16-2019-cv(L)

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

IN THE

United States Court of Appeals
for the Second Circuit

JESSICA GINGRAS and ANGELA C. GIVEN, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

JOEL ROSETTE, TED WHITFORD, and TIM MCINERNEY, in their official capacities as officers and directors of Plain Green, LLC; THINK FINANCE, INC.; TC LOAN SERVICE, LLC; KENNETH E. REES; TC DECISION SCIENCES, LLC; TAILWIND MARKETING, LLC; SEQUOIA CAPITAL OPERATIONS, LLC; and TECHNOLOGY CROSSOVER VENTURES,

Defendants-Appellants.

On Appeal from the
United States District Court for the District of Vermont
Case No. 5:15-cv-101 (Hon. Geoffrey W. Crawford)

REPLY BRIEF FOR APPELLANTS
JOEL ROSETTE, TED WHITFORD, AND TIM McINERNEY

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Nos. 16-2019 (lead), 16-2132, 16-2135, 16-2138, 16-2140 (consolidated)

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INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiffs' response brief is heavy on accusations and light on the law. It asserts that the Tribal Defendants are not immune from this suit because, in effect, Tribes are different: Tribal officials are subject to state-law suits that state officials

would not be, and Tribes are subject to Racketeer Influenced and Corrupt Organizations Act ("RICO") suits that other government entities would not be. The same goes for the application of the Federal Arbitration Act ("FAA"). Although the parties agreed to delegate issues of arbitrability to an arbitrator, Plaintiffs believe that the supposed "purchase" of tribal law and the allegedly inevitable corruption of the Chippewa Cree judicial system foreclose the normal order of things. Neither argument should sway this Court.

For starters, tribal sovereign immunity bars this suit. Although Plaintiffs belatedly object that the Tribal Defendants do not qualify as government officials, the entirety of Plaintiffs' suit—including their repeated reliance on *Ex parte Young*, 209 U.S. 123 (1908)—says otherwise. Under *Ex parte Young*, Plaintiffs' state-law claims cannot survive. Tribal officials, like state officials, may be sued in their official capacities only for violations of supreme federal law. Nor can Plaintiffs' RICO claims survive. Courts have long held that government entities (and, thus, officials sued in their official capacities) cannot form the necessary *mens rea* to commit a RICO predicate crime.

In the alternative, this suit should be sent to arbitration. Plaintiffs raise a host of arguments about the perceived unfairness of the arbitration agreement. But they focus little on the delegation clause itself, which presents an antecedent issue. Because the delegation clause requires that "any dispute," including "any issue

concerning the validity, enforceability, or scope of . . . the Agreement to Arbitrate," be resolved by binding arbitration, A114-115, the only question for this Court is whether the delegation clause is valid. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). It is. Plaintiffs' arguments to the contrary misidentify the delegation clause, rely on predictions of fraud that cannot be raised until an arbitration has actually taken place, and focus on distinct, severable aspects of the contract—such as the judicial-review and choice-of-law provisions—whose validity has been delegated to the arbitrator.

This Court should reverse.

ARGUMENT

I. TRIBAL SOVEREIGN IMMUNITY BARS THIS SUIT.

A. Plaintiffs' Suit Relies On The Premise That Plain Green Is An Arm Of The Tribe.

Plaintiffs begin by asserting that the Tribal Defendants are categorically ineligible to claim tribal immunity because Plain Green is not an arm of the Chippewa Cree Tribe. Resp. Br. 21-26. The assertion makes no sense in light of the suit that Plaintiffs brought.

Most importantly, Plaintiffs did not sue Plain Green. Instead, they sued "[t]he officers and directors of Plain Green . . . in their official capacity for equitable relief." A28-29. Their complaint reiterated that each of the Tribal Defendants was sued "in his official capacity." A29-30; *see also* A70 (excluding

Tribal Defendants from request for damages). There is no such thing as a suit against a private individual "in his official capacity." *See, e.g.*, *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (explaining that "the real party in interest in an official-capacity suit is the governmental entity"); *Lore v. City of Syracuse*, 670 F.3d 127, 164 (2d Cir. 2012) (noting that a "claim asserted against an individual in his official capacity . . . is in effect a claim against the governmental entity itself"). The entire premise of Plaintiffs' suit, then, is that the Tribal Defendants are being sued as tribal officers. *See* SPA16 (noting that the Tribal Defendants "serve as proxies in this case for Plain Green, and suit is filed against them in their official capacity to avoid the defense of tribal sovereign immunity").

