IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

LULA WILLIAMS, *et al.*,	)	
	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 3:17-cv-461 (REP)**
	)	
BIG PICTURE LOANS, LLC, *et al.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS BIG PICTURE LOANS, LLC AND ASCENSION TECHNOLOGIES, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

TABLE OF CONTENTS

INTRODUCTION

This case involves a rent-a-tribe enterprise created and operated by Defendant Matt Martorello ("Martorello")—a Chicago entrepreneur with no lineage to the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD"). Beginning in 2011, Defendants made high-interest loans to consumers in the name of Duck Creek Financial, LLC ("Duck Creek") and Red Rock Tribal Lending, LLC ("Red Rock")—two entities formed under the laws of the LVD for the dual purpose of avoiding state and federal laws and concealing the role of Martorello's companies. Although Duck Creek and Red Rock were held out as the actual lender of the internet loans, the LVD and Red Rock had minimal involvement in the operations and received a mere 2% of the net profits from the loans. On the other hand, Martorello's companies, SourcePoint VI, LLC and Bellicose Capital, LLC,[1] reaped nearly all the profits; provided the infrastructure to market, fund, and collect the loans; and controlled the tribal companies' bank accounts.

Faced with mounting pressure against similar rent-a-tribe ventures and a cease and desist issued to Red Rock by the State of New York, Martorello restructured the venture on paper, but not how it operated in practice. As part of the restructure, Martorello "sold" Bellicose to the LVD in exchange for a [redacted] promissory note to Eventide Credit Acquisitions, LLC ("Eventide")—a new company that Martorello created to further insulate the scheme from liability. As part of the sale, the parties entered into a series of overlapping agreements that allowed Martorello to continue to control the lending enterprise. Even though the key entities were

[1] Martorello owned [redacted]% of Bellicose. (Ex. 1, Dec. 31, 2015 Statement for Bellicose Capital). [redacted].

reorganized and renamed, the rent-a-tribe venture continues to operate in the same manner—with nominal involvement of and benefit to the LVD.[2]

Despite their rent-a-tribe structure, Big Picture Loans and Ascension Technologies argue that they are "arms of the tribe" and, thus, entitled to share in the sovereign immunity enjoyed by the LVD. But "[b]usiness entities that claim arm-of-the-tribe immunity have no inherent immunity of their own." *Owen v. Miami Nation Enters.*, 386 P.3d 357, 374 (2016). Rather, when determining whether an entity may share in the inherent immunity of the tribe, courts typically apply a six factor test that considers: "(1) the entity's method of creation, (2) whether the tribe intended the entity to share in its immunity, (3) the entity's purpose, (4) the tribe's control over the entity, (5) the financial relationship between the tribe and the entity, and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entities." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1184 (10th Cir. 2010). This test "takes into account both formal and functional considerations" and examines, "not only the legal or organizational relationship between the tribe and the entity, but also the practical operation of the entity in relation to the tribe." *Miami Nation Enterprises*, 386 P.3d at 365.

Because the tribal entities were created for the purpose of facilitating a criminal enterprise and to benefit outsiders to the tribe—mainly Martorello—the application of the *Breakthrough* factors does not support extending LVD's tribal immunity to either Big Picture or Ascension. In short, "[I]t is common sense that if an entity provides a nominal percentage of its revenue to the tribe, and the tribe is barely involved, the entity cannot be said to stand in the place of the tribe.

[2] After the closing occurred in January 2016, Bellicose was renamed Ascension Technologies, but it continues to be operated in the same manner and by the same individuals who ran Bellicose—none of whom are members of the LVD or work from the LVD's reservation in Watersmeet, Michigan. Similarly, Duck Creek and Red Rock were consolidated and renamed Big Picture, which continues to be operated in the same manner as the prior entities, *i.e.*, with minimal involvement in the enterprise and with nominal percentage of the revenue returned to the LVD.

