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

LILLIAN EASLEY and all other 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-N**

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

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. PLAINTIFF'S CLAIMS AGAINST HUMMINGBIRD MUST BE DISMISSED 1

A. The *Ex parte Young* Doctrine Does Not Apply To Hummingbird. 2

B. Plaintiff Fails To Plead Facts Sufficient To Overcome Hummingbird's Assertion Of Immunity. 3

III. PLAINTIFF DOES NOT AND CANNOT ASSERT VIABLE CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS 4

A. Plaintiff Asserts Official-Capacity Claims Against The Individual Defendants. 4

B. The *Ex parte Young* Doctrine Does Not Save Plaintiff's Claims 5

1. Plaintiff does not have standing to pursue prospective equitable relief. 5

2. Plaintiff cannot assert an *Ex parte Young* claim under RICO. 6

3. Plaintiff cannot assert an *Ex parte Young* claim under the Small Loan Act. 10

IV. IN THE ALTERNATIVE, THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY 14

V. CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

3D-LIQ, LLC v. Wade,
No. 1:16-CV-1358-VEH, 2017 WL 734182 (N.D. Ala. Feb. 24, 2017) 10

Absolute Activist Value Master Fund Ltd. v. Devine,
No. 2:15-cv-328-FtM-29MRM, 2016 U.S. Dist. LEXIS 52263 (M.D. Fla. Apr. 19, 2016) 9

Agency Holding Corp. v. Malley-Duff & Assocs., Inc.,
483 U.S. 143 (1987).....8

Alabama v. PCI Gaming Auth.,
801 F.3d 1278 (11th Cir. 2015) ..... *passim*

Allman v. Creek Casino Wetumpka,
No. 2:11CV24-WKW, 2011 WL 2313706 (M.D. Ala. May 23, 2011), *report and recommendation adopted*, 2011 WL 2313701 (M.D. Ala. June 13, 2011) 4

Am. Auto. Ins. Co. v. McDonald,
812 So.2d 309 (Ala. 2001).....10

Austin v. Alabama Check Casher Ass'n,
936 So.2d 1014 (Ala. 2005).....14

Bailey v. Johnson,
48 F.3d 965 (6th Cir. 1995) 8

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....10

California v. American Stores Co.,
495 U.S. 271 (1990).....9

Chevron Corp. v. Donziger,
833 F.3d 74 (2d Cir. 2016).....9

Cottone v. Jenne,
326 F.3d 1352 (11th Cir. 2003) 14

Cross v. Ala. State Dep't of Mental Health & Mental Retardation,
49 F.3d 1490 (11th Cir. 1995) 12

Edelman v. Jordan,
415 U.S. 651 (1974).....12

Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dept. of Health and Rehab. Svcs.,
225 F.3d 1208 (11th Cir 2000).....11, 12

In re Fredeman Litig.,
843 F.2d 821 (5th Cir. 1988).....7

Galaxy Distrib. of W. Va., Inc. v. Std. Distrib., Inc.,
No. 2:15-cv-04273, 2015 WL 4366158 (S.D. W.Va. July 16, 2015).....7

Gingras v. Think Fin., Inc.,
922 F.3d 112 (2d Cir. 2019).....13

Green v. Mansour,
474 U.S. 64 (1985).....11

Hengle v. Asner,
No. 3:19cv250 (DJN), 2020 WL 113496 (E.D. Va. Jan. 9, 2020).....7

Johnson v. Collins Entertainment Company,
199 F.3d 710 (4th Cir. 1999).....7

Kiowa Tribe of Okla. v. Mfg. Techs, Inc.,
523 U.S. 751 (1998).....2, 3

Lassiter v. Ala. A&M Univ. v. Bd. Of Trs.,
3 F.3d 1482 (11th Cir. 1993), *vacated*, 28 F.3d 1146 (11th Cir. 1994).....12

Leeds v. Bd. of Dental Examiners of Alabama,
382 F. Supp. 3d 1214 (N.D. Ala. 2019).....5

Lewis v. Clarke,
137 S. Ct. 1285 (2017).....5, 13

In re Managed Care Litig.,
298 F. Supp. 2d 1259 (S.D. Fla. 2003).....9

McElmurray v. Consul. Gov't of Augusta-Richmond Cnty.,
501 F.3d 1244 (11th Cir. 2007).....3

Merricks v. Adkisson,
785 F.3d 553 (11th Cir. 2015).....14, 15

Mescalero Apache Tribe v. Jones,
411 U.S. 145 (1973).....15

Michigan v. Bay Mills Indian Cmty.,
572 U.S. 782 (2014).....2, 12, 13, 15

Nat'l Org. for Women, Inc. v. Scheidler,
267 F.3d 687 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003).....9

O'Shea v. Littleton,
414 U.S. 488 (1974).....5

Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.,
769 F.3d 105 (2d Cir. 2014).....15

