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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

NORMA JEAN WEIDLEY, and ELLEN OKRZESIK	)	
Plaintiffs,	)	
vs.	)	**Case No.: 5:22-cv-00905-LCB**
ANIIIH NAKODA FINANCE LLC, d/b/a BRIGHT LENDING; et al.	)	

DEFENDANT STIFFARM'S SUBSTITUTED REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant Jeffrey Stiffarm ("President Stiffarm"), by and through the undersigned counsel, respectfully submits this Reply in support of his Motion to Dismiss Count I and Count IV alleged against him in Plaintiffs' Second Amended Complaint.

ARGUMENT

At the outset, it is important that the Court separately consider the damages claim against Stiffarm individually (Count I) from the injunctive claim against Stiffarm in his official capacity (Count IV). In their response brief, Plaintiffs fail to distinguish between the two counts which results in a conflation of the elements Plaintiffs must prove to establish standing and jurisdiction for each count.

I. President Stiffarm's motion to dismiss for lack of subject matter jurisdiction presents both a facial and factual attack to subject matter jurisdiction.

President Stiffarm's motion is both a facial and factual attack to subject matter jurisdiction under F. R. Civ. P. 12(b)(1). As clarified in *Easley v. Hummingbird Funds*, CV 1:19-00937-KD-N, at *2, (S.D. Ala. July 30, 2020) "'[f]acial attacks' on the complaint require the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." But because a "factual attack" challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings," any matters extrinsic to the pleadings, "such as testimony and affidavits," are considered. *Easley*, at *2.

Plaintiffs, in an attempt to escape President Stiffarm's references to government websites of Fort Belknap and Bureau of Indian Affairs, incorrectly assert that President Stiffarm's motion is limited to a facial attack on subject matter jurisdiction. The official documents in these government websites establish the limited authority of President Stiffarm as president of the Fort Belknap Indian Community. Yet, Plaintiffs incorrectly claim these documents are not authenticated. "Federal courts routinely consider records from government websites to be self-authenticating." *Rizo v. Yovino*, No. 1:14-cv-0423-MJS, at 9

(E.D. Cal. Dec. 4, 2015) (collecting cases). The information contained on these government websites is the very type of publicly available facts that Plaintiffs were expected to investigate prior to filing suit. *See Yepez v. Regent Seven Seas Cruises*, No. 10-23920-CIV-KING (S.D. Fla. Aug. 5, 2011) (citing *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1216 (11th Cir. 2007)). Therefore, the Court must consider these extrinsic facts raised by President Stiffarm, irrespective of the intrinsic allegations of the Second Amended Complaint, when resolving the issue of whether jurisdiction exists under F. R. Civ. P. 12(b)(1). *See Easley*, at *2.

II. Plaintiffs have no standing to pursue Count I because there is not a causal connection between their alleged injuries and President Stiffarm's action or inaction, and President Stiffarm cannot provide the redressability Plaintiffs seek.

To have standing, Plaintiffs must, at an "irreducible constitutional minimum," show they have suffered an "injury-in-fact," show a causal connection between the injury and conduct complained of, and establish the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). For a plaintiff seeking prospective declaratory or injunctive relief, a plaintiff has standing if she "allege[s] facts from which it appears there is a substantial likelihood that [she] will suffer injury in the future." *Mack v. USAA Cas. Ins. Co.*, 994 F.3d 1353, 1357 (11th Cir. 2021) (quotations omitted).

As to Count I, assuming Plaintiffs could show an injury-in-fact in this case even though Plaintiffs received more in loans than they repaid, Plaintiffs have not alleged any facts showing their asserted injuries are traceable to President Stiffarm, who was not in office at the time the loans were made or at the time any payments of interest were made. To meet the second element of standing, a plaintiff must show "a causal connection between the injury and the conduct complained of," which requires the injury be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 559 (original alterations omitted). Plaintiffs do not allege President Stiffarm took or failed to take any specific action with regard to each of their loans; they only allege that he is a current officer of the Tribe with general supervisory authority over the loan program. (Doc. 83, 10, 13.) Plaintiffs have not alleged an injury-in-fact that is traceable to President Stiffarm.

