UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Norfolk Division

MATTHEW HOWARD,

Plaintiff,

vs.

PLAIN GREEN, LLC and TRANSUNION, LLC,

Defendants.

Civil No. 2:17-cv-00302-RBS-DEM

PLAIN GREEN'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Plain Green, LLC ("Plain Green") respectfully submits the following reply memorandum in support of its Motion to Dismiss the Complaint filed by Plaintiff Matthew Howard.

INTRODUCTION

Despite Plaintiff's attempt to muddle Plain Green's arguments by referring to inapposite authority and arguments contrary to well-settled law, the issues in this lawsuit are straightforward. Plain Green operates as an economic arm of the Chippewa Cree Tribe ("Tribe") and is therefore entitled to sovereign immunity from suit. None of Plaintiff's arguments in opposition affect that dispositive conclusion. The Complaint should be dismissed.

ARGUMENT

I. THE COURT SHOULD REJECT PLAINTIFF'S ATTEMPT TO DIMINISH PLAIN GREEN'S SOVEREIGN IMMUNITY.

A. Plain Green is immune from suit regardless of the location of its activities.

Plaintiff attempts to advance the erroneous proposition that tribes and their economic arms do not enjoy sovereign immunity for off-reservation conduct. In support, Plaintiff cites a

litany of inapposite authority, analogizing to statutes governing immunity of "foreign states" and case law that is neither relevant to the issue at hand nor binding on this court. *See* Plaintiff's Opposition to Motion to Dismiss ("Opp'n") 3-6, ECF No. 18.

It is well-settled that tribal sovereign immunity exists for tribal commercial activities occurring off-reservation. In *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), the Supreme Court rejected the same argument advanced by Plaintiff: that tribal sovereign immunity should be confined to on-reservation transactions. *Id.* at 755. The Court held that tribal sovereign immunity extends to a tribe's "governmental or commercial activities" regardless of "whether they were made on or off a reservation." *Id.* Moreover, the Court recently rejected an invitation to revisit its holding in *Kiowa* and instead reaffirmed the core principle in tribal sovereign immunity jurisprudence that the "doctrine of tribal immunity—*without any exceptions for commercial or off-reservation conduct*—is settled law and controls." *See Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. 2024, 2036 (2014).

Here, the Tribe's complained of actions occurred on the Tribe's Reservation. In fact, Plain Green employs approximately fifty-five employees who conduct company business on the Tribe's Reservation. But regardless of location, Plain Green is immune from suit pursuant to unequivocal Supreme Court precedent, which further recognizes that any diminishment of tribal sovereign authority may only be effected by Congress in the exercise of its plenary authority in Indian affairs. *Bay Mills Indian Cmty*., 134 S. Ct. at 2037-38. Because the location of Plain Green's activities has no bearing on its immunity from suit, this court should reject Plaintiff's argument as directly contrary to Supreme Court precedent.

B. The location of the transaction between Plaintiff and Plain Green has no bearing on whether Congress abrogated tribal sovereign immunity in the FCRA.

In its Memorandum in Support of its Motion to Dismiss, Plain Green cited *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 827 (7th Cir. 2016), for the proposition that Congress did not abrogate tribal sovereign immunity through the FCRA. Plain Green's Memo in Support of Motion to Dismiss ("PG Memo") 8-9, ECF No. 14. In response, Plaintiff argues that the *Meyers* case is inapplicable because "the facts and circumstances of *Meyers* are inherently distinct from those of the current suit." Opp'n at 6. Specifically, Plaintiff asserts that, unlike here, "[t]he entire suit arose from actions and business transactions occurring on and within the tribal lands of the Oneida Tribe of Indians of Wisconsin." *Id.*

Plaintiff's argument—that the determination of whether Congress has abrogated tribal sovereign immunity rests on where the "actions and business transactions" giving rise to a purported claim arose—is flat wrong. "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). More precisely, "Congress may abrogate a [tribal] sovereign's immunity only by using statutory language that makes its intention unmistakably clear." *Florida v. Seminole Tribe*, 181 F.3d 1237, 1242 & n. 7 (11th Cir.1999); *accord Fla. Paraplegic Ass'n v. Miccosukee Tribe*, 166 F.3d 1126, 1131 (11th Cir. 1999); *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (explaining that Congress's intent to abrogate immunity from suit "must be obvious from 'a clear legislative statement'").