Paine Lumber Co. v. Neal,
244 U.S. 459 (1917).....8, 9

Papasan v. Allain,
478 U.S. 265 (1986).....5, 11

Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 (1984).....13

Religious Technology Center v. Wollersheim,
796 F.2d 1076 (9th Cir. 1986) 7, 8

Republic of Iraq v. ABB AG,
768 F.3d 145 (2d Cir. 2014).....8

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978).....6, 10

SEC v. Graham,
823 F.3d 1357 (11th Cir. 2016) 11

Strickland v. Alexander,
772 F.3d 876 (11th Cir. 2014) 6

Summit Medical Associates, P.C v. Pryor,
180 F.3d 1326 (11th Cir 1999) 5, 11, 12

Thalassinos v. Adair,
No. CIV.A. 13-0187-WS-N, 2013 WL 3231373 (S.D. Ala. June 26, 2013).....4

Town of Chester v. Laroe Estates,
137 S. Ct. 1645 (2017).....5

Va. Office for Protection and Advocacy v. Stewart,
563 U.S. 247 (2011).....13

Williams v. Big Picture Loans, LLC,
929 F.3d 170 (4th Cir. 2019) 4

J W ex rel. Williams v. Birmingham Bd. of Educ.,
904 F.3d 1248 (11th Cir. 2018) 5

Wooden v. Board of Regents of Univ. Sys. of Georgia,
247 F.3d 1262 (11th Cir. 2001) 6

Yaffa v. Sunsouth Bank,
No. 3:12cv288/MCR/CJK, 2016 U.S. Dist. LEXIS 182475 (N.D. Fla. Mar. 21, 2016) 9

Ex parte Young,
209 U.S. 123 (1908)..... *passim*

Statutes

Ala. Code § 5-18-10.....10, 13

Ala. Code § 5-18-15.....10

Ala.Code § 5-18-21.....10

Clayton Act, Act of July 2, 1890, c. 647, 26 Stat. 209 8

Racketeer Influenced and Corrupt Organizations Act,
18 U.S.C. § 1964..... *passim*

Other Authorities

Rule 12(b)(1).....3

Rule 12(b)(6).....14

I. INTRODUCTION

Plaintiff has now had two opportunities to plead facts establishing that the Court has subject matter jurisdiction over this dispute, and still fails to do so. In fact, Plaintiff does not even attempt to argue that the documents properly before the Court on this facial challenge to jurisdiction overcome Hummingbird's clear assertion of sovereign immunity from suit. Instead, Plaintiff implores the Court to reject settled law extending tribal sovereign immunity from suit to tribes, their instrumentalities, officers, directors, and employees, and to interpret the Amended Complaint ("Complaint") to state claims for prospective declaratory and injunction relief she did not and cannot seek. It should not.

It is well settled that a tribe and its instrumentalities are immune from *any* suit, absent Congressional authorization or waiver—neither of which is or could be asserted here. The *Ex parte Young* doctrine provides a limited carve-out from sovereign immunity in certain suits against *tribal officials* seeking only prospective equitable relief. It does not extend to suits against tribes or their instrumentalities. Nor does it apply where, as here, a plaintiff seeks equitable relief to adjudicate the legality of past conduct. Moreover, neither the Racketeer Influenced and Corrupt Organizations Act ("RICO") nor the Alabama Small Loan Act permits private plaintiffs to seek prospective declaratory or injunctive relief, and Plaintiff would not have standing to seek such relief even if the statutes permitted her to do so. Because Plaintiff does not and cannot plead around these settled rules, the Complaint should be dismissed with prejudice.

II. PLAINTIFF'S CLAIMS AGAINST HUMMINGBIRD MUST BE DISMISSED

Plaintiff wrongly contends that "case law in the federal circuits unanimously holds that, where the Plaintiff seeks prospective injunctive and declaratory relief, the 'arm of the tribe' analysis becomes irrelevant, because *even the tribe itself* cannot claim sovereign immunity against those forms of relief." Doc. 69, PageID.1038-1039. The law on this point is clear. The

Ex parte Young doctrine permits suits seeking prospective injunctive and declaratory relief in certain, limited circumstances *against tribal officials*, but Indian tribes and arms of the tribe are immune from *any suit*, absent congressional authorization or waiver. Plaintiff's failure to plead facts that overcome Hummingbird's assertion of immunity requires dismissal of Hummingbird.

A. The *Ex parte Young* Doctrine Does Not Apply To Hummingbird.

The *Ex parte Young* doctrine does not apply to an Indian tribe or an arm of the tribe. *See Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287-88 (11th Cir. 2015). "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." *Id*. at 1288 (citing *Ex parte Young*, 209 U.S. 123, 155-56 (1908)). "Under the legal fiction established in *Ex parte Young*, when a state official violates federal law, he is stripped of his official or representative character and no longer immune from suit." *Id*. (citation omitted). The Eleventh Circuit has "extended the *Ex parte Young* doctrine to tribal officials." *Id*.