Further, Plaintiffs' injuries cannot be redressed through President Stiffarm. As discussed in more detail below, Plaintiffs have argued in their briefs against the other defendants that the lending operation was run by Defendant Benjamin Gatzke and his corporations, Defendants BorrowWorks, LLC, and BWDS, LLC. (See Docs. 121-122.) On the tribal side, the tribal entities ANS and ANF are

controlled by Island Mountain Development Group (IMDG), which is the business development entity established by the Tribe. IMDG is governed by its own Board of Directors. While the Tribe can control IMDG indirectly by appointing members to the IMDG Board of Directors, the Tribe has no say in the direct, day-to-day business decision-making of IMDG. And the Tribal Council, not President Stiffarm, controls appointment to the IMDG Board. Thus, President Stiffarm, in his individual capacity, has no authority to redress Plaintiffs' alleged injuries. He cannot be held personally liable solely on that allegation.

Finally, any financial redress to the Plaintiffs would be paid from the Tribe, which is immune from suit, and would improperly direct President Stiffarm and the Tribe to take action on their tribal land. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[W]hile an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.").

III. Even assuming Plaintiffs could show an injury-in-fact in this case, Plaintiffs have not alleged any facts showing their asserted injuries resulting from their loans are in any way traceable to President Stiffarm, or that they are likely to suffer injury from him in the future. Therefore Plaintiffs' claim under Count IV is barred by the sovereign immunity enjoyed by both President Stiffarm and the Fort Belknap Indian Community, and Plaintiffs' *Ex Parte Young* claim does not apply.

Plaintiffs admit that because President Stiffarm is sued in his official capacity as a tribal leader "[I]t is the office that is the actual defendant for injunctive relief," (Doc. 124, at 4), while at the same time asserting that President Stiffarm is liable personally and that tribal sovereign immunity is not implicated. (Doc. 124, at 7). The law does not allow Plaintiffs to have it both ways. "[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . it is not a suit against the official personally, for the real party in interest is the entity." *Graham*, 473 U.S. at 166 (citations omitted, emphasis in original). *Hafer v. Melo*, 502 U.S. 21, 27 (1991), reiterates this principle, stating that governmental officers "sued for damages in their official capacity are not 'persons' for purposes of the suit, because they assume the identity of the government that employs them."

These cases cited by Plaintiffs support President Stiffarm's position that the claims against him essentially function as a lawsuit against the Fort Belknap Indian Community, a federally recognized Indian Tribe. *See Graham*, 473 U.S. at 166. An Indian tribe's sovereignty generally immunizes them from suit unless expressly waived by the tribe or abrogated by Congress. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 134 S. Ct. 2024, 2027, 188 L.Ed. 2d 1071, 1079

(2014). As further explained in *Easley*, at *3-4: "A tribe's immunity will generally extend to a tribal official for acts taken in their official capacity and within the scope of their authority. *Alabama v. PCI Gaming Auth*., 801 F.3d 1278, 1288 (11th Cir. 2015). But in a suit "brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." *Easley*, at *5 (emphasis added).

Plaintiffs further rely on *Easley* and cite to *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 119-20 (2d Cir. 2019) to argue their claims against President Stiffarm can proceed against him in his official capacity. But *Gingras* involved a suit against a lending company's Chief Executive Officer and members of the Board of Directors, not a tribe's governmental leaders who had no day to day control. *Gingras*, 922 F.3d at 119-20. Similarly, Easley involved a lending company's individual employees, but not the tribe's council members or other tribal officials. *Easley*, at *1. While the plaintiffs had originally named the tribal chairman as a defendant, he was later voluntarily dismissed from the action. *Easley*, at *1, n.1. The plaintiffs in *Easley* had also requested the court "disregard the holdings of the majority in *Bay Mills* and *Kiowa Tribe*" regarding tribal sovereign immunity over tribal commercial activities, which the court "of course, decline[d], as all lower courts are bound to follow a Supreme Court decision unless and until the Supreme

Court itself overrules that decision.'" *Easley*, at *4, n.4 (citing *United States v. Thomas*, 242 F.3d 1028, 1035 (11th Cir. 2001)). But rejecting this established precedent is precisely what this Court would have to do if it adopted Plaintiffs' arguments and allowed Counts I and IV to move forward against President Stiffarm.

For these same reasons, Plaintiffs' reliance on *Pennachietti v. Mansfield*, CV No. 17-02582, at *1 (E.D. Pa. Dec. 11, 2017), is also misplaced. The plaintiff in *Pennachiett*i sued "the manager in charge of day-to-day operations" at the tribal lending company, knowing he could not sue the Tribe or its officials.

