16-2019-cv(L)

16-2132-cv(CON), 16-2135-cv(CON), 16-2138-cv(CON), 16-2140-cv(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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.

On Appeal from the United States District Court
for the District of Vermont

BRIEF FOR PLAINTIFFS-APPELLEES JESSICA GINGRAS AND ANGELA C. GIVEN

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JURISDICTIONAL STATEMENT

The District Court has jurisdiction over this case pursuant to 28 U.S.C. §§1331, 1332, and 1367. The assertion of tribal immunity by Defendants-Appellants Joel Rosette, Ted Whitford, and Tim McInerney (the "Tribal Defendants") does not deprive the District Court of jurisdiction. *See Michigan v. Bay Mills*, 134 S.Ct. 2024, 2029 n.2 (2014).

STATEMENT OF THE ISSUES

1. Whether the District Court correctly ruled that the Tribal Defendants may not use tribal immunity to avoid liability for fraudulent conduct that occurred off the reservation and violated both federal and state law.

2. Whether the District Court correctly ruled that the Purported Arbitration Agreement and its Delegation Clause are unconscionable and unenforceable under the Federal Arbitration Act.

3. Whether this Court should remand this case, if necessary, to the District Court so that discovery can be conducted to uncover additional facts about the fraudulent creation of Chippewa Cree law and the intimidation of the Chippewa Cree judiciary and so that a jury trial can be conducted on the issue of fraud in the inducement of the Purported Arbitration Agreement.

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 by Defendants to ensnare unsuspecting victims. A32, ¶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 Plain Green was a better option than a payday loan:

A33, ¶22.

However, the cheerful cartoon characters did not tell the whole story. A33, ¶23. The reality of Defendants' operation is far different than these shiny, innocent-looking characters suggest. *Id.* Plaintiffs allege that 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. *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.*; A73-77 at A74.

Two Silicon Valley venture capital firms, Sequoia Capital Operations, LLC ("Sequoia") and Technology Crossover Ventures ("TCV"), became embroiled in this unlawful enterprise. A59, ¶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 indicating that both of 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. A277-78, ¶¶ 1-4.

B. The Fraudulent Enterprise.

Plaintiffs allege that prior to launching Plain Green in 2011, Rees created ThinkCash, Inc. ("ThinkCash"), which was a payday lender that operated over the internet. A36, ¶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 federally chartered bank based in Delaware called First Bank of Delaware ("FBD"). The participants in this "rent-a-bank" scheme attempted to rely on federal bank preemption to evade state laws that prohibited extortionate interest rates. A36-37, ¶¶39-41. In 2008, federal regulators initiated an enforcement

action to thwart this practice. A36-37. ¶40. This enforcement action culminated in a consent order that required FBD to end its relationship with ThinkCash. A37, ¶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. A37, ¶¶42-44.

After federal regulators intervened, Kenneth Rees rebranded his company as Think Finance, Inc. ("Think Finance") and moved on to a scheme that the money lending industry called "rent-a-tribe." A33,37, ¶¶33,42-44. The "rent-a-tribe" scheme attempts to take advantage of tribal immunity in the same way that ThinkCash attempted to take advantage of federal bank preemption. A37, ¶¶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." A43, ¶78, A77. As part of the negotiations, Rees and Think Finance prepared a term sheet that reflected the essentials of the transaction (the "Term Sheet"). A43, ¶78, A73-77. When they created this Term Sheet and started the Plain Green enterprise, Rees and Think Finance were attempting to evade liability for violating various laws. A36, ¶36; A44, ¶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." A87, ¶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. A43, ¶79 *quoting* A73. 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." A73. 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." A75. The Chippewa Cree Tribal Lending and Regulatory Code that Defendants cite appears to confirm that the Tribe's "finance code" was revised after the Term Sheet was created. A315 (noting dates of revision in 2013, 2014, and 2015).

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. A54, ¶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* A79-81, ¶¶12-19.

The Term Sheet not only dictated the contents of Chippewa Cree law, but it required the Tribe to use Pepper Hamilton LLP ("Pepper Hamilton") as its legal counsel. A46 ¶91 *quoting* A75. Neal Rosette, Plain Green's former CEO, stated that, "[p]rior to Think Finance Inc.'s engagement with Plain Green, LLC, the Tribe had not previously used the legal services of Pepper Hamilton nor had the Tribe had any knowledge that Pepper Hamilton even existed." A88, ¶11. In fact, "Think Finance, Inc. brought Pepper Hamilton to the Tribe even though the Tribe had retained the services of [another attorney] handling all Tribal lending activities." A88, ¶11. "Although Pepper Hamilton nominally represented the Tribe in contracting with Plain Green, LLC, its fees were paid for by Think Finance, Inc. and Pepper Hamilton received a bonus for getting the Tribe to sign on to the agreement with Think Finance." A75; A88, ¶12. The association between Think Finance and Pepper Hamilton was so close that Think Finance did not bother to send its own attorneys to meetings with the Tribe. A89, ¶13. Pepper Hamilton represented the Tribal Defendants in the District Court and continues to represent them in this Court.

C. The Illegal Loan Practices.

Plaintiffs allege that when Rees and Think Finance created the Plain Green enterprise, they not only provided the Tribal Defendants with all of the essential tools for running the illegal payday loan scheme, they dictated how the scheme

would be carried out. A44-45, A53. Specifically, Plaintiffs allege that Rees and Think Finance:

- required that Plain Green charge usurious rates between 60% and 360%, A44, ¶84;
- set the minimum repayment period of two months and the maximum repayment period of two years, A44, ¶83;
- set the maximum amount of the loan at $2,500, A44, ¶83;
- provided the capital used to make the loans, A53, ¶124; A73;
- provided the software to determine if the loans would be profitable, A43-44, ¶80;
- provided "risk management, application processing, underwriting assistance, payment processing, and ongoing customer service support . . ." A44, ¶80;
- required Plain Green to enter into a U.S. banking relationship to process loan transactions using the ACH system, A45, ¶85; and
- required Plain Green to establish a reserve account to "deal with any regulatory issues, lawsuits or other controversies involving the Tribe or its lending activities," A45, ¶86.

D. 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 (this arbitration provision is referred to as the "Purported Arbitration Agreement" or "Agreement"). A51, ¶118. Plaintiffs allege that this Agreement is unenforceable. Doc. 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. A53-54, ¶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. A50, ¶110. The District Court agreed with Plaintiffs that the Purported Arbitration Agreement was unconscionable and unenforceable. SPA25-35.

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. A55, ¶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.

A265 (emphasis added).

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 arbitrator ***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.***

A265 (italics and bold emphasis added; all caps in original).

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 they 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.

A263.

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.

A264.

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." A263. It also states that: "Neither this Agreement nor the Lender is

subject to the laws of any state of the United States." A263. 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." A258.

The Purported Arbitration Agreement also prevents the arbitration organization's rules from interfering 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." A264.

E. Rees and Think Finance Continue 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. A88. 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. A88, ¶¶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.

A88, ¶10; *see also* A279, ¶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. A57, ¶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 wrong doings." SA16; *see also* A279, ¶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. A55-56. 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. A55-56, ¶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. A56, ¶135. Houle signed the Term Sheet on behalf of the Tribe and Plain Green. A76. Neal Rosette, Plain Green's former CEO, and Billi Anne Raining Bird Morsette, Plain Green's former CFO, were involved in a separate fraudulent kickback scheme. A57, ¶138-139. After the Complaint was filed, they both pled guilty to federal felonies related to the kickback scheme. *See* A278, ¶6.

Plaintiffs allege that the corruption and instability extended to the Chippewa Cree Tribal Judiciary. A57. In his dispute with the Business Committee, St. Marks fired the Tribe's Chief Judge and several other trial judges. A57, ¶140. An interview of a former Chippewa Cree tribal judge conducted by the Federal Bureau of Investigation ("FBI") 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. A279. 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." A279, ¶9; A281. 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." A281. However, this judge entered the order removing St.

Marks even though he thought it was improper and unconstitutional because he feared retaliation. *Id.*

PROCEDURAL HISTORY

After considering the facts alleged in the Complaint and the arguments relating to Defendants' motions to dismiss and compel arbitration, the District Court found that the Purported Arbitration Agreement and the Delegation Clause were unconscionable and unenforceable. SPA33-35. It determined that tribal immunity did not bar an action against the Tribal Defendants for injunctive relief. SPA7-13. Finally, the District Court held that Plaintiffs had sufficiently alleged facts to support their claims for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Vermont Consumer Fraud Act, the Electronic Funds Transfer Act ("EFTA"), and unjust enrichment. SPA41-72.

In ruling on the motions to compel arbitration, the District Court declined to apply Chippewa Cree law, which was allegedly purchased by Defendants, and applied Vermont law instead. SPA26-29. The District Court also determined that the Delegation Clause did not empower an arbitrator to decide the validity of the Purported Arbitration Agreement. SPA31. The District Court concluded that it should determine whether the case was arbitrable, finding: "If Plaintiffs are able to prove that the tribal legal system, both with respect to its laws 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' claims . . . ." SPA32. The District Court held that "[b]y incorporating the tribal financial law and making all arbitration reviewable by the tribal court on both the law and the facts, the defendants have effectively insulated themselves from claims they have violated state and federal laws." SPA35.

STANDARD OF REVIEW

The question of whether parties have agreed to arbitrate is reviewed *de novo* to the extent that a district court's conclusion was based on a legal determination, but it is reviewed under a "clearly erroneous" standard to the extent that a district court's conclusion was based on findings of fact. *Schnabel v. Trilegant Corp.*, 697 F.3d 110, 118-119 (2d Cir. 2012). On appeal from a denial of a motion to compel arbitration, this Court must accept all factual allegations in a plaintiff's complaint as true. *Id.* at 113. "Allegations related to the question of whether the parties formed a valid arbitration agreement – a question the district court answered in the negative – are evaluated to determine whether they raise a genuine issue of material fact that must be resolved by a fact-finder at trial." *Id.* "If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary." *Id.* (citation omitted).

In this case, the District Court determined that Plaintiffs alleged "that the tribal law and the tribal court system have been corrupted by large investors from outside the reservation. The claim is plausible for the 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." SPA31-32. Defendants contested a number of the facts alleged in the Complaint by submitting declarations. For example, Defendants contested the issue of personal jurisdiction by filing declarations from each of the Tribal Defendants. However, Defendants elected not to contest the facts concerning the fraud associated with the Purported Arbitration Agreement. As a result, this Court must accept those facts as true. *Schnabel*, 697 F.3d at 113.

Finally, the District Court's decision to order discovery is reviewed for an abuse of discretion. *First City, N.A. v. Rafidain Bank*, 150 F.3d 172, 175 (2d Cir. 1998).

SUMMARY OF ARGUMENT

This case arises out of a massive fraud that was perpetrated by Defendants to engage in a predatory consumer lending scheme that violates both state and federal law. When Defendants created this illegal enterprise, they attempted to establish a labyrinthine system of protection that would cloak their scheme in the mantle of

tribal immunity and shield their illegal conduct from federal judicial review. However, Defendants miscalculated.

Tribal immunity does not apply in this case. Defendants attempted to purchase the Chippewa Cree's tribal immunity to engage in unlawful lending practices and insulate themselves from legal liability. But one of the fundamental principles of sovereignty is that it is not a commodity that can be bought and sold. In addition, the United States Supreme Court has held that state law may be enforced against tribal officials through official capacity actions even when sovereign immunity legitimately exists.

Defendants also cannot hide behind their Purported Arbitration Agreement. The Agreement is unenforceable because it is riddled with unconscionable terms and was fraudulently created by Defendants. The Agreement requires the application of Chippewa Cree law, but Rees and Think Finance purchased and wrote this "law." The Purported Arbitration Agreement prevents federal court review by directing all claims – either through review of arbitration awards or through a sham "opt-out" process – to the Chippewa Cree Tribal Judiciary, a non-functioning legal entity that has been improperly influenced by Defendants. A joint investigation by the FBI and the Department of Interior found that a tribal judge was so intimidated by Defendants' machinations that the tribal judge ignored

the Chippewa Cree Constitution and authorized the illegal and unconstitutional removal of the Tribe's elected Chairman.

In the end, neither tribal immunity nor the Purported Arbitration Agreement can prevent a federal court from addressing the Defendants' illegal behavior. This Court should affirm the District Court's decision and allow discovery to proceed in this case.

ARGUMENT

I. TRIBAL IMMUNITY DOES NOT BAR THIS ACTION.

A. The Tribal Defendants Concede That Ms. Given's EFTA Claim Is Viable.

Tribal immunity – even the broad version urged by the Tribal Defendants – will not end this suit. The Tribal Defendants concede that *Ex parte Young* "applies only where a plaintiff sues a state or tribal official, in his or her official capacity, for prospective relief from a violation of *federal law*." TD Br. at 16 (emphasis in original). The Electronic Funds Transfer Act, 15 U.S.C. §1693m ("EFTA"), is a federal statute. The District Court held that Ms. Given stated a claim under the EFTA, SPA44-47, and the Tribal Defendants concede that they are not separately challenging this claim.[1] TD Br. at 29 n.5. Therefore, Plaintiffs may seek

[1] The Tribal Defendants do not and cannot challenge the EFTA claim in this appeal. The District Court denied the Tribal Defendants' motion to certify its

prospective relief for a violation of the EFTA. Because Ms. Given has a continuing claim for prospective relief against the Tribal Defendants, this Court should return the case to the District Court to proceed with discovery.

B. Tribal Immunity Does Not Extend To Plain Green Or Its Officers Because Plain Green Is A Fraud.

1. Plaintiffs Have Never Conceded That Plain Green Or Its Officers Are Entitled To Tribal Immunity.

Defendants base all of their arguments on the incorrect premise that Plain Green is a legitimate enterprise and can be recognized as an arm of the Tribe, but Plain Green is a fraud. Doc. 85 at 2-4, 17-18, 102-105, 112-116.[2] Plaintiffs have never "conceded" that Plain Green or its officers are entitled to tribal immunity because they are "an 'arm' of the Tribe." *Compare id.* at 27-28 *with* Tribal Defendants' Brief ("TD Br.") at 16 n.3.[3] The Tribal Defendants have always understood that Plaintiffs' argument is that tribal immunity is not a commodity that can be bought and sold and extended to fraudulent enterprises. Doc. 92 at 1 (describing Plaintiffs' argument as "the Tribe 'sold' its sovereignty to Think

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order for interlocutory appeal. Doc. 173. It also denied a separate motion to certify an appeal on the issue of personal jurisdiction. *Id*.

[2] Defendants ignore the facts alleged in the Amended Complaint, which this Court must accept as true. *See, e.g.*, A36, ¶37, A43-47, ¶¶76-99, A67, ¶208.

