**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

NORMAJEAN WEIDLEY and ELLEN OKRZESIK, Plaintiffs, v. AANIIIH NAKODA FINANCE LLC, d/b/a BRIGHT LENDING, et al., Defendants.	Case No. 5:22-cv-00905-LCB **REPLY OF DEFENDANTS BORROWWORKS DECISION SCIENCE, INC., BWDS, LLC, AND BENJAMIN E. GATZKE IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT**

I. Plaintiffs continue to ignore and contradict the facts established in jurisdictional discovery.

In their opening brief, the BorrowWorks Defendants identified a litany of instances in which Plaintiffs' allegations in the SAC were contradicted by evidence. (*See* ECF No. 105, at pp. 10-12.) Undeterred, Plaintiffs continue to twist the same testimony they once described to the Court as "*detailed*" and "*accurate*" (ECF No. 81) into unrecognizability. Nowhere is this more evident than in how Plaintiffs describe the BorrowWorks Defendants' role in the Tribe's lending business.

Specifically, the crux of Plaintiffs' brief boils down to an argument that the BorrowWorks Defendants "created the ANF loan documents and

created the computer systems used to market the program, intake application, perform underwriting, approve the loans, generate the loan documents, distribute loan proceeds, collect payments and other day-to-day operational functions." (ECF No. 122 at 7.) As a result, Plaintiffs argue, "the lending platform operated by Gatzke [sic] his companies essentially are [sic] the operation." (ECF No. 122 at 2, 4, 6-7, 16, 25.) This portrayal, though, has no basis in reality.

For example, Plaintiffs claim that "Gatzke's platform also generates the loan documents." (ECF No. 122 at 4.) But the portions of the ANF deposition transcript the Plaintiffs themselves cite directly belie their contention. There, Ms. Pyette testified that REDACTED [redacted] (Tr. 54:7-9.)[1] If there were any doubt on that point, Ms. Pyette also stated unequivocally that Island Mountain—not the BorrowWorks Defendants—drafted the loan documents:

REDACTED [redacted]

[1] ANF's Rule 30(b)(6) transcript is already filed under seal. (ECF No. 100.)

REDACTED

(Tr. 61:6-10; 61:15-17.) BorrowWorks provided software that ANF, an arm of the Tribe, uses to operate. But Island Mountain, not the BorrowWorks Defendants, provided all language in loan documents and set all loan parameters. (Tr. 61:15-17; 66:17-19.) Plaintiffs' argument makes no more sense than if Plaintiffs were to argue that Microsoft has spent years practicing law. After all, while one hundred percent of the language in this brief is attorney language, all of it is generated by and implemented using the Microsoft Office Suite.

Similarly, Plaintiffs contend that the BorrowWorks Defendants' platform "conveys marketing messaging, intakes loan applications, gathers applicant information, communicates with applicants and borrowers, conducts underwriting, distributes loan proceeds and collects payments." (ECF No. 122 at 2.) Again, this is contrary to the evidence and to common sense. Island Mountain, an arm of the Tribe, makes all the decisions about the lending operation, including day-to-day management (Tr. 22:5-23:3; 35:18-36:8; 36:12-22) and underwriting parameters (Tr. 66:17-19.), and ANF,

another arm of the Tribe, directly disburses loan proceeds (Tr. 63:24-64:3) and directly receives payments (Tr. 83:10-25). BorrowWorks does not control those aspects of the lending operation; it provides support for the website through which the Tribal business operates. If Plaintiffs' theory were correct, then Courts could consider every business that uses a website to be run by its technology support vendor. BorrowWorks does not lend money any more than a company servicing slot machines runs a casino.[2]

II. Plaintiffs' claims must be dismissed because the Tribe is an indispensable party that cannot be joined.

Plaintiffs appear to concede that the Tribe enjoys sovereign immunity. In an apparent effort to show that then lending operation is not performed by an arm of the Tribe, Plaintiffs attack the Tribe's business structure as a sham. Again, those arguments are disproved by Plaintiffs' jurisdictional discovery.

