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.*,	)	**REDACTED VERSION**
	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

In enacting the Racketeer Influenced and Corrupt Organizations Act, Congress sought the "eradication of organized crime in the United States" and, specifically, to eliminate "loan sharking" as one of its primary objectives. *See* Pub. L. 91–452, § 1. To accomplish this goal, RICO prohibits "'any person'—not just mobsters—" from conspiring with others to collect unlawful debts. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985). "Unlawful debts" are debts that are "unenforceable" under state law "in whole or in part as to principal or interest because of the laws related to usury." 15 U.S.C. § 1961(6).

RICO's conspiracy prohibition is both "simple in formulation" and broad in coverage. *Salinas v. United States*, 522 U.S. 52, 63 (1997). "[U]nlike the general conspiracy provision applicable to federal crimes," RICO "broadened conspiracy coverage by omitting the requirement of an overt act" by each conspirator. *Id.* at 63-64. If a person commits a substantive violation of RICO—such as conducting the affairs of an enterprise engaged in the collection of unlawful debt—another person will be held liable if he "knew about and agreed to facilitate the scheme." *Id.* at 66. A coconspirator, in other words, "need not have a managerial role in an enterprise to be" liable for "violating § 1962(d)." *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012). Instead, "[o]nce it has been shown that a conspiracy exists, the evidence need only establish ***a slight connection*** between the defendant and the conspiracy" to support a violation of § 1962(d). *United States v. Brooks*, 957 F.2d 1138, 1147 (4th Cir. 1992) (emphasis added).

This case involves a loan sharking enterprise created and operated by Defendant Matt Martorello—a Chicago entrepreneur with no ancestry in the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD"). Beginning in 2011, Martorello entered into a joint venture with the LVD for the development and operation of a lending enterprise that offered loans at triple-

digit interest rates—exponentially higher than the 12% interest rate permitted by Virginia law. Rather than complying with these laws, Martorello's venture made blatantly usurious loans pursuant to erroneous theories that tribal law and sovereign immunity exempted the loans from state laws.

No one can genuinely dispute that Martorello knew about and agreed to facilitate the usurious lending scheme. For example, as recently observed by the Fourth Circuit, "a 2011 email from Flint Richardson to Martorello stated that the Tribal co-managers were not going to be involved in Red Rock's lending business because Bellicose," Martorello's wholly owned company, "would completely operate it." *Williams v. Martorello*, 59 F.4th 68, 87–88 (4th Cir. 2023) (citation omitted). Consistent with this basic concept, Red Rock and Bellicose entered into a Servicing Agreement dated October 25, 2011. *See* Ex. 1. Among other things, the express terms of the contract memorialize that Martorello and his company were to provide "investment and capital management services, management, operations and marketing consulting," as well as "analytic services" to "increase the profitability" of Red Rock. Ex. 1 at Martorello_026260.

Because "the success of the business" was "based in large part upon the services provided" by Bellicose/Martorello, Red Rock only received 2% of the gross income collected on the loans. Ex. 1 at Martorello_026265. Bellicose, in turn, received "a performance-based fee equal to" the amount remaining, as well as reimbursement for all expenses. *Id.* [redacted]

It also cannot be disputed that Martorello and LVD restructured the lending operations in January 2016 because of the threat of litigation and enforcement actions against him and his

entities under the then-current lending arrangement between him, his entities, and LVD. As part of the restructure, Martorello and the Tribe entered into several interrelated contracts to facilitate the continuation of their illegal lending activities. Provision after provision of these contracts were designed to continue the ongoing usurious lending activities while, at the same time, conceal Martorello's involvement. And just like the formula prior to the restructure, the Tribe only receives 4% of the gross revenues from the lending operations, and the net profits are distributed to Eventide—a company primarily owned and wholly controlled by Martorello. Ex. 3 Eventide Operating Agreement at Martorello_004598.

Martorello, in sum, has *far more* than a slight connection to the usurious lending scheme. While the parties may disagree about Martorello's level of involvement in the day-to-day operations, no one can genuinely dispute that Martorello had a major connection to this longstanding scheme. Because no one can genuinely dispute that those involved were engaged in the collection of unlawful debt and that Martorello knew about and furthered the scheme, partial summary judgment should be awarded to Plaintiffs as to each of the liability elements of their § 1962(d) conspiracy claim.[1] Resolving this core liability issue now—based on objective evidence uncovered through six years of litigation—will streamline the remaining issues for trial and, perhaps, provide a realistic path for a potential settlement of this case.

In addition, Plaintiffs seek summary judgment on Martorello's primary defense in this case: the enforcement of the tribal choice-of-law provision, as well as his interrelated defense that

[1] Plaintiffs believe the evidence unquestionably establishes that Martorello also participated in the management of the enterprise's affairs in violation of § 1962(c). However, the Supreme Court has expressly held that the "interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense." *Salinas*, 522 U.S. at 65. The § 1962(c) claim, in other words, does not subject Martorello to any additional liability. Thus, Plaintiffs move only as to the conspiracy claim.

"Plaintiffs' causes of action based on lending by Native American tribal entities are barred by the operation of Tribal Immunity." Dkt. 35 at pg. 23. According to Martorello, the choice-of-law clause in the contracts require application of the substantive laws of the LVD, thereby requiring dismissal of all of the claims. This defense is foreclosed by this Court and the Fourth Circuit's decision that the contracts violate the prospective waiver doctrine. *See, e.g.*, *Williams*, 59 F.4th at 80. It is also foreclosed by another recent decision from the Fourth Circuit, where it refused to enforce a tribal choice-of-law clause "because it violates Virginia's compelling public policy against unregulated usurious lending." *Hengle v. Treppa*, 19 F.4th 324, 349 (4th Cir. 2021).

Summary judgment on the enforceability of the choice-of-law provision is especially appropriate because it is "a controlling question of law" under these circumstances. *Hengle v. Asner*, 2020 WL 855970, at *8 (E.D. Va. Feb. 20, 2020). Indeed, in a recent tribal lending case that almost proceeded to trial, the United States District Court for the Northern District of California entered partial summary on these very issues. *Brice v. Haynes Invs., LLC.*, 548 F. Supp. 3d 882, 899 (N.D. Cal. 2021). In doing so, the court held that the "choice of law provision mandating tribal law is unenforceable" because it prospectively waived borrowers' rights, and "[a]bsent the contractual provision," there was "only one choice of law to apply," which was California's. *Id*. at 899-900.

Finally, it is well established that "substantive state law applies to off-reservation conduct, and although the Tribe itself cannot be sued for its commercial activities, its members and officers can be." *Hengle*, 19 F.4th at 349. Because tribal immunity does not shield individuals like Martorello, summary judgment should be entered on his claim that sovereign immunity bars the claims—just as ordered in *Brice*, 548 F. Supp. 3d at 901.

LEGAL STANDARD

A motion for summary judgment should be granted "where the moving party demonstrates that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Alexis v. Kamras*, No. 3:19-cv-00543, 2020 WL 7090120, at *11 (E.D. Va. Dec. 3, 2020) (Payne, J.) (citing Fed. R. Civ. P. 56(a)). "An issue is 'genuine' if a reasonable jury could return a verdict for the non-moving party." *Id.* (citing *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568 (4th Cir. 2015)). "A fact is 'material' if, based on the governing law, it could affect the outcome of the suit." *Id.* (citing *Jacobs*, 780 F.3d at 568).

"To successfully oppose a motion for summary judgment, the nonmoving party must show that there are specific facts that create a genuine issue for trial." *Alexis*, 2020 WL 7090120, at *11 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). However, "[c]onclusory or speculative allegations do not suffice to oppose a properly supported motion for summary judgment, nor does a mere scintilla of evidence." *Matherly v. Andrews*, 859 F.3d 264, 280 (4th Cir. 2017) (quoting *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002)) (internal quotation marks omitted).

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. Martorello segues from offshore to tribal lending.

1. After working several years at KPMG, Martorello started online lending in 2008. Ex. 4, Martorello Dep. 26:9-14. Martorello had an ownership interest in an online lending company called "MMP Finance," which made online "payday loans." *Id.* at 33:18-35:20. Utilizing the domain name "peppercash.com," Martorello made usurious loans that claimed to be "governed by the laws of Costa Rica." Ex. 5 at ROS002-0000691.

2. In 2011, Martorello was introduced to Robert Rosette, who was "a very well-known

attorney" in the tribal lending industry. Ex. 6 Merritt Dep. at 32:7-11.

