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-00461-REP**
BIG PICTURE LOANS, LLC; *et al.*,	:	
Defendants.	:	

DEFENDANT MATT MARTORELLO MEMORANDUM OF LAW OF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Matt Martorello ("Martorello"), by and through undersigned counsel, hereby files his memorandum of law in opposition (the "Opposition") to *Plaintiffs' Motion for Partial Summary Judgment* [Dkt No. 1165] (the "Motion") and respectfully states as follows:

INTRODUCTION

Plaintiffs' claims are premised on the flawed assumptions that their loans were governed by Virginia law. This is incorrect. The sovereignty authority of the Lac Vieux Desert Band of Lake ("LVD" or Tribe")—as recognized by decades of Supreme Court precedent—requires application of LVD's laws, not Virginia's, a fact that is fatal to Plaintiffs' claims.

However, even if the Court ultimately determines that Virginia law applies to Plaintiffs' loans, material issues of fact remain with respect to Plaintiffs' § 1962(c) claim and § 1962(d) claim. With respect to both claims, Plaintiffs fail to establish through undisputed facts that Martorello

knowingly and intentionally agreed to facilitate the collection of unlawful loans, nor do they even attempt to establish that he did in their Motion. Even beyond Plaintiffs' failure to establish Martorello's knowledge and intent, Plaintiffs cannot prevail on their § 1962(d) claim because Plaintiffs do not show through undisputed evidence that there was a separate co-conspirator that also had knowledge that the loans were unlawful. As to the § 1962(c) claim, fact issues remain regarding whether Martorello directed or controlled the operations of either RRTL or Big Picture. For each of these independent reasons, Plaintiffs' Motion should be denied.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. Origins of the Tribe's online lending business

1. The LVD is a federally recognized Indian tribe whose members reside close to their ancestral home in Watersmeet, Michigan (the "Reservation"). 25 U.S.C. § 1300h.

2. LVD's constitution established the tribal council as the governing body of the LVD, which had the power to enact laws and manage the economic affairs of the LVD in order to "promote and protect the health, safety, education, and general welfare of the Band and its members." Ex. A at 1 (LVD Constitution); Ex. C (Williams Dec.) at ¶ 3.

3. After the 2008 recession hurt its casino and impeded its ability to generate revenue to provide essential funding for the Tribe's government, LVD began exploring online lending to fund its governmental services. *See* Ex. C (Williams Dec.) at ¶ 7-10, 12; Ex. D (Hazen Aff.) at ¶ 3-4; Ex. E (Weddle Dep.) at 75:17-78:6.

4. In 2009, LVD took steps to facilitate the development of such new businesses and introduced Rob Rosette, its counsel, to Scott Merritt, who had worked in the finance industry since 2000, with the hope the two would use their combined skills to research and develop a tribal lending operation. *See* Ex. D (Hazen Aff.) at ¶ 5; Ex. H (Rosette Dep.) at 73:8-23.

II. The Tribal Consumer Financial Services Regulatory Code' structure

5. On July 8, 2011, LVD enacted the Tribal Consumer Financial Services Regulatory Code ("Code") to "control" and "regulate" consumer lending entities that are wholly owned by LVD, operate from the reservation, and operate exclusively to "improve [LVD's] economic self-sufficiency". Ex. G (Code) at §§ 1.1, 1.2, 1.3, 2.4, 5.1.

6. The Tribe's lending operations are governed by the Code, which requires all regulated entities to "conduct business in a manner consistent with principles of federal consumer protection law." *Id.* at §§ 1.1(a), 1.1(f), and 6.2.

7. The Code also created the Tribal Financial Services Regulatory Authority ("TFSRA") to regulate online lending and protect consumers. *Id.* at §§ 1.1(i), 4.1. The Code vested the TFSRA with expansive powers to investigate and ensure Code compliance. *Id.* at §§ 4.1–4.18.