[3] The District Court did not reach the arguments about Plain Green not being an arm of the tribe. *See* SPA13 n.12. Instead, the District Court offered a narrow ruling based on *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024 (2014). SPA7-13.

Finance during the formation of Plain Green [*See, e.g.*, Opp'n at 27]")(citation in original).

In the Opposition to the Motions to Dismiss, Plaintiffs raised three arguments concerning the threshold question of whether tribal immunity exists in this case. Doc. 85 at 27-28. First, the idea of selling sovereignty is inconsistent with the concept of sovereign immunity. The Supreme Court has held that sovereign immunity does not exist when the sovereign becomes a shareholder in a company. *Bank of United States v. Planter's Bank of Georgia*, 22 U.S. 904, 907 (1824). This is true even when the sovereign is a 100% shareholder. *Southern Ry. Co. v. North Carolina Ry. Co.*, 81 F. 595, 599-600 (1897). Sovereignty has never been a commodity that can be purchased. But that is exactly what Think Finance and Kenneth Rees did when they entered into the Term Sheet with the Tribal Defendants. *Id.* In exchange for less than 5% of the revenues of the Plain Green enterprise, Rees and Think Finance purchased the right to make sovereign immunity arguments whenever their criminal conduct was challenged. As this Court has said in *Otoe*, "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. Serv.*, 769 F.3d 105, 114 (2d Cir. 2014).

Second, and independently, in order for an assertion of sovereign immunity to be legitimate, "self-government and sovereign and independent authority" must

be "left in the administration of the state." *Worchester v. Georgia*, 31 U.S. 515, 561 (1831). That independence does not exist in this case because Plain Green is a fraud. Rees and Think Finance – not the Tribe – have control over Plain Green. *See, e.g.*, A43, ¶80, A48, ¶101. The Term Sheet shows that Rees and Think Finance controlled the creation of Plain Green. A73-76. Think Finance and other outside parties receive more than 95% of the revenue from the Plain Green enterprise and actually control its operations. A33, ¶23. The affidavit of Neal Rosette shows that when the profitability of Think Finance was threatened, Think Finance ordered the Tribe to fire its elected Chairman. A88, ¶¶9-10. And a former Chippewa Cree tribal judge has told the Office of the Inspector General for the Department of the Interior that he entered an order removing St. Marks, even though the judge thought it was improper and unconstitutional, because he feared retaliation. A279, ¶9; A280-85. This Court should not extend tribal immunity to an entity that is controlled by unrelated third parties seeking to circumvent state and federal law.

Third, if there is any factual question about the sale of sovereignty or other immunity-related issues, this Court should remand this matter to the District Court for jurisdictional discovery to uncover more facts. *Rafidain Bank*, 150 F.3d at 176-77. While Plaintiffs have already presented facts to the District Court that detail

the fraudulent scheme, additional discovery would further illuminate exactly how the Tribe sold its sovereignty.

Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc., 523 U.S. 751, 753 (1998), does not undermine these arguments. In *Kiowa*, a tribe purchased stock from a company and refused to pay off the promissory note associated with this purchase. The company sued the tribe for breach of contract. The Supreme Court held that tribal immunity applied and the company could not pursue the breach of contract action. However, *Kiowa* is distinguishable from this case. *Kiowa* did not involve a situation where a tribe *sold* its tribal immunity to unrelated third parties so they could evade state and federal law and perpetrate a massive fraud. Moreover, *Kiowa* did not address the availability of injunctive relief in the tribal immunity context.

2. This Court May Ignore Corporate Forms When Considering Tribal Immunity.

The Supreme Court has held that courts may ignore the corporate form when acknowledging it would work an injustice or a fraud. In *Anderson v. Abbott*, the Supreme Court noted that while "[l]imited liability is the rule, not the exception," "there are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied." 321 U.S. 349, 362 (1944); *see also* Doc. 85 at 96-97 (citing *Anderson*, 321 U.S. at 362). "Mr. Justice Cardozo stated that a surrender of that principle of limited liability would be made when the sacrifice is

essential to the end that some accepted public policy may be defended or upheld." *Id.*(internal citations omitted). Fraud is one of the occasions when limited liability should be ignored. *Id.*

In this case, Plain Green's corporate form should be ignored because recognizing the form would work a fraud. Rees and Think Finance control the affairs of Plain Green and reap the economic benefits from Plain Green's operations. They should not be allowed to use the corporate structure of Plain Green to evade state and federal law.

The authority that the Tribal Defendants cite in a footnote about an "arm" of the tribe actually supports Plaintiffs' argument. *See* TD Br. at 16 n.3. In *Allen v. Gold Country Casino*, the Ninth Circuit affirmed the dismissal of an employee's claim against a casino because the casino was an arm of the tribe and entitled to tribal immunity. However, the Ninth Circuit reversed the dismissal of claims brought against individuals and remanded the case to allow the plaintiff to amend his complaint. The Ninth Circuit justified its decision by pointing to the fact that the money generated by the casino stayed with the tribe. "One of the principal purposes of the [Indian Gaming Regulatory Act] is 'to insure that the Indian tribe is the primary beneficiary of the gaming operation.'" 464 F.3d 1044, 1046 (9th Cir. 2006). "With the tribe owning and operating the Casino, there is no question that these economic and other advantages inure to the benefit of the Tribe." *Id.* at

1047. "In light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe." *Id*. However, in this case, the structure of Plain Green not only allowed the business to operate off tribal land by making loans to individuals throughout the country, but it allowed more than 95% of the profits to go to outside parties. In addition, Rees and Think Finance created and exercised control over Plain Green. Here, the creation and operation of Plain Green actually demeaned the tribal sovereignty that the *Gold Country* decision aimed to protect.[4]

C. Tribal Officials Are Subject To Official Capacity Actions Based On Violations Of State Law.

Defendants ignore the fundamental purpose of official capacity actions when they argue that such actions do not allow the enforcement of state law against tribes by private plaintiffs. At its core, *Ex parte Young* is a case about responsibility and compliance with the law. 209 U.S. 123 (1907). Faced with the problem of states asserting sovereign immunity to prevent enforcement of Constitutional guarantees, the Supreme Court developed a legal fiction that allowed the Constitution to be enforced against states. Following its previous

[4] The other case that the Tribal Defendants cite in footnote 3, *Will v. Michigan Dep't of State Police*, only mentions "arms of the state" in passing. 491 U.S. 58, 70 (1988). It did not deal with the question of whether tribal immunity exists when the "arm of the state" is alleged to be a fraud.

decisions that required sovereigns to be held accountable for their actions, the Supreme Court recently confirmed that officers of Native American tribes can be sued under the doctrine of *Ex parte Young* and must not only comply with federal law but also state law. *Bay Mills*, 134 S.Ct. at 2035. As a result, Plaintiffs can maintain an official capacity action against the officers of Plain Green to require them to comply with both federal and state law.

1. State Law Can Be Enforced Through Official Capacity Actions.

Both Supreme Court and Second Circuit law allow courts to enjoin a tribe's off-reservation activity based on violations of state law. In discussing whether a tribe could set up a casino in Michigan in violation of state law, the Supreme Court stated that "tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Bay Mills*, 134 S. Ct. at 2035 (emphasis in original). To the contrary, the Supreme Court held that Michigan has a "panoply" of civil and criminal state law tools it could use to "shutter, quickly and permanently, an illegal casino." *Id.* In the Supreme Court's view, the state's power to enforce state law was "capacious." *Id.* at 2034.

The Second Circuit recently confirmed the obligation of Native American payday lenders to comply with state law. "Native Americans 'going beyond the reservation boundaries' must comply with state laws as long as those laws are 'non-discriminatory [and] . . . otherwise applicable to all citizens of [that] State."

Otoe-Missouria, 769 F.3d at 113 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)); *see also Nevada v. Hicks*, 533 U.S. 353, 362 (2001) ("When, however, state interests outside the reservation are implicated, States may regulate activities even of tribe members on tribal land, as exemplified by our decision in *Confederated Tribes.*"). Here, the activities of the Plain Green enterprise occurred outside the reservation, which triggered the Tribal Defendants' obligation to comply with state law. Defendants have chosen not to challenge the District Court's factual findings on that issue. *See* SPA11-12.

The Tribal Defendants' failure to mention *Otoe* is telling. Even though Plaintiffs and the District Court relied on *Otoe*, the Tribal Defendants do not discuss it. In that case, the Otoe-Missouria Tribe and Great Plains Lending, LLC sought "an injunction to restrain and enjoin the State from purporting to pursue and from actually pursuing *any and all state* regulatory and *enforcement* actions over the Tribal Nations and Tribal Business. . . ." Cmplt. ¶59 in *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, No. 1:13-cv-5930-RJS, Dkt# 1 (emphasis added). But this Court did not allow the tribe and its payday lending company to evade New York state law by asserting tribal immunity. 769 F.3d at 109. The *Otoe* ruling is binding.

2. The District Court Did Not Wipe Away A Century of *Ex parte Young* Precedent.

The Tribal Defendants engage in a bit of hyperbole when they claim that "[i]n one fell swoop, the District Court wiped away a century of *Ex parte Young* precedent." TD Br. at 22. As the District Court noted, *Bay Mills* did not just materialize from thin air. SPA11 n.10. There is a long line of cases supporting the idea that state law is enforceable against tribal members. In the *Puyallup Tribe* litigation, the Supreme Court repeatedly recognized the propriety of enjoining individual tribal members for violations of state law. In *Puyallup I*, the Court held that "a suit to enjoin violations of state law by individual tribal members" should continue. *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 396 n.11 (1968). In *Puyallup III*, the Court again held that "whether or not the Tribe itself may be sued in state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible." *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 171-72 (1977). The next term, the Supreme Court relied on *Puyallup III* and *Ex parte Young* to state that: "As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), a case involving the collection of state taxes, the Court continued to recognize the propriety of an official capacity suit. In the majority opinion, the Supreme Court

stated that "[w]e have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State." *Id.* at 514 (citing *Ex parte Young*, 209 U.S. 123 (1908)). Justice Stevens's concurrence noted the potential availability of "claims for prospective equitable relief." 498 U.S. at 515. As a result, the Tribal Defendants' assertion that *Bay Mills* "would overturn decades of settled Supreme Court holding" is incorrect. *See* TD Br. at 23.

The Tribal Defendants cite only two district court cases, *Frazier* and *Warren*, to support their position, but both of those cases were decided before *Bay Mills* and *Otoe*. The District Court correctly concluded that *Bay Mills* supplanted *Frazier*. SPA10. *Warren* relies exclusively on *Frazier* for the proposition that state law cannot be enforced against tribal officials. *Warren v. United States*, 859 F. Supp. 2d 522, 543 (W.D.N.Y. 2012) (citing *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 310 (N.D.N.Y. 2003)). Neither case correctly states the law.

The Tribal Defendants also incorrectly claim that "[n]o federal court decision, before the misguided one below, has permitted private plaintiffs to sue tribal officials for violations of *state law*." TD Br. at 16. The Fifth Circuit has permitted private plaintiffs to sue tribal officials for violations of state law. In *Comstock Oil & Gas v. Alabama & Coushatta Indian Tribes*, 261 F.3d 567, 570 (5th Cir. 2001), the Fifth Circuit held that "[t]he district court correctly concluded that the tribal council members were not entitled to tribal sovereign immunity

because, in the Fifth Circuit, tribal officials are not immune from suits for declaratory and injunctive relief." *Comstock* involved the enforcement of various oil and gas leases under both federal and state law. While two of these leases were executed by the Bureau of Indian Affairs, seven were executed by the State of Texas under Texas state law. *Id.* at 569 ("The State of Texas executed the remaining seven leases before the effective date of the Alabama and Coushatta Indian Tribes of Texas Restoration Act, and the BIA approved them."); *see also* 1986 Oil and Gas Leases in *Comstock Oil v. Ala. & Coushatta Indian Tribes,* No. 9:98-cv-266-TH, Dkt # 153-2 (E.D.Tex. 1999). After determining that tribal immunity did not apply, the Fifth Circuit remanded the case to the district court so the plaintiffs could pursue their claims under state and federal law. *Comstock,* 261 F.3d at 575.

Comstock relied on an earlier Fifth Circuit case, *TTEA v. Ysleta Del Sur Pueblo,* 181 F.3d 676, 680 (5th Cir. 1999). *TTEA* analyzed all of the relevant precedents and concluded that relief was available against tribal officials in official capacity actions:

> The distinction between a suit for damages and one for declaratory or injunctive relief is eminently sensible, and nothing in *Kiowa* undermines the relevant logic. State sovereign immunity does not preclude declaratory or injunctive relief against state officials. *See Ex Parte Young,* 209 U.S. 123 (1908). There is no reason that the federal common law doctrine of tribal immunity, a distinct but similar concept, should extend further than

> the now-constitutionalized doctrine of state sovereign immunity.

Id.

3. *Pennhurst* Does Not Address Tribal Official Capacity Actions.

The Tribal Defendants cite *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), for the proposition that "a federal court may not order state officials to conform their conduct to state law." TD Br. at 18. While this proposition is true for *Ex parte Young* actions, it is not true for *Bay Mills* official capacity actions. *Bay Mills* did not overturn *Pennhurst* because *Bay Mills* and *Pennhurst* addressed different questions.

The only circuit court of appeals to address the issue agrees. In *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015), the Eleventh Circuit acknowledged the holding in *Pennhurst*, but distinguished *Pennhurst* from the situation in *Bay Mills*. The Eleventh Circuit held 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." *Id.* (citing *Bay Mills*, 134 S. Ct. at 2034-35).

The Tribal Defendants' attempt to distinguish *PCI Gaming* fails because they selectively quote *Pennhurst* and miss the critical point. TD Br. at 19. In *Pennhurst*, the Supreme Court held that a plaintiff could not pursue an action against state officials for violations of state law because the plaintiff's action did

not implicate competing sovereign interests. In *Ex parte Young*, the Court allowed a plaintiff to bring an action in federal court because state officials were ignoring federal law. However, in *Pennhurst*, the Court held that these types of competing interests were not present. *Pennhurst*, 465 U.S. at 105-06. The Court noted that there was no "need to reconcile competing interests" "when a plaintiff alleges that a state official has violated *state* law." *Pennhurst*, 465 U.S. at 106 (emphasis in original). In cases involving the enforcement of a state's law against the state itself, "the entire basis for the doctrine of *Young* and *Edelman* disappears." *Pennhurst*, 465 U.S. at 106.

This case is distinguishable from *Pennhurst* because there are several competing sovereign interests. The first and most obvious conflict is between Plain Green, a tribal limited liability company, and Vermont, a state that has established clear laws for lending inside its borders. The second conflict is between Plain Green and the federal government, which has enacted RICO to prevent fraudulent loan sharking enterprises. The third and more subtle conflict is between the state and the federal government. As *Pennhurst* recognized, a state has a strong interest in enforcing its own laws when they do not conflict with federal law. A state's sovereign interests are infringed when federal courts refuse to enforce state laws of general applicability for violations by tribal officials that occur off of the reservation. As demonstrated by the briefing in *Bay Mills*, the

inability to enforce state law creates conflicts between the state and the federal government. *See infra* at 34-37.

