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' OBJECTIONS TO REPORT AND RECOMMENDATION (DOC. 75)

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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") respectfully object to the Report and Recommendation (Doc. 75) denying Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 37).

I. INTRODUCTION

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. In doing so, Plaintiff acknowledged and agreed to multiple provisions of the Loan Agreement providing 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. The Loan Agreement further contains a clear and conspicuous provision requiring arbitration of all disputes arising out of the Loan Agreement.

Despite Defendants' entitlement to sovereign immunity and Plaintiff's agreement to arbitrate any disputes concerning the Loan Agreement, Plaintiff filed this lawsuit, alleging claims for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Alabama Small Loan Act, Alabama Code § 5-18-1 *et seq.* Defendants filed a number of motions in response to the First Amended and Restated Complaint (Doc. 34) (the "Complaint"), including, as relevant here, a Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 37) on the grounds that Defendants are entitled to sovereign immunity, a Motion to Compel Arbitration (Doc. 38), and a Motion to Dismiss Based on Forum Non Conveniens (Doc. 40).

On July 30, 2020, the Magistrate issued a Report and Recommendation (Doc. 75), in

relevant part denying the Motion to Dismiss for Lack of Subject Matter Jurisdiction. Respectfully, for a number of reasons, Defendants believe that the Magistrate erred in recommending that the Court deny the Motion to Dismiss.

As a preliminary matter, Defendants respectfully request that the Court rule on the Motion to Compel Arbitration before addressing subject matter jurisdiction, an issue that the Magistrate previously concluded she could not reach before resolving the subject matter jurisdiction motion (Docs. 48, 51). Defendants believe this decision was contrary to Supreme Court precedent, which recognizes that non-merits issues, like a motion to compel arbitration, can be resolved before addressing whether the Court has subject matter jurisdiction.

With respect to the merits of the subject matter jurisdiction motion, Defendants believe that the Report and Recommendation errs on a number of grounds. First, it misallocates the burden of pleading and proving sovereign immunity to Defendants, rather than to Plaintiff. The Eleventh Circuit has recognized that the *plaintiff* bears the burden of proving that tribal defendants are not entitled to sovereign immunity. The Report and Recommendation, however, follows the Fourth Circuit in holding that Defendants bear the burden of proof. In so ruling, the Fourth Circuit (and the Magistrate) relied on principles applicable to state immunity under the Eleventh Amendment, an analogy that the Eleventh Circuit has squarely rejected: "[A]n Indian tribe's sovereign immunity is not the same thing as a state's Eleventh Amendment immunity, and . . . there are powerful reasons to treat an Indian tribe's sovereign immunity differently from a state's Eleventh Amendment immunity." *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1206 (11th Cir. 2012).

The Report and Recommendation likewise improperly likens tribal sovereign immunity to an affirmative defense such that a motion to dismiss based on sovereign immunity cannot be

dismissed unless the complaint's "own allegations indicate the existence of an affirmative defense" and "the defense clearly appears on the face of the complaint." (Doc. 75, PageID.1135-36.) Again, this finding is contrary to Supreme Court and Eleventh Circuit precedent, both of which have indicated that sovereign immunity is not an affirmative defense. Moreover, even if sovereign immunity were an "affirmative defense," it is akin to personal jurisdiction, which, like sovereign immunity, can be waived, but for which the burden of proof falls on the plaintiff.

Second, even if Defendants bear the burden of proving their entitlement to sovereign immunity, the Report and Recommendation errs in concluding that Plaintiff has pled adequate facts to overcome Defendants' assertion of immunity. The Complaint and the Loan Agreement attached thereto, both of which must be taken as true for purposes of the Motion to Dismiss, unequivocally reflect that Hummingbird is a tribal entity operated and controlled by the Tribe and with whom the Tribe intended to share its entitlement to sovereign immunity. The Complaint does not plead *any* facts that would allow the Court to infer that Hummingbird is not an arm of the Tribe or has unequivocally waived its immunity from suit, or that Congress has expressly abrogated its immunity. The Complaint is, therefore, insufficient to invoke the Court's subject matter jurisdiction over Hummingbird. The Report and Recommendation's conclusion to the contrary disregards the purpose and significance of tribal sovereign immunity and the procedural importance of facial challenges to subject matter jurisdiction.

The Report and Recommendation's conclusions with respect to the Individual Defendants are likewise wrong. The Report and Recommendation incorrectly concludes that Plaintiff has sued the Individual Defendants in their individual, rather than their official, capacities. This finding is contrary to Supreme Court precedent requiring the Court to look beyond the Complaint's characterization of claims as "individual" or "official" capacity claims. When

properly probed, the claims against the Individual Defendants are plainly official capacity claims, because the relief Plaintiff seeks will run against Hummingbird, and Hummingbird is the true party in interest. As such, the Individual Defendants are also immune from suit.

Finally, even if the Court were to conclude that the Complaint asserts individual capacity claims against the Individual Defendants, the Report and Recommendation errs in finding that the Individual Defendants have not established their entitlement to qualified immunity. The Report and Recommendation incorrectly indicates that the Individual Defendants were on notice that they violated clearly established law because of Supreme Court precedent suggesting that tribal officials can be sued in their individual capacities for conduct undertaken on behalf of the Tribe. But the question for purposes of qualified immunity is not, as the Magistrate found, whether the Individual Defendants were on notice that "tribal employees are not protected by tribal sovereign immunity when sued in their individual capacities"; the relevant question is whether it was *clear* to the Individual Defendants that by issuing loans to Alabama residents that purportedly did not comply with the Alabama Small Loan Act, Hummingbird clearly violated Alabama law. Because Plaintiff has not and cannot allege that the Individual Defendants knew that state lending laws clearly apply to tribal lenders, like Hummingbird, who issue loans under the authority of and governed by tribal law, Plaintiff cannot sue the Individual Defendants in their individual capacities, even if she had properly alleged such claims.

