Memo from Ken Rees to Think Finance Board Members, December 11, 2013, at 3 (App. 2762).

[338] TF-PA-710924, Memo from Ken Rees to Think Finance Board Members, January 16, 2014 (App. 2752).

[339] *Id.* at 3 (App. 2754).

[340] *Id.* at 4 (App. 2755).

to not aggressively grow their business while this gets resolved. Meanwhile our non-tribal products are really starting to grow. Rise now our largest product and we expect to generate almost $300mm in revs this year off of non-tribal. The tribal litigation would hold up our ability to go public. Spinoff enables the new entity to go public and allows Think (tribal business) to turn in to a dividend play.

2. ACH and corporate banking issues again weighing down non-tribal business. Spin off should allow easier ACH and corporate banking access.[341]

222. In order to be able to accomplish the spinoff transaction envisioned by TF's "Project Exclaim" initiative, Rees personally engaged with VPC to support the transition away from the tribal model and to raise cash for the Rise product. As Tom Welch, the VPC principal in charge of the account stated, "Rise doesn't happen w/o GPLS' cooperation."[342]

223. Rees and Lutes pushed successfully for that cooperation, for example, suggesting to VPC that it move its investment from GPLS to RISE, albeit at a lower rate;[343] securing VPC permission to redeem $50m of GPLS investments without a pre-payment

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[341] Exhibit P-267, TF-PA-210850, Email from Badr Qureshi to Chris Lutes, March 13, 2014 (App. 1471).

[342] Exhibit P-328, GPLP00016131, Email from Thomas Welch to Richard Levy, January 16, 2014 (App. 1578).

[343] TF-PA-244634, Email from Chris Lutes, October 2, 2013 (App. 1471).

penalty;[344] securing permission to "gross sweep" certain GPLS accounts enabling TF to take its "administrative agent fee" before it was fully earned in order to create more cash for RISE originations;[345] and, notwithstanding contractual covenants to GPLS that forbid TF from incurring debt, securing permission to incur debt for Rise from a different VPC investment vehicle.[346]

224. Effective May 1, 2014, TF split into two companies, with Elevate Credit, Inc. taking Rise and the other "direct" products and TF keeping only the tribal products.[347]

225. In the split, Elevate got a copy of the "legacy" technology platform on which the Plain Green, Great Plains Lending and Rise products were supported, with no valuation being assigned to that transfer.[348]

226. Among the contracts transferred to the new company was the employment contract between Defendant Rees and TC Loan Services, Inc.[349]

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[344] GPLP00015862, Email from Richard Levy to Ken Rees, January 14, 2014 (App. 2978).

[345] Welch Dep. 100:24-103:3 (App. 0608-0609).

[346] Welch Dep. 238:24-240:4 (App. 0616).

[347] TF-PA-564956, Separation and Distribution Agreement, May 1, 2014 (App. 2436).

[348] Lutes Dep. 274:9-277:5 (App. 0236-0237).

[349] TF-PA-564956, Separation and Distribution Agreement, May 1, 2014, at Schedule 1.21(d) (App. 2493).

227. While in his new position as CEO of Elevate Credit, Defendant Rees remained as the Chairman of TF's board into 2015.[350]

228. On May 2, 2014, when he was CEO of Elevate but still the Chairman of TF, Rees personally requested the owner of VPC to allow a small increase in the volume of new tribal loans.[351]

229. In his first memo to the newly created Elevate board, Rees observed that "we are learning . . . that forecasting for Rise growth is very challenging given the huge variance in loan size, APR, CPL and terms for each state."[352]

230. On October 1, 2014, a panel of the Second Circuit unanimously affirmed the district court's denial of the tribal request for a preliminary injunction `against the New York enforcement action. Otoe-Missouria Tribe of Indians v. New York State Dept of Fin. Servs, 769 F.3d 105 (2d Cir. 2014).

231. On May 15, 2015, after Rees had stepped down as Chairman of the TF board, he wrote to the new incoming chair with the following "offline" comments about

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[350] Rees Dep. 64:23-65:6 (App. 0036-0037).

[351] TF-PA-297788, Email from Richard Levy to Ken Rees, May 2, 2014 (App. 2226).