It is therefore no wonder that the *Meyers* court focused solely on the relevant language of FCRA without regard to where the activities giving rise to the purported claim occurred. The

location of the actions giving rise to a statutory claim has no relationship to whether Congress intended to abrogate immunity within that statute. Under Plaintiff's theory, Congress would have abrogated tribal sovereign immunity in the instant case but did not in *Meyers*, notwithstanding the fact that the same statutory language is at play. This contention is not only inconsistent with the decades of Supreme Court authority governing Congressional abrogation of immunity, but also defies common sense. As a result, this court should follow the clear logic of the *Meyers* decision and conclude that Congress did not abrogate tribal sovereign immunity in the FCRA.

C. Plaintiff improperly shifts the burden onto Plain Green in an attempt to establish subject-matter jurisdiction.

Plaintiff argues that Plain Green has failed to come forward with sufficient evidence demonstrating that it is an arm of the Tribe. Opp'n at 8-9. Specifically, Plaintiff boldly concludes that "without further information and evidence to support tribal sovereign immunity, the relationship between the Chippewa Cree Tribe and Plain Green is not sufficiently close enough to permit Plain Green to share in the Chippewa Cree Tribe's immunity." *Id.* This court should reject Plaintiff's unsupported attempt to improperly shift his burden to establish the court's subject-matter jurisdiction onto Plain Green.

Subject-matter jurisdiction is a threshold requirement that must be satisfied in every case, *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 422 (4th Cir.1999), and the "burden of alleging facts sufficient to establish such subject-matter jurisdiction lies . . . squarely with the plaintiff." *SunTrust Bank v. Vill. at Fair Oaks Owner, LLC*, 766 F. Supp. 2d 686, 688 (E.D. Va. 2011). Further, tribal sovereign immunity is a threshold *jurisdictional* question that must be addressed before the merits. *See Puyallup Tribe v. Dept. of Game of State of Wash.*, 433 U.S. 165, 172 (1977) (stating that "[a]bsent an effective waiver or consent," a court "may *not exercise*

jurisdiction over a recognized Indian tribe" (emphasis added)); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) (explaining that "the issue of tribal sovereign immunity is jurisdictional in nature"); *see also Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684-85 (8th Cir. 2011) ("We have held that tribal sovereign immunity is a threshold jurisdictional question."). As a result, it is Plaintiff's burden to demonstrate that tribal sovereign immunity does not bar jurisdiction in this case. Because Plaintiff has produced no such evidence, the Complaint should be dismissed without jurisdictional discovery ordered. *See Carefirst of Md., Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 402 (4th Cir. 2003) ("When a plaintiff offers only speculation or conclusory assertions . . . , a court is within its discretion in denying jurisdictional discovery."); *see also White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (upholding denial of jurisdictional discovery where the district court concluded that an entity was an "arm of the tribe" and the plaintiff offered "only speculative arguments" that the entity was not entitled to sovereign immunity); *Everette v. Mitchem*, 146 F.Supp.3d 720, 722-723 (E.D. Md. 2015) (denying plaintiff's request for jurisdiction discovery on the question of whether a tribal lending enterprises are arms of the tribe because plaintiff "failed to identify any specific facts to support her assertion that the tribes do not own, operate, and control [enterprises].").

D. Notwithstanding Plaintiff's burden to establish subject-matter jurisdiction, Supreme Court precedent dictates that Plain Green has produced evidence sufficient to demonstrate its status as an arm of the tribe entitled to sovereign immunity.

Plaintiff also asserts that Plain Green's "formal and functional" relationship with the Tribe is not sufficiently close to support extension of the Tribe's sovereign immunity to Plain Green. Opp'n at 7. And while the Fourth Circuit has not adopted a test to determine whether an entity possesses sovereign immunity as an arm of the tribe, Plaintiff cites *Breakthrough Mgmt.*

Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1183 (10th Cir. 2010), as though it is an established test in this Circuit.