Specifically, Plaintiffs claim that the entirety of the Bright Lending tribal corporate structure is a shell, implying that all the work associated

[2] Defendant Stiffarm's reference to the BorrowWorks Defendants as "lending companies" is merely a recitation of Plaintiffs' allegations. BorrowWorks' limited role is properly spelled out in the ANF deposition.

with the business is actually performed by the BorrowWorks Defendants. (*See* ECF No. 122 at 3-4.) That implication cannot be squared with the jurisdictional discovery. As Ms. Pyette testified, Island Mountain, the ultimate parent company of ANF, has REDACTED [redacted] (Tr. 61:25-62:3.) Those employees are often tribal members and perform the management and oversight of the Tribe's lending businesses, including of ANF. (Tr. 55:8-15.) Businesses regularly operate through numerous subsidiaries. Here, the Tribe has merely separated business functions, assets, and risks between multiple arm-of-the-tribe entities. The Tribe's sovereign immunity applies to those entities.

Recognizing that the jurisdictional facts fatally undermine subject matter jurisdiction, Plaintiffs also argue that the claims against the Tribal Officials are permitted under *Ex parte Young*. The BorrowWorks Defendants join the arguments made by the Tribe and the Tribal Officials showing why *Ex parte Young* does not save the Plaintiffs' claims. In addition, Plaintiffs' argument that joint tortfeasors need not be joined confirms that their lawsuit

is not about enjoining a government official from violating federal law; it is a tort claim. While Plaintiffs are correct that not all alleged joint tortfeasors need to be joined in a single action, that misses the point. This lawsuit implicates the Tribe's lending business. For the reasons stated in briefing by the Tribe and the Tribal Officials, the Tribe is an indispensable party that cannot be joined because it enjoys sovereign immunity. When a party is indispensable and cannot be joined, a court must dismiss the action under Rule 19 and Rule 12(b)(7).

III. This Court lacks personal jurisdiction over the BorrowWorks Defendants.

Plaintiffs continue to rely on misstatements of facts and impermissible group pleading in an attempt to somehow link the BorrowWorks Defendants to Alabama. As discussed above, the jurisdictional discovery Plaintiffs took revealed that the BorrowWorks Defendants' role was limited to providing software. They did not transfer money to Plaintiffs (Tr. 63:24-64:3); receive payments from Plaintiffs (Tr. 83:10-25); manage the Tribe's lending business in Alabama or anywhere else (Tr. 22:5-23:3; 35:18-36:8; 36:12-22); make eligibility determinations regarding Alabama residents (or

anyone else) (Tr. 66:13-19 (explaining that Island Mountain sets parameters for underwriting and loan eligibility); or make a decision to do business in Alabama (Tr. 72:17-73:7 (noting that the decision to do business in a particular jurisdiction would be made by Island Mountain or by the Tribe itself through legislation)). If this Court were to accept Plaintiffs' theory, then every business that uses third-party software or maintains a website (and the corporate officers of those businesses) would be subject to personal jurisdiction in every state where consumers can access the internet.

Furthermore, Plaintiffs continue to rely on impermissible group pleading to establish personal jurisdiction. *See Peeples v. Caroline Container*, No. 4:19-CV-00021, 2019 U.S. Dist. LEXIS 238314 at *15, n.3 (N.D. Ga. April 3, 2019) ("'[G]roup pleading' methods are not an acceptable way to establish personal jurisdiction over multiple defendants at once."). First, Plaintiffs fail to distinguish between the actions taken by the BorrowWorks Defendants and those taken by the Tribal defendants. For example, Plaintiffs offer a paragraph discussing "Defendants'" contacts in Alabama (ECF No. 122 at 14)—all of them acts by ANF, not BorrowWorks.

Second, Plaintiffs' use of the term "BorrowWorks Defendants" fails to

distinguish between Gatzke and various companies. (*See* ECF No. 122 at 17.) Plaintiffs never attempt to make that distinction. Plaintiffs instead argue that because Gatzke allegedly controls each of the corporate BorrowWorks Defendants, group pleading between them is acceptable. Not so. Gatzke and each corporate BorrowWorks Defendant must be subject to personal jurisdiction individually. Even if the Court accepted Plaintiffs' allegations that conflict with Plaintiffs' jurisdictional discovery, Plaintiffs have not alleged any link between Gatzke individually and Alabama.[3] After discarding the allegations that are group-pled or are contradicted by discovery, no allegations support personal jurisdiction over the BorrowWorks Defendants.

Finally, Plaintiffs have not adequately pleaded a RICO or conspiracy claim. They cannot rely on those claims to establish personal jurisdiction.