3. Martorello subsequently paid Rosette to connect him with the LVD. Ex. 7 at Martorello_008958 (email from Martorello explaining that if "I wanted to get a new contract," *i.e.*, servicing agreement, "I'd probably call a broker who would introduce me to tribes and charge me a few hundred K (we sent how much we paid for the initial intro in a prior email).").

4. Prior to meeting with the LVD's Tribal Council, Martorello worked with Rosette and his business partner, Flint Richardson, to memorialize the structure and terms of the venture. *See, e.g.*, Ex. 8 at Rosette_Revised _052501.

5. Martorello wrote several emails, asking about this new business model. *Id.* at 052499-052501.

6. One of Martorello's questions was whether "the Tribal Lending entity" would have "a Tribal Management Company, which was going to be the Bellicose customer[?]" *Id.* at 52500.

7. In response, Richardson said "NO," and clarified that Martorello's "ENTITY WOULD BE THE SERVICER FOR THE LENDING OPERATION. THE LLC MANAGERS ARE MANAGERS OF THE LLC ENTITY ON BEHALF OF THE TRIBE <u>BUT ARENT INVOLVED IN THE BUSINESS</u>." *Id.* at 52498 (caps in original, underline added).

8. And when asked by Martorello to further elaborate on this point, Richardson explained that "REPRESENTATIVES FROM THE TRIBE ARE THE LLC'S 'MANAGERS'. THE SERVICER, <u>BELLICOSE OPERATES THE BUSINESS COMPLETELY</u>." *Id.*

9. In a separate email, Martorello also asked "Is there an entity name for the tribal LLC," and then explained it should have "a unique name that doesn't expose our relations if another lender tribe entity had problems." Ex. 9 at ROS002-0000695.

10. Richardson responded: "You can name it !!" *Id.*, and Martorello later indicated that

he liked the name "Red Rock Tribal Cash, LLC." Ex. 5 at ROS002-0000681.

11. Over the next few months, Martorello worked together with Richardson, Rosette, and others to complete other items to establish the lending venture, including creation of new bank accounts in the name of Red Rock and ACH applications. Ex. 10 at ROS002-000064-66.

II. Bellicose VI and Red Rock Enter into the Initial Servicing Agreement.

12. On October 25, 2011, Martorello's wholly owned company, Bellicose VI, Inc. ("Bellicose"), entered into a Servicing Agreement with Red Rock Tribal Lending, LLC, which memorialized the initial structure of the lending enterprise. *See generally* Ex. 1.

13. This contract's recitals indicate that the Tribe desired "to engage in internet-based unsecured lending," and further provided that Red Rock was "seeking managerial, technical, and financial experience and expertise for the development and operation of the new Unsecured Lending Business." *Id*. at Martorello_026259-26260.

14. The recitals indicated that Bellicose was "willing and able to provide such assistance, experience, expertise and instruction" to facilitate the unsecured lending business. *Id*.

15. Consistent with this, a section of the contract entitled "Engagement of Servicer," establishes that Red Rock was engaging Bellicose to provide "business management, consulting and professional services," and further delegated to Bellicose "the authority and responsibility over all communication and interaction whatsoever between [Red Rock] and each service provider, lender and other agents of [Red Rock]." *Id* at Martorello_026263.

16. Among other things, the contract specifies that Bellicose's duties include: the "[s]creening of and selecting service providers and lenders, and negotiating agreements with such service providers and lenders on behalf of [Red Rock] on such terms and conditions as [Bellicose] may reasonably determine to be appropriate[,]" and preparation of "suggested practices and

recommendations" regarding "operations of" Red Rock[.]" *Id*. at Martorello_026267.

17. The Servicing Agreement also allowed Bellicose to enter into contracts in Red Rock's name and required delivery "of all contracts executed by [Bellicose] on behalf of [Red Rock]" on a "monthly basis." *Id*. at Martorello_026268.

18. Bellicose also had the authority to "collect all gross revenues and other proceeds connected with or arising from the operation" of Red Rock. *Id.* at Martorello_026273.

19. Bellicose also had the right to "sweep [Red Rock's] bank account amounts into [Bellicose's] bank accounts" to receive its share of the proceeds. *Id.* at Martorello_026265.

20. Bellicose had "sole signatory and transfer authority over such bank accounts" opened in the name of Red Rock. *Id.* at Martorello_026270.

21. The contract further established that Red Rock would receive 2% of the gross revenue collected on the loans minus charge offs. *Id*. at Martorello_026265 (establishing the fee agreement between Red Rock and Bellicose, including payment of the "Tribal Net Profits"); *Id*. at Martorello_26263 (defining the calculation for "Tribal Net Profits" as "the sum of Gross Revenues plus bad debt recoveries minus the sum of charge backs and bad debt charge-offs and multiplying the sum of this amount by two (2) percent calculated on a monthly basis[.]").

22. Red Rock's revenue share, however, was further reduced by 50% to pay a brokerage fee to another company owned by Rosette, Tribal Loan Management, LLC. *Id.* at Martorello_026279.

23. This brokerage fee was paid directly by Bellicose. *Id*.

24. Because "the success of the [lending] business" was "based in large part upon the services provided" by Bellicose, it received "performance-based fee equal to that amount remaining after payment of Tribal Net Profits, Servicer advances, and all Servicing Expenses." *Id*.

at Martorello_026265.

25. The Servicing Agreement between Red Rock and Bellicose was signed by Martorello. *Id*. at Martorello_026292.

III. SourcePoint and Red Rock enter into the Amended Servicing Agreement.

26. In July 2012, Martorello raised concerns with Rosette's 50% cut of Red Rock's revenue. At this time, Martorello wrote an email stating that "TLM shouldn't be profit sharing like an owner." Ex. 11 at Rosette_Revised _046397.

27. This component "really [was] an issue to" Martorello, who believed TLM's revenue share put his "capital lent at risk." *Id*.

28. He thought it was "very important we remove TLM as a 'profit sharing 50% of retained earnings broker' because it sounds like '50% owner,'" which "negates the entire tribal owned component that makes [him] as financer/Servicer feel like [he was] safe." *Id*.

29. Wichtman, Rosette's law partner, agreed with these concerns and responded "the TLM piece is problematic for a whole host of reasons," and while she did not "have any doubt that for bringing the regulatory structure and the Servicers to the table there should be a fee paid to TLM," that "50% of the Tribe's profits ha[d] always been a bit excessive" in her opinion. Ex. 12 at Rosette_Revised _044603.

30. On August 1, 2012, Rosette and LVD agreed to recharacterize the broker's fee pursuant to a "Side-Letter Agreement." Ex. 13 at ROS002-0001919.

31. Rather than paying the "broker's fee," LVD paid a flat-fee of $960,000.00 to TLM for "professional services from June 2011 through July 2012," including "the development of all Tribal Consumer financial services laws and associated regulatory framework for review and consideration by Tribal client." Ex. 14 at ROS002-0001918.

32. To effectuate this change, Red Rock entered into an Amended and Restated Servicing Agreement dated July 31, 2012, with another company owned by Martorello, SourcePoint VI, LLC. Ex. 15 at Martorello_003474.

33. Other than the removal of the broker's fee provision, there were no other changes to the original servicing agreement, including the fee structure and delegation of responsibilities. *Compare* Ex. 15; with Ex. 1.

34. Martorello signed the Amended and Restated Servicing Agreement, which remained in effect until January 26, 2016. Ex. 15; *see, e.g.*, Ex. 16, Martorello Depo. 30:8-15 ("Q. And was this servicing agreement ever amended during the time you were president of SourcePoint VI? A. This – I don't recall any amendments to this document at any time.").

IV. Martorello and his companies receive $88 million dollars from Red Rock's Loans Between January 2012 and January 2016.

35. In discovery, Martorello produced an excel spreadsheet entitled "Summary of Payments from January 1, 2012, through January 31, 2016." Ex. 2 at Martorello_028715.

[redacted]

[redacted][2] [redacted]

[redacted][3] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

V. Regulators begin attacking the business model in 2012 and 2013, prompting Martorello to contact Rosette regarding a potential restructure.

40. As early as December 2012—a little over a year into the business—Martorello had concerns about the viability of the tribal lending model. Ex. 18 at Martorello_038990.

41. In an e-mail to a business valuation expert, Martorello wrote that he had "some urgent questions" for them "on valuation" of his business. *Id*.

42. Among other things, Martorello asked how to value illegal businesses, such as online poker sites, medical marijuana stores, and a drug cartel. *Id*.

43. Martorello further added that "[t]his industry is going to be living in the grey area of its legality for another year or two," and that they had already "received dozens of letters from State AGs saying we need to be licensed and sending Cease and Desist orders." *Id*., at Martorello_038990-038991.

