UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANA DUGGAN, *Individually and on behalf of persons similarly situated,*	)	
Plaintiff,	)	
v.	)	Civ. A. No. 18-cv-12277-JGD
MATT MARTORELLO AND EVENTIDE CREDIT ACQUISITIONS, LLC,	)	
Defendants.	)	

REPLY IN SUPPORT OF MATT MARTORELLO'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED CLASS ACTION COMPLAINT

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I. INTRODUCTION

Plaintiff attempts to avoid dismissal of her claims by misapplying federal Indian law and misrepresenting events in the ongoing Virginia matters, the New York courts' decisions in *Otoe-Missouria*, and the documentary evidence in this matter. As the Ninth Circuit has affirmed, "[i]f the state law interferes with the purpose or operation of a federal policy regarding tribal interests, it is pre-empted." *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989) (holding that federal law preempted state assessment of timber-related taxes against non-Indian companies purchasing tribal timber). Plaintiff attempts to overcome this important federal policy by confusing a series of irrelevant tribal and non-tribal cases. However, cases pertaining to non-member conduct do not apply to a tribe; taxation cases involving tribes are not analogous and do not transpose to routine disputes involving consensual contractual relationships between a tribe and non-Indians; cases involving individual tribal members' businesses do not transpose to those involving tribally-owned businesses; and lending cases involving non-tribal businesses or tribal businesses revoking federal law are simply irrelevant.

Plaintiff similarly attempts to diminish the import of the Fourth Circuit's conclusions in *Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019), by characterizing the jurisdictional record as anemic and advancing the same bogus "misrepresentation" arguments made by the plaintiffs in *Galloway v. Big Picture Loans, LLC*, 3:18-cv-406-REP (E.D. Va.), after their counsel (who also represent the *Williams* plaintiffs) correctly predicted the *Williams* plaintiffs would lose the sovereign immunity argument before the Fourth Circuit. Regardless of whether raised here, in *Williams*, or in *Galloway*, the alleged misrepresentations lack merit.

In addition, there exists no basis for exercising personal jurisdiction over Martorello in this case in which the Tribal lending businesses ***are not parties*** given their voluntary dismissal by Plaintiff and filing of a Second Amended Complaint naming only Martorello and Eventide

Credit Acquisitions, LLC ("Eventide") as defendants.[1] *See* Dkt. 112 & Dkt. 118, ¶¶ 25-26. It is all the more unreasonable to do so in light of the legitimate purpose of the Tribe in its ecommerce business, the federal interests[2] and law promoting commercial dealings with non-Indians, and the Tribe's established dispute procedures set forth in the loan agreement. The Fourth Circuit's findings were correct and completely defeat the factual underpinnings of Plaintiff's claims. Plaintiff has not alleged facts sufficient to state a claim against Martorello or which make him subject to personal jurisdiction before this Court and dismissal is proper.

II. PLAINTIFF RELIES ON MISREPRESENTATIONS THAT CONTRADICT EVEN THE SECOND AMENDED COMPLAINT

Plaintiff offers no response to the Fourth Circuit's conclusions in *Williams* other than to argue that the Fourth Circuit relied on an incomplete record, pointing to the *Galloway* plaintiffs' arguments while ignoring the responses of the Tribal Defendants and Martorello and overwhelming evidence showing the *Galloway* plaintiffs' accusations to be knowingly false

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[1] On January 28, 2020, Eventide filed a Notice of Suggestion of Bankruptcy and Automatic Stay of Proceedings, Dkt. 120, after which the case was stayed as to Eventide. Dkt. 121. Eventide has filed a Complaint for Declaratory and Injunctive Relief in the bankruptcy court seeking to extend the automatic stay to this action. *See Eventide Credit Acquisitions, LLC. v. Big Picture Loans, LLC, et al.,* N.D. Tex. Bankr. Ct., Adv. Proc. No. 20-04008-elm. Relatedly, Martorello has filed a motion to transfer venue of this action to the Northern District of Texas where that court will refer the action to the bankruptcy court. *See* Dkt. 126, 127. Martorello respectfully submits that further proceedings related to his Motion to Dismiss should be stayed until after Eventide's action to extend the automatic stay to this action is decided by the bankruptcy court and resolution of his motion to transfer, if necessary.

[2] Distaste for the Tribe's loans is irrelevant to the federal interests at stake. Tribal and federal interests are inextricably linked to tribal economic activities: "Yet considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy, if not of themselves sufficient to 'pre-empt' state regulation, nevertheless form an important backdrop against which the applicable treaties and federal statutes must be read." *Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g*, 476 U.S. 877, 884 (1986); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (there is "a firm federal policy of promoting tribal self-sufficiency and economic development").

(evidence that Plaintiffs here also possess).[3] *See Galloway*, 3:18-cv-406-REP, Dkt. 271 & 272. A proper read of the purported "new evidence" as already presented in *Galloway* guts Plaintiff's misrepresentations and further confirms that the parties' engaged in entirely lawful conduct. While a court accepts a pleading's factual allegations as true for purposes of a motion to dismiss, "'[i]t is a well-settled rule that when a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations.'" *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 32 (1st Cir. 2000) (quoting *N. Indiana Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 454 (7th Cir. 1998)). Plaintiff's misrepresentation of the Second Amended Complaint's exhibits, the majority of which were already refuted in *Galloway*, 3:18-cv-406-REP, Dkt. 271 & 272, undermines any argument by Plaintiff that she has asserted plausible claims against Martorello.

A. Plaintiff grossly misrepresents *Otoe-Missouria* and related decisions

Plaintiff cites to the *Otoe-Missouria* injunction decisions for the proposition that the loans are subject to state law and as the factual catalyst for Martorello's alleged effort to avoid liability. Dkt. 136 at 3-5. But neither court found LVD's lending activities were "illegal," a conclusion confirmed by the Fourth Circuit's decision in *Williams.* Indeed, the Fourth Circuit noted *Otoe-Missouria* in rejecting the same theory advanced by the *Williams* plaintiffs and expressly recognized that applicability of Virginia law to the plaintiffs' loans had not yet been established. *See Williams*, 929 F.3d at 175 ("Plaintiffs sought declaratory and injunctive relief,

[3] Martorello was materially constrained to addressing only specific misrepresentations attributed to him, citing by page and line and quoting the text therein, and prohibited from addressing other allegations against. *Galloway*, Dkt. 259. However, the Virginia court did allow Martorello supplemental class certification briefing detailing the Fourth Circuit's implication on class certification and upon considering Martorello's submission issued an order denying the *Williams* plaintiffs' motion to certify a class without prejudice and setting an evidentiary hearing on the purported misrepresentations for June 5, 2020. *Williams*, Dkts. 673, 697.

alleging that Big Picture charges interest rates on its loans that are substantially–50 times–higher than would be allowed ***if Virginia law were applicable***.") (emphasis added).