4. *Bay Mills*'s State Enforcement Discussion Is Not *Dicta*.

The Tribal Defendants argue that this Court should ignore *Bay Mills* because its statement that tribal officials can be sued in their official capacities is nothing more than *dicta*. The Tribal Defendants contend that the "hypothetical state-law suit was not argued by the parties, briefed to the Court, or decided as a necessary component of the Court's holding." TD Br. at 23. The Tribal Defendants are wrong. The issue of whether injunctive relief was available against tribal officials in their official capacity for violations of state law was explicitly briefed and argued in *Bay Mills*. After analyzing the issue, the Supreme Court held that injunctive relief is available.

a. The parties in *Bay Mills* briefed the issue of whether state law could be enforced through official capacity actions.

The briefing before the Supreme Court in *Bay Mills* addressed enforcement of state law against tribal officials. The appendix to the Petition for Certiorari included the amended complaint that brought claims against tribal officers in their official capacity for violations of state law. Pet. App. 55a, *Bay Mills*, 134 S.Ct. 2024 (No.12-515) (Oct. 23, 2012). When the Solicitor General discovered this amended complaint, which was pursuing an *Ex parte Young* action, he urged the Supreme Court not to take the case because of the pendency of the official capacity

action to enforce state law. U.S. Cert. Br. at 21, *Bay Mills*, 134 S.Ct. 2024 (No.12-515), 2013 U.S. S.Ct. Briefs LEXIS 2370, *35-36 (May 14, 2013). Michigan opposed the *certiorari* brief filed by the United States and argued that an official capacity suit was insufficient to protect its state interests. Michigan Supp. Cert. Br. at 8, *Bay Mills*, 134 S.Ct. 2024 (No.12-515), 2013 U.S. S.Ct. Briefs LEXIS 2529, *12-13 (May 24, 2013).

The discussion about the availability of official capacity actions continued in the merits briefing. Bay Mills's counsel, who is also Counsel of Record for the Tribal Defendants in this appeal, suggested that official capacity actions against tribal officials were available. Resp. Br. at 19, *Bay Mills*, 134 S.Ct. 2024 (No.12-515), 2013 U.S. S. Ct. Briefs LEXIS 4324, *36 (Oct. 24, 2013). Counsel did this to assuage the Supreme Court's concern that Michigan had no alternative to prevent violations of Michigan law for off-reservation activity. "Michigan and other states also have a wide range of other dispute resolution mechanisms at their disposal, from negotiated waivers of sovereign immunity to *Ex parte Young* suits against tribal officials." *Id.*; *see also id.* at 37, 2013 U.S. S.Ct. Briefs LEXIS 4324 at *62 ("But that decision simply misapplied *Ex parte Young*, which permits suits against state officers but not state governments"). Counsel argued that allowing injunctive relief actions against officials would respect tribal immunity:

> For instance, [Michigan] may be able to file an *Ex parte Young*-type suit against tribal officials to enjoin them

> from violating the law. *See Santa Clara Pueblo*, 436 U.S. at 59. In the context of state sovereign immunity, the *Ex parte Young* doctrine provides a remedy for ongoing unlawful conduct by a governmental official where immunity would otherwise prevent enforcement of the law. *See Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011). Parallel suits against tribal officers have the advantage of enabling states like Michigan to halt unlawful conduct while still respecting tribal sovereignty.

Id. at 55; 2013 U.S. S.Ct. Briefs LEXIS 4324 at *89.

In their brief here, the Tribal Defendants also make the unusual claim that the Supreme Court made "an error" in *Bay Mills* when it announced that official capacity actions were available against tribal officials for violations of state law. TD Br. at 24. Ironically, the Supreme Court chose its words based on the words of Bay Mills's counsel:

> As 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. *See Santa Clara Pueblo*, 436 U.S. at 59, [].

Bay Mills, 134 S. Ct. at 2035. The Court's choice of words in *Bay Mills* was intentional – not an error.

The Tribal Defendants also mistakenly assert that the parties "never argued that a plaintiff might bring an *Ex parte Young*-type suit against tribal officials in their official capacity for violations of state law." TD Br. at 26. Yet, in the pages of the brief of the United States that precede the page cited by the Tribal

Defendants, the United States makes exactly that argument. "[I]njunctive or declaratory relief may also be available against the officers of either party. In that respect, Counts IV-VI in petitioner's amended complaint, raising claims under federal common law and **state law**, remain pending in the district court against respondent's Tribal Gaming Commission, the Commission's members, and the member of respondent's Executive Council." U.S. Br. at 31-32, *Bay Mills*, 134 S.Ct. 2024 (No.12-515), 2013 U.S. S.Ct. Briefs LEXIS 4384 at *52-53 (October 31, 2013) (emphasis added).

b. The *Bay Mills* Court's statements about official capacity actions for violations of state law were essential to its holding.

When the *Bay Mills* Court considered whether Michigan could bring an action for violations of state law against tribal officials, it was considering an issue that was necessary to the outcome of the case. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to the result by which we are bound."). Specifically, the Court had to resolve whether the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §2701 *et seq.*, provided a claim to enjoin the operation of a casino that was located off tribal land. The Court concluded that under the IGRA, claims may only be brought for violations that occur on tribal land. To reach that result, the Court consulted the history and design of the IGRA.

"IGRA's history and design provide a more than intelligible answer to the question Michigan poses about why Congress would have confined a State's authority to sue a tribe as §2710(d)(7)(A)(ii) does." *Bay Mills*, 134 S. Ct. at 2034. Part of that history was that States had other ways to enforce their laws: "*Cabazon* left fully intact a State's regulatory power over tribal gaming outside Indian territory – which, as we will soon show, is capacious. . . So the problem Congress set out to address in IGRA (*Cabazon*'s ouster of state authority) arose in Indian lands alone." *Id.* The Supreme Court was not concerned about Michigan's inability to bring a suit under the IGRA because it recognized that Michigan had the ability to bring an action against tribal officials under its own state laws.[5]

c. Official capacity suits have always been available to private parties.

The Tribal Defendants argue that even if states can bring official capacity actions against tribal officials, this does not mean that private parties can bring this type of suit. TD Br. at 27. However, this distinction is baseless. Official capacity actions have always been available to private parties. In fact, stockholders in a railroad brought the *Ex parte Young* case. Private parties also have repeatedly brought official capacity actions against tribal defendants. *See, e.g.*, *Vann v.*

[5] The Supreme Court's statement about the availability of official capacity actions against tribal officials was also essential to its holding that there was subject matter jurisdiction over the case. *Michigan*, 134 S.Ct. at 2029 n.2.

Department of Interior, 701 F.3d 927, 928 (D.C. Cir. 2012) (holding that descendants of ex-slaves of the Cherokee can bring an official capacity action); *Salt River Project Agr. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1177 (9th Cir. 2012) (allowing Utah corporation to bring an official capacity action); *Comstock*, 261 F.3d at 570. Finally, private parties play an important part in implementing state policy and stopping corrupt behavior. States, like Vermont, have limited resources and cannot pursue every violation of state law. Sometimes they depend on private parties to enforce state law. *See Amicus* Brief of State of Vermont, Doc.91 at 14 ("States do not have resources to pursue every illegal online lender."); *see also* 9 V.S.A. §2461 (authorizing the private enforcement of the Vermont Consumer Fraud Act).

D. The Tribal Defendants' Argument That RICO Does Not Substantively Apply In This Case Is Incorrect.

1. The Court Has No Jurisdiction To Consider The Tribal Defendants' RICO Arguments.

In raising the issue of whether RICO applies to this case, the Tribal Defendants are attempting to reach an issue that is not properly before this Court. The Tribal Defendants sought to certify the District Court's Order so that they could contest all of the rulings that the District Court made. Doc. 135. However, the District Court denied that motion. Doc. 173. The District Court did not grant Defendants the right to an interlocutory appeal on the RICO claim, and the only

issues that Defendants have an automatic right to appeal are tribal immunity and arbitrability. As a result, the Court has no jurisdiction to review the RICO issues. *Mathers v. Wright*, 636 F.3d 396, 398-99 (8th Cir. 2010).

2. RICO Applies To The Tribal Defendants.

The Tribal Defendants argue that RICO does not substantively apply to Native American tribes, but this is wrong. Congress enjoys plenary power to legislate in the area of Native American affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004). Accordingly, federal statutes of general applicability apply to Native American tribes unless Congress specifically exempts them. "[I]t is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960); *United States v. Winter*, 237 F.3d 170, 173 (2d Cir. 2001) (holding that federal criminal currency laws applied to Native Americans that ran racketeering enterprise); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) (holding that OSHA applied to construction company operated by tribe); *Menominee v. Tribal Enters. v. Solis*, 601 F.3d 669, 670 (7th Cir. 2010) (holding that OSHA applied to sawmill operated by tribe); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311-15 (D.C. Cir. 2006) (holding that the NLRA applied to casino operated

by tribe). In addition, RICO was specifically created to address fraudulent enterprises like the payday lending scheme in this case.

First, RICO creates a broad scope of liability. Section 1962(c) bars racketeering and collection of unlawful debt by "any person." 18 U.S.C. § 1962. Section 1961(3) states that "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). The broad definition of "person" encompasses both Plain Green and its officers. *See Federal Power Comm'n*, 362 U.S. at 116; *see also County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1305 (2d Cir. 1990) (holding that public utility was "person" under RICO); *Monell v. Department of Soc. Serv. of N.Y.*, 436 U.S. 658, 690 (1977) (holding that municipality was a person under Section 1983). The use of "includes" and "any" shows that Congress meant to include governmental entities within the definition of "person." *See United States v. Angelilli*, 660 F.2d 23, 31 (2d Cir. 1981). Moreover, the absence of "tribe" or an equivalent term does not mean that Congress did not sweep those entities into the broad definition of "person." *See id.* at 31 n.9. This Court's review of the statute's text and structure in *Angelilli* led it to conclude: "We see no sign of an intention by Congress to exclude governmental units from its scope." *Id.* at 31. In that case, this Court's detailed examination of the legislative history only bolstered its conclusion about the text: "Our interpretation of the language of the statute to extend to activities

affecting governmental entities is further supported by the purpose and legislative history of the Organized Crime Control Act of 1970 . . ." *Id.* at 32.

Second, the remedial provisions of RICO were designed to cut through legalistic formalities. "If the one-man band incorporates, it gets some legal protections from the corporate form, such as limited liability; and it is just this sort of legal shield for illegal activity that RICO tries to pierce." *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985). For example, Section 1964 empowers district courts to issue "appropriate orders, including but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise, . . . or ordering the dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons." 18 U.S.C. §1964(a). Section 1964(a) "is a section that 'grants district courts authority to hear RICO claims and then . . . spells out a non-exclusive list of remedies district courts are empowered to provide in such cases." *Chevron Corp. v. Donzinger*, 833 F.3d 74, 138 (2d Cir. 2016)(internal citations omitted).

Third, illegal debt collection "is at the heart of the conduct targeted by the RICO statute." *United States v. Minicone*, 960 F.2d 1099, 1107 (2d Cir. 1992); *see also United States v. Turkette*, 452 U.S. 576, 589-90 (1981) (stating that loan sharking was "among the very crimes that Congress specifically found to be typical of the crimes committed by organized crime"). The unlawful debt section

of RICO was specifically designed to target loan sharks. *Durante Bros & Sons, Inc. v. Flushing Nat'l Bank*, 755 F.2d 239, 248 (2d Cir. 1985). In enacting RICO, Congress intended to stop loan sharking "by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Id.* at 248 (quoting Organized Crime Control Act, Pub. L. No. 91-452 (1970) (Statement of Findings and Purpose)); *see also United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994) (rejecting equal protection challenge to the unlawful collection of debt portion of RICO and stating that "Congress' statement of purposes . . . gives some reason to believe that Congress" decided that collections of unlawful debt were central to evils at which RICO was directed).

In arguing that RICO does not apply to Native American tribes, the Tribal Defendants ignore everything that courts examine in interpreting the meaning of a statute. RICO's text, purpose, structure, and legislative history all support applying it here. The facts of this case, which the Tribal Defendants completely avoid, describe an illegal loan sharking enterprise that Defendants created to try to evade state and federal law. Congress created RICO to shut down exactly this type of illegal behavior.

3. The Tribal Defendants' RICO Arguments Are Inconsistent With The Supreme Court's Understanding Of RICO And Municipal Liability.

One of the arguments that the Tribal Defendants make in the section of their brief that supposedly addresses tribal immunity is that RICO should not apply because "governmental" entities cannot form the appropriate *mens rea*. TD Br. at 29. This argument is not only unrelated to the tribal immunity question before this Court, but it is also wrong. The cases cited by the Tribal Defendants deal with municipal liability, not tribal immunity. The principal concern in municipal liability cases is that taxpayers will have to pay for the misdeeds of their municipal representatives. Tribal immunity already addresses that issue, and to overlay the jurisprudence of municipal liability will only confuse, rather than clarify, the law. Moreover, the Supreme Court has repeatedly warned against reading into RICO additional requirements not found in the text of the statute. *See Sedima, S.P.R.L. v. Imrex, Inc.*, 473 U.S. 479, 495 (1985) ("There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement."); *United States v. Turkette*, 452 U.S. 576, 580 (1981).

The two cases that the Tribal Defendants cite where appellate courts imported the concept of *mens rea* into RICO jurisprudence borrowed the concept from a Section 1983 case, *Newport v. Fact Concerts*. *See Genty v. Resolution Tr. Corp.*, 937 F.2d 899, 910 (3d Cir. 1991) (citing *Newport v. Fact Concerts*, 453

U.S. 247, 260 (1991)); *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991) (quoting *Newport*, 453 U.S. at 261-62). *Newport*'s creation of a *mens rea* requirement was a reaction to *Monell v. Department of Social Services*, 436 U.S. 658 (1977). *Monell* held that municipalities were subject to liability under Section 1983: "Local governing bodies, therefore, can be sued directly under §1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers." *Id.* at 690. Section 1983 law merely prevents municipalities from being held liable for punitive damages. *Newport*, 453 U.S. at 262-63. It does not prevent municipalities from being held liable for their wrongdoing. *Id.* After *Newport*, a plaintiff can still obtain injunctive relief, declaratory relief, and attorney's fees against a municipality. *Id.* However, the Tribal Defendants urge this Court to adopt a *mens rea* requirement for the RICO statute that would not only bar punitive damages, but would prevent the plaintiffs from obtaining any type of relief, even injunctive and declaratory relief. That stretches the analogy to Section 1983 law too far.