Next, Plaintiffs have consistently defended this suit by citing *Ex parte Young*, a decision authorizing certain suits against government officials in their official capacities. *See* 209 U.S. at 159-60. Even their theory of personal jurisdiction depended on *Ex parte Young*: Because the individual Tribal Defendants have never set foot in Vermont, *see* A199, 202, 204, Plaintiffs argued that "[i]n an official capacity action, the relevant minimum contacts for the purposes of establishing personal jurisdiction are the contacts of the entity, not the individuals." Opp'n to Mot. to Dismiss 30 (D. Vt. Nov. 13, 2015), ECF No. 85. Similarly, when the Tribal Defendants argued that the Tribe and Plain Green were necessary parties under Federal Rule of Civil Procedure 19, Plaintiffs brandished

Ex parte Young in response. They argued that "sovereign entities, including Native American tribes, do not have to be joined under Rule 19" so long as their officials are sued in their official capacities. Mot. to Dismiss 40; *cf. Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547-48 (2d Cir. 1991). Plaintiffs cannot have it both ways.[1]

Finally, the District Court relied on the understanding that Plaintiffs had brought an *Ex parte Young*-type suit against tribal officials. *See, e.g.*, SPA3 (explaining that the Tribal Defendants "are sued in their official capacity for declaratory and injunctive relief only pursuant to the authority expressed in *Ex Parte Young*"); SPA8-9 (assessing claims against the Tribal Defendants under *Ex parte Young*); SPA9-10 (rejecting any claim for damages against the Tribal Defendants); SPA13 (explaining that "tribal sovereign immunity may limit the shape and nature of the relief against the Tribal Defendants"); SPA37 (resolving indispensable-party argument). If Plaintiffs did not believe that Plain Green was an arm of the Tribe entitled to sovereign immunity, they should have brought a

[1] Indeed, if Plain Green were *not* an arm of the Tribe, then Plaintiffs would necessarily be suing the named Tribal Defendants as individuals. Not only would there be indispensable-party problems with such a suit, but Plaintiffs' claims for injunctive relief would be moot. *See* Mot. for Substitution (Nov. 16, 2016), ECF No. 141 (explaining that Joel Rosette, Ted Whitford, and Tim McInerney no longer work for Plain Green).

different suit—a suit naming Plain Green or private individuals. It is too late to backtrack now.

In any event, even if the issue were an open one, Plain Green is an arm of the Tribe. The arm-of-the-Tribe inquiry generally asks (1) whether the Tribe created the entity; (2) whether the Tribe owns or controls the entity's operations; (3) whether the entity's economic success inures to the benefit of the Tribe; and (4) whether the Tribe intended to clothe the entity with immunity. *See, e.g.*, *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006); *Cohen's Handbook of Federal Indian Law* § 7.05[1][a] (2012). Here, the Tribe created Plain Green pursuant to tribal law. A270-271. The Tribe wholly owns and operates Plain Green. A270. Plain Green's economic success inures to the Tribe's benefit. A268, 270. And the Tribe has specifically indicated that Plain Green shares its sovereign immunity. A272. Plaintiffs' rhetoric about "selling" sovereignty does not change the analysis; none of Plaintiffs' authorities suggests that a court can jettison the arm-of-the-Tribe test. Resp. Br. 21-25.

B. Plaintiffs' State-Law Claims Fail Because *Ex parte Young* Does Not Apply.

The parties' primary dispute is whether Plaintiffs may bring an *Ex parte Young*-type suit against tribal officials in their official capacities for asserted violations of state law. They may not.

As the Tribal Defendants previously explained, the animating theory behind *Ex parte Young* is the supremacy of federal law. Opening Br. 17-18. Plaintiffs attempt to obscure that core premise by increasing the level of generality: They contend that "*Ex parte Young* is a case about responsibility and compliance with the law." Resp. Br. 26. But as *Pennhurst* made clear, *Ex parte Young* is not about compliance with *state* law; it is about compliance with *federal* law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104-06 (1984). Numerous cases from this Court and the Supreme Court have since reiterated that *Ex parte Young* applies to federal claims only. *See, e.g.*, *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007); *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 595 (2d Cir. 1990); Opening Br. 18-19.

Faced with that precedent, Plaintiffs argue that *Ex parte Young* authorizes state-law suits against *tribal officials*, but not *state officials*. Resp. Br. 32. That proposed distinction continues to ignore *Ex parte Young*'s federal-supremacy reasoning. It also contradicts the mountain of cases that treat tribal officials and state officials the same way for *Ex parte Young* purposes. Opening Br. 20-21. And most importantly, the distinction finds no support in the various cases that Plaintiffs cite.

Start with this Court's decision in *Otoe-Missouria Tribe of Indians v. N.Y. State Department of Financial Services*, 769 F.3d 105 (2d Cir. 2014). Resp.

Br. 27-28. *Otoe* was not an immunity case; this Court held that a State had regulatory authority over certain (arguably) off-reservation transactions. 769 F.3d at 114-15. The scope of a State's *regulatory* authority, however, is irrelevant here. Opening Br. 20 n.4. The Supreme Court has made clear that "[t]o say substantive state laws apply to off-reservation conduct . . . is not to say that a tribe no longer enjoys immunity from suit." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998); *see also Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (concluding that States may tax cigarette sales from Tribes to nonmembers but that Tribes enjoy immunity from suit to collect those taxes). *Otoe* is indeed "binding," Resp. Br. 28, but it is also beside the point.