For the foregoing reasons, Defendants respectfully request that the Court decline to adopt the Report and Recommendation's denial of the Motion to Dismiss for Lack of Subject Matter Jurisdiction and that Plaintiff's Complaint be dismissed with prejudice.

II. FACTUAL BACKGROUND

Plaintiff obtained a $650 loan from Hummingbird on March 26, 2019. (Doc. 34-1.) Plaintiff alleges that Defendants violated the Alabama Small Loan Act, Ala. Code § 5-18-1 *et*

seq., and RICO, by issuing loans without a license and with excessive interest rates. (Doc 34, PageID.495-99, ¶¶ 83-111.)

The LCO Tribe is a federally-recognized Native American Indian tribe. (Doc. 7-1, PageID.152 (84 Fed. Reg. 1200 (Feb. 1, 2019) (listing the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin)). The Complaint acknowledges, as it must, that Hummingbird asserts that it is an arm of the LCO Tribe entitled to sovereign immunity. (Doc. 34, PageID.480, ¶¶ 24-25; PageID.482, ¶ 35; PageID.486, ¶ 52.) Indeed, Plaintiff's loan agreement attached to her Complaint (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 Lac Courte Oreilles Band of Lake Superior Chippewa Indians, a federally-recognized sovereign American Indian tribe[.]" (Doc. 34-1, PageID.504.) The Loan Agreement further provides that any disputes arising under the agreement will be resolved through arbitration, which the agreement refers to as "Tribal Dispute Resolution Procedures[.]" (*Id.*)

III. LEGAL STANDARD

The Court reviews *de novo* any aspect of a report and recommendation to which an objection has been made. 28 U.S.C. § 636(b)(1). The *"de novo* review requirement is essential to the constitutionality of section 636," because the section "allows a magistrate to take over several functions that are otherwise reserved to Article III judges." *Jeffrey S. by Ernest S. v. State Bd. of Educ. of State of Ga.*, 896 F.2d 507, 512 (11th Cir. 1990). Under *de novo* review, the magistrate's recommendation is not given "presumptive weight"; instead the district judge must conduct its own review of the issues, as "[t]he authority and the responsibility to make an informed, final determination . . . remains with the judge." *United States v. Elsoffer*, 644 F.2d 357, 359 (5th Cir. 1981) (quoting *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976)). If the

district judge disagrees with the report and recommendation, she may "reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge" or she may "receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1).

IV. THE MOTION TO COMPEL ARBITRATION CAN AND SHOULD BE RESOLVED BEFORE ADDRESSING SOVEREIGN IMMUNITY

As a preliminary matter, Defendants respectfully request that the Court resolve their Motion to Compel Arbitration before addressing their entitlement to sovereign immunity.[1]

The Court has discretion to compel arbitration before addressing subject matter jurisdiction because a motion to compel arbitration raises threshold jurisdictional issues that do not go to the merits of this dispute. 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. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ruhrgas AG v. Marathon Oil Co*., 526 U.S. 574, 584 (1999)). Thus, a federal court has leeway "to choose among threshold grounds for denying audience to a case on the merits." *Id.* For example, without first establishing subject-matter jurisdiction, the Court may dismiss for lack of personal jurisdiction, decline to adjudicate state-law claims on discretionary grounds, or dispose of an action by a forum non conveniens dismissal. *Id.* at 431-32; *see also Georgia Republican Party v. S.E.C.*, 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); *Aviation One of Fla., Inc. v. Airborne Ins. Consultants (PTY), Ltd*, 722 F. App'x 870,

[1] Plaintiff and Defendants previously jointly asked the Magistrate to resolve the Motion to Compel Arbitration first, but the Magistrate declined, finding that the "Court must satisfy itself that it has subject matter jurisdiction over the Plaintiff's claims before it can decide whether to compel arbitration of those claims." (Doc. 48, PageID.719; *see also* Docs. 47, 49, 51.)

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, . . . 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."); *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"). "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 (citing cases).

Motions to compel arbitration, like motions to dismiss on forum non conveniens grounds, present non-merits issues that can be decided before the Court determines whether it has subject matter jurisdiction. Arbitration clauses are "a subset of foreign forum selection clauses," *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995), and a ruling on whether to enforce a forum-selection clause "is not a decision on the merits[.]" *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498 (1989); *see also Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1342 n.7 (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 . . . .")). As such, numerous courts have held that a court may rule on a motion to compel arbitration before resolving other jurisdictional issues.[2] *See, e.g., Burnham Enterprises, LLC v. DACC Co. Ltd.*,

[2] Defendants are aware of two contrary decisions in the Eleventh Circuit; however, neither decision is controlling here. *See Boyd v. Homes of Legend, Inc.*, 188 F.3d 1294, 1300 (11th Cir. 1999); *Ready v. River Birch Homes, Inc.*, No. 07-0031-WS-B, 2007 WL 841740, at *1, n.1 (S.D. Ala. Mar. 15, 2007). *Boyd* was decided before the Supreme Court's decision in *Sinochem* and, although *Ready* was decided shortly after *Sinochem*, it fails to cite or recognize the impact of *Sinochem*.

