UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANA DUGGAN, individually and on behalf of persons similarly situated, Plaintiff, v. MATT MARTORELLO, et al, Defendants.	No. 1:18-cv-12277-JGD

DEFENDANT MATT MARTORELLO'S CORRECTED SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS

In further support of his pending motion to dismiss,[1] defendant Matt Martorello ("Martorello") respectfully submits this supplemental memorandum concerning the effect of the nation-wide class action settlement in the matter of *Renee Galloway, et al. v. James Williams, Jr. et al.*, No. 3:19-cv-470 (E.D. Va.) (hereafter, "*Galloway III*") given final approval by Judge Payne on December 18, 2020. The Court granted leave to file this supplemental memorandum on February 16, 2021. ECF No. 195.

PRELIMINARY STATEMENT

Based on application of the equitable doctrine of judicial estoppel, Martorello's motion should be granted and this action should be dismissed pursuant to Rule 12(b)(6). "[T]he doctrine of judicial estoppel prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding." *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 32-33 (1st Cir. 2004)

[1] ECF No. 124.

(quoting *InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003)). In this instance, application of judicial estoppel bars plaintiff Dana Duggan from pursuing the claims set forth in the Second Amended Complaint ("SAC", ECF No. 118), all of which are predicated on the alleged illegality of the online tribal lending business operated by the Lac Vieux Desert Band of Lake Superior Chippewa Indians (the "Tribe"). SAC ¶¶ 1-8. The prior contradictory legal position taken by Duggan, which triggers the application of judicial estoppel, is Duggan's entering into the Class Action Settlement Agreement and Release (the "Settlement Agreement", Exhibit 1 hereto) approved by the Eastern District of Virginia (Hon. Robert E. Payne) in *Galloway III*.

Despite attempts by Duggan and other class plaintiffs to disclaim the judicial effects of the Settlement Agreement (Exh. 1 at §§ 3.3-3.5), by virtue of executing the Settlement Agreement, Duggan has agreed that the Tribe may continue to originate and collect debts with respect to the subject loans, and that Eventide Credit Acquisitions, LLC ("Eventide") may continue to receive note payments therefrom and distribute them to Martorello, which plainly constitutes an admission as to the loans' legality. Moreover, Duggan (and the other class plaintiffs) persuaded the Eastern District of Virginia to approve the Settlement Agreement (Exhibit 2).[2] Yet, if Duggan's allegations in this suit are credited, Martorello would be liable for usury and criminal racketeering, and the Virginia court endorsed or abetted what Duggan alleges to be ongoing violations of criminal usury laws and violations of the RICO Act. *See* SAC ¶¶ 163-65, 175-218. Duggan's contradictory positions in *Galloway III* and this action clearly constitute the kind of opportunistic behavior that judicial estoppel prevents. "[J]udicial estoppel prevents parties from playing fast and loose with the courts." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (quoting *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)) (internal quotes omitted).

[2] *Galloway III*, ECF No. 115 [Order granting final approval for Settlement Agreement].

BACKGROUND

Much of the factual background relevant to determination of the motion is set forth in Martorello's prior supporting memoranda and, in the interest of judicial economy, will not be repeated here.[3] Martorello recites here only the limited facts and procedural history with specific relevance to this supplemental submission.

1. Overview as to Big Picture Loans Litigations

This action is one of several related putative class action lawsuits arising from the online lending business operated by the Tribe beginning in 2011. The actions generally adhere to a common model: putative class plaintiffs allege that the Tribe's lending business (focused on short-term, small dollar, high interest loans available over the Internet) constituted violations of state anti-usury laws, as well as an enterprise to collect unlawful debt in violation of the federal RICO Act. These litigations began with filing of *Williams v. Big Picture Loans, LLC*, Case No. 3:17-cv-461 ("*Williams*"), in the Eastern District of Virginia on June 22, 2017. This action, based on allegations similar to those asserted in *Williams*, was filed on October 31, 2018. *See* ECF No. 1.