But the *Breakthrough* test has not been adopted by the Fourth Circuit and there is ample reason why it should not be. This court should not look to the *Breakthrough* decision because it employs factors that impose limitations on the doctrine of sovereign immunity not imposed by Congress. The Supreme Court has emphasized time and time again that "it is fundamentally Congress's job, not [the courts'], to determine whether or how to limit tribal immunity." *Bay Mills Indian Cmty.*, 134 S. Ct. at 2037; *see Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 510 (1991) (stating that because "Congress has always been at liberty to dispense with" or limit tribal immunity, "we are not disposed to modify" its scope). Indeed, "[t]he special brand of sovereignty the tribes retain—*both its nature and its extent*—rests in the hands of Congress." *Bay Mills Indian Cmty.*, 134 S. Ct. at 2037 (emphasis added).

In defining the scope of tribal sovereign immunity, Congress has not placed limitations on an entity's purpose or the nature of its activities as a condition of that entity's sovereign immunity. As noted, the Supreme Court has clarified that in the absence of Congressionally-imposed limitations, an entity's purpose and its activities are irrelevant to the determination whether it qualifies for immunity. *See Kiowa*, 523 U.S. at 754-55 (citing *Puyallup Tribe*, 433 U.S. 165, 97 S.Ct. 2616 (immunity extends to fishing, "which may well be a commercial activity"); *Potawatomi*, 498 U.S. 505, 111 S.Ct. 905 (immunity extends to suit over taxation of cigarette sales); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940) (immunity extends to coal-mining lease)). In light of this precedent, it follows that an arm-of-the-tribe test that assesses the nature of the entity's activities and its purposes would function as a judicially-imposed limitation on sovereign immunity that infringes on Congress's plenary authority in

Indian affairs and contradicts the Supreme Court's decisions that defer to that plenary authority. *See Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1110-11 (Colo. 2010) (noting that factors in an arm of the tribe test focusing on the entity's purpose and its activities "contradict U.S. Supreme Court precedent rendering the entity's purpose and its activities irrelevant to the determination whether it qualifies for immunity"). Because the *Breakthrough* test requires courts to discern the purpose of the entity seeking immunity in determining whether it is an arm of the tribe, it vests the judiciary with authority that "rests in the hands of Congress." *Bay Mills Indian Cmty.*, 134 S. Ct. at 2037. Thus, the *Breakthrough* test should not be adopted by this court.

Instead, this court should join the many jurisdictions that have adopted an arm-of-the-tribe test focusing principally on the legal and organizational relationship between the tribe and the subject entity. *See, e.g.*, *Cash Advance*, 242 P.3d at 1110; *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1279 (Wash. 2006) (citations omitted); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998) (concluding that an entity established by tribal council pursuant to its powers of self-government is a tribal agency protected by the tribe's sovereign immunity absent waiver). A focus on the legal and organization relationship captures the most salient factors relied on by federal and state jurisdictions when engaging in an arm-of-the-tribe inquiry. *See Cash Advance*, 242 P.3d at 1110 (adopting an arm-of-the-tribe test "which focuses on the relationship between the tribal entities and the tribes" after engaging in an extensive review of relevant federal courts of appeal decisions). The factors outlined by the Colorado Supreme Court in *Cash Advance* are most appropriate for this court's adoption as they were developed based on an extensive review of applicable federal authorities with due deference to Congress's role in defining tribal sovereign immunity. Those factors are: "(1)

whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty." *Id.* at 1111.

Application of these factors against the undisputed evidence makes clear that Plain Green possesses tribal sovereign immunity. It is undisputed that Plain Green satisfies the first factor because it was incorporated under the laws of the Tribe and operates pursuant to the Tribe's laws. PG Memo, Ex. A. at 1, 3, 13. The second factor is also satisfied because the Tribe owns Plain Green through Atoske Holding Company, a wholly-owned and operated instrumentality of the Tribe. *Id.* at 13. Indeed, the Tribe has the sole proprietary interest in, and sole responsibility for, the conduct of the activities of Plain Green. *Id.* Finally, extension of the Tribe's immunity to Plain Green protects the Tribe's sovereignty because the success of Plain Green inures to the Tribe. Plain Green is critical in the Tribe's efforts to generate revenues as a means of promoting increased economic independence and self-determination. For example, revenues from Plain Green are currently funding the development of a health clinic for the Tribe. Plain Green revenues are also used by the Tribe to fund Tribal community events, such as ceremonies and pow-wows; school supplies, medical equipment, and subsistence distributions to Tribal members. Because Plain Green satisfies the *Cash Advance* factors, it is an arm of the Tribe entitled to immunity.