The Court should not draw an analogy between municipalities and the tribal lending entity in this case for several additional reasons. First, the Court should treat Plain Green as a business (rather than a municipality) when determining

whether it can form the requisite *mens rea*. In municipal liability cases, courts recognize that artificial entities have the ability to form the requisite *mens rea*. *See Lancaster Cmty. Hosp.*, 940 F.2d at 404 (quoting *Newport*, 453 U.S. at 261-62); *Genty*, 937 F.2d at 909 ("Courts long have held ordinary corporations civilly and criminally liable for the malicious torts or crimes of their high officers, particularly when the corporation benefits from the officers' offensive conduct."). Moreover, in RICO cases, courts have repeatedly recognized that RICO applies to government-run commercial enterprises. In *United States v. Frumento*, the Third Circuit held that: "We refuse to believe that Congress had such 'tunnel-vision' when it enacted the racketeering statute or that it intended to exclude from the protective embrace of this broad statute, designed to curb organized crime, state operated commercial ventures engaged in interstate commerce, or other governmental agencies regulating commercial and utility operations affecting interstate commerce." 563 F.2d 1083, 1091 (3d Cir. 1977); *see also United States v. Morrison*, 686 F.3d 94 (2d Cir. 2012) (upholding RICO conviction of owner of Native American smoke shop).[6]

Second, artificially restricting the class of Defendants under RICO runs contrary to the text and purpose of RICO. One of RICO's goals was to stop

[6] The conviction was later vacated for jury misconduct. 580 Fed. Appx. 20 (2d Cir. 2014).

infiltration of governmental entities by organized crime. "Both the purpose and legislative history of the Act reflect concern about the infiltration of local government units." *De Falco v. Bernas*, 244 F.3d 286, 307 (2d Cir. 2001) (citations omitted); *see also supra* at 41-42. "Accordingly, the language of section 1961(4), defining enterprise, . . . unambiguously encompasses governmental units, and . . . the purpose and history of the Act and the substance of RICO's provisions demonstrate a clear congressional intent that RICO be interpreted to apply to activities that corrupt public or governmental entities." *Id.* (internal citations omitted); *see also infra* at 48-49.

Finally, imposing liability on a tribal lending entity does not raise concerns about burdening taxpayers. In the cases refusing to hold municipalities liable for their conduct, the underlying concern is that taxpayers will ultimately have to pay for the municipality's misconduct. The rationale in *Lancaster* was that the perpetrator of the RICO fraud, the "body politic," was also the victim. 940 F.2d at 404-405. "As a result, the "body politic" was not even aware of any dishonest activities, and plainly lacked the specific intent to deceive which is an element of mail fraud." *Id.* But the concern in *Lancaster* is not present here. The victim of the illegal Plain Green loan scheme is not the "body politic" of the Tribe, but financially vulnerable people who are not members of the Tribe. More importantly, Plaintiffs' claims against the Tribal Defendants are only for

prospective injunctive relief. The money that was illegally taken from Plaintiffs, more than 95% of which never went to the Tribe, can be recovered from the non-tribal architects of the scheme and the Silicon Valley venture capital firms that profited from the illegal enterprise.

4. RICO Does Not Protect Individuals Acting In Their Official Capacity.

The Tribal Defendants argue that the *mens rea* requirement that originated under Section 1983 should not only apply to municipalities under RICO, but also to individuals acting in their official capacity. TD Br. at 30. Once again, this represents a fundamental misunderstanding of Section 1983 law. In reaching its conclusion that punitive damages were not available against a municipality, the *Newport* court relied on the fact that plaintiffs could still recover punitive damages against individual officials. "By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations." *Newport*, 453 U.S. at 269. Indeed, the entire inquiry in *Newport* proceeded after the jury found that the individual officials had the required mental state for an award of punitive damages. *See id.* at 253 (discussing award of punitive damages against municipal officials).

Again, there are significant reasons to believe that Congress took a harder line against individuals acting in their official capacity when it enacted RICO than

when it enacted Section 1983. Rather than drawing an artificial distinction between officials acting in their official and personal capacity, RICO targeted corruption in the execution of official governmental duties. In *Angelilli*, this Court noted that some of the predicate acts under RICO, like bribery and obstruction of justice, were crimes involving the execution of official duties. 660 F.2d at 31-32. It also reviewed legislative history that showed Congress was focused on the actions of individuals acting in their official capacity. *See e.g., id.* at 33 ("Corrupt officials and bribed law enforcement officers operate a "silent conspiracy' in support of organized crime."); *see also DeFalco*, 244 F.3d at 308.

Courts have also recognized that RICO was aimed at officials who were acting in their official capacity. The Supreme Court has held: "[T]he appellate court's critical legal distinction – between employees acting within the scope of corporate authority and those acting outside that authority – is inconsistent with a basic statutory purpose. . . . It would immunize from RICO liability many of those at whom this Court has said RICO directly aims – *e.g.* high-ranking individuals in an illegitimate criminal enterprise, who, seeking to further purposes of that enterprise, act within the scope of their authority." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165 (2001). Several other courts of appeals have also decided RICO cases involving individuals acting in their official capacity. *See Warner*, 498 F.3d at 697 (holding misuse of official position represented predicate

act); *United States v. Garner*, 837 F.2d 1404, 1417 n.10 (7th Cir. 1987) (holding that Illinois statutory offense that dealt with misconduct done "in his official capacity" could be predicate act under RICO). Rather than exempting individuals acting in their official capacity, RICO targets individuals who abuse their official capacity to commit crimes. When Congress passed RICO, it was frustrated with organized crime's use of legal technicalities to avoid responsibility. To combat this problem, it authorized a wide range of remedies, which are available in this case.

In an attempt to side step the language and purpose of RICO, the Tribal Defendants cite a gaggle of district court cases. TD Br. at 31. But these district court cases fail to appreciate previous decisions of the Supreme Court and courts of appeals. Despite the statements that were made in the cases cited by the Tribal Defendants, the Southern District of New York originally recognized that RICO applied to individuals acting in their official capacity. *See In re Citisource, Inc. Sec. Litig.*, 694 F. Supp. 1069, 1080 (S.D.N.Y. 1988) (citing *Anderson-Myers Co. v. Roach*, 666 F. Supp. 106, 112-113 (D. Kan. 1987) (rejecting argument that RICO does not apply to persons acting in their official capacity)). Somewhere along the way, this message was lost.[7]

[7] *Frooks v. Town of Cortland*, 997 F. Supp. 438, 457 (S.D.N.Y. 1998) improperly extended *Gentry* and *Newport* by relying on *Rini v. Zwirn*, 886 F. Supp. 270, 295 (S.D.N.Y. 1995), which incorrectly assumed that if the *mens rea* of an

Finally, the unpublished decision, *Rogers v. City of New York*, 359 Fed. App'x 201 (2d Cir. 2009), does not support the Tribal Defendants' position. The *pro se* litigant did not address the *mens rea* issue in her brief to the Court. Appellant Br., *Rogers v. City of New York*, 359 Fed. App'x 201 (2d Cir. 2009).

5. *Garcia* Only Addressed On-Reservation Activity.

Garcia does not prevent the application of RICO in this case. *Garcia* involved a claim of employment discrimination that occurred ***on*** the reservation. *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 78 (2d Cir. 2001). In this case, as the District Court found, the activity occurred ***off*** the reservation and involved individuals who are not members of the Tribe. *See supra* at 27-28. In addition, even if *Garcia*'s holding somehow applied to activity that occurred *off* the reservation – and there is no reason to think that it did – then *Bay Mills* and *Otoe* overruled it.

6. The District Court Did Not Abuse Its Discretion In Granting Discovery.

There is no doubt that Plain Green officials have committed criminal acts that have undermined the administration of justice. A298-314; Plea Agreement in *United States v. Morsette*, No. 4:15-cr-61 (D.Mont. Nov. 12, 2015) ("Morsette

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agent could not be attributed to a municipality, then the agent herself could not have *mens rea*. *Newport* expressly recognizes that officers of a municipality can act with *mens rea* and that this can provide the basis for an award of punitive damages. *Newport*, 453 U.S. at 269.

Plea"); Plea Agreement in *United States v. Rosette*, No. 4:15-cr-61 (D. Mont. Nov. 16, 2015) ("Rosette Plea"). Since the filing of the Complaint, Plaintiffs have uncovered additional predicate acts under RICO that tribal officials have committed. The District Court granted Plaintiffs discovery to understand these facts and identify the perpetrators of this wrongdoing. SPA 63-64 ("The Court will also permit Plaintiffs to discover facts related to the "additional allegations."); *see also* SPA25. Regardless of the outcome of this appeal, the Court should remand the case so that Plaintiffs can conduct discovery and assert claims against various individuals in their individual capacity.

While the tribal immunity issue may appear like a complicated web, it is important to remember that Defendants intentionally wove this gossamer trap to try to evade state and federal law. The payday lenders and Silicon Valley venture capital firms that profited from the illegal loan sharking scheme thought that tribal immunity would shield their illegal behavior, but they were wrong. Tribal immunity is not something that can be purchased and used to cloak egregious behavior. The Supreme Court has made it clear that injunctive relief is available against tribal officials acting in their official capacity. And Defendants cannot escape RICO, which was specifically designed to shut down fraudulent, corrupt organizations that infiltrate government entities.

II. THIS COURT SHOULD NOT ENFORCE THE ARBITRATION AGREEMENT BECAUSE IT IS UNCONSCIONABLE AND FRAUDULENT.

In creating the fraudulent Plain Green enterprise, Defendants did not stop after they erected what they thought was an impenetrable tribal immunity barrier. They also constructed an elaborate Agreement that was designed to act as another layer of protection and guarantee that any outcome would be in Defendants' favor. They dictated the terms of the financial code that would govern any arbitration and ensured that any arbitration dispute would ultimately be decided by a tribal judiciary that they could intimidate and control. But once again, Defendants miscalculated. An arbitration agreement cannot be used as a tool in a fraudulent scheme to guarantee an outcome for the fraudulent enterprise. The Purported Arbitration Agreement and Delegation Clause are unenforceable because they are both unconscionable and fraudulent.

A. The Plain Language Of The Purported Arbitration Agreement Does Not Cover This Dispute.

Ironically, when Defendants created the Purported Arbitration Agreement in an effort to shield their fraudulent behavior from review, they drafted an agreement that specifically bars an arbitrator from ruling on this case. The plain language of the Purported Arbitration Agreement excludes arbitrator review of anything other than "individual Disputes": "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." A265. Because this is a class action case, the arbitrator cannot resolve this dispute. SPA31.

B. The Delegation Clause And The Purported Arbitration Agreement Are Unenforceable.

The Court should not compel arbitration in this case because the Purported Arbitration Agreement and the Delegation Clause are revocable under Section 2 of the Federal Arbitration Act ("FAA"). The FAA provides that arbitration agreements are unenforceable when a reason exists "at law or in equity for the revocation of any contract." 9 U.S.C. §2. "This savings clause [9 U.S.C. §2] permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, fraud, duress, or unconscionability,' but not defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2010); *see also, e.g., Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 921 (9th Cir. 2013) ("Like other contracts, arbitration agreements can be invalidated for fraud, duress, or unconscionability."); *Ryan v. Delbert Servs. Corp.*, No. 5:15-cv-5044, 2016 U.S. Dist. LEXIS 121246, *9 (E.D. Pa. Sept. 8, 2016) (invalidating delegation clause in tribal lending agreement under 9 U.S.C. §2). "If a party challenges the validity under §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, W., Inc. v. Jackson*, 130 S.Ct. 2772, 2778 (2010). In *Chavarria*,

the Ninth Circuit held that "[f]ederal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power." 733 F. 3d at 927.

1. The Purported Arbitration Agreement Is Unconscionable.

a. Three Circuit Courts of Appeal have found similar agreements unconscionable.

The Fourth, Seventh, and Eleventh Circuits have examined arbitration agreements that were designed to insulate tribal lending entities from state and federal law and concluded that these agreements were unenforceable under the FAA. *Parm v. Nat'l Bank of Calif.*, 835 F.3d 1331 (11th Cir. 2016); *Hayes v Delbert Serv.*, 811 F.3d 666 (4th Cir. 2016); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 777 (7th Cir. 2014); *see also Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1355 (11th Cir. 2014), *cert. denied.*, 2015 U.S. Dist. LEXIS 2386 (U.S. Apr. 6, 2015). In *Parm*, the Eleventh Circuit held that an arbitration agreement that a lending entity created in conjunction with the Cheyenne River Sioux Tribe was unenforceable because "the arbitration agreement's forum selection clause mandates the use of an illusory and unavailable arbitral forum." 835 F.3d at 1337. In *Hayes*, the Fourth Circuit held that an arbitration agreement created by a tribal lending operation was unenforceable because a party "may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject." *Id.* at 675. "The just and efficient system of arbitration intended

by Congress when it passed the FAA may not play host to this sort of farce." 811 F.3d at 674. Finally, in *Jackson*, the Seventh Circuit held that the agreement was "both procedurally and substantively unconscionable" because, among other things, it was not possible for the plaintiffs to understand the complex dispute resolution process and there was "no prospect of a meaningful and fairly conducted arbitration." 764 F.3d at 778-79 (internal citation omitted).

The Payday Lenders (Think Finance, Rees, TC Loan Service, TC Decision Sciences, LLC, Tailwind Marketing, LLC, and the two Silicon Valley venture capital firms – Sequoia and TCV) attempt to distinguish *Hayes* by claiming that the agreement in that case was different. Payday Lenders' Brief ("PL Br.") at 43; TD Br. at 52-53. Defendants claim that, unlike in *Hayes*, the Purported Arbitration Agreement does not bar the application of federal law. TD Br. at 52; PL Br. at 14-15, 37, 43. This is incorrect. In even broader language than the *Hayes* agreement, Defendants disclaim the applicability of federal law; borrowers "agree that no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation." *Compare* A258 *with Hayes*, 811 F.3d at 670 (borrower agrees "that no United States state or federal law applies to this agreement."); *see also* A263 ("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."). As the

Payday Lenders concede, this disclaimer of federal law was what the *Hayes* court found dispositive. PL Br. at 43 n.12. While Defendants trumpet the fact that the District Court did not uncover this language from the Agreement, it is not surprising that the District Court was unable to isolate this language from the paragraphs of mind-numbing boilerplate that Defendants strung together. In fact, what is surprising is that Defendants are arguing that Plaintiffs, ordinary consumers, should have been able to decipher and understand this language when they signed the Agreement. Defendants' failure to identify the language in their own agreement shows just how unconscionable the Agreement actually is.