In fact, the Second Circuit recognized "'two independent but related barriers to the assertion of state regulatory authority,' one a traditional federal preemption hurdle, the other a more abstract deference to tribal sovereignty" and noted that "'either, standing alone, can be a sufficient basis for holding state law inapplicable.'" *Otoe-Missouria*, 769 F.3d at 105, n.5 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)). While the truncated preliminary injunction record was insufficient to conduct a balancing test, the court did not disagree with LVD's ultimate legal position regarding the application of tribal law through the principals established in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987) and *Bracker*, finding that "[a] court might well find that the tribes' sovereign interest in raising revenue militate in favor of prohibiting a separate sovereign from interfering in their affairs" and that with the benefit of a complete record the tribes "may ultimately prevail" in the litigation. *Otoe-Missouria*, 769 F.3d at 112 n.4, 118, n.6.

The district court highlighted specific on-reservation activities which New York ***did not seek to regulate***—jurisdiction, underwriting, loan funding, and regulation—and the Second Circuit concluded in part, that to prove its claim that New York's efforts to cut off the Tribe's access to banks infringed upon its tribal sovereignty, LVD "had to demonstrate that the challenged transactions occurred somewhere other than New York, and, if they occurred on reservations, that the tribes had a substantial interest in the lending businesses." *Id.* at 112. The panel further recognized that "the transaction being regulated by New York could be regarded as on-reservation, based on the extent to which ***one side of the transaction*** is firmly rooted on the reservation." *Id.* at 115 (emphasis added). Were that so, it would "weaken New York's

regulatory authority over them." *Id.* at 107. The Second Circuit even fully adopted the tribes' position regarding the federal interests noting the federal government and tribes have a "shared commitment to [ ] continued growth and productivity."[4] *Id.* at 113.

The much deeper record before the Fourth Circuit in *Williams* confirmed both factors noted as necessary to prevail in *Otoe-Missouria*; the loan is consummated (and collected) by Big Picture Loans on reservation where it is managed, headquartered and all its employees are based, and the tribal and federal interests via Big Picture's revenues are vital to LVD's self-government.[5] *Williams*, 929 F. 3d at 174-75, 182, 184-85; *see also* Dkt. 28, 28-01 through 28-24. Relevant to the legal theories in *Bracker* and *Cabazon*, the Fourth Circuit further concluded that the entities serve the important federal interests of "tribal self-governance and tribal economic development" and "'the promotion of commercial dealings between Indians and non-Indians.'" *Id.* at 185 (quoting *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187-88 (10th Cir. 2010)).

B. Plaintiff misrepresents the terms of her loan agreement in an attempt to advance erroneous choice-of-law arguments

In an attempt to advance erroneous choice-of-law arguments, Plaintiff misrepresents the loan agreements at issue. Specifically, Plaintiff argues that "[o]ther jurisdictions have recognized the public policy interests and consistently denied efforts to enforce choice-of-law provisions, particularly those with a prospective waiver of the party's statutory rights such as we

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[4] As Plaintiff is aware, Martorello touted *Otoe-Missouria* as victorious, as did the Tribe's counsel of record in the case. *See, e.g.,* https://turtletalk.blog/2014/10/01/rosette-firm-on-the-second-circuits-decision-in-otoe-missouria-tribe/.

[5] At the time of the Big Picture Loans' motion to dismiss in this case, comparative to the US government's reliance on federal income tax, "Big Picture's operation provide[d] more than 40% of LVD's general fund, and those profits a[we]re projected to be capable to fully fund LVD's government budget in the coming years." Dkt. 28 at 12 (citing Dkt. 28-03, ¶ 18).

have here." Dkt. 136 at 21-22. But that is not what the Loan Agreements provide. It is not even what the Second Amended Complaint alleges. Rather, the Second Amended Complaint alleges the following governing law provision ***which includes "applicable federal law"***:

> **GOVERNING LAW AND FORUM SELECTION**: This Agreement will be governed by the laws of the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Tribal law"), including but not limited to the Code as well ***as applicable federal law***. All disputes shall be solely and exclusively resolved pursuant to the Tribal Dispute Resolution Procedure set forth in Section 9 of the Code and summarized below for Your convenience.

Dkt. 118 at ¶ 121 (bold italicized emphasis added); *see also* Dkt. 118-1 at 5.

It is simply beyond the pale for Plaintiff to argue that LVD law does not expressly incorporate federal laws. Moreover, Section 6.2 of LVD's Tribal Consumer Financial Regulatory Code expressly requires compliance with at all pertinent federal consumer lending laws. *See* Dkt. 28-6. Thus, contrary to Plaintiff's flagrant misrepresentation to the Court, the loan agreement's choice-of-law provision does not waive federal law and instead explicitly invokes "applicable federal law." As to the notion that applying a tribal choice of law provision is somehow *per se* unlawful, even when a tribe uses the internet, as discussed above, this has been squarely rejected both by the Fourth Circuit in *Williams* and the Second Circuit in *Otoe-Missouria*. Congress has never provided for such a drastic restriction of tribal sovereignty.

C. Plaintiff repeatedly twists and mispresents the contents of documents in an attempt to distort the record and advance a false narrative

Many of the exhibits attached to the Second Amended Complaint contradict Plaintiff's allegations and arguments. As referenced above, "when a written instrument contradicts allegations in the complaint to which it is attached, ***the exhibit trumps the allegations***.'" *Clorox Co. Puerto Rico*, 228 F.3d 24 at 32 (emphasis added).

1. Plaintiff misrepresents Martorello's alleged role in structuring the Tribe's businesses.

Plaintiff contends that Martorello "approached the LVD tribe" and structured the operations to ensure that he "operated, controlled, and funded the enterprise." Dkt. 136 at 2-3, 10. This contradicts the Second Amended Complaint.[6] Exhibit 4 to the Second Amended Complaint contains an email string from August 2011 discussing preliminary questions Martorello had about the initial proposed deal structure ***pitched to him by LVD's general counsel and agents of LVD***. Dkt. 118-4. The emails are clear in that Mr. Richardson (LVD's agent) contemplated and was proposing an arrangement in which Bellicose was in complete control of ***its servicing business***, while LVD's co-managers were in complete control of their ***lending business*****:** "THE TRIBE ESTABLISHES THE LENDING CRITERIA, AND IS THE LENDER[,] BELLICOSE IS JUST CARRYING OUT THE TRIBE'S DIRECTION." *Id.* at 2. (emphasis in original). Plaintiff ignores this email string in opposing the motion to dismiss even though it is attached to the Second Amended Complaint.

In an effort to distort the record, Plaintiff purposefully omits altogether the clarifying discussion that directly contradicts Plaintiff's arguments that Martorello approached LVD or that he created the structure to ensure his control of the operations:

> So the Tribal Lending entity has a Tribal Management Company, which is going to be the Bellicose customer – NO, YOUR ENTITY WOULD BE THE SERVICER FOR THE LENDING OPERATION. THE LLC MANAGERS ARE MANAGERS OF THE LLC ENTITY ON BEHALF OF THE TRIBE BUT ARENT INVOLVED IN THE BUSINESS.