E. Plain Green is an arm of the tribe entitled to immunity under the *Breakthrough* test.

Plain Green still qualifies as an arm of the tribe even under *Breakthrough*. The *Breakthrough* test looks to the following factors in determining whether any entity is an arm of the tribe: (1) its method of creation; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the tribe has over the entity; (4) whether the tribe intended for

the entity to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entity. *Breakthrough*, 629 F.3d at 1181.

Despite Plaintiff's erroneous assertion that Plain Green has not demonstrated that it is an arm of the tribe, all of the *Breakthrough* factors support extension of the Tribe's immunity to Plain Green.

1. Method of Creation. The first factor weighs in favor of immunity because Plain Green was incorporated under the laws of the Tribe and operates pursuant to the Tribe's laws. PG Memo, Ex. A. at 1, 3, 13. Additionally, in ratifying and approving Plain Green's Articles of Incorporation, the Tribe "recognize[d] the responsibilities of Plain Green, LLC, as an economic arm of the Tribe" to serve the needs of the Tribe and its members. *Id.* at 1. Plain Green's Articles of Incorporation provide more than sufficient evidence to satisfy the first *Breakthrough* factor. *See Breakthrough*, 629 F.3d at 1191-92 (relying on the tribal resolution creating the tribal arm to satisfy the first factor).
2. Purpose. Although Plain Green's purpose should not be relevant in assessing whether it is entitled to immunity, *see Kiowa*, 523 U.S. at 55, the second factor weighs in favor of immunity because Plain Green was "created for the financial benefit of the Tribe and to enable it to engage in various governmental functions." *Breakthrough*, 629 F.3d at 1192. The Tribe formed Plain Green for the express purposes of serving the social economic, educational, and health needs of the Tribe; increasing Tribal revenues; enhancing the Tribe's economic self-sufficiency and self-determination; and providing positive, long-term social, environmental and economic benefits to Tribal members by enhancing the Tribe's business undertakings and prospects. PG Memo, Ex. A. at 13; *Breakthrough*, 629

F.3d at 1192 (citing the tribal resolution creating the tribal arm as evidence to satisfy the second factor).

3. Structure, Ownership, and Management. The third factor weighs in favor of immunity because the structure of Plain Green ensures significant Tribal involvement and control. Indeed, the Chippewa Cree Tribal Business Committee (the Tribe's governing body) appoints all five of the company's Managing Members, which serve as its Board of Directors. PG Memo, Ex. A. at 7. Additionally, the identity of the Managing Members also ensures continued Tribal control over Plain Green's operations. At least three of the Managing Members must be members of the Tribe, and at least one must be a member of the Chippewa Cree Tribal Business Committee. *Id.* The Business Committee also retains the right to remove Managing Members for cause. *Id.* at 8. A vast majority of Plain Green employees are Tribal members, and Tribal members are also represented within the executive leadership of the company. Further, Plain Green is subject to strict regulation under the Tribe's Lending and Regulatory Code, which regulates a variety of Plain Green's activities, including extension of credit, application of usury and interest rates, and required loan agreement disclosures, among other topics. *See* Chippewa Cree Tribal Lending & Regulatory Code, Chapter 3, Parts 1, 2, 5 (attached as Exhibit A to this Reply).[1] Plain Green is also subject to regulation by the Tribal Consumer Protection Bureau ("TCPB"), which is an independent governmental regulatory subdivision of the

[1] Plain Green requests that this court take judicial notice of the Tribe's Lending and Regulatory Code as a publically-available law of a sovereign. *See U S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014) (stating that it is "well established" that this court "may properly take judicial notice of matters of public record, including statutes" (internal quotation marks omitted)); *United States v. Coffman*, 638 F.2d 192, 194 (10th Cir. 1980) ("That the courts are allowed to take judicial notice of statutes is unquestionable.").

Tribe. *See id.*, Chapter 4. The TCPB conducts quarterly compliance audits of Plain Green in additional to an annual on-site review. *See id.*, §§ 10-4-108, 10-4-111.