The Purported Arbitration Agreement and the agreement in *Hayes* are similar in many other ways. For example, both agreements state that they are "subject solely to the exclusive laws and jurisdiction of [the respective tribe]." *Compare* 811 F.3d at 669 *with* A258. They also both state that: "Neither this Agreement nor Lender is subject to the laws of any state of the United States." *Compare* 811 F.3d at 669-70 *with* A263. And both agreements state that they are made pursuant to a transaction involving or governed by "the Indian Commerce Clause of the Constitution of the United States of America" and "the law[s] of the [respective tribes]." *Compare* 811 F.3d at 670 *with* A263.

In the face of this strong authority from federal appellate courts, Defendants cite several district court opinions: *Yaroma v. Cashcall, Inc.*, 130 F. Supp. 3d 1055

(E.D. Ky. 2015); *Willams v. Cashcall, Inc.*, 92 F. Supp. 3d 847 (E.D. Wis. 2015); and *Kemph v. Reddam*, No. 13 CV 6785, 2015 U.S. Dist. LEXIS 38861 (N.D. Ill. Mar. 27, 2015). But these cases do not involve the level of fraud or unconscionability that is alleged here. For example, none of these cases involve a situation where outside entities purchased the substantive law that would apply to any disputes.

b. Under Vermont Law, the Proposed Arbitration Process is illusory because Defendants purchased the law governing the arbitration and have not relinquished tribal immunity.

Unconscionability bars the enforcement of the Purported Arbitration Agreement because under Vermont law, an arbitration procedure need only be substantively unconscionable to be invalid. *Glassford v. BrickKicker*, 2011 VT 118, ¶13. In *BrickKicker*, a home inspection company created an arbitration process where the sole available relief was the amount paid to conduct the home inspection. *Id.* ¶14. The Vermont Supreme Court found that "the subject contract's illusory remedy for any claim for damages resulting from its provisions limiting liability to the inspection fee and requiring binding arbitration costs that would exceed the amount of the liability limit" was unconscionable. *Id.* ¶ 13.

Importantly, Vermont's application of the unconscionability doctrine was not an expression of any generalized hostility toward arbitration itself. In *BrickKicker*, the Vermont Supreme Court relied on *Val Preda Leasing, Inc. v.*

Rodriguez, 149 Vt. 129, 135 (1987), which dealt with a collision damage waiver in a car rental contract. When the Vermont Supreme Court applied *Val Preda*, it was applying general common law principles to the arbitration context and not a public policy against arbitration. *Brickkicker*, 2011 VT 118, ¶13. The Vermont Supreme Court's application of the unconscionability doctrine satisfied the requirements for invalidating an arbitration agreement under Section 2 of the FAA. 9 U.S.C. §2.[8]

Here, the arbitration provision is worse than the provision in *BrickKicker*. Defendants have ensured the outcome by crafting Chippewa Cree law to favor loan sharking operations. As a precondition to any deal with the Tribe, Rees and Think Finance required the Tribe to "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." A73. The Term Sheet also stipulated that the Tribe use "best efforts" to "[r]evise the Tribal Credit Transaction Code to provide for a broader array of lending products." A75. The Term Sheet forced the Tribe to use Pepper Hamilton as counsel, *id.*, and Think Finance not only paid Pepper Hamilton's legal fees, it paid the firm a "bonus" for securing the Tribe's participation in the Plain Green scheme.

[8] *Littlejohn v. Timberquest Park at Magic, LLC*, 116 F. Supp. 3d 422 (D. Vt. 2015), does not support the Payday Lenders' position. The District Court judge in this case, who also decided *Littlejohn*, used *Littlejohn* to find that the Purported Arbitration Agreement was unconscionable. SPA26. Moreover, even in *Littlejohn*, the arbitration agreement was found to be unconscionable. The court held that picking an arbitrator with a potential bias toward the ski industry was substantively unconscionable. 116 F. Supp. 3d at 431.

A75, A88, ¶11. By controlling the Tribe's counsel, Rees and Think Finance controlled the content of the Purported Arbitration Agreement and dictated the terms of Chippewa Cree law. A50 ¶¶110, 112. In the end, the Tribe enacted law that specifically protects the loan sharking operations of Plain Green. Section 10-3-201 of Chippewa Cree law eliminates any caps on interest rates. A320. Section 10-8-101 eliminates all federal and state law that is contrary to Chippewa Cree law: "Except as otherwise provided in this Code or the other laws of the Tribe, 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 law*** or Tribal law ***to the contrary.***" A342 (emphasis added). As a result, an arbitrator following Chippewa Cree law cannot apply any of the consumer protection laws that exist under either state or federal law, including the Vermont Consumer Fraud Act and RICO.

Under Chippewa Cree law, consumers have only one remedy for an egregious fraudulent loan agreement – the right of rescission. Under Section 10-3-601(a), a loan can be rescinded one day after it is issued if the consumer repays 100% of the loan. A323. Section 10-3-601(c) provides that "[e]xcept as provided in §10-3-601(a), a Consumer does not have a right to rescind a Loan unless the Creditor agrees to the rescission in writing." Defendants point to Section 10-3-602 of Chippewa Cree law, which they claim provides a remedy if the arbitration

agreement is "oppressive, unconscionable, unfair or in substantial derogation of a Consumer's rights." PL Br. at 33; A324. However, this provision does not explain what happens if an arbitration agreement is unconscionable. Under Chippewa Cree law, it does not appear that the consumer has any remedy if this occurs. The only remedy for consumers under the Chippewa Cree financial code is the illusory right of rescission, and this right has already passed. Under Section 10-3-601(c), even if the loan agreement is "unconscionable," it cannot be rescinded without the consent of Plain Green. As a result, Section 10-3-602 provides no remedy at all.

Defendants do not cite any case decided by any Chippewa Cree tribal court that has ever invalidated, or even interpreted, an arbitration agreement under Chippewa Cree law. In fact, Defendants have not provided a single case decided by a tribal court on any subject. Plaintiffs are not in a position to furnish this Court with any of these decisions – if any exist – because Chippewa Cree law is unavailable to Plaintiffs. A79-81 ¶¶12-19. In this case, Defendants have exclusive control and possession over the purported "law" and maintain an unfair tactical advantage by being able to distribute this tribal law whenever it is convenient for them. Based on what has been selectively provided by Defendants so far, the Payday Lenders got exactly what they paid for: an arbitration agreement that can never be invalidated in Chippewa Cree courts.

Defendants also added another layer of protection for themselves under Chippewa Cree law; they have not waived immunity. The Agreement provides that any concession on venue for arbitration "shall not be construed in any way . . . as a relinquishment or waiver of the Chippewa Cree Tribe's sovereign status or immunity. . . ." A264. Section 10-4-106 of the Chippewa Cree Tribal Lending and Regulatory Code confirms that no waiver of immunity exists. It states that "[n]othing in this Code . . . shall be deemed or construed to be a waiver of sovereign immunity from a suit or counterclaim of the Tribe, a consent of the Tribe to the jurisdiction of the United States . . ." A326. Even if an arbitrator awards relief to Plaintiffs in this case, the Agreement provides Defendants with the right to have any award reviewed by a Chippewa Cree tribal court. The Agreement states: "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." A265. During this final stage of review, Defendants will seek to void any arbitration award because of the tribal immunity reserved under the Agreement. As a result, the arbitration remedy provided by the Agreement is merely illusory.

c. The Proposed Arbitration Process is illusory because Chippewa Cree Tribal Courts do not have jurisdiction to determine the questions reserved to them.

Under federal law, Chippewa Cree tribal courts do not have jurisdiction to resolve this dispute. The Purported Arbitration Agreement specifically envisions that tribal courts will play a role in resolving certain disputes. For example, the Agreement states that "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 with the Chippewa Cree Tribe not by the AAA, JAMS or an arbitrator." A265. Moreover, Defendants have the right to have a tribal court confirm any arbitration award. *Id.* However, because the tribal courts do not have the power to rule on the issues the Agreement reserves to them, the Agreement is illusory.

"[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders. . . ." *Plains Commerce Bank v. Long Family Land Co.*, 554 U.S. 316, 328 (2008); *see also Nevada v. Hicks*, 533 U.S. 353, 367 (2001) ("Respondents' contention that tribal courts are courts of 'general jurisdiction' is also quite wrong."). In *Plains Commerce Bank*, the Supreme Court noted that: "Tellingly, with only 'one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*.'" *Plains Commerce Bank*, 554 U.S. at 333 (referring to *Montana v. United States*,

450 U.S. 544 (1981) (emphasis in original; citations omitted)). There are only two situations where tribal courts may exercise jurisdiction over nonmembers: (1) when there is a consensual relationship on the reservation or (2) when the nonmembers' "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 554 U.S. at 329. In addition, a tribal court may only exercise jurisdiction based on a consensual relationship on the reservation when the nonmembers consent and the exercise of the tribe's jurisdictional power is necessary either: (1) to preserve tribal self-government or (2) to control internal relations. *Id.* at 337.

In this case, there is no consensual relationship on the reservation that would enable the Chippewa Cree tribal courts to exercise jurisdiction over the borrowers of the Plain Green enterprise. The District Court found that the relationship between the Plain Green enterprise and borrowers is not physically located on the reservation. SPA11. Under the consensual relationship test laid out in *Plains Commerce Bank*, the relationship must be physically located on the reservation for a tribal court to exercise jurisdiction over a nonmember. *Strate v. A-1 Const.*, 520 U.S. 438, 456-57 (1997). In addition, the consensual relationship exception does not apply because the relationship that the Plain Green enterprise established with the borrowers is fraudulent and tortious. *Strate v. A-1 Const.*, 520 U.S. 438, 456-57 (1997).

The second *Montana* exception also does not apply. For the exception to apply, the nonmembers' conduct has to "threaten[] or [have] some direct effect on the political integrity, the economic security or the health or welfare of the tribe." *Id.* at 457-58. "Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: 'Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." *Id.* at 459 (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)) (brackets in original).

The activity here is not of the type that the *Montana* Court felt integral to the second *Montana* exception. A commercial enterprise directed to the outside world does not implicate tribal self-government. Nor does it implicate control of the Tribe's internal relations because the Tribe is loaning money to nonmembers, not members of the Tribe. Moreover, as a factual matter, the Plain Green enterprise has had a negative effect on the government of the Tribe and has resulted in further corruption and criminal behavior. A55-57, ¶¶ 132-44, A280-85, A298-313. Because neither of the *Montana* exceptions applies, Chippewa Cree courts do not

have jurisdiction to rule on any dispute regarding the Purported Arbitration Agreement. *Jackson*, 764 F.3d at 782.

d. The Purported Arbitration Agreement is unenforceable because it has several features that are both procedurally and substantively unconscionable.

The Purported Arbitration Agreement has other features that are procedurally and substantively unconscionable and make it unenforceable. Because the claims associated with the Plain Green enterprise involve small dollar amounts, there is little incentive for an individual to bring a lawsuit. This is particularly true because payday loans target people who are financially challenged and have few, if any, resources to bring a claim. A90-91 ¶1, 11; A93-94 ¶1, 11. The Agreement also has a "loser pays" provision for shifting costs that discourages small claims from being filed: "Unless prohibited by law, the arbitrator may award fees, costs, and reasonable attorney's fees to the party who substantially prevails in the arbitration." A264.

The Agreement is unconscionable because its terms are not easily discovered on the Plain Green website. While there is a confusing collection of legal statements on the Plain Green website, borrowers are unable to see a copy of their loan contract, including the Purported Arbitration Agreement, before they complete an application for a loan. SA91. Moreover, when there is a hint of litigation, Defendants cut off access to the borrowers' accounts so they can no

longer access the documents that purport to structure the relationship between Plain Green and the borrowers. A91 ¶12; A94 ¶12. In other words, the borrowers have no access to the Agreement that supposedly governs their relationship with Plain Green.

A finding of unconscionability is also supported in this case because of the existence of inconsistent provisions in the Purported Arbitration Agreement about the powers of the arbitrator and the powers of the tribal court. Under the Agreement, the dispute between the borrowers and Plain Green is submitted to arbitration, but disputes about the validity of the purported class action waiver are to be determined by Chippewa Cree tribal courts. This section of the Agreement is difficult to read, sets up an impossible to follow process, and supports a finding of unconscionability. A265. In addition, the Agreement provides that Defendants reserve the right to confirm any arbitration award with a Chippewa Cree tribal court. Ultimately, Defendants will be able to use this review as an opportunity to assert tribal immunity and void any arbitration award. The doctrine of tribal immunity is not a doctrine that the vulnerable people in this class are likely to understand. A91 ¶ 7; A94 ¶ 7. This is yet another reason why this Court should affirm the District Court's ruling that the Agreement is unconscionable.

The Purported Arbitration Agreement is also unconscionable because it is impossible for anyone other than Defendants and the Tribe to determine what

Chippewa Cree law is. The 2006 version of Chippewa Cree law, which Plaintiffs' counsel believed was the most recent version of that law, is difficult to access. A79-81, ¶¶12-19. The University of Montana Law School will only provide a copy of the 2006 version of the Chippewa Cree law to people who visit the law library in Montana. In addition, the 2006 version of the law is not available on the internet. A80 ¶16. The Tribe's website does not make the 2006 Chippewa Cree law available, which appears to be the purportedly operative law.

2. The Court Should Apply Vermont Law When Examining The Purported Arbitration Agreement.

The Payday Lenders urge this Court to use Chippewa Cree law to determine whether this case is arbitrable. But that argument is baseless. As an initial matter, when the District Court reviewed the case, the Payday Lenders took the position that Vermont law could be used to resolve issues of "contract formation and enforceability." Doc. 64 at 11 n.4. In addition, it would be unconscionable for the Court to use a law that Defendants purchased to determine the arbitrability of this case.

The Payday Lenders' argument that the District Court improperly used Vermont law is surprising. PL Br. at 29-33. In the District Court, the "Think Finance Defendants" (which consisted of Think Finance, Inc., TC Loan Services, TC Decision Sciences, LLC, and Tailwind Marketing, LLC) stated: "The Think Defendants do not object to the application of Vermont law as to issues of contract

formation and enforceability, as they do not believe the outcome would be different under tribal law on those issues." Doc. 64 at 11 n.4. The other Defendants joined those arguments. *See* Doc 67-2 at 10 (Rees); Doc. 76 at 18 n.6 (TCV); Doc.77-1 at 8-9 (Sequoia); Doc. 95 at 9 n.9 (Think Finance Defendants' reply). The Payday Lenders should not be allowed to argue the issue one way below and then take the exact opposite position on appeal.

Even though the Payday Lenders never argued that the District Court should use Chippewa Cree law to determine whether the Agreement was enforceable, they now chide the District Court for insufficiently analyzing whether the law should be used. They characterize the District Court's discussion of the Chippewa Cree law supposedly governing arbitration "as a curt rejection of the 'explicit standard' in Section 10-3-602." PL Br. at 32. However, that characterization is unfair. The District Court was responding to an argument that the *Tribal Defendants* (not the Payday Lenders) made on the last two pages of their reply, in an 800-word footnote in 10-point font (which violated Vermont District Court Local Rule 10(a)(4) & (7)). Doc. 92 at 12-13 n.13. That argument was waived because it was made in a footnote that did not comply with the local rules, but nevertheless, the District Court addressed it and determined that Vermont law should govern the issue of whether the Agreement was unconscionable.

