IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

LILLIAN EASLEY and all others similarly situated, **Plaintiffs,** **vs.** **HUMMINGBIRD FUNDS, D/B/A BLUE TRUST LOANS; JOHN (RANDY) CADOTTE; WILLIAM TREPANIA; DAYLENE SHARLOW; TWEED SHUMAN; DON CARLEY; LEE HARDEN; TRINA. STARR; JAMES WILLIAMS, JR.,** **Defendants.**	**Case No. 1:19-cv-00937-KD-M** **JURY TRIAL DEMANDED** **CLASS ACTION**

SPECIALLY-APPEARING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Specially-Appearing Defendants Hummingbird Funds, d/b/a Blue Trust Loans ("Hummingbird"), John Cadotte, William Trepania, Daylene Sharlow, Tweed Shuman, Don Carley, Lee Harden, and Trina Starr (the "Individual Defendants") (together, "Defendants") file this Motion to Dismiss for Lack of Subject Matter Jurisdiction on the grounds that Plaintiff fails to plead facts establishing that this Court has subject matter jurisdiction over this dispute.

I. INTRODUCTION

Plaintiff's First Amended and Restated Complaint ("Complaint") must be dismissed, because Plaintiff fails to state facts sufficient to invoke the Court's subject matter jurisdiction over Hummingbird and the Individual Defendants. Plaintiff entered into a Consumer Installment Loan Agreement (the "Loan Agreement") with Hummingbird, a tribal limited liability company that is wholly-owned, operated, and controlled by the Lac Courte Oreilles Band of Lake Superior Chippewa Indians (the "LCO Tribe" or the "Tribe"), a federally-recognized sovereign American Indian tribe. Multiple provisions of the Loan Agreement represent that Hummingbird is owned and operated by the Tribe, the loan is governed by laws of the Tribe, and, as an arm of the Tribe, Hummingbird is entitled to and intends to assert sovereign immunity from suit.

Plaintiff fails to plead facts to overcome Defendants' assertion of immunity. Absent express authorization from Congress or clear waiver, tribal sovereign immunity protects Indian tribes, tribal corporations acting as arms of tribes, and tribal officials from suit. Plaintiff has not pled facts to support a claim of congressional authorization or unequivocal waiver. Nor has she identified any reason as to why either Hummingbird or the Individual Defendants are not entitled to the immunity of the Tribe. Because Plaintiff does not and cannot plead facts to invoke this

Court's jurisdiction, Defendants respectfully request that the Complaint be dismissed with prejudice.[1]

[1] Defendants are concurrently moving (i) to compel arbitration pursuant to the Loan Agreement's arbitration provisions, (ii) to dismiss the case pursuant to the Loan Agreement's forum selection clause or, in the alternative, to stay the case pursuant to the doctrine of tribal exhaustion, (iii) to dismiss the Complaint for failure to state a claim, and (iv) to strike the class allegations in the Complaint. This Motion to Dismiss for Lack of Subject Matter Jurisdiction, the Motion to Compel Arbitration, and the Motion to Dismiss on the Basis of Forum Non Conveniens should be decided first. Of these three motions, the Court has discretion to decide the particular order in which it resolves the motions, because each of the motions raises threshold jurisdictional issues that do not go to the merits of Plaintiff's claims.

Although jurisdictional questions generally must be resolved before the Court reaches the merits of a dispute, "there is no mandatory sequencing of jurisdictional issues." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (citation and internal quotation marks omitted). Thus, a federal court has leeway "to choose among threshold grounds for denying audience to a case on the merits." *Id.* (citations omitted). For example, without first establishing subject-matter jurisdiction, the Court may (i) dismiss for lack of personal jurisdiction, (ii) decline to adjudicate state-law claims on discretionary grounds, or (iii) dispose of an action by a forum non conveniens dismissal. *Id.* at 431-32 (citations omitted); *see also Georgia Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1205 n.1 (11th Cir. 2018) (deciding whether the case was in the proper venue before determining whether the plaintiffs had standing) (citation omitted); *Aviation One of Fla., Inc. v. Airborne Ins. Consultants (PTY), Ltd*, 722 F. App'x 870, 887 & n.8 (11th Cir. 2018) ("[W]e note that the district court did not err by addressing the forum-selection clause before deciding the issue of personal jurisdiction . . . Likewise, although we questioned the parties about whether the district court's diversity jurisdiction was adequately established, the court did not need to have subject-matter jurisdiction in order to dismiss the case for lack of personal jurisdiction and on forum non conveniens grounds.") (citing *Sinochem*, 549 U.S. at 435–36); *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1028 (11th Cir. 2014) (noting with apparent approval the District Court's decision to address the defendant's request to dismiss the action on forum non conveniens grounds before reaching the "question of whether foreign sovereign immunity precluded subject matter jurisdiction") (citing *Sinochem*, 549 U.S. at 432). "The principle underlying these decisions [is that] 'jurisdiction is vital only if the court proposes to issue a judgment on the merits.'" *Sinochem*, 549 U.S. at 431 (citation omitted).

Motions to compel arbitration likewise present non-merits issues that can be decided before the Court determines whether it has subject matter jurisdiction. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("When the parties' contract assigns a matter to arbitration, a court may not resolve the merits of the dispute even if the court thinks that a party's claim on the merits is frivolous.") (citation omitted); *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1342 (11th Cir. 2012) ("Arbitration clauses are similar to forum-selection clauses.") (citing *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause[.]")); *Burnham Enterprises, LLC v. DACC Co.*, No. 2:12-CV-111-WKW, 2013 WL 68923,

II. FACTUAL BACKGROUND

Plaintiff obtained a $650 loan from Hummingbird on March 26, 2019. (DOC 34-1, PageID #: 501–512, Ex. 1 to DOC 34, PageID # 475–500, Am. Compl.) Plaintiff brings this suit on behalf of herself and purported classes of (i) "[a]ll Alabama residents from whom Defendants collected, or attempted to collect, loans and/or who engaged in a loan transaction, within the coverage of the Alabama Small Loans Act, with Defendants in the four years preceding the filing of [the] Amended Complaint to the date that the Class list is created" and (ii) "[a]ll United States residents from whom Defendants collected or attempted to collect loans and/or who engaged in a loan transaction with Defendants in the four years preceding the filing of [the] Amended Complaint to the date that the class list is created." (DOC 34, PageID #: 475–500, Am. Compl., ¶¶ 44, 45.) The Complaint alleges that Defendants violated (i) the Alabama Small Loan Act, Ala. Code § 5-18-1, *et seq.*, by issuing loans without a license and with interest in excess of that allowed by the statute and by conspiring to violate the statute, DOC 34, PageID: 475–500, Am. Compl., ¶¶ 83-94, and (ii) the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c), (d), by conspiring to collect unlawful debt. (*Id.*, ¶¶ 95-111.)