No. 2:12-CV-111-WKW, 2013 WL 68923, 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."); *Halliburton Energy Servs., Inc. v. Ironshore Specialty Ins. Co.*, 289 F. Supp. 3d 819, 822 (S.D. Tex. 2017) (deciding arbitrability before addressing personal jurisdiction because "arbitrability is a procedural, jurisdictional issue rather than a merits issue."), *rev'd and remanded on other grounds*, 921 F.3d 522 (5th Cir. 2019); *In re Residential Capital, LLC*, 563 B.R. 756, 766 (Bankr. S.D.N.Y. 2016) (deciding motions to compel arbitration before motion to dismiss for lack of personal and subject matter jurisdiction because "resolution of [the motions to compel arbitration] will moot in large part the remaining motions"); *Ramasamy v. Essar Glob. Ltd.*, 825 F. Supp. 2d 466, 467 n.1 (S.D.N.Y. 2011) ("Because the Court has determined the case should be dismissed in favor of arbitration, it does not reach defendant's motion to dismiss for lack of personal jurisdiction[.]"); *Magi XXI, Inc. v. Stato Della Citta Del Vaticano*, 818 F. Supp. 2d 597, 620 (E.D.N.Y. 2011) ("[C]onsiderations of convenience, fairness, and judicial economy warrant bypassing the question of subject matter jurisdiction in favor of deciding the motion to dismiss for improper venue[.]"), *aff'd*, 714 F.3d 714 (2d Cir. 2013).

In finding that the Motion to Compel Arbitration cannot be resolved until Defendants' entitlement to sovereign immunity is addressed, the Magistrate relied on section 4 of the Federal Arbitration Act, which provides, in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction *under title 28*, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4 (emphasis added).

Here, the Complaint alleges that the Court has jurisdiction pursuant to 28 U.S.C. § 1331 because "Plaintiff's claims arise under the RICO Act, 18 U.S.C. § 1962" (among other grounds). (Doc. 34, PageID.481, ¶ 31.) Thus, jurisdiction under title 28 is present as required by section 4 of the FAA.[3] Moreover, judicial economy, efficiency, and fairness all favor deciding the Motion to Compel Arbitration first. Substantial judicial and party resources may be expended to resolve the subject matter jurisdiction issue, and even if the Court concludes that it has subject matter jurisdiction, it will still need to resolve the Motion to Compel Arbitration. In contrast, the Motion to Compel can be decided on the briefing without any discovery, and, if granted, would avoid the need for reaching the subject matter jurisdiction and remaining motions. As such, Defendants respectfully request that the Motion to Compel Arbitration be decided before the Court addresses the Motion to Dismiss for Lack of Subject Matter Jurisdiction.

V. THE COURT ERRED IN DENYING THE MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION WITH RESPECT TO HUMMINGBIRD

Respectfully, Defendants believe that the Report and Recommendation errs in denying Hummingbird's facial challenge to subject matter jurisdiction by (i) improperly allocating the burden of proving and pleading sovereign immunity to Hummingbird, and (ii) finding that the Complaint adequately pleads facts to overcome Hummingbird's assertion of sovereign immunity.

A. Plaintiff Bears The Burden Of Proving That Defendants Are Not Entitled To Sovereign Immunity.

The Magistrate wrongly concluded that Hummingbird bears the burden of proving that it

[3] The Magistrate previously relied on the Supreme Court's decision in *Vaden v. Discover Bank*, 556 U.S. 49 (2009), in finding that subject matter jurisdiction must be resolved first. (Doc. 51, PageID.735.) There, the Court noted that under section 4, "a party seeking to compel arbitration may gain a federal court's assistance only if, 'save for' the agreement, the entire, actual 'controversy between the parties,' as they have framed it, could be litigated in federal court." *Vaden*, 556 U.S. at 66. The issue there was whether the Court had jurisdiction over the dispute pursuant to 28 U.S.C. § 1331. *Id.* at 59-60. Thus, the Court's statement is consistent with section 4, which expressly requires only that jurisdiction exist "*under title 28*[.]" 9 U.S.C. § 4 (emphasis added). *Vaden* cannot and should not be read to expand the jurisdictional requirements beyond the statutory text.

is an arm of the Tribe entitled to sovereign immunity. (Doc. 75, PageID.1134-36.) The Eleventh Circuit has held that "suits [against a tribal defendant] are barred by the doctrine of tribal sovereign immunity, unless *the plaintiff* shows either a clear waiver of that immunity by the tribe, or an express abrogation of the doctrine by Congress." *Williams v. Poarch Band of Creek Indians*, 839 F.3d 1312, 1317 (11th Cir. 2016) (emphasis added).

The Eleventh Circuit's conclusion that the plaintiff bears the burden of establishing that a tribal party is not entitled to sovereign immunity is consistent with other circuits that have addressed this issue, all but one of which has concluded that the *plaintiff* bears the burden of proof. For example, the Ninth Circuit has held, "In the context of a Rule 12(b)(1) motion to dismiss on the basis of tribal sovereign immunity, 'the party asserting subject matter jurisdiction has the burden of proving its existence,' i.e. that immunity does not bar the suit." *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (citation omitted). The Sixth, Eighth, and Second Circuits have similarly indicated that the plaintiff bears the burden of proving that a tribal party is not entitled to sovereign immunity. *Spurr v. Pope*, 936 F.3d 478, 482 (6th Cir. 2019) (indicating that plaintiff bore the burden of establishing tribal defendants were not entitled to sovereign immunity on motion to dismiss for lack of subject matter jurisdiction), *cert. denied*, 140 S. Ct. 850 (2020); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685-86 (8th Cir. 2011) ("The plaintiffs bear the burden of proving that either Congress or [the arm of the Tribe] has expressly and unequivocally waived tribal sovereign immunity."); *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 84 (2d Cir. 2001) (explaining, in an action brought against a tribal agency, "On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists."). Several district courts in the Eleventh Circuit have likewise found that the