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6 Plaintiff's allegations are also based, at least in part, on a declaration that was apparently ghostwritten by plaintiffs' counsel in the *Galloway* action, included events that the Tribe asserted "would be impossible for her to have knowledge of," and were based on documents the Tribe alleged were stolen from it, for which the Tribal lending entitles filed a motion strike, *Galloway*, E.D. Va. Civil Action No. 3:18-cv-00406-REP, Dkt. 324, 325. According to the Tribe, "Pete cannot competently testify to the information contained in paragraphs 5, 6, 7, and 8 describing Red Rock's business operations, as she had no day-to-day involvement with operations of Red Rock or Big Picture at any time. She likewise cannot competently testify to the information contained in paragraph 11, as she had no involvement with operations of Big Picture at any time." *See id.*, Dkt. 325, n. 1.

> Does it mean that Bellicose is the Manager of the Tribal LLC? Similarly, in what capacity is Bellicose's name on the operating account of the Tribe? NO REPRESENTATIVES FROM THE TRIBE ARE THE LLC'S "MANAGERS". THE SERVICER, BELLCIOSE OPERATES THE BUSINESS COMPLETELTY
>
> ***
>
> Do we want to service the Tribal Management Company or do we want to service the Tribe directly? YOU WILL BE THE SERVICER FOR THE UNIQUE LLC THAT IS ESTABLISHED-FOR INSTANCE, YOUR SERVICING AGREEMENT WOULD BE FOR RED ROCK LENDING, LLC (WHICH IS THE TRIBALLY ESTABLISHED ENTITY FOR LENDING)

Id. at 4-5 (emphasis in original).

Martorello, for his part, states within the same email chain that he believed tribal origination made it lawful, and would not be comfortable with any deal where the Tribe was not in full control of its lending business, confirming that "Bellicose can have nothing to do with 'Loan Originations', it can only provide the Analytics and such," and that while "Bellicose wants to provide the IP," it must be the case that the "Consumer Lender should be the one making the final decision and originating the loans on Tribal Land," which would require further revisions to LVD's draft documents:

> B) For the USVI, Bellicose can have nothing to do with "Loan Originations", it can only provide the Analytics and such, and I think the Tribe has to be the originator anyway, correct? YES, CORRECT – CORNERSTONE OF THE SOVEREIGN MODEL. In fact, the Loan Management Software would have to be with the Tribe, and not with Bellicose. This creates a problem where it says "Servicer, shall determine whether such applicants are eligible for Loans from Consumer Lender based on Consumer Lender's credit granting standards duly adopted from time to time by Consumer Lender and applied by Servicer". Bellicose wants to provide the IP, but Consumer Lender should be the one making the final decision and originating the loans on Tribal Land. If I'm not mistaking, that applies to support the Tribal Jurisdiction as well? Similarly, Bellicose can't be as stated in provision 6 specifically. The USVI will require better separation that the Tribe is the originator and Bellicose is simply a consultant/Manager. THE TRIBE ESTABLISHES THE LENDING CRITERIA, AND IS THE LENDER BELLICOSE IS

> JUST CARRYING OUT THE TRIBE'S DIRECTION. WE CAN CHANGE THE LANGUAGE HOWEVER YOU WOULD LIKE.

Id. at 2 (emphasis in original).

LVD's agent also confirmed in the same chain that while Bellicose would be required to maintain certain information on behalf of the Tribal lending entities as its servicer, the Tribe agreed with Martorello that it should control all of their vendors. *Id.* at 3 (noting agreement that **"**TRIBE SHOULD BE ON ALL VENDOR DOCUMENTS[,] WEB-SITE, ACH AGREEMENTS ETC") (emphasis in original). Plaintiff ignores these statements even though the email string is attached as an exhibit to the Second Amended Complaint.

2. Plaintiff misrepresents Martorello's alleged acknowledgment of legal liability.

Citing to paragraphs 68 through 72 of the Second Amended Complaint, Plaintiff argues that Martorello "knew he was exposed to legal liability" and that he "has acknowledged his risk of felony charges as well as personal liability for his egregious acts." Dkt. 136 at 3, 26. Paragraph 68 of the Second Amended Complaint cites to emails attached as Exhibit 7 to the Second Amended Complaint which dispel any such alleged acknowledgement. Rather, the statements in Martorello's emails are ***consistent with and actually support*** Martorello's arguments regarding the legality of the Tribal lending businesses. Dkt. 118-7.

The email string contains dialogue between Martorello and his accountants for purposes of a business valuation for tax purposes, which necessitated highlighting the perspective of the traditional fair market value buyer who, unlike Martorello, would be less versed in the

inappropriateness of Operation Chokepoint[7] and overzealous regulatory efforts of that time and unfamiliar with the legal principals underpinning tribal sovereignty explained by the lawyers.[8] Through that lens, Martorello highlights the regulatory contention, the legal positions of certain states, and the criminal penalties associated therewith if the dozens of expert tribal lawyers deeply involved with LVD from inception through present were wrong on issues of federal and tribal law. He likens LVD's business to that of valuing the lawful gaming operation of *Cabazon* pre-Supreme Court ruling and pre-IGRA, which Plaintiff omits from her brief. Instead, Plaintiff falsely equates Martorello's statements as somehow admit. ting that the lending business was illegal. Even if Martorello acknowledged legal "risk," such is far from admitting illegality and does not represent evidence of Martorello's belief or that Martorello acknowledged his "personal liability for his egregious acts," as alleged by Plaintiff.

Most telling and the only evidence as to Martorello's belief is what exists in Exhibit 7 to the Second Amended Complaint, that despite these risks, numerous esteemed Greenberg Traurig legal experts had concluded Martorello was "not doing anything wrong/illegal" and that he believed they "CERTAINLY would not be willing to service and advise us if [he] were":

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[7] Plaintiff's exhibits do nothing more than highlight Martorello's concern with abusive and failed regulatory efforts of that time known as Operation Chokepoint. Plaintiff fails to acknowledge their own Exhibit 24 authored by then Hudson Cook attorney and former assistant Director of the CFPB explaining the history of Operation Chokepoint and potential industry ending rules, and how those abusive efforts and concerns were stomped out by efforts of Congress around the same time the *Otoe-Missouria* case outcome was celebrated. As Martorello summarizes for his valuation firm "I think you'll find this very convincing as to why we thought (and data supported) 'end of days in 2015' followed by 2016 suspecting we were in fact a "going concern" and ***even at a competitive advantage*** come Q2 2016." Dkt. 118-24 at 1 (emphasis added).

[8] In *Ramah Navajo School Board Inc. v. Bureau of Revenue* 458 U.S. 832, 846-47 (1982), the Supreme Court admonished lower courts not to give "short shrift" to the important federal policies favoring tribal self-sufficiency. Congress expressly sought the active participation of outside developers in tribal nation building efforts through the establishment of new businesses. *See Native American Business Development Act of 2000 ("NABDA")* (Sections 2(a) and 2(b), obligate the United States to: "guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency …"; encourage outside investment; facilitate outside economic ventures and technical expertise; promote the resources of the private market (under the proper interpretive canon construing such statutes liberally in favor of Indians, the internet); and export services from the reservation, all to "promote the long-range sustained growth of the economies of Indian tribes").