2. Dismissal of Tribal Defendants in *Williams*

On July 27, 2018, the Court in *Williams* (Hon. Robert E. Payne) issued a memorandum opinion denying the motion of Big Picture Loans, LLC ("BPL") and Ascension Technologies, Inc. ("Ascension") to dismiss the claims against them based on lack of subject matter jurisdiction resulting from BPL and Ascension's "arm-of-the-tribe" status. *See Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248 (E.D. Va. 2018), *rev'd and remanded*, 929 F.3d 170 (4th Cir. 2019). On July 3, 2019, the United States Court of Appeals for the Fourth Circuit issued its decision

[3] ECF Nos. 125 and 143; *see also Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019).

reversing the district court, finding that BPL and Ascension were arm-of-the-tribe government instrumentalities entitled to the privileges of sovereignty including immunity, and remanded with direction that they be dismissed. *Williams*, 929 F.3d at 185.[4]

3. Plaintiffs Commence and Quickly Settle *Galloway III*

On June 26, 2019, putative class plaintiffs (including those who had already commenced related actions in the Eastern District of Virginia)[5] filed *Galloway III*. *See* E.D. Va. Case No. 3:19-cv-00470-REP at ECF No. 1. The allegations and claims asserted in *Galloway III* mirrored those set forth in the related actions (including *Williams* and this case), but on a nationwide class basis. Whereas the Tribe, BPL, Ascension, and various tribal officials were named as defendants in *Galloway III*, Martorello was not. The parties to *Galloway III* notified the Court (Hon. Robert E. Payne) of a settlement in principle on or about October 21, 2019. *Id.* at ECF No. 14.

The Settlement Agreement in *Galloway III* was signed by counsel on behalf of plaintiff Duggan on November 26, 2019. Exhibit 1 at page 52. Putative class plaintiffs, including Duggan, filed an amended complaint in *Galloway III* on December 3, 2019. *Id.* at ECF No. 23 (Exhibit 3). The *Galloway III* Court granted preliminary approval for the Settlement Agreement on December 20, 2019. *Id.* at ECF No. 65. And on February 18, 2020, the district court executed the Fourth Circuit's July 3, 2019 mandate by dismissing the tribal defendants in *Williams*. *See Williams* ECF 668.

[4] Duggan filed a notice voluntarily dismissing BPL and Ascension as defendants in this action on December 30, 2019. ECF No. 112.

[5] *See Renee Galloway et al. v. Big Picture Loans, LLC et al.*, Case No. 3:18-cv-00406 (REP) (E.D. Va., commenced June 11, 2018) ("*Galloway I*"); *Renee Galloway et al. v. Justin Martorello et al.*, Case No. 3:19-cv-00314-REP (E.D. Va., commenced April 24, 2019) ("*Galloway II*").

4. Relevant Provisions of the *Galloway III* Settlement Agreement

The Settlement Agreement, to which Duggan is a party, contains several provisions of importance here. Section XI of the Settlement Agreement provides for injunctive relief to the plaintiff class through an injunction issued by the court. *See* Settlement Agreement § 11.1. For loans made between June 22, 2013 and December 20, 2019 that are not fully paid off and have not been in default for 210 days, Big Picture is permitted to collect up to 2.5 times the original principal amount. *Id.* § 11.2. The Settlement Agreement contains no injunctive relief that restricts or limits the amount of interest that the Tribe or its businesses may charge on their loan originations after December 20, 2019. *Id.* § 11. Nor does the settlement require any change in the operations or management of the Tribe's businesses. *Id.*

For example, in this case, Duggan alleges that she received two consumer loans from the Tribe's business. The first in 2017 for $425.00 and a second loan for $775.00. SAC ¶¶ 9-10. Duggan alleges that she repaid a total of $1,958.22 on the two loans. *Id.* If this Court were to apply the 2.5 times the principal cap on interest that Duggan agreed to in Section 11.2 of the Settlement Agreement, she would have been required to pay back $3,000.00. The actual ratio of Duggan's loan amounts to the amount Duggan repaid is approximately 1.6.[6] Duggan alleges that amounts were still owed by Duggan to the Tribe's business on the second loan. SAC ¶ 10. However, the Settlement Agreement also requires that delinquent loan accounts be forgiven. Settlement Agreement § 11.3.