The District Court's decision to apply Vermont law was well-grounded. Courts have repeatedly rejected the application of tribal law and applied the law of other forums to determine whether an arbitration clause is unconscionable. *See, e.g.*, *Parm*, 835 F.3d at 1335 (applying Georgia law); *Hayes*, 811 F.3d at 672 (applying federal law); *Jackson*, 764 F.3d at 776-77 (applying Illinois law); *Inetianbor*, 768 F.3d at 1355 (Restani, J., concurring) (applying Florida law). In *Jackson*, the Seventh Circuit held that it was unreasonable to use Cheyenne River Sioux law to determine whether the agreement was enforceable because the law provided no guidance regarding arbitration. *Id.* at 776. The Court applied Illinois law to determine that the arbitration agreement was unconscionable. *Id.* at 777.

In this case, the Purported Arbitration Agreement specifies that Chippewa Cree law governs the Agreement. However, application of Chippewa Cree law is unreasonable for several reasons. First, the Payday Lenders entered into an agreement with the Tribe that enabled the Payday Lenders to dictate the substance of Chippewa Cree law and insulate the Plain Green enterprise from liability. A73-77. Second, the section of Chippewa Cree law that the Payday Lenders now cite, Section 10-3-602, merely states that an agreement is unenforceable if it is unconscionable, but does not elaborate on how this will be determined or what this means. Moreover, this section appears to have been created by the Payday Lenders themselves. *Compare* A75 (the Term Sheet containing the "Tribal Credit

Transaction Code") *with* A315 (the "Chippewa Cree Tribal Lending and Regulatory Code"). In addition, it is nearly impossible to access the statutes, rules, or decisions that define Chippewa Cree law. A79-81, ¶¶12-19. The law is not available through law libraries without visiting Montana. *Id.* It is not available over the internet. *Id.* Plaintiffs were not the only ones that had exceptional difficulty finding this law. As the District Court noted, several district courts have had difficulty finding the appropriate law. SPA 27-28 n.15 (collecting district court cases where courts could not find Chippewa Cree law). As a result, this Court should apply Vermont law in determining whether the Agreement is unconscionable.

The Payday Lenders also point to Section 10-3-602 and assert that "[b]ecause the Arbitration Agreements at issue do, in fact, comply with the applicable standard set forth by the American Arbitration Association, they are presumptively valid under Chippewa Cree law and should have been honored." PL Br. at 30-31. However, the Payday Lenders do not cite a single case that supports their proposition that the Agreement complies with the rules of the American Arbitration Association ("AAA"). In fact, the Purported Arbitration Agreement does not comply with AAA rules because it prevents any neutral outcome by providing that the Agreement (and incorporated Chippewa Cree law) controls over AAA rules, directing the pre-ordained outcome that the Payday Lenders bought.

A264. The Payday Lenders' failure to raise this argument in the District Court, and their failure to identify the specific "applicable standard" to which they refer is important. PL Br. at 30-31. If this argument had been raised below, Plaintiffs could have responded to explain precisely how the Agreement and Delegation Clause violate AAA principles, including that the Agreement does not provide: (1) a fundamentally fair process (Principle 1); (2) access to information regarding the ADR program (Principle 2); (3) an independent and impartial arbitrator and an independent administration of the arbitration process (Principle 3); (4) a reasonably convenient location for the arbitration (Principle 7); (5) a clear and adequate notice of the arbitration provision (Principle 11a); (6) reasonable access to information regarding the arbitration process (Principle 11b); (7) a fundamentally fair hearing (Principle 12.1); (8) access to information (Principle 13); and adequate arbitral remedies (Principle 14). American Arbitration Association, Consumer Due Process Protocol Statement of Principles, https://adr.org/aaa/ShowPDF?doc= ADRSTG_ 005014 (last accessed on December 20, 2016). To the extent that the Court even finds this important, it would be prejudicial to Plaintiffs to not allow them an opportunity to make these arguments.

3. Governance Concerns Within The Chippewa Cree Tribe Frustrate The Intention Of The Purported Arbitration Agreement.

Because the District Court found that the Purported Arbitration Agreement was unconscionable, it never reached Plaintiffs' additional argument that the purpose of the Agreement was frustrated. As Plaintiffs noted in the District Court, ongoing corruption in the Tribe and instability in the Tribal Judiciary will frustrate the intent of the arbitration provision for a swift resolution. "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." Restatement (Second) Contracts §265; *see also SKI, Ltd. v. Mountainside Props.*, 2015 VT 33, ¶36 n.9.

The Arbitration Agreement expressly states that "Arbitration procedures are simpler and more limited than court procedures." A264. The arbitration will be neither simple nor limited because there is substantial uncertainty about who is in charge of the Tribe and the Tribal Judiciary. A55-57, ¶¶132-44.

4. The Purported Arbitration Agreement Is Fraudulent.

As the District Court ruled, Plaintiffs adequately alleged that Defendants engaged in a fraudulent scheme to avoid state and federal usury laws. SPA31-32

and 35. The Term Sheet shows that the Purported Arbitration Agreement also contained specific false statements that defrauded Plaintiffs.

First, the Agreement states that the "Lender" was Plain Green, LLC. The Term Sheet reveals that this statement was false. Plain Green only received 4.5% of the revenues, and it did not provide any of the money that was loaned. A73-74. In addition, the Payday Lenders ran all of the operations of Plain Green. A43-47, ¶¶80-99, A48, ¶101.

Second, the Arbitration Agreement never disclosed that there was a significant problem with corruption at Plain Green and the Tribe. For example, the sworn affidavit of former Plain Green CEO Neal Rosette avers that Rees and Think Finance forced the Tribe's Business Committee to fire the Chairman of the Tribe, St. Marks, because St. Marks posed a threat to Think Finance when he sought more money for the Tribe from the Plain Green enterprise. A88, ¶¶8-11. An anonymous witness interviewed by the FBI and the Department of the Interior reported that "the Business Committee removed Blatt-St. Marks as Chairman to continue to hide their wrong doings." SA16. The witness reported that "every single one of the Business Committee members have taken something, i.e. money, equipment, vehicles." *Id.* In addition, several former tribal officials have been convicted of, or pled guilty to, embezzlement and bribery. A55-56 ¶¶132-35; SA94-175. A collection of their plea agreements is attached. SA94-175. This corruption also

extended to Plain Green. A57 ¶¶138-39. The United States Attorney in Montana obtained an indictment from a grand jury against the former leaders of Plain Green. A278 ¶6; A298-13. The charges in that case included mail fraud, and both of the former leaders of Plain Green, Neal Rosette and Billi Anne Raining Bird Morsette, pled guilty. Rosette Plea; Morsette Plea. Finally, the former Chairman of Plain Green, John Chance Houle, who signed the Term Sheet, has pled guilty to federal crimes. SA94-133.

Third, the Purported Arbitration Agreement represents that the "agreement . . . shall be governed by the law of the Chippewa Cree Tribe." A265. However, the Term Sheet, which was never disclosed to Plaintiffs, reveals that the relevant "law of the Chippewa Cree Tribe" was bought and paid for by nonmembers of the Tribe and was not "law" at all. A54, ¶125. Instead, Chippewa Cree law was what Think Finance dictated. As the Term Sheet states: "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." A73. The Term Sheet further states that the Tribe must "[r]evise the Tribal Credit Transaction Code to provide for a broader array of lending products." A75.

Fourth, the Purported Arbitration Agreement states that: "Neither this Agreement nor the Lender is subject to the laws of any state of the United States." A263. This statement is false because the loans involve off-reservation activity

and Defendants are subject to state law. The Tribal Defendants have even confirmed the falsity of this representation. TD Br. at 20 n.4. ("Plaintiffs argue that Tribes' off-reservation commercial activities are subject to state regulation. That is generally true.").

These fraudulent statements injured Plaintiffs. Plaintiffs' declarations show that they relied on the representations and deferred taking legal action because of the purported immunity of Plain Green. A91 ¶10; A94 ¶10. Plaintiffs were unaware of Defendants' misrepresentations because Plaintiffs did not and could not know that key statements in the Agreement were false. A91 ¶¶7-9, A94. ¶¶7-9. Finally, Plaintiffs were harmed as a result of Defendants' misrepresentations. A92 ¶15.

Under Vermont law, a court may order rescission of a contract if there is fraud in the inducement. *Sarvis v. Vermont State Colleges*, 172 Vt. 76, 79-80 (2001). A court may also order rescission if the promises made "were steps in a scheme to defraud the plaintiffs and were a most apt and effectual means of accomplishing the fraud." *Comstock v. Shannon*, 116 Vt. 245, 250 (1950); *Land Fin. Corp. v. Sherwin Elec. Co.*, 102 Vt. 73, 82 (1929). If the Court does not affirm the District Court's ruling on unconscionability, it should remand the case for a determination of whether the Purported Arbitration Agreement is unenforceable because it is fraudulent.

5. The Purported Right To Opt Out Of Arbitration Is Illusory.

Defendants argue that the Agreement should be enforced because if Plaintiffs wanted to avoid the arbitration process, they could have simply opted out. PL Br. at 38. However, the supposed "opt out" provision is nothing more than a dead end. A borrower who exercises the right to opt out of the arbitration process is actually opting in to an adjudication in front of a Chippewa Cree tribal court in Montana. A263. Given the difficulty of gaining access to the substantive and procedural law that supposedly governs the dispute, there is no possibility that Plaintiffs would be able to navigate the procedural rules of a foreign court system thousands of miles away. In addition, as previously discussed, Chippewa Cree courts do not have jurisdiction to adjudicate Plaintiffs' claims. *See supra* at 63-66. Finally, the outcome of any proceeding in the Chippewa Cree courts has already been determined because Defendants control the substantive law and the judiciary. As a result, the purported "opt out" provision cannot save the arbitration agreement. *Parnell v. Cash Call, Inc.*, No. 4:14-cv-0024, 2016 U.S. Dist. LEXIS 52516, *35-36 (N.D. Ga. March 14, 2016) (holding in a tribal lending case that an "opt-out provision while initially appearing helpful, [did] not resolve any of the key difficulties" because "any disputes would still be governed by the laws of the Cheyenne River Sioux Tribe").

6. The Doctrine of Severability Is Inapplicable.

Defendants argue that if this Court finds any part of the Purported Arbitration Agreement unconscionable, it should sever that provision and enforce the rest of the Agreement. TD Br. at 54. In support of this argument, Defendants point to a boilerplate severability clause that they stuffed into the Agreement. As an initial matter, Defendants waived this argument because they only raised it in a one sentence footnote in their reply brief in the District Court. Doc. 95 at 14 n.16; *See, e.g.*, *Chhabra v. U.S.*, 720 F.3d 395, 408 (2d Cir. 2013) (rejecting argument that district court erred in refusing to consider claim that was raised first time in district court reply brief).

Even if Defendants' severability argument were properly before this Court, the argument has no merit. Under Vermont law, when a portion of an arbitration agreement is unconscionable, a boilerplate severability clause will not save the remainder of the agreement. *Glassford*, 2011 VT 118, ¶30. This is true under federal law as well. In *Hayes*, which was a case involving an arbitration agreement crafted by a lending entity affiliated with the Cheyenne River Sioux Tribe, the Fourth Circuit noted: "It is a basic principle of contract law that an unenforceable provision cannot be severed when it goes [to] the 'essence' of the contract." 811 F.3d at 675-76. Moreover, the Fourth Circuit held that: "Severance should also not be used when an agreement represents an *integrated scheme to contravene public*

policy." *Id.* at 676 (emphasis added); *see also Parnell*, 2016 U.S. Dist. LEXIS at *51.

In this case, as in *Hayes*, "the offending provisions go to the core of the arbitration agreement." *Hayes*, 811 F.3d at 676. In *Hayes*, "[i]t [wa]s clear that one of the animating purposes of the arbitration agreement was to ensure that Western Sky and its allies could engage in lending and collection practices free from the strictures of state and federal law." *Id.* Here, the purpose of the Agreement is also to shield Defendants' illegal usury practices from state and federal law. In addition, it would be impossible to sever the offending provisions of the Agreement here because the purchased Chippewa Cree law runs through the entire Agreement. There is no way to disentangle the unconscionable application of Chippewa Cree law from the remainder of the Agreement.

C. The Delegation Clause Is Invalid.

1. The Delegation Clause Does Not Clearly And Unmistakably Delegate The Issue Of Arbitrability To The Arbitrator.

A delegation clause is a portion of an arbitration agreement that empowers an arbitrator to decide if the parties agreed to arbitrate a particular dispute. A court should not determine that a delegation clause exists unless there is "clear and unmistakable evidence" that the parties agreed that the arbitrator should decide the arbitrability question. *First Options v. Kaplan*, 514 U.S. 938, 944-45 (1995). When there is a direct attack on the delegation clause, a court – not an arbitrator –

determines issues of arbitrability. *Rent-A-Center, W., Inc. v. Jackson*, 130 S.Ct. 2772, 2779 (2010); *see also id.* at 2777 n 1.

In addressing the issue of whether the Agreement contains an enforceable delegation clause, the Payday Lenders unfairly characterize the District Court's opinion and take a position contrary to what they argued before the District Court. PL Br. at 18. In their Motion to Dismiss, the Think Finance Defendants said: "A challenge to an agreement to delegate on those grounds is to be decided by the court." (Doc. 64 at 10); *see also* Doc 67-2 at 10 (Rees); Doc. 76 at 18 n.6 (TCV); Doc.77-1 at 8-9 (Sequoia). But now, Defendants have abandoned this position and argue that an arbitrator should decide whether there is an enforceable delegation clause.

Regardless of what position Defendants decide to take, there is no enforceable delegation clause in the Agreement. First, a review of the purported Delegation Clause shows that it is not a clear and unmistakable delegation of power to the arbitrator to decide whether arbitration is available in this case:

> The arbitrator has the ability to award all remedies available under the Chippewa Cree Tribe's 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 is to be determined solely by a court of competent jurisdiction located within the Chippewa Cree Tribe, and

> not by the 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 courts rules and procedures and may be enforced by such court through any measures or reciprocity provisions available.

A265. The Delegation Clause states that "the arbitrator has no authority to conduct class wide proceedings and will be restricted to resolving the individual Disputes." *Id.* This is a class action and not an "individual Dispute." By restricting the arbitrator to "individual Disputes," the parties removed all issues connected to class wide proceedings, including the question of arbitrability.