Plaintiff does not cite a single case, nor are Defendants aware of any, that applies the *Ex parte Young* doctrine to a tribe or an arm of the tribe. To the contrary, binding Supreme Court and Eleventh Circuit authority squarely hold that, absent congressional authorization or waiver, an Indian tribe and its instrumentalities are entitled to sovereign immunity from any suit, even for commercial activities conducted on or off its reservation. *Kiowa Tribe of Okla. v. Mfg. Techs, Inc.*, 523 U.S. 751, 760 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014) ("[W]e have 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).") (quoting *Kiowa*, 523 U.S. at 756) (emphasis added); *PCI Gaming*, 801 F.3d at 1287 ("'[T]he doctrine of tribal immunity is settled

law and controls' unless and until Congress decides to limit tribal immunity") (quoting *Kiowa*, 523 U.S. at 756-58). Contrary to Plaintiff's claim, tribal immunity bars suits against a tribe and its instrumentalities, even though state law may otherwise apply to a tribe and even where a plaintiff seeks declaratory or injunctive relief. *Compare* Doc. 69, PageID.1038-1040 *with Kiowa*, 523 U.S. at 755 ("To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit."); *PCI Gaming*, 801 F.3d at 1286-88 (holding arm of tribe immune from suit seeking injunction and declaratory judgment). This Court cannot and should not accept Plaintiff's invitation to reject this settled law.

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

As this Court has acknowledged, Defendants' Motion "is a facial attack on the operative complaint, as it merely asks the Court to consider whether [tribal sovereign] immunity applies based on the allegations in the complaint." Doc. 67, PageID.1032. Therefore, "the Court need not look beyond the face of the operative complaint and attached exhibits to decide Defendants' current Rule 12(b)(1) motion." *Id.*; *McElmurray v. Consul. Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). Plaintiff nevertheless argues that the Court should find that more fact finding is necessary, because Defendants submitted a declaration in support of its other motions that touch on the arm-of-the-tribe factors.[1] Doc. 69, PageID.1039. But Defendants did not rely on the declaration in asserting this facial attack on jurisdiction, nor did they need to do so. The Complaint does not allege any facts to overcome Defendants' assertion of immunity.[2] In fact, the documents properly before the Court support Hummingbird's

[1] Notably, however, Plaintiff does not identify any discovery that is necessary to resolve this motion. As such, there is no reason for the Court to revisit its earlier finding that "discovery is unnecessary to decide it." DOC 67, PageID.1032.

[2] While Plaintiff wrongly argues that the burden of *proving* sovereign immunity falls on

entitlement to sovereign immunity. *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019); Doc. 37, PageID.566-570; Doc. 34-1, PageID. 501–512, Ex. 1 to Doc. 34, PageID.475–500, Am. Compl, ¶¶ 5, 6, 8-14, 35, 60, 61, 70-72, 78, 82, 92; *see also* Doc. 70, PageID.1059 (acknowledging "the tribe's financial stake in the lender's profits"). The claims against Hummingbird should be dismissed.

III. PLAINTIFF DOES NOT AND CANNOT ASSERT VIABLE CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

Plaintiff's claims against the Individual Defendants should also be dismissed. The relief Plaintiff seeks against the Individual Defendants would run against Hummingbird, not the Individual Defendants themselves, and thus are clearly of the official-capacity variety. And although the Eleventh Circuit has extended the *Ex parte Young* doctrine to permit certain suits against tribal officials acting in their official capacity, Plaintiff has not asserted claims that fall within the categories of permissible *Ex parte Young* suits, nor would she have standing to do so.

A. Plaintiff Asserts Official-Capacity Claims Against The Individual Defendants.

Plaintiff does not even attempt to rebut Defendants' argument that the claims she asserts against the Individual Defendants are official-capacity claims, and for good reason. Doc. 37, PageID.570-573. Plaintiff's claims against the Individual Defendants are based entirely on actions they allegedly took as officers and directors of LCO Financial Services, which, Plaintiff

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Defendants, she does not and cannot dispute that she has the burden of *pleading* facts sufficient to invoke this Court's subject matter jurisdiction. *See, e.g., Thalassinos v. Adair*, No. CIV.A. 13-0187-WS-N, 2013 WL 3231373, at *1 (S.D. Ala. June 26, 2013) ("It is plaintiff's burden to plead a basis for subject matter jurisdiction in his Amended Complaint, and to include in that pleading sufficient supporting facts to support the existence of subject matter jurisdiction."); *Allman v. Creek Casino Wetumpka*, No. 2:11CV24-WKW, 2011 WL 2313706, at *2 (M.D. Ala. May 23, 2011) (dismissing complaint against casino owned by a tribe on sovereign immunity grounds where, in relevant part, "it appear[ed] from the face of the complaint that plaintiff himself acknowledge[d] the Tribe's ownership and control over the casino"), *report and recommendation adopted*, 2011 WL 2313701 (M.D. Ala. June 13, 2011).