Next, Plaintiffs misconstrue the Supreme Court's decision in *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165 (1977). Resp. Br. 29. In *Puyallup*, the State of Washington sued "41 *individuals*" to enjoin them from fishing in violation of state conservation laws. 433 U.S. at 168 (emphasis added). Three of those individuals happened to be tribal officers. *Id.* at 168 n.3. But the tribal officers were not sued in their official capacities—meaning that any injunction against them did not bind the Tribe itself. *See id.* at 171 (concluding that "a suit to enjoin violations of state law by individual tribal members is permissible"). The Supreme Court has since reaffirmed that individual tribal members, including individual tribal officials, are subject to individual-capacity

suits for violations of state law. *See Okla. Tax Comm'n*, 498 U.S. at 514. It has also indicated that tribal officials are subject to official-capacity suits for violations of federal law. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). But none of that helps Plaintiffs, who brought an *official-capacity* suit for violations of *state law*.

Plaintiffs then cite two Fifth Circuit cases that supposedly permitted just such a suit. Resp. Br. 30-31. Those two cases, however, represent the Fifth Circuit's repudiated pre-*Bay Mills* jurisprudence, which had limited tribal immunity to damages actions like the one in *Kiowa*. *See Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 571-72 (5th Cir. 2001); *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999). *Bay Mills* rejected that distinction and applied tribal immunity to a suit for injunctive relief. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031-32 (2014). In any event, it is far from clear that the Fifth Circuit ever blessed *Ex parte Young*-type suits against tribal officials based on state-law violations. The *Comstock* court, for example, exercised federal-question jurisdiction because an "extensive [federal] regulatory scheme" governed the oil leases—including those executed under state law. 261 F.3d at 574-75.

In the end, Plaintiffs are left only with some vague language in *Bay Mills*. But for several reasons, that language does not suggest that the Supreme Court

either (1) quietly overruled *Pennhurst*, or (2) quietly created a special set of *Ex parte Young* rules for tribal officials that do not apply to state officials.

First, Plaintiffs fail to grapple with *Bay Mills* itself. The Supreme Court stated that "*individuals*, including tribal officers," might be sued for injunctive relief. 134 S. Ct. at 2035 (emphasis in original). The italics suggest that the Court was envisioning individual-capacity actions. *See* Opening Br. 24-26; *cf. Hafer*, 502 U.S. at 25 ("Suits against state officials in their official capacity therefore should be treated as suits against the State."). That reading makes particular sense because the *Bay Mills* Court also insisted that it was reciting a principle that "this Court has stated before." 134 S. Ct. at 2035. Plaintiffs never explain why *Bay Mills* should instead be read to break significant new ground by authorizing state-law suits against tribal officials in their official capacities.

Second, Plaintiffs' contention that the parties in *Bay Mills* "briefed the issue of whether state law could be enforced through official capacity actions" is incorrect. Resp. Br. 34. To be sure, the United States acknowledged at the certiorari stage that several claims against tribal officials (some of which involved state law) had not yet been adjudicated. U.S. Cert. Br. at *21, *Bay Mills*, 134 S. Ct. 2024 (No. 12-515), 2013 WL 2010075 (May 14, 2013). But the point was merely that the case arose in an interlocutory posture, a traditional reason for denying Supreme Court review. *Id.* When the litigants actually discussed the viability of

Ex parte Young suits in their briefs, they focused on violations of the *federal* Indian Gaming Regulatory Act ("IGRA"). *See, e.g.*, Pet. at *13, 2012 WL 5353883 (Oct. 23, 2012); Cert. Reply Br. at *3, 2012 WL 6100048 (Dec. 6, 2012); U.S. Br. at *33, 2013 WL 5863581 (Oct. 31, 2013); Mich. Reply Br. at *20, 2013 WL 6157114 (Nov. 22, 2013). And when the litigants discussed state-law violations, as Plaintiffs note, Resp. Br. 36-37, they emphasized that *individuals* might be sued—not that *Ex parte Young* actions could be brought. Opening Br. 25. As Michigan explained at oral argument, "[i]t's well settled that . . . you can't enforce a State law" under *Ex parte Young*. Tr. of Oral Arg. at 10, *Bay Mills*, 134 S. Ct. 2024 (No. 12-515) (Dec. 2, 2013).

Third, Plaintiffs' assertion that the availability of state-law *Ex parte Young*-type suits was "necessary to the outcome" in *Bay Mills* is unsupported. Resp. Br. 37. Again, the question before the Supreme Court was whether IGRA had abrogated immunity for off-reservation gaming. Opening Br. 22-23. The Court concluded that it had not. *See Bay Mills*, 134 S. Ct. at 2033-34. After coming to that conclusion, the Court further explained that States retained regulatory authority off the reservation, *id.* at 2034, and that there were a variety of ways to enforce that authority, *id.* at 2034-35. The Court's interpretation of IGRA did not depend on the mechanisms available to enforce state law, let alone the specific availability of official-capacity suits. Thus, even if this Court were unsure of the

meaning of the *Bay Mills* dicta, it should follow a century of Supreme Court jurisprudence—beginning in 1908 with *Ex parte Young*—limiting official-capacity suits for injunctive relief to violations of federal law.