44. Martorello was in possession of a 20-page legal opinion, concluding that he could

[2] At this time, the Servicing Agreement was between SourcePoint and Red Rock. *See* Ex. 15.

[3] By this time, Justin Martorello had received his 10% economic interest. *See, e.g.*, Ex. 17 at Martorello_000302 and Martorello_000317.

be liable "for **aiding and abetting felony crime**" in states like Georgia. *Id*. (emphasis in original).

45. As early as April 2013, Martorello began e-mailing Rosette about restructuring the arrangement to reduce Martorello's liability, writing: "Let's zero in asap on minimizing my risk for being individually liable like [Colorado] just successfully did to Butch [W]ebb." Ex. 19 at Rosette_Revised_048497.

46. Over the next six months, regulators continued to threaten to take action to stop Red Rock's illegal practices. *See, e.g.*, Ex. 20 May 2013 Ltr. from Conn. Dep't of Banking.

47. On August 6, 2013, the New York Department of Financial Services ("NY DFS") issued a cease and desist to 35 online lending companies, including Red Rock.[4]

48. Six days after the issuance of the cease and desist, Rosette had drafted a complaint against the NY DFS "for LVD's consideration." Ex. 21 at Rosette_Revised_041064.

49. In an e-mail to Martorello, Rosette wrote that he "believe[d] strongly if we do nothing we may forever lose the tribal online lending opportunity," and he further added it would be "impossible to unwind or undo what the State of New York (in collaboration with federal agencies) have started without a legitimate piece of litigation being filed." *Id*.

50. In a separate e-mail to Martorello, Wichtman echoed these concerns, writing "what do we achieve by laying low waiting for the next bomb to drop - hoping that it doesn't blow us up?" Ex. 22 at Rosette_Revised_049126.

51. Martorello expressed concern with joining the litigation. *Id*. at 049125. According to Martorello, the filing would "open the doors" and result in "counter attacks from all sides," and it would be "game over really quick." *Id*.

[4] *See, e.g.*, The Official Website of New York State, Press Room, *Cuomo Administration Demands 35 Companies Cease and Desist Offering Illegal Online Payday Loans That Harm New York Consumers* (Aug. 6, 2013), *available at* https://www.governor.ny.gov/news/cuomo-administration-demands-35-companies-cease-and-desist-offering-illegal-online-payday-loans.

52. The lawsuit was filed on August 21, 2013. It sought a preliminary injunction to prevent interference with the business during the pendency of the case. *See generally Otoe-Missouria Tribe v. N.Y. Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 361 (S.D.N.Y. Sept. 2013).

53. The court denied this request and found that Red Rock was "subject to the State's non-discriminatory anti-usury laws" because the "undisputed facts demonstrate[d]" that the illegal activity was "taking place in New York, off of the Tribes' lands." *Id*.

54. The court further noted that Red Rock "built a wobbly foundation for their contention" that the activity was occurring on "on the Tribes' lands," and contrary to their argument, consumers did not "in any legally meaningful sense, travel[] to Tribal land." *Id*. at 360.

55. Two days after the district court's decision, Martorello wrote that the decision "presents a significant potential liability for [Bellicose] and we do not believe that we should service any new New York loans." Ex. 23, Rosette_Revised_06304-5.

56. Martorello further added that they were willing to see existing loans through completion, "but [they] simply cannot flaunt the clear ruling from Judge Sullivan's order, however legally incorrect it might be." *Id*.

57. Martorello further stated a concern that the "finding that tribal enterprises are subject to New York's anti-usury laws will be regarded as sufficiently final… such that it will precipitate their potential investigation and potential prosecution of us personally and our companies if we continue" to conduct business in New York. *Id*.

58. Two weeks after the decision, Martorello had come up with a solution and approached Robert Rosette regarding a restructure. *See generally* Ex. 24.

59. In an e-mail dated October 14, 2013, with a subject matter entitled "LVD to take ownership of Bellicose VI," Martorello presented some options for a restructure so that Bellicose

could attempt to share in the LVD's immunity. *Id.*

60. Martorello proposed that Bellicose would "[a]ssign today LVD 51% of Bellicose via Equity only membership interest tied to the SPVI subsidiary only." *Id.* (emphasis in original).

61. Martorello further proposed that BlueTech, his trust, would "own 49% equity, but 100% profits interests until month 49." *Id.*

62. Martorello's e-mail candidly explained that the transaction must be "structured to provide **all entities sovereign immunity**." *Id.* (emphasis added).

63. Less than six hours after sending the initial restructure e-mail to Rosette, Martorello sent a similar e-mail to the members of LVD's Tribal Council. Ex. 25 at JPB 00988.

64. In this e-mail, entitled "SPVI Equity Transfer to LVD," Martorello wrote: "Below is the beginning of a concept I have to facilitate a transition to LVD of MY businesses." *Id.* (emphasis in original).

65. This concept, as described by Martorello, was to "[a]ssign today to LVD – 51% of Bellicose VI, LLC," but "0% profits interest" until four years after the restructure. *Id.*

66. Martorello further added: the "**Current Manager (myself)** will be locked in as the decision maker for 48 months[.]" *Id.* (emphasis added).

67. A few weeks later, in an email dated October 29, 2013, Martorello informed Wichtman that vendors and debt providers of Red Rock were "asking what would happen to everything if the ruling in NY were upheld[?]" Ex. 26 at Rosette_Revised_045573

68. The repercussions, according to Martorello's e-mail, would be "**certain death**" and "all vendors including [SourcePoint], banks, ACH processors, bureaus etc would all obviously shut down if it were considered off reservation activity[.]" *Id.* (emphasis added).

69. Martorello further added that "class actions" and "personal threats of enforcement

actions against individuals by regulators" has "everyone spooked," causing "several of the biggest servicers" to "shut down." *Id*. In closing, Martorello proclaimed "[d]esperately hoping that Rule 19 works and a favorable outcome on the appeal!" *Id*.

70. On December 30, 2013, Rosette circulated a legal memorandum analyzing "whether formation of a new entity that is co-owned by the Tribe and Source Point and subject to the proposed profit, management and voting controls" suggested by Martorello would be "sufficient to pass muster with the 'arm of the tribe' test to extend the Tribe's sovereign immunity from suit to the new LLC." Ex. 27 at Rosette_Revised_052248.

71. On the proposed changes of the structure, Martorello commented that the tribe's percentage of ownership of the company "could easily be increased to whatever the benchmark of confidence is, since equity and profits interest differ." *Id*. at 052247.

72. Martorello further added that he did not think "100%" ownership was "out of reach," and "some caveats could simply be made." *Id*.

73. Martorello, however, took issue with Rosette's proposed revenue changes, writing "10% [to the tribal entity] certainly isn't going to work from a business standpoint," and he "might as well be a state licensed lender, as a comp[arison]." *Id*.

74. Martorello also rejected Rosette's proposed management structure, writing "[a]ll the investors (institutional, personal, and myself) won't allow the deal to occur without being 100% certain adequate [m]anagement resources are in control," *id*. at 052248, *i.e.*, unless non-tribal members like Martorello continued to have final say over operations.

75. And if challenged, Martorello explained that "[w]hat I think you'd tell a court" is "that if the deal were not done," then the tribe would not know: (1) "if SPVI would be around in 10 days given the industry," (2) execute "its termination provision in accordance with the"

servicing agreement, or (3) "hike rates as risk has gone through the roof with detractors now seeking out SPVI's of the world for major attacks." *Id*. at 052247.

76. Martorello further noted: "Clock is ticking before I end up in a Cash Call type attack though, at which point, I think the deal is about dead." *Id.* at 052258.

VI. With LVD seemingly uninterested in the restructure, Martorello advocates for a rebrand and threatens to sell the businesses to another tribe.

77. Without any significant progress on the restructure, Martorello e-mailed Hazen and Wichtman in July 2014, urging that Red Rock "needs a rebrand." Ex. 28 at Rosette_Revised_058409.

78. Martorello further wrote that "RRTL ha[d] been blacklisted and rolled through the mud in the press" following *Otoe-Missouria*. *Id*. He added that "it's time to get away from the word '[p]ayday' and the black mark of RRTL before rules come out and things get hotter." *Id*.

79. To accomplish the rebrand, Martorello suggested "forming ASAP a new LLC with a new domain/brand, for purposes of transferring all contracts, assets, bank accounts, liabilities etc. over to the new entities when ready." *Id*.

80. Martorello's e-mail concluded that Bellicose would "gladly facilitate the work," but it needed "the entity formed and approv[ed] to begin doing" the rest of the work. *Id*.