> I can put you on the phone with former FTC Directors, who are industry experts and our legal counsel that can tell you about the real risk of this business from the regulatory side ALONE. ***Now, I don't want you to think that we are doing anything wrong, we certainly are NOT. We use some of the biggest law firms in the country and they CERTAINLY would not be willing to service us and advise us if we were.*** However, we are living in a grey area that is being highly challenged right now. ***Greenberg Traurig is the one that did the Aiding and Abetting piece from me, and despite the fact that they feel a State could threaten me with jail time and charge me with a felony, they are still comfortable that I am not doing anything wrong/illegal and so they will defend me on it.*** GT Law is one of the biggest firms in the US.

Id. at 4-5 (emphasis added). Martorello hoped Operation Chokepoint would end and "traditional banks will one day be willing to service the industry again too." *Id.* at 1. And it did.

In an attempt to mislead the Court, Plaintiff disingenuously purports to quote an email from which she intentionally omits ***the most important*** portion of Martorello's statement. Specifically, citing Exhibit 7, Plaintiff alleges that "Martorello acknowledged that his legal counsel had advised him that he could be liable for 'aiding and abetting felony crime[s]." Dkt. 100 at ¶ 68. What Martorello's email actually states, however, is as follows:

> More equity risk you don't see in any business you'll pull COE from: Several states make it a FELONY crime to make loans over a certain rate or without a license. I had a 20 Page document done for me to understand the risk that I have as an equity owner for **aiding and abetting felony crime** in states like GA and you will see the conclusion. ***It says something like ... "yes it is possible the state will come after you for helping the tribe lend against their laws and charge YOU for aiding and abetting as a felony crime in their state (in some instances penalty could be jail time), but we don't think it's going to happen."*** That's an equity risk, how do you price that into the equation?

Dkt. 118-7 at 4 (bold italicized emphasis added).

Plaintiff's opposition contradicts both the Second Amended Complaint's allegations and exhibits and numerous lawful legal opinions from Greenberg Traurig from inception to present.

3. Plaintiff misrepresents the negotiations regarding the sale of Bellicose.

Plaintiff also argues that *Martorello* proposed restructuring the lending businesses in response to the *Otoe-Missouria* case. The truth as reflected in the emails attached as Exhibit 15 to the Second Amended Complaint is that Martorello rejected the chance to cloak the businesses in immunity *for purely economic reasons*: "10% certainly isn't going to work from a business standpoint (i.e. I might as well be a state licensed lender, as a comp.) The deal could be an outstanding deal and 1st of its kind, but we need to have it make sense." Dkt. 118-15 at 2 (containing December 2013 email Re: Memo Regarding Structure of Possible Acquisition of SPVI). Martorello was motivated by economics. The Tribe needed to ensure the now much-lightened burdens of self-government would continue indefinitely rather than cave due to Operation Chokepoint. Contrary to Plaintiff's argument, the actual record reflected in Exhibit 15 provides no evidence that Martorello developed the concept for the sale or was the one to initially approach the Tribe and its counsel with a proposal designed to provide sovereign immunity to entities essential to the Tribe's lending operation in the face of the improper industry pressures that the lending operation was facing at the time.

Indeed, the discussion concludes suggesting Martorello may have been entertaining LVD's proposal, but in fact preferred the pre-transaction servicing relationship: "All that said, ***I kind of thought we'd settled on status quo after talking about this for 18 months and nowhere to go***." *Id.* at 3 (emphasis added). By the date of the email, December 31, 2013, Martorello had been entertaining LVD's interests to acquire Bellicose as early as 2012, *i.e.*, "for 18 months"—which pre-dated the filing of the *Otoe-Missouria* district court action or even the issuance of the cease-and-desist letters from the State of New York at issue in that action. Likewise, there is no evidence that the email in Exhibit 15 was sparked by the district court's decision in *Otoe-Missouria.* Notably, the transaction did not close until January 26, 2016.

The Court should reject Plaintiff's theories which purportedly rely on "facts" that are contradicted by the exhibits attached to the Second Amended Complaint.

III. THE COURT LACKS PERSONAL JURISDICTION OVER MARTORELLO[9]

A. The Court lacks specific jurisdiction over Martorello

Plaintiff fails to show that Martorello—rather than others—purposefully directed activities at Massachusetts and that Plaintiff's alleged injuries arise out of Massachusetts-related activities of Martorello. These factors must be assessed individually as to Martorello. *Calder v. Jones*, 465 U.S. 783, 790 (1984). But Plaintiff asserts that specific jurisdiction exists because Martorello allegedly maintained such "influence and control" over Big Picture that his involuntary presence in a Massachusetts court was foreseeable. Dkt. 136 at 9.

Plaintiff's allegations of "influence and control" are gutted by the exhibits to the Second Amended Complaint discussed above and the Fourth Circuit's unanimous conclusions in *Williams*, which reviewed the Eventide sale and loan transaction documents and the evidence and determined the opposite. Moreover, as Plaintiff acknowledges in the Second Amended Complaint (and as evidenced by the adversary proceeding in the bankruptcy court), Eventide has notified the Tribe and its affiliates of various material breaches of the Promissory Note, Loan and Security Agreement, and Parental Guarantee, which have resulted in full termination of any payments under the Note for more than a year. *See* Dkt. 118, ¶ 100; Dkt. 118-36. The Tribe

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9 Plaintiff contends that the Virginia court denied Martorello's arguments for dismissal on the same claims and causes of action raised by Plaintiff here. *See* Dkt. 136 at 7. But Martorello did not file a motion to dismiss for lack of personal jurisdiction in the Virginia actions. Moreover, the fact that the Virginia court denied Martorello's motion to dismiss under Rule 12(b)(6) should be of no influence here. The Virginia court also denied the Tribal Defendants' motion to dismiss based on sovereign immunity and was ultimately reversed by the Fourth Circuit on that issue. In further effort to discredit Martorello, Plaintiff points to the Virginia court's erroneous crime-fraud opinion. Not surprisingly, Plaintiff fails to inform the Court that Martorello filed a motion for reconsideration of that decision—which was rendered prior to the Fourth Circuit's decision—as well as a motion to certify an interlocutory appeal and stay. *See Williams*, E.D. Va. Civil Action No. 3:17-cv-00461-REP, Dkt. 486, 499. Those motions have been fully briefed since June 2019, yet the Virginia court has taken no action with respect thereto.

disputes Eventide's claim. *See* Dkt. 118-37. Plaintiff's own exhibits prove that Eventide is not in control of the Tribe or its lending entities and that neither Martorello nor Eventide "receive 100% of the net revenue of the company [i.e., Big Picture Loans]." *See* Dkt. 118, ¶ 8.

Plaintiff makes no effort to reconcile her allegations with the Fourth Circuit's detailed analysis or her own exhibits. The Fourth Circuit's holding that Big Picture and Ascension are conducted under the ownership and control of the Tribe for the proper purpose of tribal economic development and self-sufficiency destroys any contention that Martorello directed or participated in the loans or designed an unlawful rent-a-tribe scheme targeting the Massachusetts market.