Moreover, if a tribe retains only a minimal percentage of the profits from the enterprise, it would appear that the enterprise may not be truly 'controlled' by the tribe." *Id.* at 249. These principles apply to Big Picture and Ascension, and, thus, the Court should deny the Defendants' motion.

RELEVANT FACTS

A. The initial structure of the rent-a-tribe enterprise.

It is no secret that "internet payday lenders have a weak history of complying with state laws." Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Wash. & Lee L. Rev. 751, 785 (2012) (providing background on payday loans and describing the rent-a-tribe model as "the most recent incarnation of payday lending companies regulation-avoidance"). *Id.* at 764. Prior to the rent-a-tribe business model, some payday lenders entered into partnerships with national banks to avoid compliance with state laws—a tactic known as "rent-a-bank."[3] Beginning in 2005, the FDIC began cracking down on rent-a-bank arrangements, and they were nearly eliminated by 2010—largely by the assessment of penalties and fines against participating banks. *Id.* In response to the crackdown on rent-a-bank arrangements, several payday lenders reincarnated the lending model through associations with Native American tribes to avoid state laws. *Id.*; *see also* Martin & Schwartz, *supra* at 1.

Discovery confirms that Martorello established a rent-a-tribe enterprise with the intent of circumventing usury and interest laws. [redacted]

[3] *See, e.g.*, Jean Ann Fox & Edmund Mlerzwinkski, *Consumer Fed'n of Am. & U.S. Pub. Interest Research Grp., Rent-a-Bank Payday Lending: How Banks Help Payday Lenders Evade State Consumer Protection* at 17-22 (2001), available at http:// www.consumerfed.org/pdfs/paydayreport.pdf.

[4] [redacted]

[redacted]

[5] SourcePoint VI was a subsidiary of Bellicose, a Delaware limited liability company owned by Martorello.

[redacted] These responsibilities were conducted from "its offices in the U.S. Virgin Islands." (*Id.* at § 3.1).

[redacted].[6] The final determination as to whether to lend, therefore, was predetermined, and Red Rock's role was reduced to "final verification of the applicant's information in the loan agreement," including "the applicant's e-signature, the due dates, the payment schedule, the applicant's bank information. " (Ex. 5, Big Picture's Am. Interrog. Resps., at Int. No. 24). As explained below, this "final verification" continues to be the primary and almost exclusive task that Big Picture's employees perform.

[6] [redacted].

B. Events leading to the change in structure and creation of Big Picture and Ascension.

In August 2013, the New York Department of Financial Services issued a cease and desist to Red Rock warning it to stop offering its illegal credit products to New York consumers. *Otoe-Missouria Tribe v. N.Y. Dep't of Fin. Servs.*, 974 F.Supp.2d 353, 356 (S.D.N.Y. 2013), *aff'd*, 769 F.3d 105 (2d Cir. 2014). The New York Department of Financial Services also issued warnings to third parties, such as banks and payment processors, to cease providing electronic banking services to Red Rock, and these third parties "cut back or cut off entirely their financial dealings with the Tribes." *Id.* In response, Red Rock filed a lawsuit in August 2013, seeking declaratory relief and a preliminary injunction that tribal businesses were inherently sovereign nations and not subject to New York law. *Id.*[7] The district court denied Red Rock's request for a preliminary injunction on September 30, 2013, finding that the "undisputed facts demonstrate[d]" that the illegal activity was "taking place in New York, off of the Tribes' lands," and thus, Red Rock was "subject to the State's non-discriminatory anti-usury laws." *Id.* at 361. The court reasoned, "There is simply no basis… that the Tribes are treated differently from any other individuals or entities that enter New York to lend to New York resident." *Id.* The Second Circuit affirmed the decision. 769 F.3d 105.