C. Plaintiffs' RICO Claims Fail Because RICO Does Not Authorize Suits Against Government Entities.

The overwhelming majority of federal courts have concluded that "governmental entities are not subject to RICO liability." Gregory P. Joseph, *Civil RICO: A Definitive Guide* § 11A, at 112 (4th ed. 2015); *see* Opening Br. 29-31. Plaintiffs nevertheless attempt to defend their RICO claims in three ways. They contend that (1) this Court lacks jurisdiction to consider the RICO question, (2) government entities are indeed subject to RICO liability, and (3) government officials are subject to RICO liability when sued in their official capacities. All three contentions are wrong.

First, Plaintiffs' jurisdictional argument ignores this Court's decision in *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76 (2d Cir. 2001). Plaintiffs concede that the Tribal Defendants "have an automatic right to appeal . . . tribal immunity" under the collateral order doctrine. Resp. Br. 40. And *Garcia* teaches that whether tribal immunity bars a suit for injunctive relief under a federal law like RICO depends on whether that law "appl[ies] substantively" to Tribes. 268 F.3d at 88. This Court answered the "applies substantively" question as part of its jurisdictional analysis in *Garcia*; it should do the same here. *See id.* at 84, 88; *see*

also Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 928-29 (7th Cir. 2008) (concluding that the question whether a State had a cause of action against a Tribe "falls within the ambit of the collateral order doctrine").[2]

Second, Plaintiffs fail to grapple with the many authorities concluding that "there is no municipal liability under RICO." *Rogers v. City of N.Y.*, 359 F. App'x 201, 204 (2d Cir. 2009). They instead argue that Tribes are subject to RICO under the statutory definition of "person." Resp. Br. 40-41 (relying on *United States v. Angelilli*, 660 F.2d 23 (2d Cir. 1981)); *see* 18 U.S.C. § 1961(3). That argument has its own problems—among them that cases like *Angelilli* have considered whether a government entity can be a RICO "enterprise," not whether the government entity is itself a "person." *See* 660 F.2d at 31. But more to the point, the prevailing rule does not rely on the premise that government entities are not "person[s]"; the rule is that, persons or not, government entities cannot form the *mens rea* necessary to commit the criminal predicate acts defined in 18 U.S.C. § 1961. *See In re CitiSource, Inc. Sec. Litg.*, 694 F. Supp. 1069, 1079-80 (S.D.N.Y. 1988) (distinguishing these two "hurdle[s]"). Courts, including courts in this Circuit, have near-uniformly held that "government entities are incapable of forming the

[2] At a minimum, this Court should exercise pendent appellate jurisdiction because the question of RICO's application to Tribes is "inextricably intertwined" with the broader question of tribal sovereign immunity. *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 116 (2d Cir. 2016) (citation omitted).

malicious intent necessary to support a RICO action." *Pedrina v. Chun*, 97 F.3d 1296, 1300 (9th Cir. 1996) (brackets and internal quotation marks omitted); *see Rogers*, 359 F. App'x at 204 (citing *Pedrina*); *Frooks v. Town of Cortlandt*, 997 F. Supp. 438, 457 (S.D.N.Y. 1998) (noting that "every court in this Circuit" has agreed), *aff'd*, 182 F.3d 899 (2d Cir. 1999); *Nu-Life Constr. Corp. v. Bd. of Educ. of City of N.Y.*, 779 F. Supp. 248, 251-52 (E.D.N.Y. 1991) (listing cases).[3]

Plaintiffs protest that many of those decisions involved municipalities. Resp. Br. 44. But Tribes are no less government entities than municipalities, and Plaintiffs offer no reason why the rule should be different for them. *See Bay Mills*, 134 S. Ct. at 2030 (noting that Tribes possess "the core aspects of sovereignty"). Plaintiffs simply double-down on their argument that Plain Green is an ordinary commercial corporation rather than an arm of the Tribe. Resp. Br. 45-46. As already explained, that argument is waived, is contradicted by Plaintiffs' own suit, and is fundamentally flawed. *See supra* pp. 3-6.

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[3] Plaintiffs' *amicus* argues that some of the predicate acts here do not require a particular *mens rea*. Public Citizen Amicus Br. 18. Plaintiffs do not make the same argument, so it has been waived. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001) ("Although an *amicus* brief can be helpful in elaborating issues properly presented by the parties, it is normally not a method for injecting new issues into an appeal, at least in cases where the parties are competently represented by counsel."). In any event, one of the RICO claims expressly requires fraudulent intent, A67, and the other requires a violation of state usury laws, A68, which in turn require "an unlawful intent." *Lowell & Austin, Inc. v. Truax*, 507 A.2d 949, 951 (Vt. 1985).