The LCO Tribe is a federally-recognized Native American Indian tribe included on a list of acknowledged tribes promulgated by the United States Department of the Interior Bureau of Indian Affairs. (DOC 15, PageID #: 411-413, Request for Judicial Notice, DOC 7-1, PageID # 147–155 - Ex. A (84 Fed. Reg. 1200 (Feb. 1, 2019) (listing the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin)).[2] The Complaint acknowledges, as it must, that

---

at *1 n.2 (M.D. Ala. Jan. 7, 2013) ("Because the motions to compel arbitration dispose of the matter at this juncture, this opinion will not address the arguments raised in the motions to dismiss, which include challenges to personal jurisdiction.") (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (holding there is no mandatory sequencing of non-merits issues)).

[2] "The contents of the Federal Register shall be judicially noticed. . . ." 44 U.S.C. § 1507.

Hummingbird asserts that it is an arm of the LCO Tribe entitled to sovereign immunity. (DOC 34, PageID #: 475–500; Am. Compl., ¶¶ 24, 25, 35, 52.) Indeed, Plaintiff's Loan Agreement attached to her original complaint unequivocally states that Hummingbird is a "tribal limited liability company organized under tribal law [and an] economic development arm of, instrumentality of, and wholly-owned and controlled by the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, a federally-recognized sovereign American Indian tribe[.]" (DOC 34-1, PageID # 501–512, Ex. 1 to DOC 34, PageID # 475–500, Am. Compl, at 4.) Multiple, additional provisions of the Loan Agreement represents that Hummingbird is owned and operated by the LCO Tribe, the loan is governed by laws of the Tribe, and, as an arm of the Tribe, Hummingbird is entitled to and intends to assert sovereign immunity from suit:

- "**GOVERNING LAW AND FORUM**: The laws of the Tribe ('Tribal law') will govern this Loan Agreement, without regard to the laws of any state or other jurisdiction, including the conflict of laws rules of any state. You [(meaning Plaintiff] agree to be bound by Tribal law, and in the event of a bona fide dispute between you and us, Tribal law shall exclusively apply to such dispute and shall be subject to the Tribal Dispute Resolution Procedures set forth below." (*Id.* at 8.)
- "**SOVEREIGN IMMUNITY**. This Agreement together with any related documents are being submitted by you to us as an economic arm, instrumentality, and wholly-owned limited liability company of the Tribe. The Tribe is a federally-recognized American Indian Tribe and enjoys governmental sovereign immunity. Because we and the Tribe are entitled to sovereign immunity, you will be limited as to what claims, if any, you may be able to assert against the Tribe and us." (*Id.*)

- "**PRESERVATION OF SOVEREIGN IMMUNITY**: It is the express intention of the Tribe and us, operating as an economic arm-of-the-tribe, to fully preserve, and not waive either in whole or in part, exclusive jurisdiction, sovereign governmental immunity, and any other rights, titles, privileges, and immunities, to which they are entitled. To protect and preserve the rights of the parties, no person may assume a waiver of immunity except by express written declaration of the Tribe's Governing Board specifically authorizing a waiver for the matter in question." (*Id.*)

III. PROCEDURAL HISTORY

Plaintiff filed her initial complaint in this action on November 7, 2019. (DOC 1, PageID #: 1–18, Compl..) On January 6, 2020, Defendants moved to dismiss the complaint for lack of subject matter jurisdiction on sovereign immunity grounds, among other motions. (DOC 8, PageID #: 156–188, Mot. to Dismiss.) On January 10, 2020, the Court stayed briefing on the motions to give Plaintiff an opportunity to file an amended complaint addressing some or all of the issues raised in the motions. (DOC 22, PageID #: 425–427, Order.) Pursuant to the Court's Order, Plaintiff filed her First Amended and Restated Complaint on January 27, 2020. (DOC 34, PageID #: 475–500, Am. Compl..) Despite Defendants' earlier motion challenging the initial complaint's allegations concerning Defendants' entitlement to sovereign immunity, as explained below, the Amended Complaint fails to assert any additional allegations directed at Defendants' entitlement to sovereign immunity.

IV. LEGAL STANDARD

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). The Supreme Court and the Eleventh Circuit consider an assertion of sovereign immunity to be "jurisdictional in nature." *F.D.I.C. v. Meyer*,

510 U.S. 471, 475 (1994); *see also Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287 (11th Cir. 2015)("We have an obligation to make sure we have jurisdiction to hear this action, which requires us to first consider whether the defendants enjoy tribal sovereign immunity from Alabama's claims.") (citations omitted). "Federal courts are courts of limited jurisdiction, and the party invoking the court's jurisdiction must prove, by a preponderance of the evidence, facts supporting the existence of jurisdiction." *Jory v. United States*, 562 F. App'x 926, 927 (11th Cir. 2014) (citing *McCormick v. Aderholt*, 293 F.3d 1254, 1257 (11th Cir. 2002)); *see also Vasquez Monroy v. Dep't of Homeland Sec.*, 396 F. Supp. 3d 1206, 1208 (S.D. Fla. 2019) (("In either [a facial or a factual attack on subject matter jurisdiction], the burden for establishing federal subject matter jurisdiction rests with the party bringing the claim.") (citing *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1247 (11th Cir. 2005)); *Young v. Myhrer*, 243 F. Supp. 3d 1243, 1263 (N.D. Ala. 2017) ("[T]he burden of establishing federal jurisdiction falls squarely upon the party who is attempting to invoke the jurisdiction of the federal court.") (citing *McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936)).