The loss in *Otoe-Missouria* was not the only problem for Martorello's scheme—various lawsuits and government enforcement actions against Defendants' competitors brought negative attention to his sham business model.[8] Discovery confirms that Martorello [redacted]

[7] The LVD and Red Rock were co-plaintiffs in this case with the Otoe Missouria Indian Tribe and Great Plains Lending, LLC, another rent-a-tribe venture.

[8] *See, e.g.*, *In Re Cashcall, Inc.*, 2013 WL 3465250, at *1 (NH Banking Dept. 2013) ("it appears that Western Sky is nothing more than a front to enable CashCall to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive business practices from prosecution by state and federal regulators."); *Consumer Fin. Protection Bureau v. CashCall, Inc.*, No. 1:13-cv-13167 (Mass) (complaint filed on Dec. 16, 2013); *In re Moses*, No. 12-05563-8-RDD, 2013 WL 53873, at *4 (Bankr. E.D.N.C. Jan. 3, 2013).

[redacted]. For example, in a January 2014 e-mail to the attorneys for Red Rock, Martorello wrote:

> [redacted].

[redacted]. Faced with the loss in *Otoe-Missouria* and the mounting pressure against similar venture, Martorello developed a solution[9] that allowed him to remain in control of the enterprise, continue to retain the majority of the profits, and create additional layers of protection from liability.

C. Defendants restructure the scheme to add additional layers of protection.

[redacted]

[9] [redacted].

[redacted].

[redacted]

[redacted]

11 [redacted]

12 [redacted]

13 [redacted]

[redacted]

D. Ascension also operates without tribal involvement or financial benefit to the LVD.

As part of the restructure, Defendants also formed Ascension in an effort to avoid liability. Other than changing the name and the jurisdiction of formation, Ascension continues to be operated in the same manner and by the same individuals who ran Bellicose—none of whom are members of the LVD or work on the reservation. (Ex. 13, Ascension's Second Am. Resp. to Interrog. at Attachment 2 (showing all employees work from Atlanta, Puerto Rico, or the Virgin Islands)).[14] And, just like Bellicose, not a single dollar of Ascension's revenue flows to the LVD. (*Id*. at Int. No. 1). Further, the LVD *admittedly* has "no involvement" with the day-to-day operations of Ascension. (*Id*. at Int. No. 15).

[redacted]

[14] [redacted].

[redacted]

E. Ascension handles the majority of Big Picture's operations.

[redacted]

[15] [redacted]

[redacted]

F. Big Picture continues to receive a nominal percentage of the revenue.

As explained in Part D, [redacted]

[16] [redacted]

the end of every month, Liang performs the accounting and e-mails Martorello to approve the monthly distributions. (Ex. 24, Collection of Distribution E-mails). In these emails, Liang consistently writes "[w]ith your approval, the following fund transfers will be initiated" and lists the amounts to be transferred to TED, Eventide, and Big Picture. (*See, e.g.*, Ex. 24, at Martorello_000216).

G. Big Picture's employees continue to handle low-level responsibilities.

Big Picture currently employs 5 tribal members. (Ex. 5, at Attachment 2). Other than Hazen, all of Big Picture's current tribal employees are customer service representatives making less than $13.00 per hour. (*Id*.). By contrast, Big Picture employs 11 non-tribal members. (*Id.*).[18] Nine of the non-tribal employees are customer service representatives; one is an administrative assistant making approximately $13.50 per hour, and another is a compliance specialist making approximately $17.30 per hour.

According to Defendants, the customer service representatives have two main responsibilities. First, they "perform a final verification of the applicant's information in the loan agreement," and absent any issues, they type "in the date to disburse the funds," which causes the loan proceeds to be electronically sent to the consumer. (Ex. 5, at Int. No. 24). Second, the customer service representatives respond to consumer emails. (*Id*. at Int. No. 25).[19]

H. The lack of involvement of Tribal Council.

1. [redacted]

[18] Of its previous employees, eight were non-tribal members and two were tribal members. (*Id*.)