Plaintiffs offer a hodgepodge of other arguments, including attacking some courts' citation to *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), a Supreme Court decision about the scope of 42 U.S.C. § 1983. Resp. Br. 44-47. On that point, Plaintiffs get things backward: Under Section 1983, a showing of custom or policy may be enough to hold a government entity liable. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). RICO, meanwhile, requires fraudulent intent, and a government entity is incapable of that sort of *mens rea*. Thus, *Newport* is instructive for its recognition that there is "respectable authority to the effect that municipal corporations can not, as such, do a criminal act or a willful and malicious wrong" and for its "disinclination to award punitive damages against a municipality." 453 U.S. at 260-61 (internal quotation marks omitted). Both principles cut against permitting RICO suits against government entities. Beyond that, the analogy need not be perfect.

All told, Plaintiffs fail to identify a *single* case in which a court has held that a government entity is subject to suit under RICO. *See* Resp. Br. 40-48 (citing *United States v. Morrison*, 686 F.3d 94 (2d Cir. 2012) (business owner); *DeFalco v. Bernas*, 244 F.3d 286 (2d Cir. 2001) (individual public and private officials and private corporations); *Cty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) (state-*regulated* utility company); *Angelilli*, 660 F.2d 23 (individual court employee); *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977)

(individual employees of state agency)). The District Court relied on dicta in a Third Circuit decision that *precluded* suit against a government entity, *see* SPA55, but that decision has been rejected in this Circuit and elsewhere. Opening Br. 31-32.

Third, Plaintiffs argue that the Tribal Defendants can be sued in their official capacities, even if the Tribe itself cannot be sued. Resp. Br. 48-50. Yet Plaintiffs conflate official-capacity suits with individual-capacity suits based on *actions taken* in an official capacity. The Supreme Court has made clear that they are not the same thing. *See Hafer*, 502 U.S. at 26 (explaining that an official-capacity suit "is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury" (internal quotation marks omitted)). Nearly all of the cases that Plaintiffs cite involve individual-capacity suits based on actions taken in the course of an official's duties. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165 (2001) (describing "high-ranking individuals . . . act[ing] within the scope of their authority"); *United States v. Warner*, 498 F.3d 666, 674 (7th Cir. 2007) (criminal case against individuals); *DeFalco*, 244 F.3d at 294 (listing individual defendants); *United States v. Garner*, 837 F.2d 1404, 1407 (7th Cir. 1987) (criminal case against

individuals); *Angelilli*, 660 F.2d at 26 (criminal case against individuals).[4] Those individual-capacity RICO suits remain available "to stop infiltration of governmental entities by organized crime" and to "target[] individuals who abuse their official capacity to commit crimes." Resp. Br. 46-47, 50.

By contrast, courts have rejected official-capacity suits like this one. Opening Br. 30-31. Because official-capacity suits are, "in all respects other than name, to be treated as a suit against the entity," they are subject to the bar on RICO suits against government entities. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

D. Tribal Immunity Leaves No Room For Discovery.

As a fallback position, Plaintiffs contend that this case should be remanded for discovery. But if the Tribal Defendants are right about the law, there is no need for discovery. Indeed, the purpose of immunity is to shield governments from "even such pretrial matters as discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Plaintiffs first argue that they are entitled to discovery because the Tribal Defendants have not yet appealed the federal Electronic Funds Transfer Act

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[4] The one exception is *CitiSource*, which involved RICO claims against New York City. As already noted, *CitiSource* held that "a municipal corporation is incapable of the criminal intent necessary to support the alleged predicate offense." 694 F. Supp. at 1079. Plaintiffs appear to have cited it because it includes a "*but cf.*" citation to a Kansas district court decision characterized (inaccurately) as an official-capacity action. *See id.* at 1080.

("EFTA") claim. Resp. Br. 20-21. Without viable RICO claims, however, the Tribal Defendants "would not . . . be subject to suit in Vermont" and the District Court would lack "pendent personal jurisdiction" over "the other claims against them," including the EFTA claim. SPA24. Plaintiffs also seek jurisdictional discovery about Plain Green's arm-of-the-Tribe status. Resp. Br. 23-24. Again, though, they have waived that argument. *See supra* pp. 3-6.[5] Last, Plaintiffs suggest that they are entitled to discovery about alleged RICO violations even if the Tribal Defendants are not subject to RICO. Resp. Br. 52. But if a claim fails at the outset, a plaintiff is not entitled to discovery on that claim. Plaintiffs cannot muddy the waters by citing the District Court's acknowledgement of "additional allegations" about *other parties*. *See* SPA25, 63-64. Put simply, if this Court upholds tribal immunity—as it should—then there is nothing left to discover from the Tribal Defendants.

II. IN THE ALTERNATIVE, THIS DISPUTE SHOULD BE SUBMITTED TO ARBITRATION.

A. The Arbitration Agreement Covers This Dispute.

Plaintiffs commit less than half a page to arguing that the arbitration agreement does not apply. Resp. Br. 53-54. They rely on the provision of the loan

[5] If Plaintiffs were allowed to take a different tack at this late stage, the Tribal Defendants should also be allowed to file a new motion to dismiss on grounds like joinder, which Plaintiffs survived the first time only by portraying this as the *Ex parte Young* suit they now seek to disavow.

agreement stating that "the arbitrator has no authority to conduct class-wide proceedings." A116. As previously explained, the fact that Plaintiffs filed this suit as a putative class action does not mean that they can avoid arbitration. Opening Br. 37-38 & n.6. Plaintiffs waived their right to proceed as a class; any arbitration would therefore be an individual arbitration. A116.