As explained previously, President Stiffarm, as the leader of FBIC, is not in charge of any of the day to day activities of IMDG and IMDG-managed entities. Plaintiffs admit as much in their Second Amended Complaint, Doc. 83, 10, 13, as well as in their other filings. As claimed by Plaintiffs in their response to Defendants BorrowWorks, LLC, BWDS, LLC, and Benjamin Gatzke's motion to dismiss:

> Defendant Benjamin Gatzke, directly and through his various companies, is the de facto operator of the illegal lending enterprise that is the subject of this action. . . Through the Bright Lending website (owned and controlled by Gatzke), the "platform" controls every aspect of the lending operation. It conveys marketing messaging, intakes loan applications, gathers applicant information, communicates with applicants and borrowers, conducts underwriting, distributes loan proceeds and collects payments.

Doc. 122, at 2.

As Plaintiffs further claimed in their response to Defendant ANF's motion to dismiss:

> BorrowWorks and BWDS are each owned and controlled by Gatzke. The BorrowWorks entities, at Gatzke's direction, provide ANF's lending and underwriting platform. Essentially the entire lending operation is processed through Gatzke's lending platform and the Bright Lending website (which he also owns and controls). This includes marketing, application intake, underwriting, generation of loan documents, communication with borrowers, distribution of loan proceeds, payment collection and other day-to-day operational functions.
>
> . . .
>
> Neither the Tribe or any tribal entity was primarily involved in the day-to-day lending activities.

Doc. 121, at 7-8.

Thus, assuming arguendo Plaintiffs' statements are correct, Plaintiffs' own filings show that the Plaintiffs believe any control, supervision, or direction over the lending program has been with the other Defendants, not President Stiffarm. The arguments Plaintiffs make in their response briefs contradict Further, as explained by Plaintiffs' in their response brief contradict their own statements are arguments made in their other filings before this Court.

Further, as contended by Plaintiffs in their response briefs, the lending operations are governed by companies with their own boards of directors and Chief Executive Officers who exercise decision-making regarding the daily

operations and management of the lending operation.

Absent allegations that President Stiffarm acted outside the scope of his capacity as the President of FBIC regarding Plaintiffs' loans, Plaintiffs are barred from alleging claims against President Stiffarm in his official capacity as a tribal leader while at the same time seeking relief from him personally. *See Lobo v. Miccosukee Tribe of Indians of Florida*, 279 Fed. Appx. 926, 927 (11th Cir. 2008) (quoting *Tamiami Partners v. Miccosukee Tribe of Indians of Florida*, 177 F.3d 1212, 1225 (11th Cir. 1999)). Plaintiffs' attempts to hold President Stiffarm liable clearly violate the rule stated in *Native American Dist. v. Seneca-Cayuga Tob*., 546 F.3d 1288, 1296 (10th Cir. 2008), which prohibits a plaintiff from suing tribal officials to avoid the operation of tribal immunity.

Neither are Plaintiffs' claims saved by the *Ex Parte Young* fiction under which they have sued President Stiffarm. Neither Counts I and IV, the only counts alleged against President Stiffarm in the Second Amended Complaint, are premised on alleged violations of federal law. *Ex Parte Young* can only be used to end continuing violations of federal law; it cannot be used to end continuing violations of state law. *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health and Rehab. Servs*., 225 F.3d 1208, 1219 (11th Cir. 2000). See also *Parfitt v. Llorens*, Case No.: 2:19-cv-727-FtM-38NPM (M.D. Fla. June 23, 2020)

("[T]he [*Ex Parte Young*] doctrine prohibits a plaintiff from seeking injunctive relief when he alleges merely that a state official has violated state law.") (emphasis added, quotations omitted).

Count I of the Second Amended Complaint alleges President Stiffarm and other defendants violated the Alabama Small Loans Act, but makes no reference to any violations of federal law. Doc. 83, 77-86. Count IV alleges an *Ex Parte Young* theory against President Stiffarm and other defendants based on allegations they "actively participated in the illegal lending activity in Alabama . . . ." but again, makes no reference to federal law. (Doc. 83, 93-94). Count V of the Second Amended Complaint is the only count that alleges a violation of federal law under 18 *U.S.C.* § 1962(c), but this count does not name President Stiffarm as a defendant. Plaintiffs even assert in their response brief that they have sued President Stiffarm under Ex Parte Young "to enjoin the collection of their loans and the continuing violation of Alabama law," but make no mention of any federal law in this count. (Doc. 124, at 2) (emphasis added).