[19] [redacted]

[redacted]

[20] [redacted]

[redacted]

2. [redacted]

3. [redacted]

[redacted]

4. [redacted]

[redacted]

[21] [redacted]

11:10-15). [redacted]

5. [redacted]

ARGUMENT

I. Burden of proof.

Before addressing the merits, it is important to begin with a critical issue absent from Defendants' brief—which party bears the burden of proof. This is an issue of first impression in the Fourth Circuit.[22] "Few arm-of-the tribe cases have closely considered" the party with the burden of proof and "the results are mixed." *Miami Nation Enterprises*, 386 P.3d at 370 (gathering

[22] Neither the Supreme Court nor the Fourth Circuit have considered or adopted the *Breakthrough* test. *Howard v. Plain Green, LLC*, No. 2:17CV302, 2017 WL 3669565, at *3 (E.D. Va. Aug. 7, 2017); (Defs.' Mem. at 17, concurring). Plaintiffs agree that the six factors considered by *Breakthrough* should guide the analysis, but they should not be considered exhaustive. The Supreme Court of California's analysis in *Miami Nation Enterprises* follows *Breakthrough*, and provides helpful guidance on the relevant considerations for each factor. 386 P.3d at 372 (adopting the first five factors of *Breakthrough* and noting the overlap of the sixth factor with the other factors). The relevant considerations identified from *Miami Nation Enterprises* should also be considered.

cases). In *Miami Nation Enterprises*, the California Supreme Court held "that the burden of proof on the issue of immunity properly falls on the entity claiming immunity." *Id*. at 369. In doing so, the court considered cases placing the burden "on state-affiliated entities persuasive with regard to tribally affiliated entities," and the court reasoned that placing the burden on the sovereign comported "with the traditional principle that a party in possession of facts tending to support its claim should be required to come forward with that information." *Id*. at 370 (citing, *e.g., U.S. v. New York, New Haven & Hartford Railroad Co.* 355 U.S. 253, 256, n.5 (1957)).

Of course, neither *Miami Nation Enterprises* nor any of the other case is binding on this Court. However, Plaintiffs believe that the cases placing the burden of proof on the tribal entity are better supported and reasoned. More importantly, Plaintiffs believe the Fourth Circuit would agree as it recently concluded that "arm-of-state status" must "be treated as an affirmative defense." *U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 148 (4th Cir. 2014). To that end, the Fourth Circuit observed that the loan companies' claim of immunity was "an affirmative defense which they bear the burden of pleading and proving." *Id*.

II. The *Breakthrough* factors weigh against extending the LVD's immunity.

A. The method of creation factor weighs against extending immunity in this case.

The first factor considered is "the method of creation" of the economic entity, which focuses on the "law under which the entity was formed." *Miami Nation Enterprises*, 386 P.3d at 245 (citing *Breakthrough*, 629 F.3d at 1191). Forming the economic entity "under tribal law weighs in favor immunity, whereas formation under state law" weighs against immunity. *Id*. (internal quotations and citations omitted). The jurisdiction of formation, however, is not the sole consideration and courts should also consider the "circumstances under which the entity's formation occurred, including whether the tribe initiated or simply absorbed an operational commercial enterprise." *Id*.

Unsurprisingly, Defendants focus exclusively on the formal considerations for this factor, arguing that it weighs in favor of Big Picture and Ascension because "it cannot be disputed that both were created by the LVD under LVD law." (Defy.' Mem. at 18). In doing so, Defendants ignore the history, context, and circumstances leading to Big Picture and Ascension's formation, including the mounting pressure against similar rent-a-tribe ventures and the cease and desist issued to Red Rock, which was challenged and upheld by a federal district court. [redacted] And, after the Second Circuit's decision on October 1, 2014, Defendants formed TED, Big Picture, and Ascension in February 2015, who "simply absorbed" the ongoing enterprise. *Otoe-Missouria* Tribe, 974 F.Supp.2d 353; *see also* Ex. 30, [redacted].