[352] TF-PA-643587, Memo from Ken Rees to Elevate Board Members, May 14, 2014, at 1 (App. 2614).

APPENDIX C

Message

From: Martin Wong [/O=PAYDAYONE/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MARTIN WONGD09]

Sent: 1/20/2014 3:58:39 PM

To: Fernanda Arana [farana@thinkfinance.com]

Subject: FW: Draft NAFSA Model Code

Attachments: DRAFT- NAFSA MODEL TRIBAL LENDING CODE - CLEAN DRAFT 1 17 14 DO edits.docx

Martin Wong
Chief Integrity Officer
ThinkFinance.com
4150 International Plaza, Suite 400
Ft Worth TX 76109

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From: David Osterfeld
[mailto:DOsterfeld@rosettelaw.com]
Sent: Friday, January 17, 2014 8:16 PM
To: Catherine Brown; Martin Wong
Cc: Michelle Nguyen; Jo Ann Barefoot
Subject Draft NAFSA Model Code

Good Evening,

I have attached a copy of the draft NAFSA Model Code. I am still ironing out some spacing/curb appeal issues, but the content is all there. I welcome your thoughts and suggestions. Martin has been an invaluable source of assistance on this journey.

Very Respectfully,

David M. Osterfeld
Rosette, LLP
Attorneys at Law
565 W. Chandler Blvd., Suite 212
Chandler, AZ 85225
Mobile: (480) 433-5811
Office: (480) 889-8990
Fax: (480) 889-8997
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From: Catherine Brown [mailto:cbrown@treliant.com]
Sent: Thursday, January 16, 2014 1:58 PM
To: Martin Wong
Cc: David Osterfeld; Michelle Nguyen; Jo Ann Barefoot

Subject: RE: Checking in

Yes, that's my plan.

Catherine M. Brown
Managing Director
Treliant Risk Advisors
2300 N Street NW, Suite 2100
Washington, DC 20037
Direct: 202.249.7940
Mobile: 216.402.7597
Facsimile: 202.223.3071
Email: cbrown@treliant.com
Website: www.treliant.com

From: Martin Wong
[mailto:mwong@thinkfinance.com]
Sent: Thursday, January 16, 2014 3:56 PM
To: Catherine Brown
Cc: David Osterfeld; Michelle Nguyen; Jo Ann Barefoot

Subject: Re: Checking in

Catherine - that is fine. Will you have both the NAFSA and Tunica proposals?

Sent from my iPhone

On Jan 16, 2014, at 2:52 PM, "Catherine Brown" <cbrown@treliant.com> wrote:

Perfect, thanks so much David. I look forward to the opportunity to work with you. Martin, I will aim to have the proposal to you not later than Monday if that's agreeable.

Best,

Catherine

Catherine M. Brown
Managing Director
Treliant Risk Advisors
2300 N Street NW, Suite 2100
Washington, DC 20037
Direct: 202.249.7940
Mobile: 216.402.7597
Facsimile: 202.223.3071
Email: cbrown@treliant.com
Website: www.treliant.com

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From: David Osterfeld
[mailto:DOsterfeld@rosettelaw.com]
Sent: Thursday, January 16, 2014 3:51 PM
To: Catherine Brown; Martin Wong
Cc: Michelle Nguyen; Jo Ann Barefoot

Subject: RE: Checking in

Catherine,

It is my pleasure to meet you. At this moment I am entering edits to the NAFSA Model Code that Martin and I had discussed on Tuesday, January 14, 2014. I was unable to work on the edits yesterday because my Commanding Officer in the JAG Corps had requested my assistance in helping prepare the office for an upcoming inspection from AF Headquarters. I project that I will have the Model Code in good form by close of business on Friday, January 17, 2014. I will make sure to send you a copy of the edited Model Code once it is complete.

Very Respectfully,

David M. Osterfeld
Rosette, LLP
Attorneys at Law
565 W. Chandler Blvd., Suite 212
Chandler, AZ 85225
Mobile: (480) 433-5811
Office: (480) 889-8990
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From: Catherine Brown [mailto:cbrown@treliant.com]
Sent: Thursday, January 16, 2014 1:42 PM
To: Martin Wong
Cc: Michelle Nguyen; Jo Ann Barefoot; David Osterfeld

Subject: RE: Checking in

Thanks so much Martin.