Plaintiff's reliance on *Brice* is misplaced and the loan agreements there were far from "identical" to those here. Most notably, the findings of revocation of federal law in *Brice* do not exist here. LVD's Tribal Law expressly embeds the federal consumer lending laws enforced by the CFPB within the Code. Moreover, in *Brice*, the court exercised specific jurisdiction over an individual who allegedly signed the agreements used to fund illegal loans and was alleged to have personally funded loans, personally invested and reinvested in a purported rent-a-tribe scheme, helped to design the financial and operational structure of the lender, used his connections to assist the collection of debts by helping locate banks that would agree to process the payments despite regulatory scrutiny, and acted as a liaison between the tribe and other entities purportedly running the scheme. 372 F. Supp. 3d at 980. Based on those allegations, the court concluded that a reasonable basis for jurisdiction in California existed "*[a]bsent evidence to the contrary*…." *Id.* at 981 (emphasis in original).

Plaintiff also wrongly cites *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163 (D. Vt. May 18, 2016), *aff'd sub nom. Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2d Cir. 2019) and

Pennsylvania by Shapiro v. Think Fin., Inc., No. 14-CV-7139, 2018 WL 637656 (E.D. Pa. Jan. 31, 2018). In both cases, as in *Brice*, specific personal jurisdiction was satisfied because the defendants were alleged to have developed, controlled, and directed the business activity at issue. *Id.* The district court in *Gingras*, however, rejected that the tribal officials including the CEO of a tribal lending entity were subject to personal jurisdiction because the plaintiff relied on contacts of only the tribal lending entity itself. 2016 WL 2932163, at *9. Those acts which included operating the website which advertised loans, emailing loan applications to forum residents, and transferring the loan principal to banks in the forum were all sufficient for subjecting the tribal lending entity to personal jurisdiction. *Id.* But those acts were "not vicariously attributed to its officials any more than directors of a corporation are subject to suit personally in any forum where the actions of the corporation satisfy the minimum contacts test." *Id.* at *9. The district court therefore ruled that the tribal officials including the CEO of the tribal lending entity who did not perform such acts could not be subject to traditional personal jurisdiction. *Id.*

Here, there is not only evidence contradicting the circumstances in cases such as *Brice*, but also the Fourth Circuit's decision in *Williams* confirms it. LVD—not Martorello—created the entities that conducted the lending operations at issue. 929 F.3d at 174-75, 178-79, 182. Accordingly, "***the Tribe here did not create Big Picture and Ascension solely, or even primarily, to protect and enrich a non-tribe member,***" *i.e.*, Martorello. *Id.* (emphasis added). LVD—not Martorello—controlled the lending operations at issue and the loans were "***its loans***." *Id.* at 175, 179, 182 (emphasis added). Citing the ***evidence***, the Fourth Circuit rejected the same control argument as Plaintiff raises here given "the evidence of the Tribe's broad power, through Hazen and Williams, over Big Picture's important business decisions and management and evidence that Hazen and Williams in fact exercised that power with

frequency." *Id.* at 183. On these facts, the Fourth Circuit agreed with the district court that the "'general structure' is to assure that Big Picture is answerable to the Tribe at every level." *Id.* at 182. Martorello is not the *de facto* owner, controller, or participant in the lending businesses at issue. Nor can Plaintiff genuinely contend after *Williams* that these tribal government agencies are the alter ego of Martorello. **More importantly, the lending businesses are not unlawful.**

The acts at issue were the acts of the Tribe's lending businesses performed on reservation under a legislative and regulatory framework established by the Tribal government before even meeting Martorello. They are not the acts of Martorello. Therefore, no basis exists for exercising personal jurisdiction over Martorello based on the alleged imputed acts of the Tribal lending entities. It is all the more unreasonable to do so in light of the legitimate tribal and federal interests at stake, and the federal policy and law in support of commercial dealings with non-Indians, and the Tribe's established dispute procedures set forth in the loan agreements. The Court should therefore deny specific jurisdiction over Martorello.

B. The Court lacks alternative personal jurisdiction under § 1965(b)

Plaintiff also fails to establish an alternative basis for personal jurisdiction under section 1965(b). The only defendants here are Martorello and Eventide. *See* Dkt. 118. Therefore, the only "parties" to this action for purposes of assessing jurisdiction under § 1965(b) are Martorello and Eventide. Because there are no "other parties" subject to personal jurisdiction in Massachusetts before the Court in this action, there is no basis to bring Martorello, who resides in Texas, before the Court under § 1965(b). *See Nuevo Mundo Holdings v. PriceWaterhouse Coopers LLP*, No. 03 CIV. 0613 (GBD), 2004 WL 2848524, at *7 (S.D.N.Y. Dec. 9, 2004) (dismissing RICO claim for lack of personal jurisdiction under § 1965(b) where co-defendants had been dismissed following motion practice); *Paolino v. Argyll Equities, L.L.C.*, 401 F. Supp. 2d 712, 718–19 (W.D. Tex. 2005) (ruling that the forum defendant's contacts could not support

personal jurisdiction over the non-forum defendants under 1965(b) after the forum defendant was dismissed pursuant to a forum selection clause).

Realizing this fatal deficiency in her § 1965(b) argument, Plaintiff contends that personal jurisdiction over Martorello must be evaluated at the time the original complaint was filed, citing *Pohlmann v. Bil-Jax, Inc.*, 176 F.3d 1110, 1112 (8th Cir. 1999). *See* Dkt. 136, n.7. *Pohlmann*, however, did not address personal jurisdiction under RICO, let alone personal jurisdiction under § 1965(b) or under circumstances remotely analogous to here—where the original parties allegedly subject to personal jurisdiction in Massachusetts have been voluntarily dismissed and a new complaint has been filed that does not name them as defendants.[10] In short, *Pohlmann* has no application here. And accepting Plaintiff's contention that Big Picture Loans and Ascension should be considered in evaluating personal jurisdiction over Martorello under § 1965(b) despite those entities having been voluntarily dismissed without answering would incentivize plaintiffs to file baseless allegations against additional parties and then voluntarily dismiss them simply for purposes of forum shopping. For these reasons, Plaintiff's contention that the Court should consider Big Picture Loans and Ascension in the § 1965(b) analysis should be rejected.

The only two defendants here, Martorello and Eventide (against which this action is stayed as a result of the bankruptcy) are amenable to jurisdiction in the Northern District of Texas. Personal jurisdiction under § 1965(b) is unavailable as a result. "'Plaintiffs' failure to include a showing that an alternative forum does not exist for prosecuting their actions is an important weight against bringing the nonresident Defendants to' [the] forum." *Kalika, LLC v. Bos. & Maine Corp.*, No. CV 15-14043-GAO, 2019 WL 1276099, at *8 (D. Mass. Mar. 20, 2019) (quoting *Brown v. Kerkhoff*, 504 F. Supp. 2d 464, 496–97 (S.D. Iowa 2007)). Given the

[10] If the settlement with the Tribal lending entities falls through, Plaintiff would need to file a separate action against the entities or seek leave to amend the complaint to add them as parties.

loose and fact-deficient theory by which Plaintiff attempts to connect Martorello to Massachusetts, Plaintiff has not and cannot meet her burden to show there is no other district in which a court could have personal jurisdiction over Martorello.