Weighing this factor in favor of Big Picture and Ascension solely because of their jurisdiction of formation also ignores Ascension's registration to do business in Puerto Rico, which makes it "[s]ubject to the Constitution of the Commonwealth of Puerto Rico…." 14 L.P.R.A. § 4021.[23] Because of its registration as a foreign corporation, Ascension has "the same rights, privileges, duties, restrictions, penalties, and responsibilities" as a domestic corporation formed under the laws of Puerto Rico. 14 L.P.R.A. § 3806. This includes the power to "[s]ue and be sued under its corporate name *in any court*. . . ." 14 L.P.R.A. § 3522 (emphasis added).

Ascension's registration as a foreign limited liability company should be dispositive. As explained by the Tenth Circuit, "the subordinate economic entity test is inapplicable to entities which are legally distinct from their members and *which voluntarily subject themselves to the*

[23] As of today, Ascension maintains active status with the Puerto Rico's Department of State, available at https://prcorpfiling.f1hst.com/CorporationSearch.aspx.

authority of another sovereign which allows them to be sued." *Sommerlath v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1149–50 (10th Cir. 2012) (emphasis added). "This approach is consistent with the traditional treatment of the sovereign immunity of the United States," whose sovereign immunity "does not extend to its subentities incorporated as distinct legal entities under state law." *Id*. Here, although Ascension did not incorporate under state law, it registered to do business in Puerto Rico—giving it the "same rights" as domestic corporations. In doing so, Ascension "voluntarily subject[ed] [itself] to the authority of another sovereign," and it should be treated like any other foreign limited liability company or domestic corporation.[24]

Defendants attempt to turn this factor into one of form over substance. *Miami Nation Enterprises*, 386 P.3d 357 at 375 ("Arm-of the-tribe immunity must not become a doctrine of form over substance."). Although Big Picture and Ascension were formed under tribal law, the circumstances surrounding their formation reveal a deceptive rent-a-tribe venture that was restructured under tribal law in an attempt to continue to avoid liability. Weighing this factor in favor of Defendants would ignore the realities of their creation and the history of the enterprise. Accordingly, this factor weighs against a finding of immunity, especially as to Ascension, which registered as a foreign limited liability company in Puerto Rico.

B. The purpose factor weighs against extending immunity to Defendants.

The second factor is "the purpose" of the entity. *Breakthrough*, 629 F.3d at 1191. This factor "encompasses both the stated purpose for which the entity was created and the degree to

[24] *Sommerlath*, 686 F.3d at 1154 (Gorsuch, J., concurring) ("But no matter how broadly conceived, sovereign immunity has never extended to a for-profit business owned by one sovereign but formed under the laws of a second sovereign when the laws of the incorporating second sovereign expressly allow the business to be sued. And it doesn't matter whether the sovereign owning the business is the federal government, a foreign sovereign, state—or tribe."); *see also Salas v. United States*, 234 F. 842, 844–45 (2d Cir. 1916) (noting that "[w]hen the United States enters into commercial business" under the laws of a state, it "is to be treated like any other corporation").

which the entity actually serves that purpose." *Miami Nation Enterprises*, 386 P.3d at 246. After examining the stated purpose, "the inquiry then examines the extent to which the entity serves that purpose." *Id*. at 247. Where, as here, an entity's "declared purpose is to further the tribe's economic development," it "may bolster its case by proving, for example, the number of jobs it creates for tribal members or the amount of revenue it generates for the tribe." *Id*. By contrast, evidence that the entity "operates to enrich primarily persons outside the tribe or only a handful of tribal leaders weighs against finding that the entity is an arm of the tribe." *Id*.