81. In follow-up, Martorello e-mailed Hazen asking "as CEO for RRTL," whether she felt "comfortable representing RRTL to council" on the rebranding. *Id*. at 058408.

82. In response, Hazen wrote: "I certainly do agree and yes I would be happy to present this to the Council." *Id*.

83. Three days later, Martorello had "the work and imaging done for ChorusLoans." *Id*. at 058407. Martorello further claimed that "[d]omain names in this space" were "very very rare and hard to come by" and "trying to get a [trademark] to protect it from competition" was "another

issue," and "SPVI did a lot of work" to create "Chorus[.]" *Id*.

84. On August 25, 2014, Martorello e-mailed Wichtman, stating that "Chorus has been sold." Ex. 29 at Rosette_Revised_043437. But Martorello had "another really great brand" known as Big Picture Loans. *Id*. Martorello attached a document to the email, "Big Picture Site Designs," showing a fully developed website and brand for Big Picture. *Id*. at 043437-57.

85. Wichtman, who was drafting the resolution for approval by tribal council, responded, "Which one do you want me to use?" Ex. 30 at Rosette_Revised_043435. To which, Martorello replied: "BigPictureLoans.com." *Id*.

86. The following day, the tribal council approved the creation of Big Picture, as well as its Articles of Organization and Operating Agreement. *See* Ex. 31.

87. Once the rebrand was accomplished, Martorello sent an e-mail to Chairman Williams on August 26, 2014, providing more details and stressing the urgency of the restructure. Ex. 32 at Rosette_Revised_048541.

88. In this e-mail, Martorello wrote that Bellicose wanted to "move quickly to transition the business into very capable hands." *Id*.

89. Martorello further explained that he had "to stress the urgency on [his] end" and "SPVI/BVI are looking to move very quickly on such an exit." *Id*. at 048541-2.

90. "[R]ather than putting the business on the 'auction block' to the highest bidder," Martorello indicated that he was coming "exclusively to LVD," but it was "important that LVD knows that time is of the essence for SPVI/BVI in getting a sale done." *Id*.

91. Martorello wanted to know "if LVD is interested or not interested," so they could "move as quickly as SPVI/BVI needs to so that we're not inadvertently disadvantaged." *Id*.: *see also* Ex. 33 ("If we can't reach terms with LVD to buy SPVI, then SPVI will be sold to another

Tribe (likely Middletown).").

92. Chairman Williams did not respond to Martorello's e-mail that day, prompting Martorello to e-mail Karrie Wichtman later that evening, complaining that he had not heard "anything back from the Chairman" in response to his e-mail, nor did Martorello get "any sense of excitement from anyone[.]" Ex. 34 at Rosette_Revised_045272.

93. In this e-mail, Martorello also stated that there would be "a lot of legal details to go through" on the deal and "the seller," *i.e.*, Martorello, "will have to keep a final say so in business decisions to protect the business from being destroyed by the new owner before paid." *Id.*

94. Martorello added: "No need to reinvent the wheel or shake things up, just need to keep it alive and then use the earnings from it to take risks with and do other things." *Id.*

VII. Restructuring became urgent after the Second Circuit's decision.

95. Over the next month, the parties did not make significant progress on the key terms or mechanics of the sale, but on October 1, 2014, it became urgent when the Second Circuit affirmed the district court's decision in *Otoe-Missouria*.

96. In doing so, the Second Circuit made several damaging findings, including that "New York's usury laws apply to all lenders, not just tribal lenders[.]" *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 117 (2d Cir. 2014).

97. The Second Circuit also observed that "Native Americans 'going beyond the reservation boundaries' must comply with state laws as long as those laws are 'non-discriminatory [and] … otherwise applicable to all citizens of that [State]." *Id.* (citations omitted).

98. Against this backdrop, the Second Circuit observed that "[m]uch of the commercial activity at issue takes place in New York." *Id.* It reached all of these conclusions even though LVD/Red Rock never disclosed to the district court or Second Circuit the role of Martorello's

companies in the operations. *See generally* 769 F.3d 105.

99. After the Second Circuit issued its decision, Martorello wrote an e-mail to Wichtman on October 10, 2014, stating: "I can't urge any stronger that LVD not proceed even if [O]toe does." Ex. 35 at Rosette_Revised_043659. Martorello also noted that "SPVI won't be willing to testify, or do anything as the result of another filing will certainly end in a slew of attacks on me, SPVI and my team." *Id.*

100. Ultimately, Wichtman agreed, and as she explained in a subsequent e-mail to Martorello, their best option was to "go quietly into the night and restructure based on what we know from the opinion in order to build an even stronger case for future litigation." Ex. 36 at Rosette_Revised_001130.

VIII. Martorello insists on retaining control over the business after the restructure.

101. Although Martorello "sold" his companies to LVD, he insisted on control over the business prior to repayment of the promissory note.

102. For example, in an e-mail dated August 26, 2014, Martorello insisted "**the seller**," "**will have to keep a final say so in business decisions** to protect the business from being destroyed by the new owner before paid." Ex. 34 at 045272 (emphasis added). Martorello wrote that there was "[n]o need to reinvent the wheel or shake things up, just need to keep it alive and then use the earnings from it to take risks with and do other things." *Id.*

103. Similarly, in an e-mail to Wichtman, Hazen, and Chairman Williams dated September 15, 2014, Martorello insisted that "**the Bellicose Companies will be sold only 'as is', with existing Management in place and the company remaining substantially the same**." Ex. 37 at Rosette_Revised_040179 (emphasis added). Martorello further added that "[o]f course[,] a purchase, merger and dissolution are required for a Tribal buyer, and so the name will/jurisdiction

of the LLC will change." *Id*.

104. Despite the creation of the new company, Martorello wrote that it needed to "remain an independent cutting edge" company, which "needs to be run in the same format it is today." *Id*. Martorello added that remaining separately managed by the servicer would aid the "PR effect" on hiring and retaining professionals "who will understand they risk being labeled by peers as working for some 'illegal' lender" if the companies were combined. *Id*.

105. They maintained the status quo even though one of Rosette's lawyers, Tanya M. Gibbs, identified the structure—requiring Big Picture "to establish certain relationships with a servicer"—as opening them up to rent-a-tribe arguments similar to "the current class action litigation pending in Vermont, *Gingras & Givens v. Rosette*." Ex. 38 at Rosette_Revised 043997. To avoid this, Ms. Gibbs wondered whether they needed to "to put these things in writing." *Id*.

106. Martorello insisted on formal control in writing, saying it was "take it or leave it[.]" *Id*. at 043996. Martorello further added that "Servicer comfort" was the "only way" that an important investor would "be involved." *Id*. From "their perspective," if LVD "was to cut SPVI out of the picture, then [it] simply cannot perform as a business." *Id*.

107. Similarly, in an email dated January 14, 2016, *i.e.*, Martorello explained that the enterprise's lenders "care about the person who runs the business at AT." Ex. 39 at Rosette_Revised_043978

108. So long as the restructure documents were "clear that the position in question and under scrutiny to the lenders is President and CEO (Brian)," it was sufficient according to Martorello. *Id*.

109. Martorello further wrote: "**As far as I know, the Manager[s], don't really do anything**." *Id*. (emphasis added).

110. In closing, Martorello explained that he would leave it up to his attorney, John Williams, on what the transaction documents "say if that jives, and what the authority is of BMF vs the Managers, but if Managers are really only involved per the [operating agreement] to get feedback from the CEO/President" then that seemed "OK." *Id*.

111. If the managers did "more than that" or the governing documents "say the position of concern are the Managers," then there was "some cleaning up to do," Martorello wrote. *Id*.

112. Two days after this exchange, John Williams e-mailed Wichtman a draft of the Delegation of Authority Policy to ensure it was clear who had operational control. Ex. 40.

113. The Delegation of Authority policy, as explained by Wichtman in an email dated January 14, 2016, ensured that "The Tribal Council does not get to make the decision regarding [McFadden's] employment nor determine his salary other than through the budgeting process" [which involves Eventide.] Ex. 41 at Rosette_Revised_020473.

114. Wichtman further explained that this structure ensured that the "Tribal Council can't get a wild hair up their hiny and pass a resolution or motion to fire [Brian] because they do not have the authority to act in that capacity as Member." *Id*.

X. The restructuring documents require maintenance of non-tribal control over key operations, as well as the approval of Martorello to make any significant changes.

115. Bellicose Capital was sold to the Tribe in exchange for a Secured Promissory Note in the amount of $300,000,000.00 to be paid to Eventide. Ex. 42 at Martorello_000100.