Plaintiff does not even respond to Martorello's argument that Plaintiff failed to allege a single nationwide conspiracy necessary to invoke 1965(b). And, Plaintiff attempts to have her cake and eat it too—arguing that this Court has jurisdiction over Martorello for acts taken outside of Massachusetts, but then arguing with a straight face that no jurisdiction could exist in the Western District of Michigan assuming the Court were to consider Big Picture Loans and Ascension in the jurisdictional analysis because Martorello is not "'at home' in that district" (a general jurisdiction concept). Dkt. 136 at 16. Plaintiff cannot have it both ways.[11] Plaintiff fails to demonstrate that this Court has personal jurisdiction over Martorello, the claims against Martorello should be dismissed.

IV. THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM

A. The choice-of-law provision is valid and enforceable

Plaintiff entered into loan agreements with a governmental agency arm of LVD, which is governed by LVD law and applicable federal law. Plaintiff has not cited any federal law that invalidates the Tribe's application of its own laws to the agreements, or restricts Martorello's ability to support LVD. Basic principles of contract law allow the parties to mutually choose and execute a choice of law. The act of invalidating such choice is extraordinary. The Fourth Circuit affirmed LVD's substantial interest in the consumer loans, finding them critical to the Tribe's interests of tribal self-governance, recognizing the important benefits of health care, education,

[11] Plaintiff's contention that Big Picture and Ascension are not subject to personal jurisdiction in the Western District of Michigan is devoid of merit given that those entities were incorporated under LVD law, which is located within that district. *See Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (place of incorporation is a paradigmatic basis for jurisdiction over a company).

subsidized housing, law enforcement, elder care, foster care and employment. Indeed, these are federal and tribal interests and federal policy in action. Though, comparatively, the consumers received the benefit of their bargain at a higher interest rate than that of their domicile, there can be no doubt that the substantial Tribal and federal interests prevail. The opposite would indeed lead to dire circumstances for LVD. Furthermore, the choice of law provision is not an impermissible prospective waiver of consumers' federal rights and is not unconscionable. There is no legal authority to impute state regulatory laws, via non-tribal party Martorello, upon LVD's on-reservation governmental lending activities, nor is there any basis to displace LVD's laws, as chosen by the parties at time of contract under traditional choice of law analysis, and all of Plaintiff's causes of actions alleging unlawful interest fail as a matter of law.

1. LVD has a substantial relationship to and interest in the consumer loans.

The Fourth Circuit repeatedly recognized the **substantial interest** of LVD in the consumer loans at issue. As confirmed by the Fourth Circuit, and cited by the Second Circuit in *Otoe-Missouria* as necessary to prevailing on injunctive relief, LVD deployed tribally-owned and tribally-controlled arm-of-the-Tribe lending entities engaged in self-determination, consummating and collecting on consensual loan transactions via tribal servers. all ***on the reservation*** subject to and fully compliant with Tribal and Federal law. *Williams*, 929 F.3d at 170, 178, 182-183; *see also* Dkt. 28, 28-02 through 28-24. Plaintiff's reliance on *CashCall, Inc. v. Mass. Div. of Banks*, No. 13-CV-1616-B, 2015 WL 5173531, at *3 (Mass. Sup. Ct. Sept. 1, 2015), and related public policy and unconscionability arguments are irrelevant and also foreclosed by the Fourth Circuit's conclusions in *Williams*.

The district court in *CashCall* applied *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), to conclude that the loans were "not related to 'on-reservation activity' and are not necessary to protect tribal self-government or internal relations." 2015 WL 5173531, at *3.

In *Jackson*, the court applying Illinois law correctly reasoned that a loan agreement entered into by a company owned by an ***individual tribal member*** was unconscionable because it referenced tribal law and procedures that did not exist, invoked a constitutional provision that was largely irrelevant, and inconsistently referenced exclusive tribal court and tribal arbitration such that borrowers were unable to understand to what they were agreeing. 764 F.3d at 778. Plaintiff makes no effort to show such internal inconsistencies here—nor can she—without misrepresenting the language of the loan agreements. Plaintiff does not attempt here to deny the existence or implementation of the procedures outlined in the Code, and the LVD Court presiding is indeed a sophisticated judicial authority for which all disputes ultimately resolve.

Unlike here, *Jackson* and *CashCall* involved ***no tribe.*** Yet, Plaintiff cites statements from *CashCall* (and by extension *Jackson*) and acknowledges the standard applied by those courts, nearly identical to the standards confirmed by the Second Circuit in *Otoe-Missouria*, that if the loans were "related to on-reservation activity" and "necessary to protect tribal self-government," state infringement on tribal sovereignty is not permitted. The Fourth Circuit agreed with the district court's description of the on-reservation loan consummation and lending business activity,[12] imputed federal interests, and detailed the necessity of tribal self-government, which the Fourth Circuit expressly sought to protect, and correctly held that the businesses "serve[s] the purposes of tribal economic development and self-governance," and is the true lender. *Williams*, 929 F.3d at 170, 178, 182-183. The Fourth Circuit expressly rejected the contention that Big Picture and Ascension were formed "'for the real purpose of helping Martorello and Bellicose to avoid liability, rather than to help the Tribe start a business.'" *Id.* at

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[12] *See Williams*, 929 F.3d at 174 ("The district court found that the Tribe has a substantial role in the operations of Big Picture, 'as the entity employs a number of tribal members'. . . and '***conducts all of its operations on the Reservation***.'"); *see also Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 255, 262-265 (E.D. Va. 2018).

178; *see also id.* at 179 ("[T]he Tribe here did not create Big Picture and Ascension solely, or even primarily, to protect and enrich a non-tribe member."). Plaintiff does not attempt here to deny the existence or implementation of the procedures outlined in the Code, and the LVD Court presiding is indeed a sophisticated judicial authority for which all disputes ultimately resolve. Therefore, Plaintiff's claims of unconscionability can only succeed if this Court holds that contracts with tribal entities and/or tribal law are *per se* unconscionable—a proposition that runs counter to the entire body of federal Indian law and policy.

Plaintiff's arguments regarding Massachusetts public policy also wholly ignore the federal tribal trust responsibility, the consideration of federal interests, and strong federal law and policy promoting tribal self-determination and commercial dealings between Indians and non-Indians. *See, e.g.*, *Montana v. United States*, 450 U.S. 544, 565-66 (1981).[13]

Plaintiff struggles to outweigh the long-standing principles of tribal jurisdiction and self-determination by lumping together easily distinguishable cases and uncorroborated declarations about the public policy of the state of Massachusetts. For example, Plaintiff's reference to *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), disregards that the tribe was not a party and does not apply when the tribe *is* a party as they are here. Even Plaintiff's own cited authorities support enforcement of LVD law here. Plaintiff cites *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019), to argue that consensual tribal regulation over activities of non-tribal members are enforceable under *Montana* for limited purposes such as when necessary to preserve tribal self-government. And as the Fourth Circuit

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[13] Plaintiff attempts to transpose Montana's limitations on tribal jurisdiction over the *conduct of non-members*, it is not the non-member conduct Plaintiff seeks to burden with state law in this case. Still, the first *Montana* exception stands for the proposition that the inherent sovereign power of a tribe extends beyond just tribal activities, but also to the activities of nonmembers who enter into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements," like here.

concluded, the lender is an arm-of-the-tribe and the purpose behind the lending businesses at issue here served critical goals of "tribal economic development and self-sufficiency." *Williams*, 929 F.3d at 178. Indeed, these "policy considerations of tribal self-governance and self-determination counsel against second-guessing a financial decision of the Tribe where, as here, the evidence indicates that the Tribe's general fund has in fact benefited significantly from the revenue generated by an entity" which counsels for even *greater* deference to tribal choice of law here. *Id.* at 181. Ultimately, there is nothing that can be balanced against a Tribal governmental agency engaging in commercial activities with consenting consumers and service providers, subject to its own laws.