[3] The Gatzke Declaration did not side-step anything. Plaintiffs' allegations that the BorrowWorks Defendants secretly participated in lending (ECF No. 122 at p. 19) is contrary to the evidence from jurisdictional discovery and should be disregarded. And the Gatzke Declaration properly focuses on each individual defendant, not group pleading.

IV. The SAC fails to state a claim.

A. Liability under the ASLA does not extend to the BorrowWorks Defendants because they were not a lender.

Plaintiffs contend that the BorrowWorks Defendants could be liable under the ASLA because the statute proscribes "the procurement of a loan through any use of activity of a third person." (ECF No. 122 at 24.) But that argument is fatally flawed. The statutory section Plaintiffs cited only applies to the "procurement" of loans.[4] The BorrowWorks Defendants did not procure any loans in Alabama—loans were offered and funded by ANF, an arm of the Tribe. (*See* Tr. 63:24-64:3 (all loans were disbursed directly by ANF) and Tr. 83:10-25 (all payments went directly to ANF).).[5]

Nor do Plaintiffs present any caselaw that would authorize an ASLA claim against a vendor providing services to a loan business, like the

[4] The other statutory section Plaintiffs cite confers investigatory powers on a state regulator and does not provide Plaintiffs a basis to state a claim against a non-lender.

[5] Plaintiffs argue that the Court should ignore the facts from jurisdictional discovery when evaluating the portion of the motion under Rule 12(b)(6). While courts typically look to the four corners of a complaint when evaluating a motion under 12(b)(6), plaintiffs are not permitted to take advantage of that legal standard by pleading allegations that are directly contradicted by known facts.

BorrowWorks Defendants. Their only seeming support, the *Hengle* decision, applied Virginia law and did not involve the ASLA. *See Hengle v. Asner*, 433 F. Supp. 3d 825, 895 (E.D. Va. 2020). This Court should decline Plaintiffs' invitation to expand the statute.

B. The ASLA does not create a private right of action.

The ASLA is a comprehensive regulatory scheme. Had the Alabama legislature wanted to provide a private right of action, it could have done so. The intentional absence of any reference to a private right of action confirms that the Legislature did not intend to provide one.

Plaintiffs argue that this Court should infer a private right of action where none exists because otherwise portions of the statute would be rendered meaningless. That is not accurate. The Bureau of Loans can litigate whether a loan is void or voidable. In addition, a borrower could rely on the statute's voidness language as a defense if a lender attempted to enforce a loan contract that violated the ASLA. Under Ala. Code § 5-18-4, the lender's inability to retain money received under an illegal loan[6] is labeled as a

[6] The fact that Plaintiffs rely on their ability to purportedly sue to recover the money they paid confirms that this action is not an *Ex parte Young* case.

penalty under the statute. Violation of the ASLA is a misdemeanor that would be enforceable by the Bureau of Loans, which could seek restitution or disgorgement as part of a misdemeanor prosecution. Furthermore, Ala. Code § 5-18-10 is not a limitation on remedies. It is "in addition to all other remedies that [the supervisor of the Bureau of Loans] may have at law." Ala. Code § 5-18-10(d). Thus, each provision of the ASLA is enforceable without rewriting the statute to include a private right of action that is not there.

The cases Plaintiffs cite on page 23 of their opposition do not hold that a private right of action exists under the ASLA. *Floyd* was an action brought by the supervisor of the Alabama Bureau of Loans of the State Banking Department, not a private plaintiff. *Floyd v. Title Exchange and Pawn of Anniston, Inc.*, 620 So. 2d 576 (Ala. 1993). *Alabama Catalog Sales v. Harris* only addressed whether a court or an arbitrator should rule on a motion to compel arbitration. It did not address, at any point, whether a private right of action existed; that issue appears not to have been raised. 794 So. 2d 312 (Ala. 2000). Similarly, *Pendleton v. American Title Brokers, Inc.*, focused on the

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Furthermore, a private plaintiff may not seek prospective injunctive relief under RICO. *See Hengle v. Treppa*, 19 F.4th 324, 356 (4th Cir. 2021).

Truth in Lending Act. *See* 754 F. Supp. 860, 864-65 (S.D. Ala. 1991). Even when the Court did discuss the ASLA, it does not appear that the parties litigated whether that statute created a private right of action; instead, the defendant argued it was a pawnbroker except from the statute entirely. *Id.* *Alabama Catalog Sales* and *Pendleton* should not be interpreted as having decided issues that were not presented to those courts.