Federal Rule of Civil Procedure 12(b)(1) allows for dismissal of a claim when the Court lacks subject matter jurisdiction. *Longo v. Seminole Indian Casino-Immokalee*, 110 F. Supp. 3d 1252, 1253 (M.D. Fla. 2015) ("Dismissal on tribal immunity grounds may be raised in a Motion to Dismiss under [Federal Rule of Civil Procedure] 12(b)(1).") (citation omitted), *aff'd*, 813 F.3d 1348 (11th Cir. 2016). A challenge to the Court's subject matter jurisdiction pursuant to Rule 12(b)(1) can take the form of either a facial attack or a factual attack. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir. 1990). Facial attacks "require[ ] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations

in his complaint are taken as true for the purposes of the motion."[3] *Id.* at 1529 (quoting *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)). The Court's analysis when considering a facial attack, however, is not limited to the allegations in the complaint. Instead, the Court may consider documents attached to the complaint, because "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."[4] Fed. R. Civ. P. 10(c); *see also Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002). Like the material allegations in the Complaint, information in incorporated exhibits is accepted as true for purposes of a motion to dismiss. *Burch v. Apalachee Cmty. Mental Health Servs., Inc.*, 840 F.2d 797, 798 (11th Cir. 1988), *aff'd sub nom. Zinermon v. Burch*, 494 U.S. 113 (1990).

[3] Factual attacks, on the other hand "challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id.* (citation and internal quotation marks omitted). When an attack is factual, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to a plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* (quoting *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981)).

Should the Court deny this facial attack, Defendants expressly reserve the right to bring a factual challenge to the Court's subject matter jurisdiction. *See, e.g., Wein v. St. Lucie Cty., Fla.*, 461 F. Supp. 2d 1261, 1262 (S.D. Fla. 2006) ("[I]t is well established that issues concerning subject matter jurisdiction can be raised at anytime"; considering defendants' challenge to subject matter jurisdiction pursuant to Rule 12(b)(1) brought after the court's dispositive motion deadline) (citing Fed. R. Civ. P. 12(b)(1), 12(h)(3); *Baker Oil Tools, Inc. v. Delta S.S. Lines, Inc.*, 562 F.2d 938, 940 (5th Cir. 1977); and *In re Waterfront License Corporation*, 231 F.R.D. 693 (S.D. Fla. 2005)).

[4] In addition, the Court may consider documents "attached to a motion to dismiss without converting the motion into one for summary judgment if the attached document[s are] (1) central to the plaintiff's claim and (2) undisputed." *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). "In this context, 'undisputed' means that the authenticity of the document is not challenged." *Id.* A document "need not be physically attached to a pleading to be incorporated by reference into it; if the document's contents are alleged in a complaint and no party questions those contents, [the Court] may consider such a document provided it meets the centrality requirement[.]" *Id.*

Moreover, to establish subject matter jurisdiction, a plaintiff "must affirmatively allege facts demonstrating the existence of jurisdiction[.]"[5] *Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994); *see also Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1216 (11th Cir. 2007) ("Rule 8(a) requires the plaintiff to set forth in the complaint the factual support for jurisdiction."); *Johnson v. Westgate Vacation Villas, LLC*, No. 617CV2141ORL37GJK, 2018 WL 7461686, at *1 (M.D. Fla. Jan. 3, 2018) ("Although Plaintiffs assert that subject matter jurisdiction exists in this action based on § 1332 . . ., the Complaint does not include the necessary factual allegations to support this assertion."). Accordingly, when considering a facial attack on jurisdiction, the Court need not accept as true conclusory jurisdictional allegations or factual allegations in the Complaint that are contradicted by exhibits attached thereto. *Lawrence v. United States*, 597 F. App'x 599, 602 (11th Cir. 2015) ("When reviewing a ruling on a facial jurisdictional attack, as in this case, we accept the well-pleaded factual allegations in the complaint as true. However, we are not required to accept mere conclusory allegations as true, nor are we required to accept as true allegations in the complaint that are contrary to factual details presented in the exhibits. Rather, 'when the exhibits contradict the general and

[5] Plaintiff's jurisdictional allegations, like all factual allegations in the Complaint, are "subject to Rule 11's command—under pain of sanctions—that the 'allegations and other factual contentions have, [or are likely to have following discovery,] evidentiary support[.]'" *Lowery*, 483 F.3d at 1216 (quoting Fed. R. Civ. P. 11(b)). Where a "material element required for . . . the court's subject matter jurisdiction is missing from the complaint," the plaintiff cannot rely on jurisdictional discovery to acquire the information needed to cure the deficiency. *Id.* "In such a situation, the court [should] not reserve ruling on the motion to dismiss in order to allow the plaintiff to look for what the plaintiff should have had—but did not—before coming through the courthouse doors, even though the court would have the inherent power to do so. In deciding if dismissal is proper, a court [should] look only to the facts as alleged in the complaint and [should] not waste limited judicial resources by directing its inquiry elsewhere." *Id.*; *see also* Motions to Dismiss (Rule 12(b)), Rutter Group Prac. Guide Fed. Civ. Proc. Before Trial (Nat Ed.) Ch. 9-D ("Plaintiff is not free to make unsubstantiated claims of federal jurisdiction in the complaint and then conduct discovery in an attempt to support such claims. Rule 11 sanctions may be imposed where allegations of federal jurisdiction are factually or legally without merit.").

conclusory allegations of the pleading, the exhibits govern.'") (citation omitted); *see also Butler v. Sukhoi Co.*, 579 F.3d 1307, 1313–14 (11th Cir. 2009) ("[A]lthough the complaint makes the bald assertion that jurisdiction exists under [the Foreign Sovereign Immunities Act] because the action 'involves a foreign state and instrumentalities or agencies of a foreign state not entitled to immunity' . . . this is a legal conclusion that we need not accept as true.") (citing *O'Bryan v. Holy See*, 556 F.3d 361, 376 (6th Cir. 2009) (where defendant asserts a facial attack on the subject-matter jurisdiction alleged in the complaint, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss"); and *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1298 (11th Cir. 2000)); *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205–06 (11th Cir. 2007) ("Our duty to accept the facts in the complaint as true does not require us to ignore specific factual details of the pleading in favor of general or conclusory allegations. Indeed, when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern.")); *Flylux, LLC v. Aerovias de Mexico, S.A. de C.V.*, 618 F. App'x 574, 578 (11th Cir. 2015) (granting facial attack on subject matter jurisdiction pursuant to Rule 12(b)(1) where the complaint "contain[ed] only conclusory allegations").

V. PLAINTIFF FAILS TO PLEAD ADEQUATE FACTS TO INVOKE THE COURT'S SUBJECT MATTER JURISDICTION

A. Tribal Sovereign Immunity Protects Indian Tribes And Tribal Corporations Acting As Arms Of The Tribes From Suit Absent Express Authorization From Congress Or Clear Waiver.