116. As part of the sale, Martorello and the Tribe agreed to several interrelated transactional documents, including (1) the Delegation of Authority Policy, (2) the Intratribal Servicing Agreement, (3) the Loan and Security Agreement, and (4) the Secured Promissory Note. *See generally* Exs. 43, 44, 45 and 46.

117. For example, the Tribe contractually relinquished the right to control key aspects

of Ascension through the Delegation of Authority Policy. *See generally* Ex. 43.

118. Under this policy, Brian McFadden—not the Tribe—has the sole authority to: (1) handle Ascension's "strategic direction, goals and targets," (2) execute documents on behalf of Ascension, (3) open and maintain bank accounts, (4) adopt employee benefit plans and programs, and (5) "authority regarding all matters necessary for the day to day management of Ascension." *Id*. at § 1.4(a)-(e)) at LVD-DEF00002882.

119. By contrast, the only matters designated to the tribal co-managers are: (1) approval of contracts in excess of $100,000 in a calendar year, (2) appointment of the president, and (3) approval of any "new major employee benefit plans." *Id*. at § 1.2(a)-(c) at LVD-DEF00002881.

120. And, while the authority to appoint the president seems to provide some control, the Loan and Security Agreement takes this power away because to appoint a new president, Hazen and Williams must receive the approval of Eventide (and hence, Martorello). *See* Ex. 45 at Martorello_000080.

121. The Tribe also contractually relinquished the right to control key aspects of Big Picture through an "Intratribal Servicing Agreement," which is virtually identical to the prior servicing agreement between SourcePoint and Red Rock. *Compare* Ex. 44, *with* Ex. 15 at § 4.2.1.

122. For example, the Intratribal Servicing Agreement indicates that Big Picture has retained Ascension, the "Servicer," for the purpose of providing "business management, consulting and professional services[,]" and establishes that Ascension "shall have the authority and responsibility to manage communication and interaction between [Big Picture] and each vendor, Commercial Finance Provider and other agents of" Big Picture. Ex. 44 at LVD-DEF00002338-2339.

123. Among other things, the Intratribal Servicing Agreement also: (1) prohibits Big

Picture from hiring any vendor unless it is approved by Ascension (*id*. at LVD-DEF00002340); (2) requires Ascension to "insure that gross revenues and other proceeds connected with or arising from the operation of" Big Picture are "deposited daily" into Big Picture's bank accounts (*id*. at LVD-DEF00002342); and (3) requires Ascension to provide an Operating Budget and Servicing Budget for the lending enterprise (*Id*.).

124. And just like the Delegation of Authority Policy, the Intratribal Servicing Agreement cannot be amended, modified, or terminated without the consent of Eventide. Ex. 45 at Martorello_000080 ("Servicing Agreement. Neither Borrower nor any Subsidiary shall amend, modify, or terminate the Servicing Agreement. . . .").

125. The Loan and Security Agreement also contains a significant number of controls and restrictions over the lending business, such as a requirement that Big Picture maintain "a minimum portfolio size of fifteen million dollars ($15,000,000) to a maximum portfolio size in any given month equal to 1.1 times the previous month's portfolio size." *Id*. at Martorello_000075.

XI. Martorello Continues to Receive the Net Profits of the Lending Scheme and Directly Approves of Certain Matters Related to the Lending Business.

126. The Secured Promissory Note establishes a repayment schedule based on the profitability of the lending enterprise, requiring the Tribe to make monthly payments "equal to the amount of Net Cash Available." Ex. 46 at Martorello_000129.

127. The Net Cash Available is calculated as "[g]ross [r]evenues deposited" into Big Picture Loans' accounts, minus the following: (1) a monthly distribution to the Tribe of 2% of the Gross Revenues; (2) a monthly reinvestment amount of 2% of the Gross Revenues (to be used to increase the portfolio); and (3) ordinary expenses. *Id*. at Martorello_000129-130.

128. Martorello—through his companies and trust—has received substantial distributions from Big Picture and Ascension's operations. For example, Martorello produced a

spreadsheet entitled "Eventide Distribution Calc.," which tracks the inbound and outbound distributions to Eventide and its shareholders between March 2016 and April 2017. Ex. 47.

[redacted]

130. Sworn financials submitted in connection with Eventide's bankruptcy confirm the distributions between February 2018 and August 2019. Ex. 49 (excerpt from statement of financial affairs of Eventide regarding its payment to insiders). During this time, Eventide distributed: (1) $9,597,883 to Breakwater Holdings; and (2) $4,031,550 to Gallant Capital. *Id*.

131. Documents produced by Martorello also confirm that he approved operational changes to the lending business. For example, in June 2016, Martorello provided written consent for "Ascension Technologies, LLC's expansion and establishment of an office in Atlanta, Georgia." Ex. 50 at LVD-DEF00003643.

132. Martorello also approved requests for outside third parties to "reinvest in the business of BPL[.]" Ex. 51 at Martorello_000020; *see also* Ex. 52 at Martorello_00021 (consenting to a $720,593.16 reinvestment by an outside noteholder); *see also* Ex. 53 at Martorello_00022 (consenting to a $750,000 reinvestment by an outside noteholder); *see also* Ex. 54 at Martorello_00023 (consenting to a $900,000 reinvestment by an outside noteholder).

133. Also, the hiring of new employees for Ascension requires Martorello's approval, and he has exercised this power. *See* Ex. 55 at LVD-DEF00015613 (consenting to the hiring of a Risk and Analytics Manager, as well as a Vice President of Marketing).

[5] Breakwater Holdings is a wholly owned subsidiary of Martorello's trust. Ex. 48.

XII. The Annual Percentage Rates and Payment Histories of Class Members.

134. On March 13, 2019, this Court issued a Memorandum Opinion related to a subpoena duces tecum issued to TranDotCom Solutions, LLC ("TranDotCom"), which is the "company that maintains Big Picture's data relating to the allegedly usurious loans such as loan amounts, origination dates, and payments." Dkt. 415 at pg. 3.

135. The Court ordered that TranDotCom "segregate and preserve the data that it has agreed to produce" and "file a pleading in this Court certifying under oath that it has segregated and preserved the data" pending the Court's decision on the Plaintiffs' motion for class certification. Dkt. 416.

136. On May, 3, 2019, TransDotCom complied with the Court's Order and filed a certification under oath that it had preserved and will continue to preserve the data. Dkt. 480-1.

137. After the Court granted Plaintiffs' Motion for Class Certification on July 20, 2021, TranDotCom provided the data on CSV files. Ex. 56, Ebert Expert Report at ¶ 5.

138. This data contains "[e]ach of the data points necessary to establish the amount paid by consumers… without referencing any additional materials or third-party sources." *Id*. at ¶ 12.

139. Among other things, the data contains the following information for each loan: the payment date, the payment amount, the principal paid, and interest paid. *Id*. at ¶ 14.

140. The data also contains a field entitled "Loan State," which is the state that the consumer resided when the loan was originated. *Id*. at ¶ 10.

141. These data points have confirmed that there are a total of 7,774 consumers in the Red Rock RICO Class as certified by this Court. *Id*. at ¶ 28.

142. The data further confirms that those 7,774 consumers paid "$10,342,045.41 in interest and $4,283,421.94 in principal." *Id*. at ¶ 30.

143. These data points have confirmed that there are a total of 6,544 consumers in the Big Picture RICO Class as certified by this Court. *Id*. at ¶ 13.

144. The data further confirms that those 6,544 consumers paid "$12,287,519.50 in interest and $4,706,202.02 in principal." *Id*. at ¶ 15.

145. The data also contains the annual percentage rate imposed by each loan. *Id*. at ¶ 42.

146. "The average APR for the consumer loans was 727.80%," and the "lowest APR charged was 34.8887%." *Id*. at ¶¶ 42-45.

ARGUMENT

I. Summary judgment should be granted that the choice-of-law clauses are unenforceable, and the jury should be instructed that Virginia law applies.

Martorello has repeatedly pointed to the choice-of-law provision in the loan contracts absolves him from legal liability for Plaintiffs' claims. *See, e.g.*, Dkt. 37 at 18 (arguing that "the holding of *Settlement Funding* conclusively demonstrates that Virginia consumers may lawfully be charged interest rates exceeding those set by the Virginia usury statute where the consumer's loan agreement contains a choice of law provision[.]"); Dkt. 988 at 10 ("The loan agreements provide that they are governed by tribal law, including the Tribal Consumer Financial Services Regulatory Code[.]"). Similarly, Martorello argued that "Virginia law does not apply to the loans, which were originated, funded, managed, and collected by an arm of the Tribe (Big Picture) on the Reservation." Dkt. 1030 at pg. 23; *see also id*. at 24 ("The Indian Commerce Clause of the U.S. Constitution prevents the application of state laws to loans made by an Indian tribe.").