alleges, "is the board or department or division of the LCO Tribe which manages internet loans made through Hummingbird," and all of the relief she seeks would run against Hummingbird. *Id*.; Doc. 34, PageID.475–500, Am. Compl., ¶¶ 6, 8-14, 89, 104, 111. As such, Plaintiff's claims are "clearly of the official-capacity variety." *Leeds v. Bd. of Dental Examiners of Alabama*, 382 F. Supp. 3d 1214, 1231 (N.D. Ala. 2019); *Lewis v. Clarke*, 137 S. Ct. 1285, 1290-91 (2017).

B. The *Ex parte Young* Doctrine Does Not Save Plaintiff's Claims.

"[T]ribal officials are generally entitled to immunity for acts taken in their official capacity and within the scope of their authority. . . ." *PCI Gaming*, 801 F.3d at 1288. Although the *Ex parte Young* doctrine provides a limited exception to this general rule for certain official-capacity suits asserting prospective declaratory or injunctive relief, Plaintiff does not and cannot allege a viable *Ex parte Young* claim under RICO or the Alabama Small Loan Act.

1. Plaintiff does not have standing to pursue prospective equitable relief.

"Article III standing is a prerequisite to a federal court's exercise of subject-matter jurisdiction." *J W ex rel. Williams v. Birmingham Bd. of Educ.*, 904 F.3d 1248, 1264 (11th Cir. 2018). Since "standing 'is not dispensed in gross,' a 'plaintiff must demonstrate standing for each claim and for each form of relief that is sought.'" *Id.* (quoting *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1650 (2017)). The individual standing requirements must be met regardless of whether the plaintiff is "attempting to represent [her] own interest or those of a class." *Id*. at 1265; *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

The doctrine of *Ex parte Young* applies only to suits "seeking *prospective* equitable relief to end *continuing* violations of federal law." *Summit Medical Associates, P.C v. Pryor*, 180 F.3d 1326, 1336 (11th Cir 1999) (emphasis in original). "[A] plaintiff may not use the [*Ex parte Young*] doctrine to adjudicate the legality of past conduct." *Id*. at 1337 (citing *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986)). Where, as here, a plaintiff seeks declaratory or injunctive relief,

Article III's "injury-in-fact requirement insists that [she] 'allege facts from which it appears there is a substantial likelihood that [she] will suffer injury in the *future*.'" *Strickland v. Alexander*, 772 F.3d 876, 883 (11th Cir. 2014) (emphasis added) (citation omitted).

Plaintiff alleges that she has already paid off her loan in full. Am. Compl. ¶ 32. "There is no likelihood, therefore, that [Plaintiff] will ever again be exposed to [Defendants'] allegedly" unlawful lending practices. *See Wooden v. Board of Regents of Univ. Sys. of Georgia*, 247 F.3d 1262, 1285 (11th Cir. 2001). Moreover, "the fact that others may be exposed to that process in the future is not sufficient for [Plaintiff] to obtain prospective relief that will not benefit h[er] in conjunction with h[er] individual claim." *Id*. Plaintiff's claims against the Individual Defendants must be dismissed with prejudice for this reason alone.

2. Plaintiff cannot assert an *Ex parte Young* claim under RICO.

Even if Plaintiff had standing to seek prospective declaratory or injunctive relief, RICO does not provide for a private right of action for equitable relief. To pursue an *Ex parte Young* claim, the statute under which a private plaintiff sues must provide a private right of action for equitable relief. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (finding § 1302 of the Indian Civil Rights Act of 1968 "does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers").[3] RICO does not.

RICO provides that the Attorney General can seek injunctive relief, 18 U.S.C. § 1964(b), and private litigants may seek treble damages, *id*. § 1964(c).[4] Although the Eleventh Circuit has

[3] *See also PCI Gaming*, 801 F.3d at 1293 (finding § 1166 of the Indian Gaming Regulatory Act "does not provide states with either an express or implied right of action to sue tribal officials to enjoin unlawful gaming on Indian lands").

[4] 18 U.S.C. § 1964 provides, in relevant part:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing

not addressed the issue, the Ninth Circuit has found this language, bolstered by the legislative history, dispositive in holding that RICO forecloses private actions for injunctive relief. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1082 (9th Cir. 1986) (subsection (a) "is a broad grant of equitable jurisdiction to the federal courts[,]" subsection (b) "permits the government to bring actions for equitable relief[,]" and subsection (c) is "the private civil RICO provision, [which] states that a private plaintiff may recover treble damages, costs and attorney's fees").[5] The Court reasoned that "the inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in part (c), logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs." *Id*. at 1083 (original emphasis).