It is true that if Plaintiffs were to challenge the validity of their class arbitration waiver, then that challenge would fall within the tribal court's authority. A116. But Plaintiffs do not purport to challenge that waiver, nor can they in light of clear Supreme Court case law establishing that such waivers are valid and enforceable. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

B. The Arbitration Agreement Delegates Disputes About Arbitrability To The Arbitrator.

The parties to an arbitration agreement may choose to have the arbitrator, rather than a court, decide "'gateway' questions of 'arbitrability,'" such as challenges to the validity of the arbitration agreement itself. *Rent-A-Center*, 561 U.S. at 68-69. This is the logical place to start—and end—the analysis: If the arbitration agreement contains a valid delegation clause, then the FAA precludes the Court from considering challenges to the validity of the arbitration agreement as a whole. *Id.* at 69 n.1. And the arbitration agreement here indeed contains a clear, unmistakable, and valid delegation clause. Opening Br. 35-49.

1. Plaintiffs Misidentify The Delegation Clause.

Plaintiffs focus on the wrong part of the arbitration agreement. The agreement contains a clear and unmistakable delegation clause: It provides that "any dispute . . . will be resolved by binding arbitration," and it defines the term "Dispute" to include "any issue concerning the validity, enforceability, or scope of . . . the Agreement to Arbitrate." A114-115. Both opening briefs, the District Court's opinion, and even Plaintiffs' *amicus* all focus on that language. *See* Opening Br. 36-37; Think Fin. Br. 17-19; SPA30; Public Citizen Amicus Br. 21. Plaintiffs, however, direct their arguments to an unrelated provision that defines the scope of the arbitrator's power *to award remedies*, not the scope of the disputes that are to be decided through arbitration. Resp. Br. 80-81 (referring to remedies provision as the "purported Delegation Clause"). Near the end of their brief, Plaintiffs address this discrepancy by asserting that the *defendants* have identified the wrong contractual language. Resp. Br. 94-95. But that assertion rests on two fatal misconceptions.

First, Plaintiffs misstate the Tribal Defendants' argument when they say that "Defendants argue that the part of the Agreement that defines the term 'dispute' is the delegation clause." *Id.* at 94. In fact, the Tribal Defendants' position is and has been that the delegation is achieved through the contractual language stating that "any dispute . . . will be resolved by binding arbitration" (which Plaintiffs

simply ignore) *coupled with* the agreement's definition of "dispute" to include disputes about arbitrability. Opening Br. 36.

Second, Plaintiffs appear to misunderstand what a delegation clause is. They state that the provision identified by the Tribal Defendants "is not a delegation clause because it does not identify the powers of the arbitrator." Resp. Br. 94-95 (citing A265). But there is no formalistic requirement that a delegation clause be phrased in terms of the arbitrator's powers rather than in terms of the controversies to be settled by arbitration. *See Rent-A-Center*, 561 U.S. at 68-70. As the term is used by the Supreme Court, a "delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Id.* at 68; *see also* SPA30. In fact, this Court has recognized that the delegation of threshold arbitrability issues may even be achieved by *incorporation*. *See Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005). What matters is that the parties agreed for the arbitrator to decide disputes about arbitrability.

2. The Agreement Clearly And Unmistakably Assigns Questions About Its Validity To The Arbitrator.

Plaintiffs assert that "Chippewa Cree law does not empower arbitrators to decide whether disputes are arbitrable" and that "[a]ny 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." Resp. Br. 81-82. Plaintiffs are wrong. The FAA provides that an arbitration agreement "shall be

valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). "The FAA thereby places arbitration agreements on an equal footing with other contracts." *Rent-A-Center*, 561 U.S. at 67; *see also Concepcion*, 563 U.S. at 339 (concluding that the FAA "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability" (internal quotation marks omitted)).

It is therefore irrelevant whether tribal law provides an arbitrator with *arbitration-specific* powers or legal standards. In the end, decisions about the validity of an arbitration agreement—including a delegation clause, *see Rent-A-Center*, 561 U.S. at 68-69—must be made on the basis of generally applicable contract law. *See T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 344 (2d Cir. 2010) ("To determine whether the parties intended to submit a given matter to arbitration, the general rule is that courts 'should apply ordinary state-law principles that govern the formation of contracts.'" (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995))). And while Plaintiffs assert that "[t]he Tribal Defendants have never identified this contract law," Resp. Br. 92, the Tribal Defendants' opening brief explains that tribal contract law can be supplemented as necessary by Montana contract law, Opening Br. 42 n.7.