Defendants contend that the purpose factor weighs in favor of immunity because Big Picture and Ascension were created "to develop [LVD's] economy by generating revenue to fund essential governmental services and to employ members." (Defs.' Mem. at 19). Other than generically citing Big Picture and Ascension's stated purpose, Defendants omit any evidence regarding the total amount of jobs created for the tribe or the amount of revenue generated for the tribe. (Defs.' Mem. at 19-20). This wasn't an accident—the evidence shows that the enterprise primarily enriches persons outside the tribe and two tribal lenders, Hazen and Williams.

Ascension. Ascension currently employs more than 30 individuals, but not a single employee is a LVD member.[25] Ascension also has 10 former employees, but none of those individuals are LVD members. (*Id.*) Rather than hiring tribal members, all positions at Ascension were assigned to Bellicose. (Ex. 30, Feb. 24, 2015 Letter). Additionally, CEO and co-manager Hazen, Chairman Williams and Treasurer McGeshick testified that LVD members were unqualified to work at Ascension, and no programs have been started to qualify tribal members. Ex. 30, Hazen 172:22-176:2; Ex. 15, Williams Depo. 13:13-15:9; Ex. 16, S. McGeshick 17:7-21.

[25] (*See, e.g.*, Ex. 13, at Attachment 2; Ex. 15, Williams Depo. 13:7-12).

The amount of revenue that Ascension generates for the LVD is equally unpersuasive. Despite its formation in February 2015, Ascension has not returned a single dollar in revenue to LVD. (Ex. 13, at Int. No. 1 ("Ascension has never made any payments directly to the LVD.")). Instead, Ascension is a self-described non-profit that "does not make money." *Id*. Accordingly, it does not fulfill either of its stated purposes.

Big Picture. Big Picture does not fare much better. It currently employs 5 tribal members, but has 11 non-tribal member employees. (Ex. 5, at Attachment 2). Other than Hazen, all of Big Picture's current tribal employees are customer service representatives [redacted]

Big Picture also omits any information regarding the net revenue it paid to the LVD and the amount of revenue flowing to third parties. [redacted]

[redacted]

[26] [redacted]

[27] [redacted]

Once again, Defendants attempt to turn this factor into one of form over substance. Even though the asserted purpose is to develop the LVD's "economy by generating revenue to fund essential governmental services and to employ members," neither Big Picture nor Ascension actually serve that purpose other than the nominal revenue allocated to the LVD and four jobs created by Big Picture for tribal members. On the other hand, the enterprise "actually operates to enrich primarily persons outside the tribe," namely Martorello and the other executives of Ascension, [redacted].

C. The control factor weighs against extending immunity to Defendants.

The third factor considers the "amount of control" the tribe exercises over the entities, which focuses on the "structure, ownership, and management" of the entities. *Breakthrough,* 629 F.3d at 1191. "Given the manipulability of formal arrangements, it is important to carefully examine how such arrangements function as a practical matters," or the doctrine risk expansion "beyond its established rationales and indeed beyond 'common sense." *Miami Nation Enters.*, 386 P.3d at 250 (citing Martin & Schwartz, *supra*, 69 Wash. & Lee L. Rev. at 784). Accordingly, the control inquiry examines the "entity's formal governance structure," the "entity's day-to-day management," and evidence of whether "the tribe actively directs or oversees the operation" or "otherwise exercises little or no control or oversight." *Id*. at 247.

Ascension. The LVD *admittedly* has no involvement with the day-to-day operations of Ascension. (Ex. 5, at Int. No. 15 ("LVD has no involvement with Ascension's operations.")). [redacted]

[redacted]

Big Picture. [redacted]

[redacted][28]

[redacted]

[28] 386 P.3d at 377 ("But other evidence casts doubt on whether [the tribal entities'] role in approving loans indicates a significant degree of control. Documents compiled as part of the FTC investigation suggest the bulk of AMG's operations are conducted in Kansas, outside the boundaries of the Miami Tribe (in Oklahoma) and the Santee Sioux Nation (in Nebraska).").