burden rests with the plaintiff. *Allman v. Creek Casino Wetumpka*, No. 2:11CV24-WKW, 2011 WL 2313706, at *2 (M.D. Ala. May 23, 2011) (indicating that plaintiff bore the burden of proving that the tribe and tribal corporation were not entitled to sovereign immunity), *report and recommendation adopted*, 2011 WL 2313701 (M.D. Ala. June 13, 2011); *Inglish Interests, LLC v. Seminole Tribe of Fla., Inc.*, No. 2:10-CV-367, 2011 WL 208289, at *2 (M.D. Fla. Jan. 21, 2011) (placing burden of establishing that tribal business entity was not entitled to sovereign immunity on the plaintiff); *Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe of Fla.*, No. 19-CV-62591, 2020 WL 43221, at *8 (S.D. Fla. Jan. 3, 2020) (holding "Plaintiffs have failed to satisfy their burden of establishing jurisdiction" in action against Indian tribe).

Rather than following these decisions, the Report and Recommendation follows the Fourth Circuit, finding "the burden of proof should fall to the entity seeking immunity as an arm of the tribe, despite the jurisdictional nature of such immunity." (Doc. 75, PageID.1134 (citing *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176-77 (4th Cir. 2019).) In *Williams*, the Fourth Circuit relied on principles governing claims of sovereign immunity asserted by "arms of the state" under the Eleventh Amendment, which the majority of courts have held have the burden of proving immunity, to conclude that tribal entities likewise bear the burden to establish immunity from suit. *Id.* at 176. The Court reasoned, "The same burden allocation applies to an entity seeking immunity as an arm of the tribe. Placing the burden of proof on the defendant entity aligns with our reasoning . . . that sovereign immunity is 'akin to an affirmative defense' and gives proper recognition to the similarities between state sovereign immunity and tribal sovereign immunity." *Id.*

Respectfully, in addition to being contrary to Eleventh Circuit precedent, the Report and Recommendation errs in following the Fourth Circuit, for at least two additional reasons. First,

unlike the Fourth Circuit, the Eleventh Circuit has *rejected* the application of state sovereign immunity principles to tribal sovereign immunity. The Eleventh Circuit has explained, "[A]n Indian tribe's sovereign immunity is not the same thing as a state's Eleventh Amendment immunity, and . . . there are powerful reasons to treat an Indian tribe's sovereign immunity differently from a state's Eleventh Amendment immunity." *Contour Spa*, 692 F.3d at 1206. For this reason, the Eleventh Circuit is unlikely to adopt the Fourth Circuit's conclusion that a tribal entity bears the burden of proof.[4]

The Eleventh Circuit has rejected the application of Eleventh Amendment sovereign immunity principles to Indian tribes for good reason. "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. . . . As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978) (citation omitted). In other words, "Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). "Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' That immunity. . . is 'a necessary corollary to Indian sovereignty and self-governance.'" *Id.* at 788 (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

[4] Like the Eleventh Circuit, the Ninth Circuit – which has recognized that the plaintiff bears the burden of overcoming a tribal defendant's assertion of sovereign immunity – has found that analogizing between tribal sovereign immunity and the immunity of states under the Eleventh Amendment is of limited utility. *See, e.g., United States ex rel. Cain v. Salish Kootenai Coll., Inc.*, 862 F.3d 939, 945 (9th Cir. 2017) ("To determine the reach of tribal immunity using Eleventh Amendment case law would be anachronistic."); *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1015-18, 1020 (9th Cir. 2016) (tribal immunity "is not synonymous with a State's Eleventh Amendment immunity, and parallels between the two are of limited utility").

"The baseline position, [the Supreme Court has] often held, is tribal immunity[.]" *Id.* at 790. Thus, like the Eleventh Circuit, the Supreme Court has "often noted . . . that the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 755–56 (1998). Instead, tribal immunity is more akin to the sovereign immunity possessed by foreign countries and the United States. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); *Contour Spa*, 692 F.3d at 1206 ("[T]ribal immunity is in many respects more analogous to foreign sovereign immunity than to state Eleventh Amendment immunity."); *Williams v. Poarch Band of Creek Indians*, 839 F.3d 1312, 1316 (11th Cir. 2016) (noting the "nation-to-nation relationship" between the United States and Indian tribes); *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1150 (10th Cir. 2012) ("While tribal sovereign immunity is not coextensive with that of the states, [t]ribal sovereign immunity *is* deemed to be coextensive with the sovereign immunity of the United States.") (original emphasis).

For this reason, the Court should look to case law interpreting the federal government's[5] burden in establishing sovereign immunity, which holds that the federal government is *presumed* to be immune from suit unless the *plaintiff* proves otherwise. *See, e.g., Ishler v. Internal Revenue*, 237 F. App'x 394, 398 (11th Cir. 2007) ("[T]he plaintiff bears the burden of establishing subject matter jurisdiction [over the federal government], and, thus, must prove an explicit waiver of immunity."); *Brewer v. Comm'r*, 430 F. Supp. 2d 1254, 1258 (S.D. Ala. 2006) ("Although [the United States] is the moving party, plaintiff is the party seeking to invoke the

[5] Jurisdiction over foreign nations is governed by statute, the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611.