LVD and the federal interest have a substantial relationship to and interest in the consumer loans at issue that prevails over any interest of a Massachusetts consumer's purported harm for having received "the benefit of their bargain." Because Massachusetts does not have a materially greater interest than LVD, and because federal law and policy promote the very tribal economic activities at issue here and further the balance toward tribal self-determination, the Court should require application of LVD's laws which permit the interest at issue here. Congress has not provided for a curtailment of tribal ecommerce activity through the application of state law in the consumer finance context or created a federal usury rate, which could bind the activities of tribal entities. *See* Consumer Finance Protection Act, 12 U.S.C. § 5481(27) (defining tribes as states for the purpose of federal consumer finance regulations). The fact is that Congress rejected a federal rate cap as recently as 2010 in the very same law that designated tribes regulators of their consumer lending operations. *See* S. Amdt. 3746 to S.3217, 111th Cong. (introduced May 13, 2010; rejected May 19, 2010) (proposing capping interest rate at

which loans could be offered at the maximum rate permitted by the State in which the consumer resided).

There is no provision under any law which provides a basis for any claim against Martorello as a proxy to work around tribal sovereignty. And despite the normative pleas of Plaintiff, where Congress has refused to act, it is inappropriate for this Court to do so. The policy remains to promote.

2. The choice-of-law provision is not an impermissible prospective waiver.

Plaintiff's prospective waiver arguments fail repeatedly. Dkt. 136 at 21-22. As an initial matter, the prospective waiver doctrine has no applicability to the invalidation of a choice-of-law clause standing alone. The *dicta* from which the prospective waiver doctrine started notes that it is only applicable where "choice-of-forum and choice-of-law clauses operated ***in tandem*** as a prospective waiver…." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (emphasis added). And, as each and every case cited by Plaintiff in support of the prospective waiver argument confirms, the doctrine has only ever been examined and applied in the context of evaluating a choice-of-law provision in the context of an arbitration agreement and/or delegation clause. Because Plaintiff attacks the choice-of-law clause standing alone, the prospective waiver doctrine has no applicability here.

Second, Plaintiff fails to present any evidence that the prospective waiver doctrine is applicable here. Instead Plaintiff offers only the repugnant (and demonstrably false) assertion that because other courts have found a prospective waiver in the context of a Native American loan agreement, this loan agreement too must run afoul of the prospective waiver doctrine. But citations to arbitration provisions in other cases involving entirely different tribal governments and loan agreements are not evidence and cannot be used to invoke the prospective waiver doctrine. *Cf. Yaroma v. Cashcall, Inc.*, 130 F.Supp.3d 1055, 1065 (E.D. Ky. 2015) (compelling

arbitration of claims arising from Native American lending agreement where only challenge to arbitrability under choice-of-law provision was litigant's citation to other Native American lending cases, which the court noted was "not an appropriate substitute for presenting […] evidence"). Plaintiff does not even bother to examine LVD's laws, and as discussed above even misrepresents the loan agreement to once again have the Court believe facts that are not true. The language here is patently distinguishable from the cases cited by Plaintiff.

Third, Plaintiff fails to meaningfully engage with the applicable prospective waiver case law and, instead, merely engages in a misguided effort to align this case with others rejecting choice-of-law provisions as impermissible prospective waivers of federal rights. Plaintiff argues that the prospective waiver doctrine will apply when a choice of law provision attempts waive the party's "statutory rights…." Dkt. 136 at 22. Plaintiff's statement of the governing law is incorrect. Rather, as the Supreme Court recently acknowledged, the prospective waiver doctrine will apply only when a litigant cannot pursue *any* remedies and is therefore unable to effectively vindicate her rights. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013). This, in turn, requires that the litigant demonstrate that the choice of law and choice of forum clauses *eliminates the right to pursue a remedy*. *Id.* at 236. Plaintiff makes no such showing.

The Supreme Court has repeatedly enforced choice-of-law provisions that select the laws of a foreign jurisdiction ***to the exclusion of state and federal law***. For example, in *Mitsubishi Motors*, the Supreme Court permitted a foreign arbitration to be conducted under Swiss law, even though the litigant argued that "a contrary result would be forthcoming in a domestic context" under federal law. 473 U.S. at 629-30. Likewise, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, the Supreme Court permitted a foreign arbitration to go forward under Japanese law that provided potential complete defenses to liability unavailable under federal law.

515 U.S. 528, 540-41 (1995). And, in *M/S Bremen v. Zapata Off-Shore Co.*, the Court required enforcement of a choice of English forum and law clause in an arbitration agreement, notwithstanding that English law was likely to enforce certain exculpatory clauses within the contracts that severely limited the litigant's maximum recovery. 407 U.S. 1, 3-4, 7-8, 8 n.8, 13 n.15 (1972). In each of these cases, the Supreme Court acknowledged that it was likely some law other than state or federal law would apply to the dispute—to the disadvantage of one of the litigants— yet nevertheless enforced the choice-of-law and choice-of-forum provisions.[14]

This mandatory authority is never even discussed by Plaintiff in making a prospective waiver argument, and requires that the Court reject Plaintiff's improper attempts to invoke the prospective waiver doctrine.

B. <u>The RICO claims should be dismissed</u>

Plaintiff acknowledges she must allege facts sufficient to prove that what was collected was an "unlawful debt," requiring (among other things) that the debt was "at least twice the enforceable rate." Plainly, given Big Picture Loans' immunity a state rate is not enforceable.