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). While Indian tribes are subject to control by Congress, they remain "separate sovereigns pre-existing the Constitution." *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). Thus,

unless and until Congress acts, Indian tribes retain "their historic sovereign authority." *Id.* (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

Among the core aspects of sovereignty that tribes possess is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo*, 436 U.S. at 58). That immunity is "a necessary corollary to Indian sovereignty and self-governance." *Id.* (citations omitted). Accordingly, the Supreme Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Id.* at 789 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs, Inc.*, 523 U.S. 751, 756 (1998)). A congressional abrogation of immunity must be "clear." *Id*. at 790. "The baseline position, [the Supreme Court has] often held, is tribal immunity; and '[t]o abrogate [such] immunity, Congress must "unequivocally" express that purpose.'" *Id*. (quoting *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001)). Waivers of tribal sovereign immunity likewise "must be unequivocally expressed." *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1286 (11th Cir. 2001) (citation omitted); *see also Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1206 (11th Cir. 2012) ("Our precedents make it abundantly clear that a waiver of tribal sovereign immunity cannot be implied on the basis of a tribe's actions; rather, it must be unequivocally expressed.").

The Supreme Court and the Eleventh Circuit have squarely held that this broad reach of tribal sovereign immunity extends to corporate subsidiaries of tribes. *Bay Mills*, 572 U.S. at 790 (citing *Kiowa*, 523 U.S. at 758); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287 (11th Cir. 2015) (finding commercial entity owned by tribe to operate casino an arm of the tribe entitled to sovereign immunity); *see also Sanderford v. Creek Casino Montgomery*, No. 2:12-CV-455-

WKW, 2013 WL 131432, at *2 (M.D. Ala. Jan. 10, 2013) ("As a threshold issue, Defendant Creek Casino is indistinguishable from the Tribe for the purposes of tribal sovereign immunity. The Tribe is a federally recognized Indian Tribe and enjoys sovereign immunity absent Congressional abrogation or waiver. Defendant is a gaming operation wholly owned and operated by the Tribe. It exists to fund and support, among other things, the Tribe's 'operations or programs,' the 'general welfare of the Tribe and its members,' and 'economic development.'"); *Allman v. Creek Casino Wetumpka*, No. 2:11CV24-WKW, 2011 WL 2313706, at *2 (M.D. Ala. May 23, 2011) ("The court concludes that the Tribe's sovereign immunity extends to the Casino for two reasons. First, it appears from the face of the complaint that plaintiff himself acknowledges the Tribe's ownership and control over the casino. . . . Second, the Tribal Code provides that 'the Tribe shall have the sole proprietary interest in and responsibility for the conduct of all gaming activities on the Reservation[,]' and, further, that revenue from its gaming establishments provides funds for, inter alia, 'Tribal operations or programs,' '[e]conomic development,' and '[t]he general welfare of the Tribe and its members.' Under these circumstances, plaintiff's claims against the Creek Casino Wetumpka are also barred by tribal sovereign immunity.") (citations omitted), *report and recommendation adopted*, 2011 WL 2313701 (M.D. Ala. June 13, 2011); *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, No. 07-0688-WS-M, 2008 WL 80644, at *1 (S.D. Ala. Jan. 7, 2008) (granting motion to dismiss filed by Poarch Band of Creek Indians, Creek Indian Enterprises, and P.C.I. Gaming on the basis of sovereign immunity as to all defendants, where the latter two defendants were "wholly owned by the Tribe and chartered under its tribal laws"), *aff'd*, 563 F.3d 1205 (11th Cir. 2009).

B. Plaintiff Fails To Plead Facts Sufficient To Overcome Hummingbird's Assertion Of Tribal Immunity.

Plaintiff acknowledges that Hummingbird "purports to be an entity organized under the laws of the [LCO Tribe]" and that Hummingbird intends to assert, and does not waive, sovereign immunity as an arm of the LCO Tribe. (DOC 34, PageID #: 475–500, Am. Compl., ¶¶ 5, 35.) These allegations alone are sufficient to require Plaintiff to allege facts overcoming Hummingbird's assertion of sovereign immunity. But even if that were not the case, the Loan Agreement – the contents of which (i) must be accepted as true for purposes of this motion to dismiss and (ii) control over contradictory allegations in the Complaint – plainly requires Plaintiff to allege facts overcoming immunity. *See, e.g., Burch*, 840 F.2d at 798 (exhibits incorporated into complaint must be taken as true for purposes of a motion to dismiss); *Griffin*, 496 F.3d at 1205–06 (explaining that when "exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern."). The Loan Agreement unequivocally states that Hummingbird "is a tribal limited liability company organized under tribal law [and an] economic development arm of, instrumentality of, and wholly-owned and controlled by the [LCO Tribe], a federally-recognized sovereign American Indian tribe." (DOC 34-1, PageID #: 501–512, Ex. 1 to DOC 34, PageID # 475–500, Am. Compl, at 4.) The LCO Tribe is a federally-recognized Native American Indian tribe included on a list of acknowledged tribes promulgated by the United States Department of the Interior Bureau of Indian Affairs and, as such, is entitled to immunity from suit. (*See* DOC 15, PageID #: 411-413, Request for Judicial Notice, DOC 7-1, PageID # 147–155 - Ex. A (84 Fed. Reg. 1200 (Feb. 1, 2019) (listing the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin));; 84 Fed. Reg. 1200 (explaining that the "listed Indian entities are acknowledged to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with

the United States as well as the responsibilities, powers, limitations, and obligations of such Tribes"); *Cherokee Nation v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997) ("The inclusion . . . on the Federal Register . . . would ordinarily suffice to establish that the group is a sovereign power entitled to immunity from suit.'"). Multiple other provisions of Plaintiff's Loan Agreement represent that Hummingbird is owned and operated by the LCO Tribe, the loan is governed by laws of the Tribe, and, as an arm of the Tribe, Hummingbird is entitled to and intends to assert sovereign immunity from suit. (DOC 34-1, PageID #: 501–512, Ex. 1 to DOC 34, PageID # 475–500, Am. Compl., at 8.)