Plaintiffs' lengthy discussion of this Court's decisions in *T.Co* and *Contec* is difficult to parse, but it appears to respond to an argument that the Tribal Defendants have never made. *See* Resp. Br. 82-86. The opening brief cited those decisions because they found that language similar to the delegation clause here "displayed clear and unmistakable intent to submit the question to the arbitrator" rather than to a court. *T.Co*, 592 F.3d at 344; *see* Opening Br. 36-37. Plaintiffs, meanwhile focus on the fact that the agreements in *T.Co* and *Contec* achieved their "clear and unmistakable" delegations by incorporating an arbitration organization's rules. Resp. Br. 82-84. Although the arbitration agreement in this case likewise refers to the "rules and procedures" of AAA and JAMS, A115, the Tribal Defendants did not argue that such a reference is the source of the delegation. Rather, the Tribal Defendants have consistently maintained that language *within the arbitration agreement itself*—the statement that "any dispute . . . will be resolved by binding arbitration," A114, read together with the definition of "dispute," A115—satisfies the "clear and unmistakable" standard. If anything, the delegation is clearer here than in *T.Co* or *Contec* because the relevant language appears in the arbitration agreement itself.[6]

[6] Plaintiffs also seek to distinguish *T.Co* by arguing that the Court "never reached the issue of whether the language of the arbitration agreement 'clearly and unmistakably' expressed an intention to delegate to the arbitrator." Resp. Br. 83. That is false. The Court found "a 'clear and unmistakable' expression of [the

Finally, Plaintiffs' purported concerns about corruption are properly addressed through the FAA's provision for post-arbitration review by a federal court, which can "vacat[e] the award upon the application of any party to the arbitration . . . where the award was procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a); *see* Opening Br. 45-47. Plaintiffs argue that such review would be unavailable here, despite the clear terms of the FAA, because of the arbitration agreement's provision for tribal court review. Resp. Br. 86; *see also id.* at 89 (claiming that the delegation clause "holds the key to keeping Defendants' entire fraudulent scheme from federal review"). But the agreement does not purport to rule out federal court review, and nor could it. It merely provides that "the arbitrator's award may be filed with the tribal court" and "may be set aside by the tribal court upon judicial review." A116. At any rate, the FAA's judicial review provisions cannot be overridden by contract. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). As a result, the FAA's federal court backstop will be available here, obviating any need for this Court to consider Plaintiffs' *ex ante* prognostications about corruption.

Section 4 of the FAA is not to the contrary. Plaintiffs contend that Section 4 authorizes a court to consider whether the arbitration will be a "corrupt process"

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parties'] intent to allocate to the arbitrator the task of interpreting the scope of his powers and duties." 592 F.3d at 344.

before the fact, by providing that "[i]f 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." Resp. Br. 93 (quoting 9 U.S.C. § 4, though mistakenly citing 9 U.S.C. § 2). But there is no dispute in this case that the parties made the arbitration agreement and that Plaintiffs are now refusing to perform; rather, Plaintiffs contend that the arbitration process will inevitably be tainted by corruption. That argument about "fraud" and "undue influence" is to be made *after* the arbitration actually occurs, as Section 10—which expressly addresses those circumstances—prescribes. Opening Br. 45-47; *see Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (deeming pre-arbitration attack on foreign arbitration "premature").

3. The Delegation Clause Is Valid And Enforceable.

Plaintiffs argue that the delegation clause is "unconscionable" and "illusory" because it "fails to provide any mechanism [for the arbitrator] to invalidate the Agreement" if he finds it unlawful. Resp. Br. 87. According to Plaintiffs, 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." *Id.*

Plaintiffs are doubly wrong. For starters, Section 10-3-601 provides that "a Consumer does not have a right to rescind a Loan" more than one day after receiving it "unless the Creditor agrees to the rescission in writing." A323. But that limitation on the *borrower's* ability to *unilaterally* rescind the loan places no restriction on an arbitrator's authority to invalidate the agreement to the extent that it is unlawful. And if tribal law is not sufficiently developed to recognize that traditional remedy itself, then its incorporation of Montana law will suffice. *See* Opening Br. 42 n.7; *see also* Tribal Code § 10-3-602 (prohibiting unconscionable arbitration clauses in loan agreements). In addition, Plaintiffs' suggestion that tribal law "preempts federal law," Resp. Br. 87, is preposterous. Congress has plenary authority over Indian Tribes; if there is a conflict, then federal law preempts tribal law, not the other way around. *See, e.g.*, *Bay Mills*, 134 S. Ct. at 2030.

Plaintiffs also contend that the delegation clause is "unconscionable because no one can actually understand it," "because it limits the scope of any arbitration to only 'individual Disputes,'" and because it provides for tribal court review that Plaintiffs believe the tribal court lacks jurisdiction to conduct. Resp. Br. 87-88. First, Plaintiffs have not established that the delegation clause is particularly difficult to understand (though their brief misidentifies it), and they provide no citation for the dubious proposition that a difficult-to-understand contract is

unconscionable. Second, as discussed above, the Supreme Court has made clear that an arbitration agreement cannot be invalidated simply because it forecloses class proceedings. *See supra* p. 19. Third, Plaintiffs do not explain how the tribal court's supposed lack of jurisdiction could render the delegation clause (as opposed to the tribal-review provision) unconscionable. At any rate, Plaintiffs consented to the tribal court's jurisdiction when they signed their loan agreements, and are thus nothing like the unconsenting defendants in the cases they cite. Resp. Br. 63-66.