The Ninth Circuit also found support for this interpretation in the legislative history of RICO. First, at the time it enacted § 1964, the House of Representatives rejected an amendment that would have expressly permitted private parties to sue for injunctive relief. *Id.* at 1085-86

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reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

[5] *Wollersheim* has been followed by courts in numerous jurisdictions. *E.g., Hengle v. Asner*, No. 3:19cv250 (DJN), 2020 WL 113496, at *37-40 (E.D. Va. Jan. 9, 2020); *Galaxy Distrib. of W. Va., Inc. v. Std. Distrib., Inc*., No. 2:15-cv-04273, 2015 WL 4366158, at *4-5 (S.D. W.Va. July 16, 2015); *see also In re Fredeman Litig.*, 843 F.2d 821, 830 (5th Cir. 1988) (noting in dictum, "We find the analysis contained in the *Wollersheim* opinion persuasive."); *Johnson v. Collins Entertainment Company*, 199 F.3d 710, 726 (4th Cir. 1999) (noting in dictum that § 1964(c) of RICO "makes no mention whatever of injunctive relief," thereby creating "'substantial doubt whether RICO grants private parties . . . a cause of action for equitable relief.'").

(citing 116 Cong. Rec. at 35,346 and 35,227-28). Second, the following year, Congress rejected a bill that would have amended §1964 to authorize private plaintiffs to seek injunctive relief. *Id.* at 1086. Congress's decision to reject private actions for injunctive relief supports the inference that Congress did not intend for RICO to provide that remedy. *Republic of Iraq v. ABB AG*, 768 F.3d 145, 169-71 (2d Cir. 2014) (finding no private cause of action under the Foreign Corrupt Practices Act, noting that a bill introduced to provide a private cause of action "was deleted by a committee of the Senate"); *Bailey v. Johnson*, 48 F.3d 965, 968 (6th Cir. 1995) (rejecting private cause of action under the Food, Drug & Cosmetic Act in part because Congress considered and rejected a private right of action). In fact, the Supreme Court has relied on the legislative history of RICO, including the same failed amendments discussed above, to decide the applicable statute of limitations for RICO claims. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc*., 483 U.S. 143, 151-55 (1987). In discussing the bill introduced a year after RICO was enacted, the Supreme Court recognized that its purpose was "to broaden even further the remedies available under RICO[,]" including permitting "private actions for injunctive relief." *Id.* at 155.

Moreover, RICO was modeled after the Clayton Act, which in its original form prohibited private actions for injunctive relief. *Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917). Like RICO, the original Clayton Act of 1890 gave the Attorney General the power to "institute proceedings in equity to prevent and restrain" violations, while authorizing private actions for treble damages. Clayton Act, Act of July 2, 1890, c. 647, 26 Stat. 209. Relying on *Paine Lumber*, the Ninth Circuit concluded that Congress intended for RICO's nearly identical language to be interpreted in the same manner as the Supreme Court had interpreted the Clayton Act. *Wollersheim*, 796 F.2d at 1086-87.

Defendants recognize that other circuits have read § 1964 differently. *E.g.*, *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003); *Chevron Corp. v. Donziger*, 833 F.3d 74, 139 (2d Cir. 2016) (following *Scheidler*).[6] However, those cases rest on dubious logic. *Scheidler* entirely dismissed the legislative history as an aid in statutory interpretation. 267 F.3d at 699. *Scheidler* also erred in holding that because the Supreme Court has held a private plaintiff can bring an action for injunctive relief under the Clayton Act, the same was true of RICO. *Id.* at 700 (citing *California v. American Stores Co*., 495 U.S. 271 (1990)). The private right of action in the Clayton Act was founded on a subsection added by amendment to the Clayton Act—which has no analog in RICO.[7] *American Stores*, 495 U.S. at 283-84. Thus, this Court should follow *Wollersheim* and find that RICO does not provide a private right of action for injunctive relief.

Moreover, even if the Court were to find that RICO provides a private right of action for injunctive relief, Plaintiff fails to adequately plead a claim for such relief. The Complaint's vague request for "declaratory relief" and "[i]njunctive relief" does not provide sufficient detail for the Court to conclude that the relief Plaintiff seeks is prospective. Am. Compl. ¶¶ 50, 104(g)-(h), 111(g)-(h). Nor would it be reasonable to draw such a conclusion, given that Plaintiff does

[6] The district courts in this Circuit that have found RICO permits private actions for injunctive relief all rely on *Scheidler*, which is flawed for the reasons set forth herein. *Yaffa v. Sunsouth Bank*, No. 3:12cv288/MCR/CJK, 2016 U.S. Dist. LEXIS 182475, at *17-18 (N.D. Fla. Mar. 21, 2016) ("In the absence of any controlling precedent in the Eleventh Circuit, the Court agrees with the reasoning of the Seventh Circuit in *Scheidler*); *In re Managed Care Litig.*, 298 F. Supp. 2d 1259, 1282-83 (S.D. Fla. 2003) (following *Scheidler*); *Absolute Activist Value Master Fund Ltd. v. Devine*, No. 2:15-cv-328-FtM-29MRM, 2016 U.S. Dist. LEXIS 52263, at *13 (M.D. Fla. Apr. 19, 2016) ("The Court finds the reasoning in *Scheidler* to be persuasive.").