Hummingbird's assertion of tribal immunity demands that Plaintiff pleads facts that would allow the Court to retain subject matter jurisdiction over this suit. To do so, Plaintiff must allege facts that would allow the Court to plausibly infer that: (i) Congress has authorized suits in this context; (ii) Hummingbird and the Tribe have waived immunity from suit; or (iii) the Tribe's sovereign immunity does not extend to Hummingbird. The Complaint fails to plead any such facts. Plaintiff does not and cannot allege that Congress has "unequivocally" authorized suit against Indian tribes or arms of such tribes under the Alabama Small Loan Act or RICO. *See Bay Mills*, 572 U.S. at 790; *Navajo Nation v. Urban Outfitters, Inc.*, No. CIV 12-195, 2014 WL 11511718, at *6-7 (D.N.M. Sept. 19, 2014) (dismissing counterclaim asserted against tribe, corporation formed under tribal laws, and a business enterprise that was "a wholly-owned instrumentality of the [tribe]" based on facial attack, where counterclaim allegations did not support either Congressional abrogation of tribal immunity or waiver by tribe or tribal entities). Nor can Plaintiff plausibly allege that Hummingbird or the Tribe have "unequivocally" waived their sovereign immunity. *See Sanderlin*, 243 F.3d at 1286. Indeed, in the Loan Agreement,

Hummingbird and the Tribe have expressly asserted their intent to claim sovereign immunity. (DOC 34-1, PageID #: 501–512, Ex. 1 to DOC 34 PageID # 475–500, Am. Compl., at 8.)

Plaintiff likewise fails to allege any facts to show that the Tribe's sovereign immunity does not extend to Hummingbird. The Complaint does not allege a *single fact* suggesting that Hummingbird is not immune from suit as an arm of the Tribe. Instead, the only allegations in the Complaint targeted at Hummingbird's entitlement to immunity are conclusory allegations that have nothing to do with Hummingbird. For example, the Complaint generally describes what it refers to as "rent-a-tribe scheme[s,]" in which, Plaintiff claims, the "high-cost lender, operating online, associates with a Native American Tribe attempting to insulate itself from federal and state law by 'renting' the Tribe's sovereign legal status and its general immunity from suit under federal and state laws." (DOC 34, PageID #: 475–500, Am. Compl., ¶ 24.) The Complaint states, "As courts and regulators examine the underlying relationship between the high-cost lender and the Tribe, they can only conclude that the relationship between the Tribe and the monied interests which provide the capital for this scheme is insufficient to permit the lender to avail itself of the Tribe's immunity." (*Id.*, ¶ 25.) Without citing a single fact or case, the Complaint then concludes, "In virtually every such instance, it is not the Tribe operating or even benefiting primarily from the usurious lending — it is the outside entity." (*Id.*) These statements reflect the entirety of the Complaint's allegations purporting to counter Hummingbird's assertion of sovereign immunity. Not only do the allegations fail to allege a single fact relating to Hummingbird, they are also wrong, as courts have concluded that tribal lending entities are entitled to sovereign immunity as arms of their respective tribes. *See, e.g., Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019) (concluding that tribal lending entities were arms of the tribe entitled to sovereign immunity).

Moreover, the Complaint's allegations, and particularly the allegations in support of the RICO claims, support a finding that Hummingbird is an arm of the Tribe entitled to sovereign immunity. To determine whether a tribal commercial entity is an arm of the tribe entitled to sovereign immunity, courts considers several factors, including "(1) the method of the entities' creation; (2) their purpose; (3) their structure, ownership, and management; (4) the tribe's intent to share its sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) the policies underlying tribal sovereign immunity and the entities' 'connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities.'" *Big Picture Loans*, 929 F.3d at 177 (quoting *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)).

The Complaint alleges facts supporting a finding of sovereign immunity under the third and fourth factors. For example, as to the third factor, the Complaint alleges that Hummingbird and the Individual Defendants, operating through LCO Financial Services, a tribal entity, operate and control all aspects of the tribal lending business, including, for example, drafting the loan documents, managing Hummingbird's website, managing Hummingbird's banking relationships, providing customer service, issuing loans, and collecting amounts outstanding on loans. (DOC 34, PageID #: 475–500, Am. Compl., ¶¶ 6, 8-14, 60, 61, 70, 71, 72.) Likewise, as to the fourth factor, the Complaint acknowledges that the Tribe intended to share its sovereign immunity with Hummingbird. (*Id.*, ¶ 35.) Having admitted these allegations, it is difficult to see how Plaintiff can argue that Hummingbird is not an arm of the Tribe entitled to sovereign immunity.

Numerous courts have dismissed claims against tribes, tribal agencies, tribal commercial entities, and tribal officials, on facial attacks to subject matter jurisdiction based on similarly deficient pleadings. *See, e.g., Ordinance 59 Ass'n v. Babbitt*, 970 F. Supp. 914, 918 (D. Wyo.

1997) (concluding tribal business council and its members entitled to sovereign immunity and dismissing based on facial attack where plaintiffs' complaint stated business council and its members carried out the complained-of actions while acting in official capacity), *aff'd*, 163 F.3d 1150 (10th Cir. 1998); *Harper v. White Earth Human Resources*, No. 16-cv-1797, 2016 WL 8671911 (D. Minn. Oct. 7, 2016) (dismissing claims against tribal agencies and entities after facial attack where plaintiff's complaint alleged defendants were "all entities within the [tribe] Reservation System and the . . . Tribal Council" and claims arose from plaintiff's employment by the tribe), *report and recommendation adopted*, 2017 WL 701354 (D. Minn. Feb. 22, 2017); *South Fork Livestock P'ship v. U.S.*, No. 3:15-cv-0066, 2015 WL 4232687 (D. Nev. July 13, 2015) (dismissing complaint based on defendant tribes' facial attack where no congressional act authorized suit against tribes for alleged violations of federal grazing permits and no express waiver of sovereign immunity by tribes); *Clark v. Rolling Hills Casino*, No. CIV S-09-1948, 2011 WL 1466885, at *2-3 (E.D. Cal. Apr. 18, 2011) (dismissing claims against casino owned and operated by tribe based on facial attack on subject matter jurisdiction where plaintiff acknowledged casino's connections to tribe in complaint), *report and recommendation adopted*, 2011 WL 211083 (E.D. Cal. May 24, 2011). Because Plaintiff fails to plead any, much less plausible, allegations to overcome Hummingbird's assertion of immunity from suit, the claims against Hummingbird should be dismissed with prejudice.