Second, Chippewa Cree law does not empower arbitrators to decide whether disputes are arbitrable. While Section 10-3-602 mentions unconscionability, it does not describe what powers an arbitrator has under Chippewa Cree law. *Compare* A324 *with* the FAA, 9 U.S.C. §5. To address this deficiency, Defendants claim that Chippewa Cree law can be supplemented with federal and state law. TD Br. at 42 n.7. This argument ignores the fact that the Agreement and the Chippewa Cree financial code, which Defendants purchased, expressly disclaim the application of federal law. Specifically, Section 10-8-101 makes Chippewa Cree law the only applicable law, notwithstanding federal law to the contrary. A342. Likewise, the Agreement itself bars the application of federal law. A258 & A263. Any arbitrator operating under the Agreement and Chippewa Cree law would have

no basis for invalidating the Delegation Clause because there is no tribal law on the subject. As a result, any delegation of the decision about arbitrability is merely illusory.

Defendants argue that Plaintiffs have supposedly misidentified a class action waiver as a delegation clause (TD Br. at 37; PL Br. at 24), but this argument is meritless. The first phrase of the paragraph has nothing to do with class actions: "The arbitrator has the ability to award all remedies available under tribal law . . . ." And although the second part of the sentence discusses class actions, it only does so for the purpose of taking away the arbitrator's power to hear them: "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." A265.

Defendants also focus on several inapposite cases to support their argument. TD Br. at 36.[9] The first case, *T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 344 (2d Cir. 2010), was a case where both parties to an arbitration moved the arbitrator to reconsider the award he had rendered. After the arbitrator

[9] Defendants cite *Parnell v. Cash Call, Inc.*, 804 F.3d 1142, 1148 (11th Cir. 2015), but neglect to mention that the Eleventh Circuit remanded the case to the district court to allow the plaintiff leave to amend. On remand, the district court invalidated the delegation clause of the arbitration agreement. *Parnell*, 2016 U.S. Dist. LEXIS at *51. The Eleventh Circuit recently affirmed that ruling. 2016 U.S. App. LEXIS 20774 (11th Cir. Nov. 21, 2016).

affirmed the bulk of his award, both parties sought to vacate or modify parts of the award in federal court. Importantly, that case did not involve a situation where one of the parties was arguing that a court, not an arbitrator, should decide the issue of whether an unconscionable and fraudulent arbitration agreement was enforceable. The question before this Court in *T. Co.* was whether an arbitrator had the power to decide whether it had the ability to address a motion to reconsider. This Court never reached the issue of whether the language of the arbitration agreement "clearly and unmistakably" expressed an intention to delegate to the arbitrator the question of whether he had the power to rule on a motion to reconsider. Instead, this Court based its decision on the conduct of the parties because both parties requested that the arbitrator reconsider the award. *See id.* at 344.

The second case, *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005), is also inapposite. *Contec* involved a situation where the parties had unambiguously incorporated an arbitration organization's rules. *Id.* at 208 ("such controversy shall be determined by arbitration held . . . in accordance with the Commercial Arbitration Rules of the American Arbitration Association"). However, this case is distinguishable because the Purported Arbitration Agreement does not clearly and unambiguously incorporate the rules of AAA or JAMS.

The Tribal Defendants argue that two lines in the Agreement referencing the AAA and JAMS satisfy the "clear and unmistakable" standard. TD Br. at 37. But

there is nothing clear about this Agreement other than the fact that Defendants specifically designed it to prevent Plaintiffs from ever getting a just award. The relevant provision 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." A264 (emphasis added). The first sentence makes only "policies and procedures" applicable to consumer transactions; it does not make "rules" applicable. This is important because the AAA has both. *Compare*, AAA Policy on Appellate Arbitration Procedures in Consumer Arbitration Matters and Consumer Due Process Protocol *with* AAA Consumer Arbitration Rules. https://www.adr.org/aaa/faces/aoe/gc/consumer?_afrLoop=490599636974530&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D490599636974530%26_afrWindowMode%3D0%26_adf.ctrl-state%3D1988qxviqh_306 (last accessed on November 3, 2016). As a result, the AAA consumer transaction rules do not apply under the Agreement. And even if they did apply, the second sentence makes it clear that Tribal Law is predominant over the policies, procedures, and rules of any arbitration organization.

Under Second Circuit law, an agreement does not contain a clear and unmistakable delegation clause when it makes the rules of an arbitration organization inferior to other law or rules. *NASDAQ OMX Group, Inc. v. UBS, Sec., LLC*, 770 F.3d 1010, 1031-32 (2d Cir. 2014). In *NASDAQ*, an arbitration agreement stated that: "Except as may be provided in the NASDAQ OMX Requirements, all claims, disputes, controversies and other matters in question between the parties to this Agreement . . . shall be settled by final and binding arbitration." *Id.* at 1031. The *NASDAQ* Court held that this language made "it far from 'clear and unmistakable' that the Services Agreement provides UBS with an arbitrable claim." *Id.* at 1032. As a result, the Court determined that it should make the decision of whether an arbitrable claim existed:

> The Services Agreement need not clearly remove the question of arbitrability from arbitration in order for that question to be one for judicial determination. Rather, UBS must point to a clear and unmistakable expression of the parties' intent to submit arbitrability disputes to arbitration. . . . UBS cannot carry that burden by pointing to a broad arbitration clause that the parties subjected to a carve-out provision.

Id. Here, the language disclaiming the applicability of the rules and procedures of either AAA or JAMS is nearly identical to the language in *NASDAQ*. The Agreement states: "To the extent the arbitration firm's rules or procedures are different than the terms of this Agreement to Arbitrate or Tribal Law" they will not

apply. As a result, there is no clear and unmistakable delegation to the arbitrator under the Purported Arbitration Agreement.

Finally, Defendants try to save their delegation clause by making a new assertion that "arbitral awards are *always* subject to judicial review under the FAA." TD Br. at 38. Not only is this not true under the Purported Arbitration Agreement, it provides another reason why the Agreement is unconscionable and unenforceable. The Payday Lenders argue that when the Agreement says that an arbitration award "may" be confirmed by the Chippewa Cree tribal courts, this does not mean that it must be confirmed by them. PL Br. at 40. But there is no doubt that Defendants inserted this clause in the Agreement to protect themselves against any award issued by a AAA or JAMS arbitrator; this clause ensures that Defendants will be able bring the dispute back to a forum that they effectively control. Defendants' new interpretation of the Agreement also runs contrary to both the plain language of the Agreement and the Tribe's finance code, which makes tribal court the only avenue of appeal. A263, A258, A342. If a federal court review option existed, the Agreement would say that an award "may be set aside by a Tribal court *or a federal court* upon judicial review." A265 (new hypothetical language in italics). The Purported Arbitration Agreement only allows one path for judicial review. No ordinary person reading the language would think that federal review is available.

2. The Delegation Clause Is Unconscionable.

The Delegation Clause is unconscionable because it is illusory. It seemingly gives the arbitrator the authority to decide whether the case is arbitrable, but fails to provide any mechanism to invalidate the Agreement. The Agreement states that: "The arbitrator has the ability to award all remedies available under Tribal Law." A265. But the tribal finance code that Rees and Think Finance purchased renders the arbitrator powerless to invalidate the Purported Arbitration Agreement. Because Section 10-3-601(c) of the Chippewa Cree Code excludes all other remedies other than a one day cancellation and Section 10-8-101 preempts federal law that is inconsistent with Chippewa Cree law, the Agreement and Chippewa Cree law preempt the broader remedies found in Section 2 of the FAA. The only remedy available to the arbitrator is rescission, which is already barred because more than one day has passed. *See Parm*, 835 F.3d at 1338 (invalidating delegation clause because of the unavailability of arbitral forum); *Ryan*, 2016 U.S. Dist. LEXIS 121246 at *15 (invalidating delegation clause because of wholesale waiver of federal law).

The Delegation Clause is also unconscionable because no one can actually understand it. A borrower cannot find the applicable Chippewa Cree law to be able to understand what an arbitrator's powers are. In addition, Defendants cut off access to the Purported Arbitration Agreement if a borrower complains about the

loan. A35, ¶33. *See also Ryan*, 2016 U.S. Dist. LEXIS 121246 *17 ("Even if the borrower read the delegation provision, the borrower would be unlikely to understand its full implications because they only become clear in light of the interaction between the delegation provision, the arbitration clause, and the choice of law provision.").

The Delegation Clause is also unconscionable because it limits the scope of any arbitration to only "individual Disputes." If arbitrators may only decide a case involving one borrower, they will be unable to appreciate the scope of Defendants' fraudulent scheme and to award a remedy to stop it.

Another reason why the Delegation Clause is unconscionable is because it states that Chippewa Cree courts will provide the judicial review of any decision issued by the arbitrator on arbitrability. But the Chippewa Cree courts do not have jurisdiction to conduct that review. This lack of jurisdiction makes the Delegation Clause unconscionable. *Parnell*, 2016 U.S. Dist. LEXIS 52516 at *32-33.

In the face of these arguments, the Payday Lenders cite *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 666 (2d Cir. 1997), and argue that bare allegations of a scheme to defraud cannot be a basis for challenging an arbitration clause. PL Br. at 22. However, *Campaniello* is inapposite. In *Campaniello*, the plaintiffs were not specifically challenging the delegation clause, but the arbitration agreement as a whole. Plaintiffs' case here is actually closer to

Moseley v. Electronic & Missile Facilities, Inc., 374 U.S. 167 (1963), which is a case the *Campaniello* court addressed. *Campaniello* distinguished *Moseley* on the basis that the *Moseley* plaintiffs alleged that the arbitration clause allowed defendants to avoid federal law. 117 F.3d at 667. This is precisely what Plaintiffs have alleged here. A54 ¶¶126-127. Finally, Plaintiffs' allegations of fraud relating to the Agreement and the Delegation Clause are far more detailed than in *Campaniello*. A50-55 ¶¶110, 112, 118-131.

3. The Delegation Clause Is Fraudulent.

The Delegation Clause was an essential part of Defendants' fraudulent scheme because they planned to use this clause to prevent federal courts from examining their fraudulent practices. A55, ¶131. According to the Delegation Clause, "[t]he arbitrator shall make written findings and the arbitrator's award may be filed with the 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." A265. The Delegation Clause holds the key to keeping Defendants' entire fraudulent scheme from federal review. *See Parnell*, 2016 U.S. Dist. LEXIS 52516 at *30-31, *33-34 (invalidating delegation clause based on fraud). It ensures that the case will ultimately end up in a Chippewa Cree tribal court, which is the same tribal court that has been so intimidated that it ignored the law. A279, ¶9; A280-85.

Defendants complain that the allegations about the corruption at Plain Green, the Tribe, and the Tribal Judiciary are insufficient to show that the Delegation Clause is fraudulent. TD Br. at 42-43; PL Br. at 14. However, the Complaint has detailed allegations showing the extensive and complex corruption that exists at Plain Green, the Tribe, and the Tribal Judiciary. A55-57 ¶¶132-144. The "Additional Allegations" that Plaintiffs supplied to the District Court show more examples of corruption and intimidation of the Tribal Judiciary and the Business Committee that Plaintiffs discovered after they filed their Complaint. A277-279.[10] Plaintiffs provided the District Court with the underlying documents supporting these allegations. A280-85, A298-313, SA13-31, 94-133. These documents include a joint FBI and Department of Interior investigation showing that one tribal judge was so intimidated that he made a decision even though he knew it was inconsistent with Chippewa Cree law. A280-85. This tribal judge noted that "the removal of St. Marks as Chairman should never have been effective because the Business Committee violated the CCT Constitution." A281. The judge entered the TRO removing St. Marks even though the request lacked evidence and violated the Tribe's Constitution because the judge felt intimidated. A281. In addition, there is an interview with a tribal member who said that

[10] Plaintiffs supplied the Additional Allegations to the District Court in connection with its opposition to the various motions to dismiss. The allegations related to facts discovered after Plaintiffs filed their Complaint.

everyone on the Business Committee had received bribes. SA16. Since Plaintiffs filed the Complaint, there have been several additional guilty pleas for corruption at Plain Green. These guilty pleas include the former Chairman of Plain Green who signed the Term Sheet, the former Chief Executive Officer of Plain Green, and the former Chief Operating Officer of Plain Green. Plaintiffs' allegations are far from threadbare. TD Br. at 41.

This corruption also relates to the Delegation Clause. Plaintiffs have identified three misrepresentations that specifically relate to the Delegation Clause. First, the Delegation Clause contains a false claim that Chippewa Cree law is legitimate. A54, ¶125; A265 ("The arbitrator has the ability to award all remedies available under Tribal law . . . ."). As the corruption allegations show, the finance code of the Chippewa Cree law is anything but legitimate. It was purchased by Defendants and structured so that there are *no* remedies available to Plaintiffs. The Delegation Clause's choice of law provision creates a show trial where the outcome is already determined by hidden actors.

Second, the Delegation Clause also misrepresents that Plain Green is the Lender. The Delegation Clause states that the "***parties*** agree that the arbitrator has no authority to conduct class-wide arbitration." A265(emphasis added). The representations that Plain Green was a party to the agreement and the "Lender" are false because the true lenders were the other Defendants, which Defendants

fraudulently concealed. This representation affects the essence of the transaction. Plaintiffs had to know with whom they were dealing before they could know whom to sue. Plaintiffs did not know that hidden parties were controlling Plain Green.

The Tribal Defendants argue that the fact that the Payday Lenders purchased the Chippewa Cree "*consumer finance laws*" and not "the Tribe's general *contract law*, which the arbitrator would apply in evaluating Plaintiffs' argument that the arbitration agreement is invalid," somehow means that Plaintiffs are not attacking "the validity of the delegation clause but rather the validity of the underlying agreement." TD Br. at 41-42. This argument is not only confusing, but wrong. It is not clear what, if any, distinct "contract law" exists under Chippewa Cree law. The Tribal Defendants have never identified this contract law or provided any decisions interpreting it to either Plaintiffs or the District Court. And the Payday Lenders expressly cite the consumer finance laws that they purchased and argue that the arbitrator should apply this law to decide whether the case is arbitrable. PL Br. at 33.

The Tribal Defendants also argue that the absence of corruption allegations in the arbitration organization means that the Delegation Clause is not fraudulent. TD Br. at 42. This argument ignores the fact that the Payday Lenders purchased the content of the law that the arbitrator applies both in determining arbitrability

and the underlying merits of the case. *See supra* at 58-62, 75, 87. It also ignores the fact that Defendants "may" confirm any decision made by the arbitrator in the Chippewa Cree tribal courts where Defendants have the ability to intimidate judges to obtain the ruling they desire.