court's jurisdiction. As such, plaintiff bears the burden of establishing subject matter jurisdiction."); *Daytona Beach Resort & Conference Ctr. Condo. Ass'n, Inc. v. United States*, No. 616CV232ORL41DAB, 2016 WL 5858724, at *2 (M.D. Fla. May 31, 2016) ("In the absence of a waiver of sovereign immunity, the Court lacks jurisdiction over claims against the [federal] government Defendants. It is, of course, a plaintiff's burden to establish that jurisdiction lies in this Court."), *report and recommendation adopted*, 2016 WL 5815902 (M.D. Fla. Oct. 5, 2016); *Ferrer v. Yellen*, No. 13-22975-CIV, 2014 WL 12651189, at *3 (S.D. Fla. Oct. 3, 2014) ("Faced with a motion to dismiss for lack of subject matter jurisdiction [filed by federal defendants], Plaintiffs bear the burden of demonstrating that there *is* subject matter jurisdiction.") (original emphasis), *report and recommendation adopted sub nom*. *Ferrer v. Bernake*, 2014 WL 12652353 (S.D. Fla. Oct. 29, 2014).[6]

Second, contrary to the Report and Recommendation's conclusion, tribal sovereign immunity is not "akin to an affirmative defense[,]" such that a motion to dismiss based on sovereign immunity cannot be granted unless the Complaint's "own allegations indicate the existence of an affirmative defense" and "the defense clearly appears on the face of the complaint." (Doc. 75, PageID.1135-36.) Unlike affirmative defenses, which are waived unless raised, tribal sovereign immunity can be raised at any time, and is only waived when "unequivocally expressed." *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1286 (11th Cir.

[6] Other circuits are in accord. *E.g.*, *Lundeen v. Mineta*, 291 F.3d 300, 304 (5th Cir. 2002) ("The burden is on [the plaintiff] to show [the federal government consented to be sued], because he is the party asserting federal jurisdiction."); *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (in case involving claim of federal sovereign immunity, "plaintiff bears the burden of persuasion if subject matter jurisdiction is challenged under Rule 12(b)(1)"); *Safeco Ins. Co. of Am. v. Nelson*, ___ F. Supp. 3d ___, 2020 WL 3445045, at *2-3 (S.D. Cal. June 24, 2020) ("It is an unquestioned principle that the United States is a sovereign entity that is not amenable to suit without its consent. It is also well-established that the burden of overcoming sovereign immunity lies with the party bringing suit against a sovereign. . . . The question, then, is whether Plaintiff has affirmatively pleaded around the United States' sovereign immunity.").

2001) (citation omitted); *Contour Spa*, 692 F.3d at 1206 ("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."); *United States v. Land, Shelby Cnty.*, 45 F.3d 397, 398 n.2 (11th Cir. 1995) (rejecting argument that federal government waived sovereign immunity by failing to raise it with the district court because "[s]overeign immunity . . . is an issue of subject matter jurisdiction and, thus, may be raised at any time."). Because of this, numerous courts – including the Supreme Court and the Eleventh Circuit – have indicated that sovereign immunity is *not* an affirmative defense. *See, e.g., Tamiami Partners By & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1050 (11th Cir. 1995) ("Does tribal sovereign immunity under federal law provide immunity from suit or is it merely a defense to liability? The Supreme Court has unequivocally answered this question, having held that, absent explicit congressional abrogation or a tribal waiver, tribal sovereign immunity provides an Indian tribe with immunity from suit.") (citing *Santa Clara Pueblo*, 436 U.S. at 58); *A. L. Rowan & Son, Gen. Contractors, Inc. v. Dep't of Hous. & Urban Dev.*, 611 F.2d 997, 1001 n.2 (5th Cir. 1980) (rejecting argument that "the sovereign immunity defense was raised belatedly because it is an affirmative defense," because "want of consent is a fundamental defect that may be asserted at any time, and that is not subject to estoppel") (citation omitted);[7] *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (rejecting argument that tribal sovereign immunity "is an affirmative defense that unless raised in an answer is waived"); *In re Knapp*, 294 B.R. 334, 338 (W.D. Wash. 2003) ("Sovereign immunity is not an affirmative defense that must be timely asserted or it is waived"); *Scott v. City of Valdosta*, 634 S.E.2d 472,

[7] Decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981 are binding on the Eleventh Circuit. *Bonner v City of Pritchard*, 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc).

476 (Ga. App. 2006) ("Sovereign immunity is not an affirmative defense that the governmental defendants must establish.").

Moreover, even if sovereign immunity were an affirmative defense, the fact that sovereign immunity can be waived or that facts concerning sovereign immunity may be in Defendants' possession, does not suggest that Defendants bear the burden of proof. The same is true of personal jurisdiction, *see* Fed. R. Civ. P. 12(h), but "[i]t goes without saying that, where the defendant challenges the court's exercise of jurisdiction over its person, the plaintiff bears the ultimate burden of establishing that personal jurisdiction is present." *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1217 (11th Cir. 2009).

B. Plaintiff Bears The Burden Of *Pleading* Facts Sufficient To Invoke The Court's Jurisdiction

Even if Hummingbird were to bear the ultimate the burden of *proving* its entitlement to sovereign immunity, Plaintiff still bears the burden of *pleading* facts sufficient to invoke the Court's subject matter jurisdiction.

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."). To establish subject matter jurisdiction, a plaintiff "must affirmatively allege facts demonstrating the existence of jurisdiction[.]"[8] *Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994); *see also Lowery v.*

[8] 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

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."); *Sovereign Bonds Exch. LLC v. Fed. Republic of Germany*, 899 F. Supp. 2d 1304, 1309 (S.D. Fla. 2010) ("It is presumed that a federal court lacks jurisdiction in a particular case until the plaintiff demonstrates the court has jurisdiction over the subject matter."), *aff'd sub nom. World Holdings, LLC v. Fed. Republic of Germany*, 701 F.3d 641 (11th Cir. 2012); *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.").