C. The Individual Defendants Are Entitled To Sovereign Immunity.

As with Hummingbird, Plaintiff fails to plead facts sufficient to overcome the Individual Defendants' entitlement to sovereign immunity. "The Tribe's sovereign immunity extends to its governmental personnel (i.e., tribal officials such as tribal council members and the tribal police chief)." *Terry v. Smith*, No. CIV.A. 09-00722-KD-N, 2011 WL 4915167, at *7 (S.D. Ala. July 20, 2011), *report and recommendation adopted*, 2011 WL 4915163 (S.D. Ala. Oct. 14, 2011).

"[T]ribal officers are protected by tribal sovereign immunity when they act [1] in their official capacity and [2] within the scope of their authority . . . ." *Id.* (citation omitted).

Whether an individual defendant is entitled to sovereign immunity turns not "on the characterization of the parties in the complaint," but rather on whether the "sovereign is the real party in interest." *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017). The sovereign is the real party in interest where the "remedy sought is truly against the sovereign." *Id.* (citation omitted). For example, "lawsuits brought against employees in their official capacity 'represent only another way of pleading an action against an entity of which an officer is an agent[.]'" *Id.* at 1290-91 (quoting *Kentucky v. Graham*, 473 U.S. 159, 165–166 (1985)). In such an official-capacity claim, the "relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Id.* at 1291. "Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law." *Id.* In such suits, recovery is sought, not from the sovereign, but from the personal assets of the individual. *Kentucky*, 473 U.S. at 166 ("[A]n award of damages against an official in his personal capacity can be executed only against the official's personal assets[.]").

Here, it is apparent that Hummingbird, a sovereign entity, is the real party in interest. Although Plaintiff purports to sue the Individual Defendants in their "individual capacities" (PageID #: 475–500, Am. Compl., ¶ 7), to the extent Plaintiff alleges any specific conduct by the Individual Defendants at all Plaintiff's allegations are, in fact, based solely on the Individual Defendants' positions as officers and directors of LCO Financial Services, which, Plaintiff alleges, "is the board or department or division of the LCO Tribe which manages internet loans made through Hummingbird[.]" (*Id.*, DOC 34, PageID #: 475–500, Am. Compl, ¶¶ 6, 8-14.) Such allegations plainly implicate the Individual Defendants' official conduct on behalf of

Hummingbird (through LCO Financial Services). *See, e.g.*, *Terry*, 2011 WL 4915167, at *7 (finding tribal officials entitled to sovereign immunity because "[t]o the extent the Tribal Officials acted at all (in having 'conversations with' Plaintiffs regarding 'the casino' . . .), they clearly acted in their official capacities and within the scope of their authority").

Moreover, as the Supreme Court in *Lewis* explained, Plaintiff's categorization of the capacity in which she has sued the Individual Defendants does not control. *Lewis*, 137 S. Ct. at 1290. Instead, the relevant question is whether the relief sought is from Hummingbird, which it plainly is. For example, in Count One, in which Plaintiff alleges Defendants violated the Alabama Small Loan Act, Plaintiff seeks (i) a declaration that all loans issued by Hummingbird are void and (ii) for "all interest collected on each such loan to be returned to the borrowers." (DOC 34, PageID #: 475–500 , Am. Compl. at 22.) Both requests for relief could only be recovered from Hummingbird, which issued Plaintiff's loan and collected payments on Plaintiff's loan. Although the Complaint alleges that the Individual Defendants participated in the issuance and collection of Hummingbird's loans, the Complaint concedes that these actions were taken by the Individual Defendants as officers or directors of LCO Financial Services, "the board or department or division of the LCO Tribe [that] manages internet loans made through Hummingbird[.]" (*Id.*, ¶¶ 6, 8-14.) Plaintiff does not and cannot allege that the Individual Defendants either personally issued the loans sought to be declared void or personally collected and retained any interest on the loans sought to be returned. Similarly, in Counts Three and Four, Plaintiff seeks to recover based on the "payment of unlawful and usurious rates of interest on" the Hummingbird loans. (DOC 34, PageID #: 475–500, Am. Compl., ¶ 102; *see also id.*, ¶¶ 97, 107.). In other words, Plaintiff seeks repayment of interest paid to Hummingbird. Again,

any such repayment would come from Hummingbird, not the personal assets of the Individual Defendants.

The recent decision in *Leeds v. Bd. of Dental Examiners of Alabama*, 382 F. Supp. 3d 1214 (N.D. Ala. 2019), is instructive on this point. There, the Court dismissed the plaintiffs' individual capacity claims against individual members of the Board of Dental Examiners of Alabama because such claims were "clearly of the official-capacity variety." *Id.* at 1231. In so concluding, the Court looked not to the label the plaintiffs' had assigned to the claims, but to the relief the plaintiffs sought. *Id.* In particular, the Court found the claims against the Board members to be official capacity claims because the plaintiffs did "not seek to impose personal liability upon the Board members by, for example, seeking an award of damages against the individual officers for their allegedly unlawful conduct." *Id.* "Nor [did the plaintiffs] seek to enjoin the Board members with respect to conduct 'undertaken by individuals acting independently of their offices.'" *Id.* (citation omitted). Instead, the plaintiffs sought "injunctive and declaratory relief that would forbid the Board members (or any of their successors, for that matter) from acting in their official capacities to enforce state law in a [particular] manner[.]" *Id.* Because the "requested relief would run against the state itself, not merely against the individual Board members[,]" the Court dismissed the plaintiffs' individual capacity claims against the Board members. *Id*.