Further, applying the 2.5 times cap to Duggan's schedule of payments listed in one of her Consumer Installment Loan Agreements with Big Picture demonstrates that the June 22, 2013 to

[6] The total paid by Duggan ($1,958.22) divided by total cash received by Duggan ($1,200.00) equals 1.63185.

December 20, 2019 class members' maximum loan durations will not exceed six months. (*See* Exhibit 4.) According to the memorandum opinion granting final approval of the Settlement Agreement, "[f]or class members who paid off their loans and who paid more than 2.5 times the original loan principal, the Settling Defendants *will establish* an $8.7 million Settlement Fund from which class members can make a claim." *Galloway III*, ECF No. 114, at 6. (emphasis added). Though curiously omitted from the face of the class notice, the declarations of counsel in support, and in the motion for final approval, the Settlement Agreement actually requires the Big Picture Defendants to make those payments over *a two-year period*, which will span between January 2021 – January 2023 and therefore must come from the interest collected from borrowers with loans originated after the December 20, 2019 class end date. *See* Settlement Agreement § 10.1; https://www.bplsettlement.com/; and *Galloway III*, ECF Nos. 104, 105. Another key term approved by the court, and additionally omitted from the face of their class notice, motion for final approval and declarations in support, the Settlement Agreement requires three individual defendants (Dowd, Liang, and McFadden) to transfer to the settlement fund their respective membership interests in Martorello's company, and co-defendant in this case, Eventide (the seller-financier, creditor to the Tribe and what Duggan alleges is the lynchpin of a criminal RICO enterprise).[7] (Settlement Agreement § 10.2.) The provision goes as far as to expressly note its contemplation that Dowd, Liang, and McFadden's share of ongoing Big Picture note payments to Eventide shall flow to the settlement fund as well, which the Court clearly understood. (Settlement Agreement § 10.2); *see also Galloway III*, ECF No. 92, at 8 ("Under the Settlement Agreement,

[7] Plaintiffs did, however, conspicuously disclose to the court these key material terms in seeking preliminary approval, and a studious class member could have identified the key terms by reading the 56-page Settlement Agreement attached to the class notice website for themselves.

the consumer loans made by Big Picture will continue to be serviced by Ascension and the proceeds therefore will be collected and *will be available to make payments on the Note to Eventide*." (emphasis added)).

Indeed, the Settlement Agreement permits, and effectively requires, Big Picture to continue making and collecting on the same loans that Duggan alleges are unlawful here because it contemplates that the $8.7 million settlement fund will be funded in three separate deposits of $2.9 million over the course of two years *after* the Settlement Agreement gained final approval by the court on December 20, 2020. Settlement Agreement § 10.1. In effect, the Settlement Agreement allows Big Picture's allegedly unlawful loan operation (including making its loan payments to Martorello's company, Eventide) to continue, in return for the Settlement Class indirectly receiving a share of the profits. Indeed, by receiving equity in Eventide, Duggan and the Settlement Class are now part owners and beneficiaries of an entity allegedly engaging in criminal activity.

5. Proceedings on this Motion and Final Approval of the *Galloway III* Settlement Agreement

Martorello filed his motion to dismiss the SAC in this action on February 12, 2020. ECF No. 124. A videoconference motion hearing was held on Martorello's motion on October 1, 2020. ECF No. 182. Counsel for Martorello argued the Settlement Agreement estopped Duggan from challenging the legality of the loans during that hearing, and the Court allowed supplemental briefing on this issue. *Id.* at 42:1-44:3.