Numerous courts – including the Eleventh Circuit – have recognized that, *even where the defendant may bear the ultimate burden of establishing its entitlement to immunity*, once the defendant invokes its immunity, the plaintiff must *plead* facts sufficient to overcome the defendants' assertion of immunity. *See, e.g., Barr v. Gee*, 437 F. App'x 865, 876 (11th Cir. 2011) (granting motion to dismiss based on prosecutorial immunity, reasoning, "To the extent that [the plaintiff] alleged that one or more of the attorneys 'collected' or 'created' false evidence, such conduct would not be protected by prosecutorial immunity. Nevertheless, [the plaintiff's] assertion to this effect was unsupported by any factual allegations permitting an inference that any attorney participated in the evidence-gathering stage. Thus, [the plaintiff's] complaint did

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.").

not sufficiently allege that the State Attorney's Office defendants engaged in misconduct outside the bounds of prosecutorial immunity."); *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1313 (11th Cir. 2009) ("Because the [plaintiffs] sought to invoke the jurisdiction of the United States courts . . . , they bore the burden of presenting a prima facie case that jurisdiction existed. Where, as here, the party asserting immunity under the [Foreign Sovereign Immunities Act] does not contest the alleged jurisdictional facts, but rather, challenges their legal adequacy, we review de novo the complaint's jurisdictional allegations to determine whether they were sufficient to eliminate the [defendants'] presumptive immunity."); *Clark v. Sierra*, 837 F. Supp. 1179, 1181–82 (M.D. Fla. 1993) (granting judge's motion to dismiss based on judicial immunity where plaintiff failed to plead facts indicating that requirements for judicial immunity had not been met); *Temple v. McIntosh Cnty., Georgia*, No. 2:18-CV-91, 2019 WL 287482, at *6–7 (S.D. Ga. Jan. 22, 2019) (granting motion to dismiss filed by County because plaintiff failed to meet her burden of alleging a waiver of sovereign immunity where "Plaintiff's only mention of waiver is in one sentence of the Complaint which states: 'Defendants have waived any defense of sovereign immunity by the purchase of liability insurance or otherwise.'").[9]

To hold otherwise would ignore the nature of sovereign immunity and erase the important and necessary distinction between facial and factual attacks on subject matter jurisdiction. "The Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation." *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163,

[9] *See also Morkal v. Hawks*, No. 3:12-CV-00218 RRB, 2015 WL 6159335, at *2 (D. Alaska Oct. 19, 2015) (granting motion to dismiss and explaining, "As Federal Defendants have challenged jurisdiction and asserted that sovereign immunity applies, the burden shifts to Plaintiff to establish the existence of jurisdiction."); *Gerhardt v. Mares*, 179 F. Supp. 3d 1006, 1060–61 (D.N.M. 2016) (in relevant part, granting motion to dismiss filed by government employees because "First, New Mexico has not waived immunity for prima facie tort claims against its employees. . . . Second, [the plaintiff] has not overcome this obstacle by alleging that any of these Defendants acted outside the scope of their duties.").

1172 (10th Cir. 1998). Thus, "[t]ribal sovereign immunity would be rendered meaningless if a suit against a tribe asserting its immunity were allowed to proceed to trial." *Tamiami Partners*, 63 F.3d at 1050. Factual attacks on jurisdiction require defendants asserting immunity to undertake an expensive and time-consuming effort to demonstrate their entitlement to immunity and potentially to bear the cost and burden of jurisdictional discovery. Allowing a plaintiff to circumvent the basic and core requirement that she plead facts sufficient to overcome a tribal defendant's assertion of immunity would likewise undermine the Tribe's full enjoyment of sovereign immunity, by requiring the Tribe to endure the burdens of litigation absent any factual basis to do so, and would eviscerate the important procedural protections facial attacks provide to defendants asserting immunity from suit.

C. Plaintiff Fails To Plead Facts Invoking The Court's Subject Matter Jurisdiction Over Hummingbird.

The Report and Recommendation wrongly concludes that Hummingbird's Motion to Dismiss for Lack of Subject Matter Jurisdiction should be denied because "whether Hummingbird truly is an arm of the LCO Tribe does not clearly appear on the face of the complaint." (Doc. 75, PageID.1136.) Even if this were the appropriate legal standard (which it is not, as discussed above), the Complaint and Plaintiff's Loan Agreement, which is attached to and thus incorporated into the Complaint, unequivocally reflect that Hummingbird is a tribal entity operated and controlled by the Tribe and with whom the Tribe intended to share its entitlement to sovereign immunity.

As a preliminary matter, Plaintiff does not allege or argue that Hummingbird waived its immunity or that Congress has authorized suits in this context. As such, the only issue is whether the Tribe's sovereign immunity extends to Hummingbird as an arm of the Tribe. To determine whether a tribal commercial entity is an arm of the tribe entitled to sovereign

immunity, courts generally consider 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 terms of Plaintiff's Loan Agreement plainly indicate that Hummingbird is an arm of the Tribe entitled to sovereign immunity. The Loan Agreement states:

- "We are a tribal limited liability company organized under tribal law. We are 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 (the "Tribe"). We are licensed and regulated by the Tribal Financial Services Regulatory Authority (the "Authority") and operate in accordance with the Tribal Consumer Financial Services Regulatory Code." (Doc. 34-1, PageID.504.)

- **"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." (Doc. 34-1, PageID.508.)

- **"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.*)

By signing the agreement, Plaintiff acknowledged that she "READ, UNDERST[OO]D, AND

AGREE[D] TO ALL OF THE TERMS AND CONDITIONS OF TH[E] AGREEMENT." (Doc. 34-1, PageID.511 (original emphasis).)