Similarly, here, Plaintiff does not seek to impose personal liability on the Individual Defendants and, instead, her requested relief would run against Hummingbird, not the Individual

Defendants. Under these circumstances, the Individual Defendants are entitled to sovereign immunity, and the claims against them should be dismissed.[6]

Defendants anticipate that Plaintiff will likely argue that, even if her claims against the Individual Defendants are official capacity claims, an exception to the rule barring such claims applies here. "In *Ex parte Young*, the Supreme Court recognized an exception to sovereign immunity in lawsuits against state officials for prospective declaratory or injunctive relief to stop ongoing violations of federal law." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1288 (11th Cir. 2015) (citing *Ex parte Young*, 209 U.S. 123 (1908)). Under the *Ex parte Young* doctrine, where the plaintiff alleges that a state official acting in her official capacity is engaged in ongoing conduct that violates federal law and the plaintiff seeks prospective relieve to stop ongoing violations, the state official is "stripped of his official or representative character and no longer immune from suit." *Id.* (citations omitted). The doctrine applies to tribal officials. *Id.*

For several reasons, the *Ex parte Young* exception does not apply here. First, the exception applies only to allegations of ongoing violations of federal, not state, law. *Leeds*, 382 F. Supp. 3d at 1229 ("[T]hough official-capacity suits seeking prospective relief are permissible under *Ex parte Young* for violations of federal law, they are impermissible . . . for violations of state law.") (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)). Accordingly, sovereign immunity bars Plaintiff's claims against the Individual Defendants because the claims arise out of alleged violations of the Alabama Small Loan Act.[7]

---

[6] To the extent the Court disagrees and believes that Plaintiff has sued the Individual Defendants in their individual capacity, Plaintiff's recovery against the Individual Defendants must be limited to money damages only, and only to the extent recoverable from the individuals' personal assets. *See Kentucky*, 473 U.S. at 166 ("[A]n award of damages against an official in his personal capacity can be executed only against the official's personal assets[.]").

[7] In *PCI Gaming*, the Court 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

Second, the exception applies only to requests for *prospective* relief to prevent the violation of federal law. As such, to the extent Plaintiff seeks anything other than prospective relief to enjoin an ongoing violation of federal law (i.e. money damages, restitution, etc., *see* PageID: 1 – 18; Compl. at 13, 15-16, 17), such claims are barred. *See PCI Gaming*, 801 F.3d at 1288; *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1337 (11th Cir. 1999) ("[T]the Eleventh Amendment bars suits against state officials in federal court seeking retrospective or compensatory relief . . . If the prospective relief sought is the functional equivalent of money damages, however, i.e., '[i]t is measured in terms of a monetary loss resulting from a past breach of a legal duty,' *Ex parte Young* does not apply.") (citation omitted).

Third, although the Complaint vaguely purports to seek "declaratory relief" and "injunctive relief[,]" PageID #: 475–500, Am. Compl. at 24, 26, it does not provide any details concerning the type of declaratory or injunctive relief sought. As noted, the *Ex parte Young* doctrine applies only to claims for "prospective declaratory or injunctive relief to *stop ongoing violations of federal law*." *PCI Gaming,* 801 F.3d at 1288 (emphasis added). Absent additional details concerning the nature of the requested relief, on its face, the Complaint fails to seek relief that would bring the claims against the Individual Defendants within *Ex parte Young*.

VI. IN THE ALTERNATIVE, THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

To the extent the Court disagrees and believes that Plaintiff has sued the Individual Defendants in their individual capacities, the Individual Defendants are entitled to qualified immunity. "[Q]ualified immunity offers complete protection for government officials sued in

---

outside of Indian lands." 801 F.3d at 1290 (citing *Bay Mills*, 572 U.S. at 794). Here, however, Plaintiff does not allege that the Individual Defendants engaged in any conduct off of tribal lands.

their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1254 (11th Cir. 2010) (additional quotation marks and citations omitted). Qualified immunity is "intended to 'allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law.'" *Id.* (citation omitted); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.").

Qualified immunity is properly asserted through a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Chesser v. Sparks*, 248 F.3d 1117, 1121 (11th Cir. 2001). "Once the affirmative defense of qualified immunity is advanced . . . [u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003) (citation omitted). "Absent such allegations, '[i]t is . . . appropriate for a district court to grant the defense of qualified immunity at the motion to dismiss stage.'" *Id.* (citation omitted); *see also Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1300 (11th Cir. 2007) ("If a defendant asserts a qualified immunity defense in a Rule 12(b)(6) motion to dismiss, the Court should grant qualified immunity if the plaintiff's complaint fails to allege a violation of a clearly established constitutional or statutory right."); *Chesser*, 248 F.3d at 1121 (explaining that a motion to dismiss based on qualified immunity "will be granted if the 'complaint fails to allege the violation of a clearly established constitutional right'") (citation omitted).

"Evaluating the defense of qualified immunity involves a two step inquiry: first, whether the defendant's conduct violated a clearly established constitutional [or statutory] right; and, second, whether a reasonable government official would have been aware of that fact." *Chesser*, 248 F.3d at 1122. Here, Plaintiff cannot make either showing as a matter of law.

First, Plaintiff cannot establish that the Individual Defendants' conduct violated any statutory right, let alone a clearly established one. "If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Merricks v. Adkisson*, 785 F.3d 553, 558–59 (11th Cir. 2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). Moreover, "recognizing that the clearly established law question turns on the law at the time of the incident, the district court must consider the law 'in light of the specific context of the case, not as a broad general proposition . . . .' In other words, the facts of the case before the court must be materially similar to the facts in the precedent that clearly establishes the deprivation." *Id.* at 559 (citations omitted). "For qualified immunity purposes, a pre-existing precedent is materially similar to the circumstances facing the official when the specific circumstances facing the official are enough like the facts in the precedent that no reasonable, similarly situated official could believe that the factual differences between the precedent and the circumstances facing the official might make a difference to the conclusion about whether the official's conduct was lawful or unlawful, in the light of the precedent." *Id.* (citation omitted). "Furthermore, the court cannot consider just any case law to decide if a right was clearly established. Only binding opinions from, the United States Supreme Court, the Eleventh Circuit Court of Appeals, and the highest court in the state where the action is filed, can serve as precedent, for this analysis." *Id.* (citation omitted).

"The relevant, dispositive inquiry in determining whether a right is *clearly* established is whether it would be *clear* to a reasonable [official] that his conduct was unlawful in the situation he confronted." *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (original emphasis) (citation omitted). In other words, "the law [must] put the [official] *on notice* that his conduct would be *clearly* unlawful." *Id.* (original emphasis) (citation omitted).