Also, the Court should reject Plaintiff's position that proximate cause is satisfied here because Martorello "created the lending scheme." Dkt. 136 at 26. As stated by the Supreme Court, "[o]ur precedents make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm." *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 12 (2010). Proximate cause is not satisfied "merely by alleging that the fraudulent scheme embraced all those indirectly harmed by the alleged conduct." *Id.* The predicate acts

[14] Countless appellate courts have reached a similar conclusion. *See, e.g., Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1269 (11th Cir. 2011) (holding that "choice-of-law clauses may be enforced even if the substantive law applied in arbitration potentially provides reduced remedies (or fewer defenses) than those available under U.S. law"); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993) (holding that "it is not enough that the foreign law or procedure merely be different or less favorable than that of the United States," but rather the proper "question is whether the application of the foreign law presents a danger that the [plaintiff] 'will be deprived of *any* remedy or treated unfairly.'") (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55 (1981)).

must lead directly to the injury. *Id.* But here the alleged predicate act (collection of an unlawful debt) fails because *Williams* recognized that the loans serve a proper purpose of tribal economic development and self-sufficiency and therefore the Tribe has a substantial interest in the loans such that state law cannot apply. Even so, *Williams* demonstrates that the Tribe—not Martorello—passed its laws, formed the entities, originated and collected on reservation, made the important business decisions, regulated the lending, and conducts the lending businesses. Martorello is accused of doing *too much* of that which Congress encourages under the NABDA and recognizes as lawful in other statutes, he provided technical expertise, and is now an officer of a creditor to a very successful tribal business, exemplary of the overwhelming body of federal law policy. There is no direct connection between Plaintiff's alleged injuries and any conduct of Martorello, particularly following Martorello's legitimate sale of Bellicose to the Tribe.[15]

Plaintiff's references to case law such as *Brice* is helpful to illustrate material flaws in her theories against Martorello. There the court concluded that the "injury here was expressly contemplated, and allegedly designed and specifically intended by the Haynes defendants." 372 F. Supp. 3d at 983. Here, however, *Williams* found that the lending entities are owned by the Tribe, controlled and managed by the Tribe, and operate from the reservation. 929 F.3d at 175, 185. Nor was the creation of Big Picture and Ascension "solely the product of Martorello's design or urging." *Id.*at 178. And the Fourth Circuit noted that Martorello has not received any

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[15] Even if the allegations were true (which Martorello denies) and Martorello did seek out and manage the Tribe's lending business to his financial benefit, there remains no legal authority for the Court to restrict the Tribe's sovereignty and impute state law on tribal government activity conducted on reservation. *See, e.g., Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 983 (10th Cir. 2005) (A non-Indian approached the tribe seeking exemption from state law; purchased land to convert to reservation; leased the land back over 20 years; and paid for, built and operated the billboards exclusively; and made $2 million to the tribe's $60,000 lease payments. Like here, the state of Utah argued that the tribe was merely marketing an exemption from state law to an outsider. The Tenth Circuit recognized tribal opportunities are rare and their benefits relative, thus rejecting a business judgment test and preempted state law.).

substantial economic benefit from Big Picture. *Id.* at 179. The purpose of Big Picture and Ascension was not to protect Martorello, but to benefit the Tribe through the continuation of its lending businesses and the Tribe's concern was with reducing its own exposure to liability. *Id.* This was achieved through Martorello's legitimate sale to the Tribe completed in January 2016. *Id.* at 175. None of Plaintiff's alleged harms can be said to have been directly or proximately caused by Martorello as a result.

Brice further demonstrates the flaws in Plaintiff's 1962(c) theory. In *Brice*, the court found that section 1962(c)'s participation and direction elements were met by allegations that the defendants "were instrumental in setting up, and knowingly set up, an enterprise whose sole purpose was to collect illegal debts, thereby causing those acts to occur and reaping the benefits therefrom." 372 F. Supp. 3d at 985. Here, the Tribe created Big Picture and Ascension "in part to reduce exposure to liability." *Williams*, 929 F.3d at 179. Doing so did "not necessarily invalidate or even undercut the Tribe's stated purpose, *i.e.*, tribal economic development." *Id.* Martorello's sale to the Tribe was completed in January 2016. *Id.* at 175. As to control, Big Picture is answerable to the Tribe and while some outsourcing to Ascension may occur Big Picture remains in control of essential functions. *Id* at 182-83. Martorello, however, provided "vendor services" prior to the sale using an NIGC-based contract identical to the lender's engagement with Ascension that was blessed by the Fourth Circuit. *Id.* at 175. The acquisition allowed "the Tribe to engage in online lending without relying on outside vendors for support services." *Id.* As a result, the lending businesses are conducted without Martorello's participation or control. And they certainly do not exist for the "sole purpose…to collect illegal debts" as alleged in *Brice*, but rather, for the purpose of making and collecting on *lawful* loans. Indeed, Martorello could not possibly have "knowingly set up, an enterprise whose sole purpose

was to collect illegal debts" prior to a court's balancing test determining that state law applies to the loans. Plaintiff cannot state a claim under 1962(c) as a result. Without a viable 1962(c) claim, Plaintiff's conspiracy claim under 1962(d) fails as well.

C. The state law claims should be dismissed

Plaintiff's Massachusetts statutory and unjust enrichment arguments rely on the same rejected facts and theories discussed above regarding the choice-of-law provision and Martorello's alleged control over the lending at issue. As observed in *Williams*, the lending at issue serves fundamental federal policies of tribal economic development and self-sufficiency." 929 F.3d at 178. And these "policy considerations of tribal self-government and self-determination counsel against second-guessing a financial decision of the Tribe where, as here, the evidence indicates that the Tribe's general fund has in fact ***benefitted significantly*** from the revenue generated by an entity." *Id.* at 181 (emphasis added). Plaintiff asserts no injustice supported by law that justifies undermining the federal policies served by the very lending challenged here. Dismissal is proper as a result.

D. Declaratory and injunctive relief claims should be dismissed

Plaintiff does not dispute that the contract at issue involved only Plaintiff and Big Picture. Martorello has no ownership interest in the loan. Instead, Plaintiff contends that because Plaintiff asserts spurious claims that contravene the explicit terms of Plaintiff's loan agreement that somehow a live controversy exists between Plaintiff and any non-party to the contract who points to the actual terms to which Plaintiff agreed. Plaintiff does not deny that only the lender (i.e., Big Picture Loans)—and not Martorello, whose role as officer of a mere consultant to the tribe's lending business ended more than four years ago—is capable of stopping or modifying its lending activities. Incredibly, the Settlement Agreement between Duggan and the Tribal lending entities expressly contemplates that the Tribal lending entities *will continue to collect from*

Massachusetts consumers ***at triple digit interest rates under tribal choice of law*** and make millions of dollars in payments to plaintiffs from for the alleged RICO enterprise's collections over the next two years. *See Galloway, et al. v. Williams, et al.,* E.D. Va. Civil Action No. 3:19-cf-00470-REP, Dkt. 18-1, Section XI. Settlement Class Injunctive Relief. As such, no injunctive relief or declaratory judgment against Martorello is possible or appropriate.

V. CONCLUSION

As set forth above and in the responses of the Tribal Defendants and Martorello in *Galloway* (*see Galloway*, Dkts. Nos. 271 & 272), Plaintiff's factual allegations that rely on the same exhibits and regurgitate the same bogus contentions as the *Galloway* plaintiffs' are false and contradicted by the very allegations in the First Amended Complaint and attached exhibits. The exhibits trump Plaintiff's allegations. *Clorox Co. Puerto Rico*, 228 F.3d at 32. For the reasons set forth above in and in Martorello' s Motion to Dismiss, Plaintiff's allegations do not defeat Martorello's arguments and Plaintiff's claims against Martorello should be dismissed in their entirety with prejudice.

Dated: April 6, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2020, a true copy of the above document, including attachments, was served via electronic means using the Court's Electronic Case Filing (ECF) system upon all registered ECF users, and paper copies will be sent to those indicated as non-registered participants.

/s/ Ashley M. Paquin
Ashley M. Paquin

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