"Choice of law determinations, as well as contract interpretation issues, are pure legal questions well-suited to summary judgment." *Flintkote Co. v. Aviva PLC*, 177 F. Supp. 3d 1165, 1172 (N.D. Cal. 2016) (citation omitted)); *see also Hengle*, 2020 WL 855970 at *8 (holding that enforceability of tribal choice-of-law provision was "a controlling question of law"). Here,

summary judgment should be granted on this question because this Court and the Fourth Circuit have held that: (a) the contracts and tribal law in this case work in tandem to prospectively waive the rights of borrowers; and (b) enforcement of a tribal choice of law provision violates Virginia's compelling public policy against usurious lending.

A. As already determined, the tribal choice-of-law provision is unenforceable because the contract and tribal code prospectively waive the rights of borrowers.

The "Supreme Court has consistently accorded choice of forum and choice of law provisions presumptive validity," but this presumption "is not absolute, and, therefore, may be overcome by a clear showing that they are 'unreasonable under the circumstances.'" *Hunter v. NHcash.com, LLC*, 2017 WL 4052386, at *3 (E.D. Va. Sept. 12, 2017) (quoting *The Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 9 (1972)). Those circumstances include if "(1) their formation was induced by fraud or overreaching; (2) the complaining party will for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state." *Hunter*, 2017 WL 4052386, at *3 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991); *The Bremen*, 407 U.S. at 12–13, 15, 18)).

One such exception to enforcement of a choice-of-law provision "is the so-called 'prospective waiver' doctrine, under which an agreement that prospectively waives 'a party's right to pursue statutory remedies' is unenforceable as a violation of public policy." *Hengle*, 19 F.4th at 334 (citation omitted). This oft-repeated lesson boils down to the following: an agreement that "forbid[s] the assertion of certain statutory rights" is a violation of public policy and cannot be enforced. *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). Put differently, "a party may not underhandedly convert a choice of law clause into a choice of *no* law

clause—it may not flatly and categorically renounce the authority of federal statutes to which it is and must remain subject." *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 675 (4th Cir. 2016).

Waiving substantive claims is a hallmark feature of tribal lending agreements—despite having been now rejected by the Fourth Circuit *in six cases*, including this one. In each case, the Fourth Circuit applied the prospective waiver doctrine to invalidate contracts that have the same effect as the agreement here—the terms in the agreement amounted to "an unambiguous attempt to apply tribal law *to the exclusion of federal and state law*." *Dillon*, 856 F.3d at 336; *see also Hengle*, 19 F.4th 324 at 349; *Sequoia*, 966 F.3d at 293; *Haynes Invs.*, 967 F.3d at 344.

Applying these principles, this Court previously held that "[a]lthough there is no express renunciation of federal law, the net result of the loan contract is that the consumers have no meaningful way to vindicate their federal rights." *Williams v. Big Picture Loans, LLC*, 2021 WL 2930976, at *6 (E.D. Va. July 12, 2021). The Court reached this conclusion after extensive examination of the contracts and tribal law, such as the contract's provision stating that any complaint "shall be considered similar in nature to a petition for redress submitted to a sovereign government, without waiver of sovereign immunity and exclusive jurisdiction, and does not create any binding procedural or substantive rights for a petitioner." *Id.* (quoting ECF No. 1055-1). On appeal, the Fourth Circuit affirmed this Court's decision and held that "the Loan Agreement, and the Code provisions incorporated into the Loan Agreement make clear that the waiver does not permit the Borrowers to effectively vindicate their federal rights." *Martorello*, 59 F.4th at 84. This is now the law of the case. Thus, the choice-of-law provision cannot be enforced.

B. The tribal choice-of-law provision is also unenforceable under *Hengle*.

In addition to violating the prospective waiver doctrine, the tribal choice-of-law provisions are unenforceable under the Fourth Circuit's decision in *Hengle*. In that case, this Court "certified

for interlocutory review the question of whether enforcement of the governing-law clause would violate Virginia's compelling public policy." *Hengle*, 19 F.4th at 349. In answering this question, the Fourth Circuit concluded "that the Supreme Court of Virginia would not enforce the [tribal] governing-law clause because it violates Virginia's compelling public policy against unregulated usurious lending." *Id*. at 352. While acknowledging "that contractual choice-of-law clauses should be enforced absent unusual circumstances," the Fourth Circuit found that "the circumstances here—unregulated usurious lending of low-dollar short-term loans at triple-digit interest rates to Virginia borrowers—***unquestionably*** 'shocks… one's sense of right' in view of Virginia law." *Id*. (emphasis added) (citation omitted).

In reaching this conclusion, the Fourth Circuit explained that "[s]ince as early as 1734, the Virginia legislature has regulated usurious loans based upon 'considerations of public policy.'" *Id*. at 352 (citation omitted). After citing several cases acknowledging these considerations, the court further added that: "Virginia's legislature has signaled the importance it attaches to the usury laws by enacting an anti-waiver provision, which states that '[a]ny agreement or contract in which the borrower waives the benefits of [Virginia's usury laws] or releases any rights he may have acquired under [those laws] shall be deemed to be against public policy and void.'" *Id*. Such a provision, the court explained, is "evidence that a state usury statute represents a fundamental policy of the State that overcomes a contractual choice-of-law clause." *Id*.

Because of Virginia's fundamental public policy against usurious lending, the Fourth Circuit declined to enforce the tribal choice-of-law clause. *Id*. at 352-353. So too here. Martorello's attempt to enforce a virtually identical provision is directly foreclosed by *Hengle*.

C. Virginia law applies to the loans as confirmed by *Hengle*.

In *Hengle*, the Fourth Circuit found that identical conduct—the making and collection of internet loans—constitutes off-reservation conduct subject to nondiscriminatory state regulation, such as Virginia's usury law. *Hengle*, 19 F.4th at 348. In doing so, the Fourth Circuit rejected the tribal officials' argument that "the conduct at issue here occurred on the reservation," including their reliance on a statement in the loan contracts that they were "made and accepted in the sovereign territory of the Habematolel Pomo of Upper Lake." *Id.* (citations omitted). The Fourth Circuit further explained that "the conduct alleged is not limited to where the parties 'made and accepted' the agreements," but rather, where the loans were marketed, taken out, and collected—all of which was performed in Virginia. *Id.* Such activities, the court concluded, "are 'directly analogous to the lending activity that other courts have found to *clearly* constitute off-reservation conduct subject to nondiscriminatory state regulation." *Id.* at 348–49 (emphasis added) (quoting *Hengle*, 433 F. Supp. 3d at 876; and citing *Gingras*, 922 F.3d at 121; *Otoe-Missouria*, 974 F. Supp. 2d at 360–61 (S.D.N.Y. 2013); *Colorado v. W. Sky Fin., LLC*, 845 F. Supp. 2d 1178, 1181 (D. Colo. 2011); *United States v. Hallinan*, 2016 WL 7477767, at *1 n.2 (E.D. Pa. Dec. 29, 2016)).

Here, it cannot be genuinely disputed that the conduct at issue—the making and collection of the loans—occurred off the reservation. Document after document establishes that Red Rock and Big Picture were online lending entities, not storefront lenders. *See, e.g.*, Ex. 1 at Martorello_026259 (servicing agreement's acknowledge that Red Rock desired to "engage in internet-based unsecured lending,"); Dkt. No. 106-1 at ¶¶ 16, 47, 49, 55, 70, 100 (sworn testimony from Martorello repeatedly characterizes the business as online lending). It also cannot be disputed—based on the loan data—that Virginia borrowers received and repaid these loans. *See, e.g.*, Ex. 56 at ¶ 10. Virginia law, thus, applies to such conduct under the Fourth Circuit's decision

in *Hengle*, which is also consistent with multiple other decisions on this issue.[6]

What's more, Virginia law should apply to the loans and transactions because "[t]here is no viable alternative," *Gingras v. Rosette*, 2016 WL 2932163, at *15 (D. Vt. May 18, 2016), since the tribal law itself violates the prospective waiver doctrine as already determined by this Court and the Fourth Circuit. *Martorello*, 59 F.4th at 89. Put differently, implicit in any choice-of-law analysis is the availability of two enforceable governing laws. But just as in *Gingras* and *Brice*, it naturally flows that the LVD's law cannot be applied as the default governing law because the chosen law itself violates the prospective waiver doctrine. *See Brice*, 548 F. Supp. 3d at 899–900 (granting summary judgment on the law that applied because "California law is the only law left that could apply to the plaintiffs' and class members' claims" because tribal law prospectively waived borrowers' remedies). Thus, Virginia law is the only option because "the Loan Agreement, and the Code provisions incorporated into the Loan Agreement make clear that the waiver does not permit the Borrowers to effectively vindicate their federal rights." *Id*. at 84.