C. The Arbitration Agreement Is Valid And Enforceable.

This Court need not consider the validity of the arbitration agreement itself; that task is for the arbitrator. If, however, this Court considers Plaintiffs' challenges, they fail for reasons already discussed. Opening Br. 49-54. Plaintiffs' responses do not change the analysis.

Plaintiffs contend that this case is on all fours with *Hayes v. Delbert Services Corp.*, 811 F.3d 666 (4th Cir. 2016), because language in the loan agreement might be read to disclaim otherwise-applicable federal law. Resp. Br. 56-57; *but see* A263 (federal law does not apply "*unless* found expressly applicable to the operations of the Chippewa Cree Tribe" (emphasis added)). To the extent that the arbitrator (or this Court) reads the agreement to disclaim all federal law and concludes that such a disclaimer is invalid, the disclaimer should be severed

pursuant to the agreement's express severability clause. That feature distinguishes this case from *Hayes*, in which the Fourth Circuit made no mention of a severability clause. Opening Br. 53-54.

Parm v. National Bank of California, N.A., 835 F.3d 1331 (11th Cir. 2016), is also inapposite. That case turned on the arbitration agreement's requirement that arbitration "be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative" of that Tribe, when no such representative was available. *Id.* at 1333; *see also id.* at 1335-37. There is no similar provision in the agreement here, which gives Plaintiffs the right to select AAA or JAMS to administer the arbitration. A115.

Plaintiffs next assert that the arbitration agreement is "merely illusory" because the Tribal Defendants "have not waived immunity" and "will seek to void any arbitration award because of the tribal immunity reserved under the Agreement." Resp. Br. 62. But the arbitration agreement merely states that it does not constitute "a relinquishment or waiver of the Chippewa Cree's Tribes [*sic*] sovereign status or immunity." A116. The agreement clearly allows for arbitration between Plaintiffs and Plain Green—that is the whole point of the arbitration agreement. A114 ("any dispute you have with Lender . . . under this Agreement will be resolved by binding arbitration"); A109 ("Lender" means Plain Green); *cf. C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*,

532 U.S. 411 (2001) (by signing agreement providing that all disputes would be resolved through arbitration, Tribe consented to arbitration and enforcement).

Finally, Plaintiffs' argument that the arbitration agreement "has several features that are both procedurally and substantively unconscionable" should not be considered, as that section of Plaintiffs' brief does not supply a single citation to relevant case law or statutes. *See* Resp. Br. 66-68.

D. If Any Individual Provision Is Unenforceable, It Must Be Severed And The Remainder Of The Agreement Enforced.

Plaintiffs assert that the Tribal Defendants forfeited their severability argument by addressing it in their reply brief before the District Court. Resp. Br. 78. But the Tribal Defendants raised the arbitration agreement's severability clause in direct response to Plaintiffs' arguments about the validity of certain portions of the agreement—arguments that Plaintiffs advanced in their opposition to the motion to compel arbitration. The Tribal Defendants were under no obligation to divine and address Plaintiffs' arguments before Plaintiffs made them. *See United States v. Bari*, 599 F.3d 176, 180 n.6 (2d Cir. 2010) (per curiam) ("[A]lthough we normally will not consider *issues* raised only in reply briefs, we will consider *arguments* raised in response to arguments made in appellee's brief." (citations omitted)).

Plaintiffs' argument that the severability doctrine is inapplicable here is equally unavailing. Although the presence of a severability clause alone is not

always dispositive, the case cited by Plaintiffs acknowledges that "[a]n illegal or unconscionable provision of a contract may generally be severed so long as it does not constitute the essential purpose of the agreement." *Glassford v. BrickKicker*, 35 A.3d 1044, 1054 (Vt. 2011) (quoting *In re Poly-Am., L.P.*, 262 S.W.3d 337, 360 (Tex. 2008)). The essential purpose of the arbitration agreement here is, of course, to secure the well-recognized efficiency of arbitration. A114 ("Arbitration procedures are simpler and more limited than court procedures."); *see, e.g.*, *ReliaStar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009) ("the purpose underlying arbitration" is "to provide parties with efficient dispute resolution, thereby obviating the need for protracted litigation"). Thus, if the ancillary provisions that Plaintiffs challenge, such as the agreement's choice-of-law and judicial review provisions, are invalid, then those provisions should be severed and the case sent to arbitration, consistent with the pro-arbitration policy underlying the FAA.

CONCLUSION

For the foregoing reasons, and those in the Tribal Defendants' opening brief, the District Court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this Reply Brief complies with the type-volume limitation of Local Rule 32.1(a)(4)(B) because the Brief contains 6,995 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

I further certify that this Reply 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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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, I caused the foregoing to be filed through this Court's CM/ECF appellate filer system, which will send a notice of electronic filing to all registered users including the following lead counsel of record for Plaintiffs-Appellees:

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