A hearing on final approval of the *Galloway III* Settlement Agreement was held on December 15, 2020 and Judge Payne's Order granting final approval (Exhibit 2) was entered on December 18, 2020. *Galloway III*, at ECF Nos. 115 and 116.

ARGUMENT

The doctrine of judicial estoppel applies to bar Duggan from proceeding with the claims she asserts in this litigation because she advanced contradictory positions as part of the Settlement Agreement in *Galloway III* that were adopted, at her request, by the Eastern District of Virginia in approving that Agreement. "The equitable doctrine of judicial estoppel is ordinarily applied to 'prevent[ ] a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding.'" *Guay v. Burack*, 677 F.3d 10, 16 (1st Cir. 2012) (citation omitted). "Where one succeeds in asserting a certain position in a legal proceeding, one may not assume a contrary position in a subsequent proceeding simply because one's interests have changed." *Id.*; *see also In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process.").[8] Specifically, Duggan should not be allowed to assert to this Court that her loan repayment terms constitute criminal violations of Massachusetts anti-usury laws and a RICO conspiracy because she previously persuaded the Eastern District of Virginia to allow the Tribe to continue to service and collect debts pursuant to such terms.

Two requirements must be met for judicial estoppel to apply. Both are easily met here. "First, the estopping position and the estopped position must be directly inconsistent, that is, mutually exclusive." *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004) (citing *Faigin v. Kelly*, 184 F.3d 67, 82 (1st Cir. 1999)). "Second, the responsible party must have succeeded in persuading a court to accept its prior position." *Id.* (citing *Lydon v. Boston*

[8] Where its requirements are met (as they are here), judicial estoppel is applied at the pleadings stage. "[M]any courts have in fact resolved the issue of judicial estoppel upon a 12(b)(6) motion." *Carr v. Beverly Health Care & Rehab. Servs., Inc.*, No. C-12-2980 EMC, 2014 WL 31390, at *1 (N.D. Cal. Jan. 3, 2014) (collecting cases).

Sand & Gravel Co., 175 F.3d 6, 13 (1st Cir. 1999)).

1. Duggan's Positions In This Action Contradict Her Positions Taken in *Galloway III*.

Duggan took two positions in the *Galloway III* Settlement Agreement – and persuaded the court to approve them as lawful and in the best interests of the settling class of plaintiffs – that contradict the positions she takes in this action. The first is agreeing to the continued origination and collection of BPL loans charging interest without regard to Massachusetts usury law (Settlement Agreement § 11.2), which directly contradicts the position Duggan takes here. While the Settlement Agreement slightly reduces the interest consumers will pay on existing loans,[9] it does not require the Tribe's business to follow Massachusetts law or the laws of any other state. Because the Settlement Agreement requires the Tribal business to make its payments into the settlement fund over a two-year period, the Settlement Agreement not only permits, but practically obligates the Tribe's business to continue making and collecting on loans so that the settlement fund contributions can be made.

The second is assuming an ownership interest in Martorello's company, Eventide, in order to share in the note payments that Eventide receives from Big Picture, and that are funded by income from Big Picture's loans. Settlement Agreement § 10.2; *see also Galloway III*, ECF No. 92, at 8 ("Under the Settlement Agreement, the consumer loans made by Big Picture will continue to be serviced by Ascension and the proceeds therefore will be collected and will be available to make payments on the Note to Eventide.").

In this action, Duggan alleges that performance under the terms of her Loan Agreement constitutes criminal conduct and racketeering. SAC ¶¶ 163-65, 175-218. She further alleges that

[9] For example, a consumer with a loan identical to Duggan's loan would see their total finance charges reduced by $260.94.