II. Summary judgment should be granted on Martorello's tribal immunity defense.

The Court should also grant summary judgment on Martorello's third affirmative defense that a "cause of action based on lending by Native American tribal entities" is "barred by the operation of Tribal immunity." Dkt. 35 at pg. 23. This affirmative defense demonstrates a fundamental misunderstanding of sovereign immunity and, thus, its lack of any impact on the claims. Under Martorello's theory, tribal sovereign immunity provides tribal businesses, as well as those that partner with them, with a free pass to violate state laws with impunity.

[6] *See also Consumer Fin. Prot. Bureau v. CashCall, Inc.*, 2016 WL 4820635, at *5 (C.D. Cal. Aug. 31, 2016) (holding that California law applied to internet loans because the "borrowers were citizens or residents" of California, "the borrowers applied for the loans from their home states, the funds were received by the borrowers in their home states, and borrowers made payments on their loans from their home states."); *MacDonald v. CashCall, Inc.*, 2017 WL 1536427, at *10 (D.N.J. Apr. 28, 2017) (same with respect to New Jersey consumer).

Martorello is simply wrong as a matter of law—the Supreme Court has held and consistently reaffirmed that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973) (citing *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968)). Put differently, tribal immunity "limits how states can enforce their laws against tribes or arms of the tribes, but . . . it does not transfigure debts that are otherwise unlawful under RICO into lawful ones." *Neff*, 787 F. App'x at 92.

Based on these principles, the Fourth Circuit confirmed in *Hengle* that "substantive state law applies to off-reservation conduct, and although the Tribe itself cannot be sued for its commercial activities, its members and officers can be." *Hengle*, 19 F.4th at 349 (citation omitted). It further added: "though the tribe itself retains sovereign immunity, it cannot shroud its officials with immunity in federal court when those officials violate applicable state law." *Id*. By extension, it naturally flows that sovereign immunity neither protects nor legalizes the conduct of Martorello or bars a cause of action against non-tribal members who partner with Tribes.

III. Summary judgment should be granted that Martorello violated § 1962(d) as to Plaintiffs and the Class Members.

RICO generally prohibits four types of activities: (1) § 1962(a) prohibits a person who has received income through the collection of an unlawful debt from investing any of that income in the enterprise; (2) § 1962(b) prohibits a person from maintaining control over an enterprise through the unlawful collection of debt; (3) § 1962(c) prohibits a person from conducting the affairs of an enterprise through the collection of unlawful debt; (4) § 1962(d) prohibits any person from conspiring to commit any of the provisions in §§ 1962(a)-(c). 18 U.S.C. § 1962(a)-(d). RICO defines "unlawful debt" as a debt that was incurred in connection with "the business of lending

money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." 18 U.S.C. § 1961(6).

Under RICO's conspiracy statute, "there is no requirement of some overt act or specific act." *Salinas*, 522 U.S. at 63. Instead, a person may be liable as a co-conspirator "even if" they do not "agree to commit or facilitate each and every part of the substantive offense." *Id*. (citation omitted). This means that a person "may be liable for conspiracy even though he was incapable of committing the substantive offense." *Id*. at 64. If one person commits a substantive violation of RICO, another person may be held liable if he "knew about and agreed to facilitate the scheme." *Id*. at 66. "Accordingly, to prove a RICO conspiracy, two things must be established: '(1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense.'" *Hengle*, 433 F. Supp. 3d at 898.

A. It cannot be disputed that Martorello knew about the scheme.

The "point of making" a plaintiff show that conspirators had "some knowledge of the nature of the enterprise[] is to avoid an unjust association" of a conspirator who inadvertently facilitates a scheme, such as an internet provider. *United States v. Christensen*, 828 F.3d 763, 780 (9th Cir. 2015) (citation omitted). In this case, it cannot be disputed that Martorello had "knowledge" of the scheme. *See* KNOWLEDGE, Black's Law Dictionary (11th ed. 2019) (defining the word as "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact.").

As detailed in the Statement of Undisputed Material Facts, Martorello had an awareness of the scheme, including evidence of: (1) his participation in the negotiation, creation, and execution of the servicing agreements; (2) his and his companies receipt of [redacted] from the loans originated in the name of Red Rock; (3) his involvement in the NYDFS litigation; (4) the more

than a dozen emails authored by Martorello regarding the restructure, including the emails related to Martorello's insistence that non-tribal members remain in control of operations; and (5) his involvement in the rebranding and restructuring. In light of this evidence, there can be no genuine dispute of Martorello's knowledge of the scheme.

B. The evidence shows that Martorello furthered the scheme and knowingly accepted millions of dollars in benefits from it.

In addition to the knowledge requirement, a person must "adopt the goal of furthering or facilitating" the scheme to violate § 1962(d). *Salinas*, 522 U.S. at 63. A conspirator "may do so in any number of ways short of agreeing to undertake all of the acts necessary" for the completion of the substantive violation. *Id*. at 65. One such way could be proven "by evidence that the defendant agreed to facilitate a scheme by providing tools, equipment, cover, or space; [and] that the facilitation was knowing because the defendant was aware of the broader scheme, even if he was unaware of the particulars[.]" *United States v. Zemlyansky*, 908 F.3d 1, 12 n.6 (2d Cir. 2018). Another way would be showing that "the defendant knowingly benefitted from the scheme; and that other members of the enterprise intended to accomplish specific predicates." *Id*.

Based on the evidence, no reasonable juror could find that Martorello did not agree to facilitate the scheme. For example, as noted by the Fourth Circuit, "a 2011 email from Flint Richardson to Martorello stated that the Tribal co-managers were not going to be involved in Red Rock's lending business because Bellicose would completely operate it." *Williams*, 59 F.4th 87–88 (citation omitted). A few years later, in the first email to Tribal Council about the restructure, Martorello wrote candidly about his role in the business, proposing: "**Current Manager (myself)** will be locked in as the decision maker for 48 months[.]" Ex. 25 at JPB 00988 (emphasis added). And prior to the closing of the restructure, Martorello sent a consistent email stating: "**As far as I know, the Manager[s], don't really do anything**." Ex. 39 at Rosette_Revised_043978 (emphasis

added). No one can genuinely dispute the meaning of these emails or that they show, at a minimum, Martorello's facilitation of the scheme.

Martorello's facilitation of the scheme is further reflected by involvement with the creation and execution of key documents, like the initial servicing agreement between Red Rock and Bellicose. As explained above, this contract clearly establishes a venture "to engage in internet-based unsecured lending," and that Bellicose was "willing and able to provide such assistance, experience, expertise and instruction" to facilitate the unsecured lending business. Ex. 1 at Martorello_026260. Consistent with this, the contract further establishes that Red Rock was engaging Bellicose to provide "business management, consulting and professional services," and further delegated to Bellicose "the authority and responsibility over all communication and interaction whatsoever between [Red Rock] and each service provider, lender and other agents of [Red Rock]." *Id* at Martorello_026263. The Servicing Agreement also allowed Bellicose to enter into contracts in Red Rock's name and required delivery "of all contracts executed by [Bellicose] on behalf of [Red Rock]" on a "monthly basis." *Id*. at Martorello_026268. And critically, Bellicose also had the authority to "collect all gross revenues and other proceeds connected with or arising from the operation" of Red Rock. *Id.* at Martorello_026273.

Martorello's facilitation of the scheme is further reflected by his receipt of [redacted] By way of example and as detailed above, Martorello produced the excel spreadsheet entitled "Summary of Payments from January 1, 2012, through January 31, 2016." Ex. 2 at Martorello_028715. [redacted]

[redacted]

Martorello's facilitation of the scheme is further reflected by his efforts to rebrand Red Rock and his involvement in the ultimate restructure. For example, it cannot be disputed that Martorello emailed Hazen and Wichtman in July 2014, urging that Red Rock "needs a rebrand." Ex. 28 at Rosette_Revised_058409. Martorello further explained that "RRTL ha[d] been blacklisted and rolled through the mud in the press" following the *Otoe-Missouria* decision. *Id*. He added that "it's time to get away from the word '[p]ayday' and the black mark of RRTL before rules come out and things get hotter." *Id*. To accomplish the rebrand, Martorello suggested "forming ASAP a new LLC with a new domain/brand, for purposes of transferring all contracts, assets, bank accounts, liabilities etc. over to the new entities when ready." *Id*. Martorello's e-mail concluded that Bellicose would "gladly ***facilitate*** the work," but it needed "the entity formed and approv[ed] to begin doing" the rest of the work. *Id*. (emphasis added). This email and countless other documents demonstrate that Martorello was heavily involved in the restructuring efforts, as well as the creation of the documents that continued the lending enterprise.