[redacted]

In short, the control factor weighs against extending immunity to Ascension and Big Picture because: (1) The LVD *admittedly* has no involvement with the day-to-day operations of Ascension, which operates in Atlanta, Puerto Rico, and St. Croix; (2) [redacted]; (3) [redacted]; and (4) [redacted].

D. The intent factor weighs in favor of immunity, but it should be given the least weight.

Plaintiffs do not dispute that the LVD intended to vest Big Picture and Ascension to share in the LVD's immunity—at least to the extent a tribe could bestow immunity by merely stating it would like to share it and not actually operating the entity as an arm of the tribe. (Defs.' Mem. at 22). Plaintiffs note, however, that "tribal intent" as expressed in an entities' organizing documents "reveals little about 'whether the entity *acts* as an arm of the tribe so that its *activities* are properly deemed to be those of the tribe." *Miami Nation Enterprises,* 386 P.3d at 379 (emphasis in original) (quoting *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006)). While "no single factor is universally dispositive," this factor should be given the least weight because its scope concerns exclusively formal considerations, which reveal little about the entities' activities.

E. The financial relationship factor weighs against Defendants.

The fifth factor examines the "financial relationship between the tribe and the entities." *Breakthrough,* 629 F.3d at 1181. The "starting point for analyzing the financial relationship" is whether "a judgment against the entity would reach the tribe's assets." *Miami Nation Enterprises*, 386 P.3d at 373. Other relevant factors may include whether the tribe depends on the entity "for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities." *Id*. By extension, "[i]f a significant percentage of the entity's revenue flows to the tribe, or if a judgment against the entity would significantly affect the tribal treasury," then the financial relationship factor "will weigh in favor of immunity even if the entity's liability is formally limited." *Id*. (citations omitted). But, even where liability "could theoretically impact tribal finances," the tribal entity "must do more than simply assert that it generates some revenue for the tribe in order to tilt this factor in favor of immunity." *Id*., *see also Lewiston Golf Course Corp.*, 968 N.Y.S.2d 271, 279 (2013) (same).

For starters, a judgment against Big Picture or Ascension would not reach the tribe's assets. (Ex. 5, at Int. No. 23); *see also* Ex. 13, at Int. No. 18). Under New York and Alaska's test, this fact alone would be dispositive.[29] If the Court considers additional evidence, it further weighs against a finding of sovereign immunity.

Ascension. In support of the fifth factor, Defendants assert that "profits received from Big Picture and Ascension are all remitted to LVD and used to fund governmental services for its members." (Defs.' Mem. at 23). To that end, Defendants claim that Ascension's profits "inure exclusively to LVD," and Ascension's Operating Agreement requires distributions "whenever its account balances exceed $500.00." (*Id*.). These are deliberate misrepresentations—Ascension has not remitted a single dollar of revenue to the LVD. (Ex. 13, at Int. No. 1). Instead, it admittedly does not make money. (*Id*.). Accordingly, it is impossible that any judgment against Ascension would reduce revenue for the LVD's governmental functions because Ascension does not contribute to the LVD's revenue.

Big Picture. Defendants make the same claims regarding Big Picture, *i.e.*, that its revenues are "all remitted to the LVD," and its profits "inure exclusively to LVD." (Defs.' Mem. at 23). Once again, these are deliberate misrepresentations—[redacted]

[29] *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538, 550 (2014); *Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 440 (Alaska 2004).

[30] [redacted]

[redacted]. And, while these amounts were distributed to the *tribal lending entities*, Defendants fail to submit any evidence of how much of this revenue reaches the LVD's bank accounts or various governmental programs.

Defendants also misrepresent that Big Picture distributes revenue to the LVD "whenever its account balances exceed $500.00." (Defs.' Mem. at 23). [redacted] *Compare Breakthrough*, 629 F.3d at 1194-1195 (finding financial factor favored immunity where 100% of the casino's revenue went to the tribe), *with Miami Nation Enters.*, 386 P.3d at 378 (finding factor weighed against immunity where it was unknown "what percentage of revenue from the lending businesses currently flows to the tribes, and the evidence we have [from contracts] suggests it is very small").