C. The SAC fails to properly plead a conspiracy.

As an initial matter, because Plaintiffs cannot establish a private right of action for a violation of the ASLA, they have not established the underlying wrong for a conspiracy claim. Plaintiffs do not argue that their conspiracy claim can survive without an ASLA claim. If the Court dismisses the ASLA claim, it must also dismiss the conspiracy claim.

But as the BorrowWorks Defendants explained in their opening brief, even if the ASLA claim were viable—and it is not—Plaintiffs still have not adequately pleaded a claim of conspiracy. Plaintiffs' only response supporting their conspiracy allegations is to punt: they claim they are not required to plead any specifics of the alleged conspiracy because they can rely on circumstantial evidence. (ECF No. 122 at 25-26.) Plaintiffs are

incorrect. That type of conclusory allegation of conspiracy has long been prohibited. Instead, a Plaintiff must spell out details as to who agreed to what, and when. *See Griswold v. Department of Indus. Relations*, 903 F. Supp. 1492, 1501 (M.D. Ala. 1995) ("[T]he Eleventh Circuit requires a heightened pleading standard in conspiracy cases because a defendant must be informed of the nature of the conspiracy alleged."). The fact that circumstantial evidence may be used to prove a claim does not eliminate or alter the pleading requirements imposed by the Eleventh Circuit.

Finally, Plaintiffs never addressed the argument that they may not circumvent the ASLA—which does not include a private right of action—simply by pleading a conspiracy. The Court should not permit Plaintiffs to make an end-run around the statutory scheme.

D. The SAC fails to properly plead unjust enrichment.

In their motion to dismiss the SAC, the BorrowWorks Defendants pointed out that Plaintiffs may not base an unjust enrichment claim based on the ASLA because that statute does not provide a private right of action; a plaintiff may not manufacture a private right of action by relabeling it as an unjust enrichment claim. Plaintiffs do not respond to that point. Instead,

they cite cases in which an unjust enrichment claim survived a motion to dismiss. (*See* ECF No. 122 at 27.) None of those cases involved the ASLA and do not support using unjust enrichment to manufacture a private right of action where the legislature did not provide for one.

E. The SAC fails to properly plead a RICO claim.

Plaintiffs' only explanation for why their RICO claim should survive is that a court may not consider the ANF deposition testimony on a motion to dismiss. As pointed out above, however, a plaintiff also may not plead inaccurate facts simply to avoid dismissal.[7]

Moreover, Plaintiffs brief fails to grapple with the central issue bearing on BorrowWorks Defendants' liability under RICO. Not all contact between a third party and an alleged RICO enterprise is sufficient to impose liability on that third party. Plaintiffs have failed to plead a viable RICO claim because they have not explained, using properly pleaded allegations or

[7] Conversely, if the Court takes Plaintiffs at their word that "[t]he record is clearly insufficient for the court to make final factual determinations of the parties' respective roles in the lending operations," (see ECF No. 122 at 30), then Plaintiffs have admitted that they cannot overcome sovereign immunity because Plaintiffs bear the burden of proving jurisdiction.

jurisdictional discovery, how the BorrowWorks Defendants' provision of a software platform to an arm of the Tribe was sufficiently entwined with the allegedly unlawful conduct to impose RICO liability.

Plaintiffs also fail to address their lack of standing to pursue a RICO claim against the BorrowWorks Defendants. The BorrowWorks Defendants incorporate the Tribal Officials' arguments relating to implausibility and standing. Plaintiffs were obligated to show how *each* defendant's *specific* violation of Section 1962 proximately caused Plaintiffs' alleged harm. *See Slay's Restoration, LLC v. Wright Nat'l Flood Ins. Co.*, 884 F.3d 489, 494 (4th Cir. 2018). Plaintiffs' failure to address this argument cedes the point. Plaintiffs have not pleaded and cannot show how any of the three BorrowWorks Defendants specifically and directly caused any injury to Plaintiffs.

V. CONCLUSION

For these reasons, the BorrowWorks Defendants respectfully request that the Court dismiss the claims against them with prejudice.

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Respectfully submitted,

By: */s/ John N. Bolus*

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 6th day of October 2023, the foregoing document was filed electronically with the Courts CM/ECF system and served on the parties via the Court's electronic filing system.

/s/ John N. Bolus
Of Counsel