Defendants also make the remarkable argument that a court may only address corruption after the corrupt process is complete. TD Br. at 38, 45. The FAA does not require this. Under Section 2, the Court must act before an arbitration commences: "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. §2; SPA 78. In *Rent-A-Center*, the Supreme Court held that courts must resolve challenges to the validity of arbitration agreements before ordering compliance under Section 4. 130 S. Ct. at 2778. In fact, Section 2 allows for the party facing a motion to compel arbitration to have a jury trial on any factual issues that would invalidate the agreement. Plaintiffs have requested this jury trial.

The fact that Section 10 of the FAA provides additional remedies after an arbitration is complete, if "the award was procured by corruption, fraud, or undue means," does not mean that a court cannot act before an arbitration to prevent a fraud. 9 U.S.C. §10; SPA79. The reason that the FAA allows awards to be overturned after an arbitration is that fraud may occur during the administration of

an arbitration that could not be detected before the arbitration began. In this case, the Court does not need to wait until after the arbitration process occurs because there is already substantial evidence of fraud.

4. Defendants Incorrectly Identify The Delegation Clause.

Defendants argue that the part of the Agreement that defines the term "dispute" is the delegation clause, but this is incorrect. According to Defendants the delegation clause states: "A Dispute includes, by way of example and without limitation, any claim arising from, related to or based upon marketing or solicitations to obtain the loan and the handling or servicing of your account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this loan or the Agreement to Arbitrate." A115; *see* TD Br. at 36; PL Br. at 26. But this is not a delegation clause because it does not identify the powers of the arbitrator. *See Rent-A-Center*, 130 S.Ct. at 2777.

In *Rent-A-Center*, the Supreme Court determined that the phrase "'[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable'" was the delegation clause. 130 S.Ct. at 2777. In this case, the phrase that sets forth the powers of the

arbitrator is not the sentence on page A115 that Defendants identify. It is the paragraph found at A265, which Plaintiffs quoted above.

5. Plaintiffs Are Specifically Challenging The Delegation Clause.

Even though Plaintiffs have made it clear that they are specifically attacking the Delegation Clause of the Agreement, Defendants continue to argue that Plaintiffs are not doing so. TD Br. at 43; PL Br. at 17. Plaintiffs allege *in their Complaint* that they are specifically attacking the Delegation Clause. A55, ¶131. They also spent seven pages in their Opposition to the Motion to Dismiss detailing their specific attacks on the Delegation Clause. Doc. 85 at 57-63.

If Defendants' argument is that specific attacks on delegation clauses must only be in complaints (PL Br. at 21), they are wrong. *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*, 130 S. Ct. at 2779. The Eleventh Circuit also recently confirmed that a specific attack on a delegation clause can be made in an opposition to a motion to compel arbitration. *Parm*, 835 F.3d at 1335 n.1; *see also Hayes*, 811 F.3d at 671 n.1; *Parnell*, 2016 U.S. Dist. LEXIS 52516 at *30-31.

Defendants may be saying that any attacks on a delegation clause must be unique to the delegation clause. But the Think Finance Defendants disavowed that argument in their Reply Brief in the District Court. Doc. 95 at 3 n.3. They were

correct in doing so. Under *Rent-A-Center*, the party opposing arbitration need only make a challenge that is specific to the delegation clause; it does not matter if the party also challenges other parts of the arbitration agreement. *Rent-A-Center*, 130 S. Ct. at 2778-79. In *Rent-A-Center*, the Court noted that "Section 2 [of the FAA] operates on the specific 'written provision' to 'settle by arbitration a controversy that the party seeks to enforce. Accordingly, unless Jackson challenged the delegation provision ***specifically***, we must treat it as valid under §2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.* at 2779 (emphasis added). The Court said that Jackson had to challenge the delegation provision "specifically," not "uniquely." *Id.* at 2779. The Supreme Court stated: "The District Court correctly concluded that Jackson challenged ***only*** the validity of the contract as a whole. ***Nowhere*** in his opposition to Rent-A-Center's motion to compel arbitration did he even mention the delegation provision." *Id.* (emphasis added). In other words, if a reason exists for independently invalidating the delegation provision, it does not matter if that argument will also invalidate the arbitration agreement as a whole.

D. The Payday Lenders Cannot Take Advantage Of The Purported Arbitration Agreement.

Each of the Payday Lenders tries to take advantage of the Purported Arbitration Agreement, but none of them is entitled to do so. PL Br. at 46. Plaintiffs did not agree to arbitrate with any of them. Despite Defendants'

contention that the arbitration clause is broadly worded, it does not extend to all Defendants. The Purported Arbitration Agreement states: "A 'Dispute' is any controversy or claim between you and Lender, its marketing agent, affiliates, assigns, employees, officers, managers, members or shareholders (each considered a 'Holder' for purposes of this Agreement)." A264. The Agreement does not mention Rees, the Think Finance Defendants, or either of the Silicon Valley venture capital firms that were clandestinely running the payday loan scheme.

"It is black letter law that an obligation to arbitrate can be based only on consent." *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 358 (2d Cir. 2008). To determine whether a third party can estop a signatory to an arbitration agreement and require them to arbitrate, this Circuit employs a two-part test. First, the factual issues regarding Plaintiffs' dispute with Plain Green must be "intertwined" with the dispute with Defendants. *See id.* at 359. Second, "there must be a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying the obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement." *Id.* In examining the second prong of this test, defendants that come by their relationship through wrongful means cannot avail themselves of the benefits of the arbitration agreement. *Id.* at 362. In addition, any presumption in favor of arbitration that may exist does not apply to

the question of whether an agreement to arbitrate has been made. *Applied Energetics, Inc. v. Newoak Capital Mrkts., LLC*, 645 F.3d 522, 526 (2d Cir. 2011). The estoppel inquiry is fact specific. *Ross v. American Express*, 547 F.3d 137, 144 (2d Cir. 2008).

The Payday Lenders fail the second prong of this test. The relationship that Rees and Think Finance created between the Plain Green enterprise and the Payday Lenders was designed to further a fraud. The Complaint alleges that the Think Finance Defendants pretended to provide services to Plain Green to conceal the fact that they were actually running the fraudulent enterprise. To further their fraud, Rees and the Think Finance Defendants tried to make themselves look like agents of Plain Green. As a result, this relationship cannot be used as a basis to sweep the Payday Lenders into the Purported Arbitration Agreement. *Sokol Holdings, Inc.*, 542 F.3d at 362.

Second, none of Defendants is an actual agent of Plain Green. A claim of agency requires facts establishing: (1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking. *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 342 (D. Vt. 2010) (citations and quotations omitted). An essential characteristic of an agency relationship is that the agent acts subject to the principal's direction and control.

Id. (citations omitted); *Kimco Leasing Co. v. Lake Hortonia Properties*, 161 Vt. 425, 429 (1993) (agent must be subject to the principal's control). The party asserting that agency exists bears the burden of proof on that issue. *Id.*

Whatever the term "agent" means, it does not mean an undisclosed, criminal mastermind. The Complaint does not allege that Rees or the Think Finance Defendants are agents. It alleges that Rees and the Think Finance Defendants dominated and controlled Plain Green. A33, 39, 42-46 ¶¶23, 54-56, 58, 69-71, 77-91. Plaintiffs have also alleged that Rees and the Think Finance Defendants deliberately attempted to conceal their control by claiming that they were only providing "services." A48 ¶101. The Court must accept Plaintiffs' allegations as true. *Schnabel*, 697 F.3d at 113; *Gent v. Wallingford Bd. of Educ.*, 69 F.3d 669, 674-75 (2d Cir. 1995)(holding that Court must accept as true Plaintiff's characterization of document attached to the complaint).

The Payday Lenders incorrectly claim that Plaintiffs alleged that Rees and the Think Finance Defendants are agents of Plain Green. PL Br. at 50. This is false; Plaintiffs never alleged this. The Payday Lenders selectively cite three words, "on behalf of," from paragraph 109 of the Complaint and argue that this somehow means that Plaintiffs allege that Rees and the Think Finance Defendants are agents. The Payday Lenders' selective reference ignores the context and meaning of the paragraph, which alleges that Rees and the Think Finance

Defendants dominated and controlled the officers of Plain Green. A33, 39, 42-46 ¶¶23, 54-56, 58, 69-71, 77-91. The Payday Lenders also ignore allegations that show that when Rees and the Think Finance Defendants appeared to act on behalf of Plain Green, they did so with the actual intent of avoiding liability and furthering a fraud. For example, Paragraph 99 alleges: "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." A47. Paragraph 101 states that "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 operations through an assortment of subsidiaries and affiliates like Defendants Tailwind Marketing, TC Loan, and TC Decision Sciences." A48. By selectively focusing on only three words of the Complaint, the Payday Lenders have not provided a fair reading of the Complaint.[11]

[11] None of the other paragraphs that Defendants cite show that any agency relationship existed between Plain Green and Rees and the Think Finance Defendants. Paragraphs 89, 90, 109, 152, and 153 allege that Rees and Think

The Payday Lenders also fail to establish that their participation in a fraudulent enterprise entitles them to any form of estoppel. This Circuit has tended to allow estoppel only when the relationship between entities is a formal corporate relationship – not an *ad hoc* collection of participants in a fraudulent enterprise. As this Court noted in *Ross*: "But this Court's cases which have applied estoppel against a party seeking to avoid arbitration have tended to share a common feature in that the non-signatory party asserting estoppel has had some sort of *corporate* relationship to a signatory party; that is, this Court has applied estoppel in cases involving subsidiaries, affiliates, agents, and other related business entities." *Ross*, 547 F.3d at 144 (emphasis in original). The Payday Lenders have failed to meet their burden of showing that such a relationship exists. Mr. Hargrove, the new Chief Operating Officer of Think Finance who filed an affidavit to support the Think Finance Defendants' motion to compel arbitration, spends no time describing the actual relationship between the Payday Lenders and Plain Green. A96. He provides none of the underlying agreements that would illuminate the relationship. He does not provide any correspondence or other documents that would clarify Think Finance's actual operation of the Plain Green enterprise. He

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Finance controlled and dominated other participants in the fraudulent scheme. They do not support the claim that the Payday Lenders were agents of either Plain Green or the Tribal Defendants.

also lacks personal knowledge because he was not at Think Finance during the relevant time period. In the end, Mr. Hargrove's affidavit does nothing to help Defendants meet their burden of showing that estoppel would be appropriate. *See Ross*, 547 F.3d at 144.

The *BMO* cases cited by the Payday Lenders cite are distinguishable. Each of these cases involved originating depository financial institutes ("ODFIs"), which were entities that processed wire transfers. *Booth v. BMO Harris Bank*, No. 13-5968, 2014 U.S. Dist. LEXIS 111053 at *3 (E.D. Pa. Aug. 11, 2014); *Graham v. BMO Harris Bank*, No. 3:13CV1460, 2014 U.S. Dist. LEXIS 4090548, *9-10 (D. Conn. July 16, 2014); *Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396, 1397-98 (S.D. Fla. 2014); *Moss v. BMO Harris Bank, N.A.*, 24 F. Supp. 3d 281, 284 (E.D.N.Y. 2014). None of the ODFIs were in the same position as Rees and Think Finance, who served as the leaders of a fraudulent criminal enterprise. As a result, none of the cases support the Payday Lenders' arguments here. Moreover, the *BMO* plaintiffs did not seem to be aware of Think Finance's actual role in the fraudulent scheme.

Finally, the Payday Lenders argue that they are third-party beneficiaries of the Purported Arbitration Agreement. However, this Court has recognized that "[w]here, as here, a non-signatory moves to compel arbitration with a signatory, it remains an open question in this Circuit whether the non-signatory may proceed

under any theory other than estoppel." *Ross*, 547 F.3d at 143 n.3. But even if the Court decided to permit a third-party beneficiary approach, the Payday Lenders would not meet the requirements. To qualify as a third-party beneficiary, the parties to the contract must have intended to confer a benefit on the third party. *See Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1019 (2d Cir. 1993). As discussed above, none of the Payday Lenders was named in the Agreement either by name or by description. And Plaintiffs had no idea that these entities existed or what their roles were in the Plain Green enterprise. Accordingly, the Payday Lenders cannot be considered third party beneficiaries.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING DISCOVERY.

Plaintiffs are entitled to discovery to fully investigate the fraudulent enterprise alleged in the Complaint and the current corruption that is affecting the Chippewa Cree Tribe. Since the filing of the Complaint, Plaintiffs have uncovered additional facts relating to the Plain Green enterprise, including additional predicate acts under RICO that tribal officials have committed. Plaintiffs sought leave to amend their Complaint in the District Court, but the District Court did not reach that issue. Doc. 85 at 15 n.3 and 54 n.12; *see also* Doc. 128 at 3. Instead, the District Court granted Plaintiffs discovery to investigate the additional facts and identify the perpetrators of the wrongdoing. SPA 63-64 ("The Court will also

permit Plaintiffs to discover facts related to the "additional allegations."). The Court also granted discovery to uncover additional facts about the Silicon Valley venture capital firms' role in the fraudulent enterprise. SPA25.

The Tribal Defendants argue that Plaintiffs did not cite any authority to support the proposition that discovery may be ordered before a ruling on arbitrability. TD Br. at 47. But Plaintiffs did just that. Pre-arbitration discovery is available to determine whether a particular arbitration provision is unconscionable. Doc. 85 at 71 (citing *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 774 n.5 (3d Cir. 2013)).

The Tribal Defendants also argue that no Court has allowed discovery into corruption of a foreign sovereign. TD Br. at 47. But that is not true. For example, in *Chevron Corp.*, this Court authorized discovery into corruption in the Ecuadorian judicial system. *Chevron Corp. v. Berlinger*, 629 F.3d 297, 303, 306 (2d Cir. 2011) (allowing discovery from filmmaker who had footage of plaintiffs' attorney describing how he pressured an Ecuadorian judge to rule in plaintiffs' favor).

Although both the Agreement and the Delegation Clause are unenforceable, if the Court does not affirm the District Court's decision, the Court should, at a minimum, remand the case for discovery and allow the District Court to rule on Plaintiffs' request to amend the Complaint. Alternatively, Plaintiffs request leave

from this Court to amend their Complaint if the Court rules that the Complaint is insufficient.

Even if the Court does not agree with the District Court's decision to permit pre-arbitration discovery in this case, Plaintiffs are still entitled to a jury trial to present the facts they have collected and to resolve whether they were fraudulently induced into agreeing to the Purported Arbitration Agreement and the Delegation Clause. 9 U.S.C. §4; *see also Schnabel*, 697 F.3d at 113. The District Court never reached the issue of whether a jury trial needed to occur because it concluded that as a matter of law the Agreement and the Delegation Clause were unenforceable. If this Court reverses on that issue, it should remand the case to the District Court for a jury trial.

Conclusion

Plaintiffs have alleged that Defendants engaged in a fraudulent loan sharking scheme that violated both state and federal law. This Court should affirm the decision of the District Court and stop this illegal enterprise.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the Brief contains 24,754 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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