[7] Congress amended the Clayton Act in 1914. The amended law moved the language from section 4 to section 15 and added section 16, which authorizes private actions for injunctions. Act of October 15, 1914, c. 323, §§ 15, 16, 38 Stat. 730, 736-37. Those provisions are codified at 15 U.S.C. §§ 25-26. Although *Paine* was decided after the amendment, it still decided the scope of the prior version of the Act. *Paine*, 244 U.S. at 471.

not have standing to seek such relief. The Complaint also fails to adequately plead an ongoing violation of RICO that may be remedied by prospective relief. Plaintiff's assertion that Defendants' "conduct . . . continues to date and will be repeated again" is not supported by any facts and thus is not sufficient to allege an ongoing violation of RICO. *Id*. ¶¶ 103, 110; *3D-LIQ, LLC v. Wade*, No. 1:16-CV-1358-VEH, 2017 WL 734182, at *10 (N.D. Ala. Feb. 24, 2017) (dismissing § 1983 claim against state official for failure to plausibly allege an ongoing violation of federal law); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

3. Plaintiff cannot assert an *Ex parte Young* claim under the Small Loan Act.

For several reasons, Plaintiff also cannot use the *Ex parte Young* doctrine to pursue official-capacity claims against the Individual Defendants under the Small Loan Act. First, the Small Loan Act does not provide a private right of action for injunctive relief – a necessary prerequisite for asserting an *Ex parte Young*-type claim. *See Santa Clara Pueblo*, 436 U.S. at 71. While the Act permits private plaintiffs to assert damages claims, it permits *only* the State Supervisor of the Bureau of Loans of the State Banking Department and the Attorney General to seek injunctive relief.[8] Nor can a private right of action for injunctive relief cannot be implied. "One claiming a private right of action within a statutory scheme must show clear evidence of a legislative intent to impose civil liability for a violation of the statute." *Am. Auto. Ins. Co. v. McDonald*, 812 So.2d 309, 312 (Ala. 2001) (finding no private right of action under Insurance Code, as Code explicitly gives insurance commissioner authority to do so).

[8] *Compare* Ala. Code § 5-18-15(l) (requiring "[a]ny licensee making any charge in excess of the amount authorized" by the statute, to refund to the borrower the total amount of her actual damages, and providing "[t]he remedies provided herein shall be the remedy of the borrower . . . as the result of this violation") *and id*. § 5-18-21 (providing that "any licensee who fails to comply with any requirement imposed under this chapter with respect to any person is liable to the person for the actual damage sustained by the person as the result of the failure") *with* Ala. Code § 5-18-10 ("an action may be brought on the relation of the Attorney General or the supervisor to enjoin the person from engaging in or continuing the violation or from doing any act or acts in furtherance thereof . . .").

Second, even if the Small Loan Act could be construed to provide a private right of action for injunctive relief, Plaintiff does not seek any *prospective* declaratory or injunctive relief under the Small Loan Act. "The availability of [the *Ex parte Young*] doctrine turns, in the first place, on whether the plaintiff seeks retrospective or prospective relief." *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dept. of Health and Rehab. Svcs.*, 225 F.3d 1208, 1219 (11th Cir 2000). While Plaintiff urges the Court to construe "*any* request in Plaintiff's Complaint . . . as a request for prospective injunctive and declaratory relief[,]" Doc. 69, PageID.1040 n.2, the relief Plaintiff seeks under the Small Loan Act is plainly retrospective.[9] Plaintiff's request to void loans issued to the putative class would focus on only whether Defendants violated laws "over a period of time in the past" and thus would squarely conflict with the settled principal that "a plaintiff may not use the [*Ex parte Young*] doctrine to adjudicate the legality of past conduct." *Papasan*, 478 U.S. at 278; *Summit*, 180 F.3d at 1337; *SEC v. Graham*, 823 F.3d 1357, 1362 (11th Cir. 2016) ("A declaration of liability . . . is designed to redress previous infractions rather than to stop any ongoing or future harm.") (citing *Green v. Mansour*, 474 U.S. 64, 67 (1985) (characterizing declaratory relief that "related solely to past violations of federal law" as retrospective for purposes of the Eleventh Amendment)).[10]

Plaintiff's request for the return of interest collected on the loans issued to the putative class likewise seeks retroactive relief. Where, as here, the relief sought is the functional

[9] Count 1 of the Complaint "prays . . . that this Court hold[] all loans made to any Alabama resident since the inception of Defendants' unlawful scheme to be void and to order all interest collected on each such loan to be returned to the borrowers." Am. Compl. ¶ 89. Doc. 34, PageID.495-496. Count 2 of the Complaint [Conspiracy to Violate the Alabama Small Loan Act] does not include a prayer for relief. *Id.* ¶¶ 90-94. (Doc. 34, PageID496-497.)