Moreover, *Ex Parte Young* only applies to prospective, injunctive relief; it does not apply to any of Plaintiffs' claims for retrospective or monetary damages. *Fla. Ass'n,* 225 F.3d at 1219. Even prospective relief sought is barred if it is "measured in terms of a monetary loss resulting from a past breach of a legal duty"

because "it is the functional equivalent of money damages . . . ." *Yvonne Mote Representative Watkins v. Moody*, Case No.: 3:17-cv-0406-LCB, at *10 (N.D. Ala. Feb. 28, 2019) (quotations omitted).

"To determine whether *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Parfitt*, at *16 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)) (quotations omitted). This Court need not look far to see that Counts I and IV of the Second Amended Complaint do not come close to meeting this test.

IV. Legislative and qualified immunity also act to shield President Stiffarm from Plaintiffs' claims.

Many courts have applied legislative immunity to members of tribal councils. *See Nation v. Ducey*, No. CV-15-01135-PHX-DGC (D. Ariz. June 21, 2016) (citing *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985); *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe of Ariz.*, 966 F. Supp. 2d 876, 885-86 (D. Ariz. 2013)). *See also Skokomish Indian Tribe v. Forsman*, No. C16-5639 RBL (W.D. Wash. Mar. 23, 2017) (holding tribe is entitled to legislative immunity for promulgating hunting regulations, but not ad hoc decision-making such as issuing hunting licenses). President Stiffarm, as a

member of the Tribe's Council, is similarly entitled to legislative immunity for his role in enacting legislation and passing ordinances, a role which does not authorize him to control the operations or administrative decisions of any Tribal business. *See Crymes v. DeKalb County*, 923 F.2d 1482 (11th Cir. 1991) (providing a legislative act for which immunity applies "involves policymaking rather than mere application of existing policies.").

As for qualified immunity, tribal officials are generally not protected when sued in their individual capacities. *Easley*, at *3, n.6. But as stated above, Plaintiffs have sued President Stiffarm in his official capacity. Plaintiffs have not alleged any specific allegations, nor could they, regarding President Stiffarm's individual action or inaction regarding Plaintiffs' loans. "Claimants may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate" the protections afforded by tribal immunity, absolute, or qualified immunity. *Basset v. Mashantucket Pequot Museum and Research*, 221 F. Supp. 2d 271 (D. Conn. 2002).

V. Tribal exhaustion is required.

Plaintiffs assert tribal exhaustion is not required because Plaintiffs have never been to the Fort Belknap Reservation and never agreed to present their claims to the tribal court. Yet, Plaintiffs admit in the Second Amended Complaint

that their loan documents contain choice of law provisions invoking tribal law. (See Doc. 83, ¶¶ 18, 36, 47, 58.)

Plaintiffs then cite *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 776 (7th Cir. 2014) for the proposition that the choice of law provision in their loan documents should not be read to require tribal exhaustion. (Doc. 124, at 12). *Jackson* is distinguishable. There, the Seventh Circuit determined an arbitration clause found in a loan agreement was unreasonable and thus unenforceable because the clause required arbitration conducted by a nonexistent forum that did not have consumer dispute rules referenced in the loan agreement. *Jackson*, 764 F.3d at 776. Such claims do not exist here.

Moreover, tribal jurisdiction need only be "colorable" for the tribal exhaustion doctrine to apply. *Hengle v. Asner*, 433 F. Supp. 3d 825, 860 (E.D. Va. 2020). Tribal exhaustion is required for a claim premised on off-reservation conduct that impacts directly upon tribal affairs, particularly if tribal resources are at issue. *Ninigret Devolopment v. Narragansett Indian*, 207 F.3d 21, 32 (1st Cir. 2000).

As stated above, the monetary relief sought from President Stiffarm in his official capacity as President would be paid from the Tribe, and the injunctive and declaratory relief sought by Plaintiffs would improperly direct him and FBIC to

take action on their own land. *See Graham*, 473 U.S. at 166. Such redress directly bears upon tribal resources, and tribal exhaustion is required. *Ninigre*t, 207 F.3d at 32.

CONCLUSION

For the foregoing reasons, President Stiffarm respectfully requests the Court grant his motion to dismiss Counts I and IV of Plaintiffs' Second Amended Complaint.

Dated: October 5, 2023.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following persons this 5th day of October, 2023, via the Court's ECF system upon:

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