4. Tribal Intent that Entity is Vested with Immunity. The fourth factor weighs in favor of immunity because the Tribe clearly intended for Plain Green to share in its immunity as an arm of the Tribe. Plain Green's Articles of Organization state: "Tribe hereby confers on [Plain Green] sovereign immunity from suit to the same extent that the Tribe would have such sovereign immunity if it engaged in the activities undertaken by [Plain Green]." PG Memo, Ex. A. at 14. The Articles further state: "The [Tribe] hereby confers on the Company all of the Tribe's right, privileges and federal immunities concerning federal, state, and local taxes, regulation, and jurisdiction, to the same extent that the Tribe would have such rights, privileges, and immunities, it if engaged in the activities undertaken by [Plain Green]." *Id.* at 5. As was the case in *Breakthrough*, the fourth factor is satisfied because the Tribe "clearly expressed its belief that [Plain Green] was a division of the Tribe that was entitled to its immunity from suit." 629 F.3d at 1194.
5. Financial Relationship. The Tribe is the sole owner of Plain Green, PG Memo, Ex. A. at 13, and, as a result, all of Plain Green's profits inure to the benefit of the Tribe. Moreover, Plain Green does not pay service provider fees to outside entities because it operates all facets of its business internally.
6. Serving the Purposes of Sovereign Immunity. Plain Green's immunity would further federal policies intended to promote Indian tribal autonomy because Plain Green serves a critical role in the Tribe's efforts to generate revenues as a means of promoting increased economic independence and self-determination. As noted, revenues from Plain Green are currently funding the development of a health clinic for the Tribe. Revenues are also

used by the Tribe to fund Tribal community events, such as ceremonies and pow-wows; school supplies, medical equipment, and subsistence distributions to Tribal members, among other Tribal initiatives. Indeed, Plain Green "plainly promote[s] and fund[s] the Tribe's self-determination through revenue generation and the funding of diversified economic development." *Breakthrough*, 629 F.3d at 1195. Without revenues from Plain Green, it would be much more difficult for the Tribe to meet the needs of its members and provide them with necessary governmental services, including law enforcement, fire, public utility, housing, and other fundamental welfare services. As a result, the sixth factor weighs in favor of immunity because the purposes underlying tribal sovereign immunity are served by extending immunity to Plain Green. *See Kiowa*, 523 U.S. at 757 (explaining that a central purpose underlying immunity is "to promote economic development and tribal self-sufficiency").

In sum, all *Breakthrough* factors weigh in favor of immunity. As a result, if this court adopts the *Breakthrough* test, it should conclude that Plain Green is an arm of the Tribe entitled to tribal sovereign immunity.

II. PLAINTIFF'S REMAINING ARGUMENTS CONCERNING PLAIN GREEN'S RULE 12(B)(6) MOTION ARE MERITLESS.

A. This Court has the authority to convert Plain Green's Motion to Dismiss into a Motion for Summary Judgment without regard to extrinsic evidence provided by Plain Green.

Plaintiff contends that this court cannot convert Plain Green's Motion to Dismiss into one for summary judgment because Plain Green has not submitted extrinsic evidence relevant to Plaintiff's FCRA claim. Opp'n at 11. Alternatively, Plaintiff contends that the court may not review Plain Green's extrinsic materials attached its Motion to Dismiss because "[a]dditional

discovery is required to determine whether Plain Green complied with the statutory requirements of the FCRA." *Id.*

Plaintiff's arguments are not supported by Fourth Circuit case law. Plaintiff cites no Fourth Circuit authority for the proposition that submitting extraneous evidence in a motion to dismiss is a necessary prerequisite for a court to convert a Rule 12(b)(6) motion into one for summary judgment. In fact, the Fourth Circuit conditions such conversion not on submission of extraneous evidence, but on ensuring that the parties have an opportunity to present evidence relevant to the factual question at issue: "Rule 12(b)(6) allows a district court to convert a motion to dismiss for failure to state a claim into a motion for summary judgment, *provided the parties receive 'reasonable opportunity' to present all pertinent materials*." *Herbert v. Saffell*, 877 F.2d 267, 270 (4th Cir. 1989) (emphasis added).

Here, Plain Green's request is entirely consistent with the *Herbert* rule. If this Court determines that Plaintiff's Complaint passes Rule 12(b)(6) muster, Plain Green requests that the Court order preliminary discovery into the narrow question of whether Plain Green received adequate notice of Plaintiff's dispute and convert Plain Green's 12(b)(6) motion into one for summary judgment. Ordering preliminary, limited discovery ensures that all parties "receive 'reasonable opportunity' to present all pertinent materials" on the question of notice. *See Herbert*, 877 F.2d at 270.