[10] Contrary to Plaintiff's suggestion, *Summit* does not require the Court to construe Plaintiff's requested relief as prospective. There, the state officials "ha[d] not yet initiated prosecution, nor ha[d] they specifically threatened . . . prosecution." *Summit*, 180 F.3d at 1339. No past conduct was at issue, and thus the requested relief in *Summit* was "unquestionably . . . prospective." *Id.*

equivalent of money damages, *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." *Summit*, 180 F.3d at 1337; *Fla. Ass'n of Rehab. Facilities*, 225 F.3d at 1221 ("[i]mmunity is triggered when [a] declaration or injunction effectively calls for the payment of state funds as a form of compensation for past breaches of legal duties by state officials") (citations omitted).[11] Simply put, the *Ex Parte Young* doctrine does not permit Plaintiff to demand "reparation for the past." *Edelman v. Jordan*, 415 U.S. 651, 665 (1974).[12]

Finally, even if Plaintiff could overcome all of these obstacles, Plaintiff still cannot use the *Ex parte Young* doctrine to seek relief against the Individual Defendants under the Small Loan Act because *Ex parte Young* applies only to violations of federal law. While the Eleventh Circuit held in *PCI Gaming* that "tribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands[,]" that decision is not controlling here for several reasons. *PCI Gaming*, 801 F.3d at 1290 (citing *Bay Mills*, 572 U.S. at 795-96).

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[11] Cases cited in Plaintiff's Opposition are in accord. Opp. at 4 (Doc. 69, PageID1041) (citing *Lassiter v. Ala. A&M Univ. v. Bd. Of Trs.*, 3 F.3d 1482, 1485 (11th Cir. 1993) ("The Eleventh Amendment bars retroactive damage awards that must be paid by the State."), *vacated*, 28 F.3d 1146 (11th Cir. 1994); *Cross v. Ala. State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1503 (11th Cir. 1995) ("The Eleventh Amendment bars appellees' section 1983 lawsuit for monetary damages against [state officials] in their official capacities.")).

[12] For similar reasons, Plaintiff also cannot use the *Ex parte Young* doctrine to seek an injunction enjoining future collection on loans issued during the putative class period, even if she had standing to do so. "[T]here are very limited circumstances where a court may enter an order implicating the [sovereign's] treasury if such payments will be nothing more than ancillary to compliance with [an] enforceable prospective injunction prohibiting future unlawful conduct by [the sovereign's] officials." *Fla. Ass'n of Rehab. Facilities*, 225 F.3d at 1225. This is not such a case. An order precluding Hummingbird from collecting on past loans would provide for "relief . . . with respect to events pre-dating the judgment [which] cannot remotely be described as an 'ancillary' remedy necessary to ensure future compliance. . . ." *Id*. at 1225, 1227 (vacating district court order to the extent it "contemplate[d] the payment of state funds to remedy unlawful conduct prior to the date of the final judgment"). Because such an injunction would "invade [Hummingbird's] sovereignty as much as an award of damages would," it is barred by tribal immunity. *See Summit*, 180 F.3d at 1337.

First, *PCI Gaming* did not hold that *private plaintiffs* may pursue official-capacity claims against tribal officials for off-reservation conduct.[13] There, as in *Bay Mills*, the State was the plaintiff, not a private party. The distinction is important. While it is true that there has been no "warrant [in the Supreme Court's] cases for making the validity of an *Ex parte Young* action turn on the identity of the plaintiff[,]" *Va. Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 256 (2011), that is because the identity of who is enforcing *state* law has not been a concern for the Court since *Pennhurst*. 465 U.S. at 104-06. Allowing individuals to seek prospective injunctive relief against state or tribal officials for violations of *federal* law serves the important goal of ensuring the "vindicat[ion of] the supreme authority of federal law." *Id*. at 106. The same cannot be said when private parties assert claims under state law, particularly where, as here, the state *alone* has the power to seek injunctive relief under the state statute at issue. Ala. Code § 5-18-10; *see also Pennhurst*, 465 U.S. at 102 ("[T]he theory of *Young* has not been provided an expansive interpretation.").