In sum, while Martorello may dispute his involvement in the day-to-day operations (such as the marketing, origination, and collection on a particular date), it cannot be legitimately disputed that Martorello had high-level involvement in the facilitation of the scheme. Accordingly, partially summary judgment should be granted that Martorello violated § 1962(d)

VI. Summary judgment should be granted that a violation of § 1962(c) occurred.

A. Summary judgment should be awarded that an enterprise existed.

RICO defines an "enterprise" as "any individual, partnership, corporation, association, or

other legal entity, and any union ***or*** group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1691(4) (emphasis added). Here, it cannot be disputed that Red Rock and Big Picture—two limited liability companies—were enterprises as defined by 18 U.S.C. § 1691(4). Indeed, quite tellingly, both servicing agreements repeatedly use the word "Enterprise," as the word for Red Rock and Big Picture instead of their actual names. Ex. 1 at Martorello_26259 ("THIS SERVICING AGREEMENT… is made and entered into… by and between RED ROCK TRIBAL LENDING, LLC ("Enterprise"). . . ."); Ex. 44 at LVD-DEF00002337 (same as to Big Picture). Thus, it cannot be possibly disputed that an enterprise existed.

In addition and in the alternative, it cannot be disputed that an association-in-fact enterprise existed. The Supreme Court's decision in *Boyle*, recognized that RICO's definition of enterprise was "obviously broad" and included an "association in fact" enterprise. 556 U.S. at 944. Put differently, an enterprise may be a legally recognized entity like a corporation or an "association in fact enterprise," *i.e.*, "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583 (1981); *Boyle*, 556 U.S. at 948. To that end, the Supreme Court has held that an association-in-fact enterprise merely requires three structural features: (1) a purpose, (2) relationships among those associated with the enterprise, and (3) longevity sufficient to permit these associates to pursue the enterprise's purpose. *Id*. at 946. Indisputable evidence establishes each one of these features.

First, evidence that "the purpose of the enterprise was to make money" through "otherwise unenforceable loans or collecting unlawful debts" establish the purpose element. *Fleetwood Servs., LLC v. Complete Bus. Sols. Grp., Inc.*, 374 F. Supp. 3d 361, 374 (E.D. Pa. 2019). It can also be shown that defendants "associated with each other and nonparties for the common purpose of exploiting the sovereignty of the Tribe to engage in the practice of issuing usurious loans."

Solomon, 2019 WL 1320790, at *7. The Statement of Undisputed Material Facts establishes that Martorello and others associated together for the purpose of collecting the usurious debts, thereby establishing this element.

Second, the relationship feature is satisfied by allegations of "an informal, on-ongoing organization which operated as a unit" to provide "allegedly usurious loans." *See Fleetwood*, 374 F. Supp. 3d at 374. For instance, one court found that the relationships feature was satisfied in a similar case through allegations that: (1) American Web Loan served "as the nominal lender of the illegal loans"; (2) Curry was "the mastermind of the illegal lending scheme," and was the "de facto" controller "of the scheme's lending operations"; (3) Medley "provided, and continue to provide, financial backing to grow the illegal lending scheme"; and (4) the "[t]ribe served to enact and maintain certain tribal laws and create tribal business organizations, including American Web Loan," in "furtherance of the illegal lending scheme and to help shield the illegal lending scheme from federal and state law." *Solomon*, 2019 WL 132070 at *7–8. Here, it cannot be disputed that there were relationships and ongoing organizations. Indeed, there is a series of written agreements tying the parties to each other through contractual and financial obligations, including the servicing agreements, loan and security agreement, delegation of authority policy, and promissory note.

Third, the evidence easily establishes the longevity requirement, which simply "demands proof that the enterprise had 'affairs' of sufficient duration to permit an associate to 'participate' in those affairs through" the predicate act. *Boyle*, 556 U.S. at 946. But "[w]hile the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence." *Id*. at 948. Here, the length of the operations of the enterprise, which commenced in 2011 and continues through today, more than satisfies this minimal requirement.

B. The loans constituted unlawful debts as defined by RICO.

RICO defines "unlawful debt" as a debt that was incurred in connection with "the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." 18 U.S.C. § 1961(6). "As is evident" from the plain language, "the statute's definition of 'unlawful debt' invokes state as well as federal laws related to usury to provide the concept of 'unlawful[ness]." *United States v. Moseley*, 980 F.3d 9, 18 (2d Cir. 2020); *see also Goldenstein v. Repossessors Inc.*, 815 F.3d 142, 148 (3d Cir. 2016) (noting that RICO "encompasses efforts to collect on a usurious loan").

There can be no dispute that the interest rate charged on the loans to Class Members contained twice the enforceable rate established by Virginia law (24%). *See* 18 U.S.C. § 1961(6) (defining "unlawful debt"); Va. Code § 6.2-303(A) ("no contract shall be made for the payment of interest on a loan at a rate that exceeds 12 percent per year."). Here, "The average APR for the consumer loans was 727.80%," and the "lowest APR charged was 34.8887%." Ex. 56 at ¶¶ 42-45. Because the evidence shows that the loans exceed 24%, summary judgment should be granted that the loans constituted "unlawful debt."[7]

C. Persons associated with the enterprise engaged in the collection of the debt.

"Each prohibited activity is defined in 18 U.S.C. § 1962 to include, as one necessary element, proof either of 'a pattern of racketeering activity' or of 'collection of an unlawful debt.'" *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 232 (1989). "Unlike a 'pattern of racketeering activity' which requires proof of two or more predicate acts, to satisfy RICO's 'collection of unlawful debt' definition" the plaintiff "need only demonstrate a single collection." *United States v. Giovanelli*,

[7] To constitute unlawful debt, the debt must be incurred with the business of lending money. 18 U.S.C. § 1961(6). It cannot be genuinely disputed here that this element is not satisfied as the evidence shows Red Rock and Big Picture were online lending entities who made thousands of loans in Virginia alone. *See, e.g.*, Exs. 2 and 56.

945 F.2d 479, 490 (2d Cir. 1991); *see also Hengle*, 433 F. Supp. 3d at 891 ((“An action based on the collection of unlawful debts ‘requires only a single act of collection as a predicate for RICO liability.’”) (quoting *Proctor v. Metro. Money Store Corp.*, 645 F. Supp. 2d 464, 481 (2009)).

Here, the undisputed evidence demonstrates that—**at a minimum**—Red Rock, Bellicose, SourcePoint, Big Picture, Ascension, Eventide, and their employees were involved in an enterprise engaged in the unlawful collection of debt. The undisputed evidence shows that these entities entered into a series of agreements for the making and collection of unlawful debt. *See* Exs. 1, 15, and 43-46. The evidence further establishes that actual collection of unlawful debt occurred, including with respect to the named Plaintiffs and Class Members. *See* Ex. 56 at ¶¶ 57-70 (detailing the amounts paid by Plaintiffs). This data further shows that there are 7,774 consumers who meet the Red Rock RICO Class as certified by this Court, and those consumers paid “$10,342,045.41 in interest and $4,283,421.94 in principal.” *Id*. at ¶ 30. Similarly, the data confirms that 6,544 consumers in the Big Picture RICO Class, who paid “$12,287,519.50 in interest and $4,706,202.02 in principal.” *Id*. at ¶ 15. The trial should, therefore, focus on the amount to be awarded to Class Members, not whether the debt was unlawful in the first place.

In short, the evidence shows that multiple participants “were instrumental in setting up, and knowingly setting up, an enterprise whose sole purpose was to collect illegal debts.” *Brice*, 372 F. Supp. 3d at 985. The evidence further shows far more than “a single act of collection” to establish the predicate offense of collection of unlawful debt. *Hengle*, 433 F. Supp. 3d at 891. Accordingly, summary judgment should be entered that substantive violations of § 1962(c) occurred, thereby making anyone found to be a conspirator responsible for the acts of Red Rock, Bellicose, SourcePoint, Big Picture, Ascension, and Eventide.

Respectfully submitted,
PLAINTIFFS, *on behalf of themselves and the classes as certified by the Court*

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