"Eventide continues to oversee and control the illegal business operations, which charge illegal interest to borrowers in Massachusetts and across the United States, so that it may reap all of the net profits as detailed below." SAC ¶ 26. Thus, she alleges that Eventide, an entity in which she is now a part owner and from whose operations she derives financial benefit pursuant to the Settlement Agreement, is the lynchpin of the "illegal business operations" she attacks in this suit. Surely Duggan would not have agreed that the settlement fund should acquire part of a criminal enterprise, and a court never would have permitted such a transaction.

On their face, Duggan's positions in *Galloway III* are "clearly inconsistent" with her claims in this case. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citations omitted). Duggan correctly stated in her *Galloway III* pleadings that a court will not "lend its assistance in any way toward carrying out the terms of an illegal contract." *Galloway III*, Opp. to Mot. to Intervene, 3:19-cv-470, ECF 56 at 6 (citing *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899). Yet here Duggan asserts that the Tribe's businesses were required to follow state law.

2. <u>Duggan Persuaded the Eastern District of Virginia to Accept Her Prior Positions.</u>

There also can be no question that the second requirement for judicial estoppel is met because the Eastern District of Virginia indisputably accepted Duggan's positions by granting final approval of the Settlement Agreement. "The 'prior success' requirement does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits. 'Rather, judicial acceptance means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition.'" *Reynolds v. C.I.R.*, 861 F.2d 469, 473 (6th Cir. 1988) (citation omitted). Thus, "when a bankruptcy court—which must protect the interests of all creditors—approves a payment from the bankruptcy estate on the basis of a party's assertion of a given position, that, in our view, is sufficient 'judicial acceptance'

to estop the party from later advancing an inconsistent position." *Id.* A settlement, if it requires court approval, constitutes judicial acceptance. *See Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 605 (9th Cir. 1996) (noting that obtaining a favorable settlement is equivalent to winning a judgment for purposes of applying judicial estoppel). Thus, a litigant who obtains a favorable settlement based on staking out one position "is stuck with that proposition in subsequent litigation." *Kale v. Obuchowski*, 985 F.2d 360, 362 (7th Cir. 1993).

For Duggan now to attack the terms of Big Picture's loans and the ongoing operations of Eventide in this action after persuading the court in *Galloway III* to approve the Settlement Agreement "[c]reates the appearance that either the first court has been misled or the second court will be misled, thus raising the specter of inconsistent determinations and endangering the integrity of the judicial process." *Alternative Sys. Concepts, Inc.*, 374 F.3d at 33 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). This is precisely the danger that judicial estoppel prevents and it should be applied here. Duggan should not be permitted to benefit from her agreement that the Tribe's business may continue making and collecting on loans without regard to state interest rate caps (including a $5,000 class representative service award to Duggan and forgiveness of the outstanding balance on her second loan), while also asserting in this Court that such loans are illegal.

The fact is that any judgment against Martorello or Eventide would require a determination that Duggan's loan is illegal, which would be impossible to reconcile with the Settlement Agreement approved by the court in Virginia. If Duggan can be a creditor to the Tribe, so too can Eventide. If Duggan can receive note payments as an owner of Eventide, so too can Martorello.

Worse, were Martorello liable for the conduct of the Tribe in this case, so too now is Duggan.[10]

CONCLUSION

For the reasons stated here, and in Martorello's prior submissions and all of the proceedings held herein, the Court should grant Martorello's motion to dismiss, together with such other and further relief as the Court deems just and proper.

Dated: February 26, 2021

Respectfully submitted,

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[10] Martorello intends to file a motion asserting that his due process rights have been violated based on his inability to obtain discovery from BPL, Ascension, and the Tribe, as well as a motion asserting Federal Rule of Civil Procedure 19 requires dismissing this action. Currently, Martorello lacks access to loan data and is unable to obtain discovery from BPL, Ascension, and the Tribe. This lack of information prejudices Martorello's defense.

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2021, a true copy of the above document, including attachments, if any, 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.

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