Here, because the Individuals Defendants did not violate – and could not have violated – any clearly established statutory right, they are entitled to qualified immunity. Plaintiff's claims are based on the premise that Hummingbird violated Alabama law by issuing loans in violation of the Alabama Small Loan Act. But the loan agreements plainly provide that the loans are governed by the laws of the LCO Tribe, and Hummingbird, as an arm of the LCO Tribe, is immune from enforcement of state laws. (DOC 34-1, PageID #: 501–512 , Ex. 1 to DOC 34 PageID #: 475–500, Am. Compl.) The Individual Defendants could not reasonably have foreseen that a court could construe Hummingbird's issuance of laws as violating Alabama law. Courts have long held that a bona fide "arm of the tribe" engaged in commercial activities both on and off the reservation is immune from enforcement of state laws. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-58 (1998); *PCI Gaming Auth.*, 801 F.3d 1287 (finding commercial entity owned by tribe to operate casino an arm of the tribe entitled to sovereign immunity). Indeed, the Fourth Circuit, in the context of a tribal lending case, recently reaffirmed the principle that entities owned and operated by Native American Tribes may be immune from enforcement of state laws as an arm of the tribe. *Big Picture Loans*, 929 F.3d at 177 (finding that a lending entity owned and operated by the Lac Vieux Desert Band of the Lake Superior Chippewa Indians was immune from suit as an arm of the tribe).

Plaintiff cannot cite to any decision by the Supreme Court, the Eleventh Circuit, or the Alabama Supreme Court holding that an arm of a tribe is liable for violations of state law. To Defendants' knowledge, none exists. Under these circumstances, the Individual Defendants could not have violated any clearly established law.

Moreover, even if the Individual Defendants were mistaken in their belief that their conduct was lawful, "[i]f [their] mistake as to what the law requires [was] reasonable [they are] entitled to the immunity defense." *Saucier v. Katz*, 533 U.S. 194, 205 (2001). As the Supreme Court has explained,

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular . . . conduct. It is sometimes difficult for an [official] to determine how the relevant legal doctrine. . . will apply to the factual situation the officer confronts. An [official] might correctly perceive all of the relevant facts but have a mistaken understanding as to whether [particular conduct] is legal in those circumstances. If the [official's] mistake as to what the law requires is reasonable, however, the [official] is entitled to the immunity defense.

Id.

There can be no doubt that the Individual Defendants reasonably believed that their conduct was lawful. As one court recently confirmed, even loans issued by tribal entities that are *not bona fide arms of a tribe* are not automatically unlawful. *CFPB v. CashCall, Inc.*, No. 15-CV-7522 JFW, 2018 WL 485963, at *15 (C.D. Cal. Jan. 19, 2018). As the *CashCall* court explained, the analysis required to determine the legality of a lending model is highly fact dependent, and the outcome of any particular determination is and has been far from predictable:

> [A]t its inception, there was nothing inherently unlawful about the Western Sky Loan Program. It was not until this Court found that CashCall—not Western Sky—was the true lender that Defendants could have understood that they may be liable . . . .
>
> At the time, there was no case law that clearly established that the Tribal Lending Model was not a lawful model or that any attempt to adopt and implement the Tribal Lending Model would subject Defendants to liability . . . .

> Thus, the Court cannot conclude that Defendants should have known that the structure of the Western Sky Loan Program would subject them to liability . . . or that it was obvious they would be subject to such liability.

Id.

Given that even the CashCall Defendants could not have predicted that the structure of their loan program—which, again, the Court found did not involve a bona fide arm of a tribe—could subject them to liability, the Individual Defendants certainly could not have reasonably predicted that loans issued by Hummingbird—which is a bona fide arm of a tribe—could be deemed to violate state law. As a result, the Individual Defendants are protected by qualified immunity and by basic due process principles. *See, e.g., FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("[L]aws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 44 (D.C. Cir. 2016) (holding retroactive application of statute denied fair notice to defendant), *vacated in part on other grounds and reinstated in part on reh'g en banc*, 881 F.3d 75, 83 (D.C. Cir. 2018) (reinstating portion of panel decision finding lack of fair notice).

VII. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Complaint be dismissed with prejudice for lack of subject matter jurisdiction.[8]

Respectfully submitted,

Dated: February 10, 2020

s/Robert R. Baugh
Robert R. Baugh (BAU002)
SIROTE & PERMUTT, PC
2311 Highland Avenue South
Post Office Box 55727
Birmingham, AL 35255-5727
Phone: 205-930-5100
E-mail: rbaugh@sirote.com

and

s/John C.S. Pierce
John C.S. Pierce (PIE009)
SIROTE & PERMUTT PC
1 St. Louis Centre, Suite 1000
Mobile, AL 36602
Phone: (251) 432-1671
Fax: (251) 434-0196
E-mail: jpierce@sirote.com

and

s/Ashley Vinson Crawford
Ashley Vinson Crawford
(*admitted pro hac vice*)
AKIN GUMP STRAUSS HAUER & FIELD, LLP
580 California Street, Suite 1500
San Francisco, CA 94104
Phone: 415-765-9501
E-mail: avcrawford@akingump.com

[8] Dismissal with prejudice is appropriate where, as here, Plaintiff has already amended her Complaint and any amendment would be futile. *See Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1239 (11th Cir. 2000) (Leave to amend . . . need not be granted where amendment would be futile.").

and

s/Danielle Ginty _____
Danielle Ginty
(admitted pro hac vice)
AKIN GUMP STRAUSS HAUER & FIELD, LLP
580 California Street, Suite 1500
San Francisco, CA 94104
Phone: 415-765-9501
Email: dginty@akingump.com

Attorneys for Specially-Appearing Defendants Hummingbird Funds, LLC d/b/a Blue Trust Loans, John Cadotte, William Trepania, Daylene Sharlow, Tweed Shuman, Don Carley, Lee Harden and Trina Starr

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 2020, a copy of the foregoing was filed electronically with the Clerk of the Court by using the CM/ECF electronic filing system which will serve a copy on all counsel of record as follows:

Attorneys for Plaintiff
Earl P. Underwood, Jr.
Underwood & Riemer, PC
21 South Section Street
Fairhope, AL 36532
Phone: 251-990-5558
Email: epunderwood@gmail.com

Steven P. Gregory
Gregory Law Firm, P.C.
2700 Corporate Drive, Suite 200
Birmingham, AL 35242
Email: steve@gregorylawfirm.us

Attorney for Plaintiff
Earl P. Underwood, Jr.
Underwood & Riemer, PC
21 South Section Street
Fairhope, AL 36532
Phone: 251-990-5558
Email: epunderwood@gmail.com

Steven P. Gregory
Gregory Law Firm, P.C.
2700 Corporate Drive, Suite 200
Birmingham, AL 35242
Email: steve@gregorylawfirm.us

s/Robert R. Baugh
OF COUNSEL