[31] (Ex. 24, June 19, 2017 E-mail at Martorello_000251).

Although there is no precise line of demarcation, the Indian Gaming Regulatory Act ("IGRA"), the federal law addressing Native American gaming and casinos, provides a useful benchmark on the appropriate ratio. 25 U.S.C. § 2711. Under the IGRA, a tribe "may enter into a management contract for the operation" for gaming activities on tribal lands. 25 U.S.C. § 2711(a)(1). However, the Chairman of the National Indian Gaming Commission must approve any "management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity," and "such fee shall not exceed 30 percent of the net revenues." *Id*. at 2711(c)(1).

Taken together, the financial relationship factor weighs against extending immunity to Ascension and Big Picture because: (1) any judgment against them would not directly reach the tribe's assets, (2) any judgment against Ascension would not indirectly reach the tribe's assets as it does not generate revenue, (3) there is no evidence that a judgment against Big Picture would adversely affect the LVD's treasury, (4) [redacted], and (5) [redacted].

F. The purpose of sovereign immunity factor weighs against Defendants.

The sixth factor examines "the policies underlying tribal sovereign immunity and its connection to tribal development, and whether those policies are served by granting immunity to the economic entities." *Breakthrough*, 629 F.3d at 1187. The doctrine of sovereign immunity seeks to promote "Indian self-government, including its 'overarching goals' of encouraging tribal self-sufficiency, and economic development." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) (citations omitted). But, "if respect for tribal self-determination and self-sufficiency means anything, it must mean respecting and giving effect to a tribe's free choices." *Somerlott*, 686 F.3d at 1157 (Gorsuch, J., concurring).

Here, the LVD "could have chosen to operate" the lending enterprise "itself and enjoy immunity for its operations." *Id*. (citing *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S.

751, 753 (1998) (involving a promissory note executed by a tribe itself). Instead, the LVD formed limited liability companies, registered one of them to business in a foreign jurisdiction, which "carried with it the rationally attractive upside" of allowing "a potentially greater range" of employees, business partners, and investors. *Id*. At the same time, the LVD contractually relinquished control of the operations and received a nominal percentage of the revenue. This structure does not promote tribal self-sufficiency or economic development. It does the opposite—future ventures will offer tribes the most one-sided business arrangements imaginable, knowing tribes would take 1-2% in lieu of nothing. Frank Commerce & Terry Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L.Rev. 553, 559–60 (1986) ("Nevertheless, a blind adherence to the concept of sovereign immunity would retard commercial and economic development.").

Whether the policies underlying tribal immunity are served must also be considered in light of the circumstances of this case. Tribes did not initiate these ventures. Rather, payday lenders developed the business model after the FDIC shut down rent-a-bank arrangements. *See, e.g.*, Martin & Schwartz, *supra*, 69 Wash. & Lee L. Rev. at 785. Avoidance of state regulation by non-tribal businesses does not serve the purpose of immunity. *Id*.

CONCLUSION

For the reasons discussed above, the Court should deny Defendants' motion.

Respectfully submitted,
PLAINTIFFS

By: */s/ Kristi C. Kelly*
Kristi C. Kelly, Esq., VSB #72791
Andrew J. Guzzo, Esq., VSB #82170
Casey Nash, Esq., VSB #84261
KELLY & CRANDALL, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030
(703) 424-7572

(703) 591-0167 Facsimile
Email: kkelly@kellyandcrandall.com
Email: aguzzo@kellyandcrandall.com
Email: casey@kellyandcrandall.com
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 7th of December 2017, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record.

/s/
Kristi Cahoon Kelly, Esq. (VSB #72791)
KELLY & CRANDALL, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030
Tel: 703-424-7572
Fax: 703-591-0167
Email: kkelly@ kellyandcrandall.com
Counsel for the Plaintiffs