Furthermore, even if private plaintiffs could pursue official-capacity claims for violations of state law against tribal officials for off-reservation conduct, Plaintiff does not allege that the

[13] With respect, the Eleventh Circuit also wrongly interpreted one paragraph of *Bay Mills* to permit *Ex parte Young*-type suits against tribal officials under state law when their conduct occurs off Indian lands. And the Second Circuit was wrong to follow suit four years later. *See Gingras v. Think Fin., Inc.*, 922 F.3d 112, 120 (2d Cir. 2019). Decades before *Bay Mills*, the Supreme Court squarely held that *Ex parte Young* does not permit state-law claims against state officials, focusing heavily on the fact "that the *Young* doctrine rests on the need to promote the vindication of *federal rights*." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104-06 (1984) (emphasis added). Indeed, the purpose of the doctrine is to "hold state officials responsible to 'the supreme authority of the United States.'" *Id.* at 105. *Bay Mills* did not even address *Pennhurst*, much less explicitly overrule it, and emphasized, in refusing to overturn *Kiowa*, that the Court "does not overturn its precedents lightly." 572 U.S. at 795-96, 798. Moreover, just three years after *Bay Mills*, the Supreme Court confirmed that tribal officials are subject to the same sovereign immunity principles as state officials. *Lewis*, 137 S. Ct. at 1291. *Bay Mills* should not be read to wipe out decades of settled authority and make "[t]he immunity tribal officials enjoy from state law claims brought in federal court . . . narrower than the immunity of state officials from such claims[.]" *PCI Gaming*, 801 F.3d at 1290.

Individual Defendants engaged in any off-reservation conduct. The paragraphs of the Complaint Plaintiff relies on do not identify a single activity the Individual Defendants engaged in off tribal lands. Opp. at 10 Doc., 69, PageID1047; Am. Compl. ¶¶ 53 (alleging Defendants offer and collect on loans to consumers that are in Alabama), 54 (same), 60 (alleging the Individual Defendants cause Hummingbird to enter into relationships with banks to process ACH transactions for Plaintiff and the putative class). (Doc. 34, PageID488-489). At best, the Complaint alleges that the Individual Defendants controlled activities of Hummingbird that resulted in *Plaintiff's* off-reservation conduct in connection with her loan, which is not sufficient to trigger the application of *Ex parte Young*.

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

Even if Plaintiff's claims could be construed as individual-capacity claims, the Individual Defendants are entitled to qualified immunity. Where, as here, a plaintiff fails to allege a violation of clearly established law, "[i]t is . . . appropriate for a district court to grant the defense of qualified immunity at the motion to dismiss stage."[14] *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003) (citation omitted). Plaintiff claims that *Austin v. Alabama Check Casher Ass'n*, 936 So.2d 1014 (Ala. 2005), set forth clearly established law that governs here. Doc. 69, PageID.1047. It did not. *Austin* did not address (or even involve) any lender operating as an arm of a tribe. The tribal sovereignty issues involved in this case make the facts here patently different from *Austin*, where there was no question that the lenders would be subject to the Small

[14] As Defendants' note in their opening brief, a challenge to qualified immunity is properly brought as a motion to dismiss pursuant to Rule 12(b)(6). Doc 37, PageID.576. Because the Court has stayed Defendants' Rule 12(b)(6) Motion, Defendants respectfully request that, if the Court determines that Plaintiff has asserted individual capacity claims against Defendants, the Court reserve ruling on the qualified immunity defense until it reaches the 12(b)(6) Motion.

Loan Act if the check-cashing transactions at issue constituted "loans" under the Act. *Merricks v. Adkisson*, 785 F.3d 553, 559 (11th Cir. 2015) ("[T]he facts of the case before the court must be materially similar to the facts in the precedent that clearly establishes the deprivation.") (citations omitted).

Plaintiff also does not and cannot point to any "binding opinions, from the United States Supreme Court, the Eleventh Circuit Court of Appeals, [or] the [Alabama Supreme Court]" that could serve as clearly established law here. *Merricks*, 785 F.3d at 559. As Plaintiff correctly notes, in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) ("*Mescalero I*"), the Supreme Court held that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of [a] State." Doc. 69, PageID.1042. But the Supreme Court has not applied, or even considered whether this rule would apply, in the unique factual circumstances presented here. *See Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 114 (2d Cir. 2014) ("[T]he Supreme Court has [not] confronted a hybrid transaction like the loans at issue here, e-commerce that straddles borders and connects parties separated by hundreds of miles").[15] Under these circumstances, the Individual Defendants are plainly entitled to qualified immunity.

V. CONCLUSION

Because Plaintiff has twice failed to plead facts that would permit the Court to assert subject matter jurisdiction over Defendants, the Complaint should be dismissed with prejudice.

[15] Notably, in both *Bay Mills* and *Mescalero*, the tribal conduct that the state was attempting to regulate was plainly conducted off the reservation. *Bay Mills*, 572 U.S. at 791 (noting "the very premise of this suit . . . is that the Vanderbilt casino is *outside* Indian lands") (emphasis in original); *Mescalero I*, 411 U.S. at 146 (the tribe "operates a ski resort in the State of New Mexico, on land located outside the boundaries of the Tribe's reservation").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 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:

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