The Magistrate disregarded these terms, finding, "Hummingbird's assertions in the agreement that it is an arm of the LCO Tribe are simply its own views of its legal status." (Doc. 75, PageID.1136 n.11.) But the contents of the Loan Agreement (i) *must* be accepted as true for purposes of the Motion to Dismiss and (ii) control over contradictory allegations in the Complaint. *See, e.g., Burch v. Apalachee Cmty. Mental Health Servs., Inc.,* 840 F.2d 797, 798 (11th Cir. 1988) ("When reviewing a motion to dismiss pursuant to Rule 12(b)(6), we take the material allegations of the complaint and its incorporated exhibits as true[.]"), *aff'd sub nom. Zinermon v. Burch*, 494 U.S. 113 (1990); *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."); *Univ. Creek Assocs., II, Ltd. v. Bos. Am. Fin. Grp., Inc.*, 100 F. Supp. 2d 1337, 1338 (S.D. Fla. 1998) ("The court must 'take the material allegations of the complaint and its incorporated exhibits as true[.]'").

Moreover, "a person who signs a contract is on notice of the terms therein and is bound thereby, even if he or she fails to read the document." *Compass Bank v. Limon*, 464 F. App'x 782, 786 (11th Cir. 2012) (quoting *Ex parte Renovations Unlimited, LLC*, 59 So. 3d 679, 684 (Ala. 2010)). Hummingbird entered into the Loan Agreement in reliance on Plaintiff's acknowledgement that it is an arm of the Tribe entitled to sovereign immunity. Neither Plaintiff – nor the Court – should be permitted to disregard these material terms, absent, at a minimum, well-pled facts contradicting them.

The Loan Agreement's unambiguous provisions indicating that Hummingbird is an arm of the Tribe make it plain on the face of the Complaint that dismissal is required unless Plaintiff pleads facts indicating that Hummingbird is not entitled to sovereign immunity. But Plaintiff fails to allege *any* facts to show that the Tribe's sovereign immunity does not extend to Hummingbird. 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 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.480, ¶ 24.) Plaintiff does not allege any facts that would allow the Court to infer that Hummingbird was created in such a manner or for any nefarious purpose. The Complaint also claims that, "[a]s 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*, 929 F.3d at 177 (concluding that tribal lending entities were arms of the tribe entitled to sovereign

immunity). In short, Plaintiff asks the Court to assume that Hummingbird is not a legitimate arm of the Tribe because, according to Plaintiff, other tribal lenders are illegitimate. Such groundless and speculative allegations are plainly insufficient to invoke the Court's jurisdiction.

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. For example, the Complaint concedes 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.477-78, ¶¶ 6, 8-14; PageID.489-92, ¶¶ 60, 61, 70, 71, 72.) Likewise, the Complaint acknowledges that the Tribe intended to share its sovereign immunity with Hummingbird. (*Id.*, PageID.482, ¶ 35.) Having admitted these allegations, the only conclusion to be drawn from the Complaint is that Hummingbird is 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., Allman*, 2011 WL 2313706, at *2 (dismissing complaint against tribe and tribal corporation because, in relevant part, "The complaint includes no factual allegations suggesting a waiver of sovereign immunity by the Poarch Band . . . [and] it appears from the face of the complaint that plaintiff himself acknowledges the Tribe's ownership and control over the casino."); *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, at *2 (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.

VI. THE COURT LIKEWISE ERRED IN FINDING SUBJECT MATTER JURISDICTION OVER THE INDIVIDUAL DEFENDANTS

The Report and Recommendation wrongly concludes that the Court has jurisdiction over the Individual Defendants – all alleged to be tribal officials – because Plaintiff has sued them in their individual, rather than their official, capacities. (Doc. 75, PageID.1129-30.) In so holding, the Report and Recommendation overlooks Supreme Court precedent concerning the distinction between individual and official capacity claims. Even if the Report and Recommendation is correct that Plaintiff has alleged individual capacity claims, it misapplies the doctrine of qualified

immunity in finding that the Individual Defendants are not entitled to such immunity.

A. Plaintiff Has Sued The Individual Defendants In Their Official, Rather Than Their Individual, Capacities.

The Report and Recommendation concludes that the Individual Defendants do not have immunity from suit solely because the Complaint alleges that the Individual Defendants are being sued in their "individual capacities." (Doc. 75, PageID.1129-30.) This finding is contrary to the Supreme Court's mandate that, in determining whether an individual defendant has been sued in his or her individual or official capacity, "courts *may not simply rely on the characterization of the parties in the complaint*, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017) (emphasis added). Thus, 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." *Id.* The sovereign is the real party in interest where the "remedy sought is truly against the sovereign" such that the judgment will "operate against the Tribe" and will "require action by the sovereign or disturb the sovereign's property." *Id.* at 1291.

It is apparent from the face of the Complaint that Hummingbird is the real party in interest here. Plaintiff's limited allegations regarding the Individual Defendants relate entirely to their 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[.]" (Doc. 34, PageID.477-78, ¶¶ 6, 8-14.) Such allegations plainly implicate the Individual Defendants' official conduct on behalf of Hummingbird (through LCO Financial Services). *See, e.g.*, *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, No. CIV.A. 09-00722-KD-

N, 2011 WL 4915163 (S.D. Ala. Oct. 14, 2011) (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").