David, I look forward to receiving the draft at your earliest convenience.

Best,

Catherine

Catherine M. Brown
Managing Director
Treliant Risk Advisors
2300 N Street NW, Suite 2100
Washington, DC 20037
Direct: 202.249.7940
Mobile: 216.402.7597
Facsimile: 202.223.3071
Email: cbrown@treliant.com
Website: www.treliant.com

From: Martin Wong [mailto:mwong@thinkfinance.com]

Sent: Thursday, January 16, 2014 3:36 PM

To: Catherine Brown

Cc: Michelle Nguyen; Jo Ann Barefoot; David Osterfeld (DOsterfeld@rosettelaw.com)

Subject: Re: Checking in

Catherine - David Osterfeld of the Rosette firm, a tribal firm representing several tribal lenders, is currently making the edits. David, please send the next version to Catherine who is working on the accreditation proposal as we discussed at the NAFSA board meeting. Thanks. Martin

Sent from my iPhone

On Jan 16, 2014, at 2:29 PM, "Catherine Brown" <cbrown@treliant.com> wrote:

Hi there,

Any progress on the model lending code? I'm working on the proposal we discussed, and reviewing the draft document would be extremely helpful.

Thanks very much.

Catherine
Catherine M. Brown
Managing Director
Treliant Risk Advisors
2300 N Street NW, Suite 2100
Washington, DC 20037
Direct: 202.249.7940
Mobile: 216.402.7597
Facsimile: 202.223.3071
Email: cbrown@treliant.com
Website: www.treliant.com

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APPENDIX D

Message

From:	Martin (wongmj@aol.com)
Sent:	1/19/2014 6:19:41 PM
To:	Martin Wong [mwong@thinkfinance.com]; David Osterfeld [DOsterfeld@rosettelaw.com]
Subject:	edits for your review.
Attachments:	DRAFT_-_NAFSA_MODEL_TRIBAL_LENDING_CODE_-_CLEAN_DRAFT_1_17_14_DO_edits.docx

* * *

(b) A Licensee shall not:

(1) Engage in any Tribal Consumer Financial Services other than those allowed under this Code.

(2) Assess any interest, fee, or charge that is greater than any applicable limitation, if any, prescribed in this Code.

(3) Use or cause to be published or disseminated any advertisement that contains false, misleading or deceptive statements or representations.

(4) Engage in unfair, deceptive, abusive or fraudulent practices or unfair or deceptive advertising in connection with a loan. ALender~~person~~ violates the requirements of this Ccode by engaging in any act that limits or restricts the application of this Ccode.

(c) Unconscionability. When discovered through investigation of a consumer complaint of through examination of a Licensee as permitted herein, the Authority may render void and unenforceable a

Loan that the Authority deems unconscionable or to have been induced by unconscionable conduct. To determine whether the actions of a lender were unconscionable, consideration shall be given to the following, among other factors by the Authority:

(1) The financial benefits of the Loan to the Consumer and the level of risk incurred by the Llender in extending credit; or

(2) The relation between the amount and terms of credit granted and the cost of making the Loan.

~~(3) A lender shall require a consumer to fill out a loan application, or a modified version thereof if a lender-consumer relationship has been consummated by the parties previously, and shall maintain this application on file.~~

~~(A) A lender shall require the consumer to provide a pay stub or other evidence of income at least once each twelve-month period. Such evidence shall not be over forty-five days old when presented. If a lender requires a consumer to present a bank statement to secure a loan, the lender shall allow the consumer to delete from the statement the information regarding to whom the debits listed on the statement were payable.~~

~~(B) If the amount borrowed is not more than twenty five percent of the consumer's monthly gross income and benefits, as evidenced by a paycheck stub or otherwise substantiated, a lender shall not be obligated to investigate the consumer's continued debt position, and the consumer's ability to repay the loan need not be further demonstrated. (Need disvussion)~~

(4) If a lender complies with the requirements of subsections (2) and (3), and if the loan otherwise complies with this code and other applicable law, neither the consumer's inability to pay nor the lender's decision to obtain or not obtain

* * *