Furthermore, Plaintiff is incorrect when he asserts that Plain Green has not submitted extrinsic materials relevant to the notice issue. *See* Opp'n at 11. In its Motion to Dismiss, Plain Green has asserted a critical fact on the question of notice: "Plain Green has no evidence that it received notice." PG Memo at 12. Plain Green cannot submit any other evidence of notice when it has none. Based on Plain Green's representation and the centrality of the notice issue to

Plain Green's liability, it would be appropriate for the Court to order preliminary discovery on the question of notice and convert Plain Green's Motion to Dismiss to one for summary judgment once all parties have had an opportunity to submit relevant evidence on the notice question.

B. Plaintiff alleges that Plain Green violated duties under the FCRA for which there is no private cause of action.

In the final section of his Opposition, Plaintiff alleges that Plain Green "did not timely correct the inaccuracy on Mr. Howard's credit report," citing to 15 U.S.C. § 1681s-2(a)(2)(A)-(B), which discusses a furnisher's duty to provide credit reporting agencies with corrected information when it determines that information regarding a consumer is not complete or accurate.

Plaintiff's allegation suffers from multiple fatal flaws. First, "[t]here is no private right of action for violation of 15 U.S.C. § 1681s-2(a)." *Rossman v. Lazarus*, No. 1:08-CV-316 (JCC), 2008 WL 4181195, at *7 (E.D. Va. Sept. 3, 2008) (citing 15 U.S.C. § 1681s–2(d); *Nelson v. Equifax Information Services, LLC*, 522 F.Supp.2d 1222, 1230 (C.D. Cal. 2007); *Rollins v. Peoples Gas Light and Coke Co.*, 379 F.Supp.2d 964, 966 (N.D. Ill. 2005); *BankOne, N.A. v. Colley*, 294 F.Supp.2d 864, 869-70 (M.D. La. 2003)). Second, Plaintiff never alleged that Plain Green violated 15 U.S.C. § 1681s-2(a) in his Complaint. It is "axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Katz v. Odin, Feldman & Pittleman, P.C.*, 332 F.Supp.2d 909, 917 n. 9 (E.D. Va. 2004) (quoting *Morgan Distrib. Co., Inc. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989)); *see also Davis v. Cole*, 999 F.Supp. 809, 813 (E.D. Va. 1998) (refusing to consider additional allegations offered in response to motion to dismiss). Plain Green cannot be liable for violating a provision of FCRA that was not alleged in the Complaint and for which there is no private right of action.

C. Plain Green cannot be liable for failure to act in response to notice from credit reporting agencies other than Trans Union because Plaintiff did not allege such notice in his Complaint.

Plaintiff contends that Plain Green only addresses one of the credit reporting agencies, Trans Union, as having not given notice to Plain Green despite the fact that "Plaintiff disputed the accuracy of the account with all three credit reporting agencies, as established in Exhibit D." Opp'n at 12. Plaintiff appears to argue that Plain Green could be liable under his Complaint even if Trans Union did not provide the requisite notice under FCRA, 15 U.S.C. § 1681s-2(b)(1), because other credit reporting agencies may have provided notice. Plaintiff is mistaken.

In order to state a claim against Plain Green under 15 U.S.C. § 1681s-2(b), Plaintiff must allege, among other things, that the consumer reporting agency that he notified regarding his dispute in turn notified Plain Green of the dispute. *Rossman*, 2008 WL 4181195, at *7. In his Complaint, Plaintiff alleges that one—and only one—of the credit reporting agencies to which he communicated his dispute, Trans Union, notified Plain Green. *See* Compl., ¶ 18. Plaintiff does not allege that Experian or Equifax notified Plain Green of Plaintiff's dispute. Because Plaintiff alleges that only Trans Union provided notice, Plain Green cannot be liable under Plaintiff's Complaint based on notice from any other credit reporting agency. And again, Plaintiff's hypothetical allegations in his Opposition regarding notice from Experian and Equifax must be disregarded as they were not alleged in the Complaint. *See Katz*, 332 F.Supp.2d at 917 n.9.

CONCLUSION

For the foregoing reasons, the arguments in Plaintiff's Opposition are without merit. This court should dismiss Plaintiff's Complaint against the Plain Green with prejudice.

Dated: July 25, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July 2017, an electronic copy of the foregoing will be served using the Court's CM/ECF system on the following:

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