Likewise, all of the relief Plaintiff seeks would come from Hummingbird, not the Individual Defendants. 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.496, ¶ 89.) Both requests for relief could only be recovered from Hummingbird, which issued Plaintiff's loan and collected payments on Plaintiff's loan. The same is true with respect to Count Two, in which Plaintiff seeks to recover "interest payments" made to Hummingbird. (*Id.*, PageID.497, ¶ 94.) 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.*, PageID.477-78, ¶¶ 6, 8-14.) Plaintiff does not and cannot allege that the Individual Defendants either personally issued the loans she seeks to void or personally collected and retained any interest on the loans she seeks to have 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. (*Id.*, PageID.498, ¶ 102; *see also id.*, PageID.499, ¶¶ 97, 107.) In other words, Plaintiff seeks repayment of interest she and the putative class paid to Hummingbird. Again, any such repayment would come from Hummingbird, not the personal assets of the Individual Defendants.

B. The Individual Defendants Are Entitled To Qualified Immunity.

Contrary to the findings in the Report and Recommendation, even if Plaintiff had properly alleged claims against the Individual Defendantsin their personal capacities, they are entitled to qualified immunity.[10] "[Q]ualified immunity offers complete protection for government officials sued in 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.").

"Evaluating the defense of qualified immunity involves a two step inquiry: first, whether the defendant's conduct violated a clearly established constitutional right; and, second, whether a reasonable government official would have been aware of that fact." *Chesser v. Sparks*, 248 F.3d 1117, 1122 (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

[10] As Defendants' previously noted, a challenge to qualified immunity is properly brought pursuant to Rule 12(b)(6). (Doc 37, PageID.576.) Although Defendants asked the Court to reserve ruling on the qualified immunity defense because the Court had stayed Defendants' Rule 12(b)(6) Motion, (Doc. 73, PageID.1097 n.14,) the Magistrate addressed and rejected the defense in a footnote.

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).

The Report and Recommendation concludes that the Individual Defendants have not demonstrated that they are entitled to qualified immunity because they have (i) "not cited any authority that extends the protections of qualified immunity to tribal officials," and (ii) "been put on notice at least since the U.S. Supreme Court's 2017 decision in *Lewis*, 137 S. Ct. 1285 – well before Easley took out the subject loan – that tribal employees are not protected by tribal sovereign immunity when sued in their individual capacities." (Doc. 75, PageID.1131 n.6.) Neither finding is correct.

First, qualified immunity plainly applies to tribal officials. *See, e.g., Kennerly v. United States*, 721 F.2d 1252, 1259 (9th Cir. 1983) (noting that qualified immunity applies to tribal officials); *Beattie v. Smith*, 543 F. App'x 850, 852 (10th Cir. 2013) (tribal police officers entitled to qualified immunity); *Armstrong v. Mille Lacs Cnty. Sheriffs Dep't*, 228 F. Supp. 2d 972, 989 (D. Minn. 2002), *aff'd sub nom. Armstrong v. Mille Lacs Tribal Police Dep't*, 63 F. App'x 970 (8th Cir. 2003) (same); *Bressi v. Ford*, No. CV-04-264 TUC JMR, 2005 WL 8162304, at *2 (D. Ariz. Feb. 1, 2005) (same).

Second, the relevant question is not, as the Report and Recommendation frames it, whether the Individual Defendants were on notice that "tribal employees are not protected by tribal sovereign immunity when sued in their individual capacities." (Doc. 75, PageID.1131 n.6.) Instead, the relevant question is whether it was *clear* to the Individual Defendants that by issuing loans to Alabama residents that allegedly did not comply with the Alabama Small Loan Act, Hummingbird clearly violated Alabama law. *See, e.g., Grider*, 618 F.3d at 1254.

"If the law at the time [of the challenged conduct] 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)). "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). "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." *Merricks*, 785 F.3d at 559.

This case presents novel issues relating to tribal sovereignty. Plaintiff's claims are premised on the theory that Hummingbird (and by extension the Individual Defendants) violated Alabama law by issuing loans in violation of the Alabama Small Loan Act. But Plaintiff's Loan Agreement plainly provides that the loan was issued by arm of the LCO Tribe and is governed by the laws of the LCO Tribe. (Doc. 34.) There are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members" including, most critically here, "the right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Neither the Alabama Supreme Court, the Eleventh Circuit, nor the Supreme Court has found that, or considered whether, state lending laws apply to tribal lenders, like Hummingbird, who issue loans under the

authority of and governed by tribal law.[11] *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 [tribal] loans at issue here, e-commerce that straddles borders and connects parties separated by hundreds of miles"). It is thus far from *clear* that a tribal lender, like Hummingbird, should be considered to have engaged in off-reservation conduct (and thus to be subject to state laws, such as the Alabama Small Loan Act) when its lending operations are conducted entirely on the reservation.[12] The Individual Defendants certainly cannot be said to have been "*on notice* that [their] conduct would be *clearly* unlawful[,]" and thus are entitled to qualified immunity. *Vinyard*, 311 F.3d at 1350.

VII. CONCLUSION

Defendants respectfully request that the Court decline to adopt the Report and Recommendation's denial of their Motion to Dismiss for Lack of Subject Matter Jurisdiction and that the Complaint be dismissed with prejudice.

Respectfully submitted,

Dated: August 13, 2020

[11] As Plaintiff noted in her Opposition, in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), 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.) Notably, however, in *Mescalero*, the tribal conduct at issue was plainly conducted off the reservation. 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"). Here, the Complaint does not identify any activity Hummingbird or the Individual Defendants engaged in beyond the reservation. 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.

[12] In her Opposition to Defendants' Motion, Plaintiff contended 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 does 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 Loan Act if the check-cashing transactions at issue constituted "loans" under the Act. *Merricks*, 785 F.3d at 559 ("[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).

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

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 13th day of August, 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

Kenneth J. Riemer
Underwood & Riemer, PC
2153 Airport Blvd.
Mobile, AL 36606
Phone: 25-432-9212
Email: Kriemer01@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