8. Under the Code, all people and entities engaged in tribal consumer financial services are required to be licensed and to comply with the Code and all applicable federal laws. (Code §§ 1.3(d), 5, 6, 7, 5.2(b)(8)).

III. The Tribe negotiates for Martorello to provide assistance to its lending business.

9. After years of Rosette's research, LVD contracted with Rosette and Flint Richardson (through Tribal Loan Management, LLC ("TLM")) and Scott Merritt (Tribal Loan Solutions, LLC ("TLS") to develop LVD's lending operations. *See* Ex. AAAA.

10. Through TLM and TLS, LVD identified additional expertise, first in online title lending and then from Martorello and his companies. *See* Ex. I (Wichtman Dep.) at 32:19-33:7, 65:17-66:24, 72:25-74:5; Ex. E (Weddle Dep.) at 17:15-18:16; Ex. J (Mansfield Dep.) at 47:9-22.

11. By the time the Tribe and Martorello were connected in August 2011, the Tribe had already decided to expand, had a basic framework for their lending operation, and even had a

preliminary deal structure in mind and draft deal documents that it provided to Martorello.[1]

12. In September 2011, LVD formed RRTL under LVD law to function as an arm of LVD with all of its operations on the reservation and to provide consumers with unsecured, small-dollar loans under the Code and applicable Federal law. *See* Ex. C (Williams Dec.) at ¶¶ 11-26; Ex. D (Hazen Aff.) at ¶ 6; Ex. F, Ex. K (RRTL Articles of Organization).

13. In October 2011, Martorello engaged prominent Indian law lawyer, Jennifer Weddle, co-head of Greenberg Traurig's ("GT") Indian law department, to help ensure the loans and relationships between his companies and LVD were lawful. *See* Ex. E (Weddle Dep.) at 30:20-32:15; 34:25-38:17; 47:19-50:24; 55:5-57:17; *see also* Ex. L (Weddle Aff.) at ¶ 2-4, 6, 13-15.

14. More than a dozen well-respected GT lawyers covered everything from the loan agreements, the Code, the RRTL website and disclosures, and the agreements with servicing entities and creditors were engaged on the matter to vet the deal. *See* Ex. E (Weddle Dep.) at 211:10-212:14; 26:15-29:2; 121:25-123:25; Ex. L (Weddle Aff.) at ¶ 6; Ex. UU (ROSETTE_REVISED_002169) (GT task list for completing RRTL deal). Weddle testified that she was involved because her view was that LVD's loans are lawful. *See* Ex. E (Weddle Dep.) at 66:4-69:6.

15. On October 25, 2011, RRTL entered into the Servicing Agreement with Bellicose, which Martorello managed, for vendor management services, compliance management assistance, marketing material development, pre-qualified leads, and the development of risk modeling and data analytics. Ex. PP (MARTORELLO_003474–003512); Ex. E (Weddle Dep.) at 19:03–21:01,

[1] *See, e.g.*, Ex. JJJJ (ROSETTE_REVISED _048832) at 048833 (Tribe has established a Tribally charted LLC and has passed a lending law ordinance with its lending commission); Ex. KKKK (ROSETTE_REVISED _048835) (LVD's agents inform Martorello of LVD's minimum Tribal Net Profits requirements, proposed contractual term, and other deal terms); Ex. MMMM (ROSETTE_REVISED _052381) (LVD's agents forwarded initial draft of servicing agreement).

117:03–118:11; Ex. D (Hazen Aff.) at ¶ 10.[2]

16. GT and Rosette law used a National Indian Gaming Commission ("**NIGC**") template as the template for its Servicing Agreement with Bellicose. Ex. E (Weddle Dep.) at 118:12–119:16. The parties chose the NIGC template in order to already be compliant with any future federal regulation. Ex. E (Weddle Dep.) at 117:06–119:16.

17. The Servicing Agreement provides that the SPVI would be paid a performance-based fee. *See* Ex. O at § 3.5. The economics between the Tribe and Mr. Martorello's company caused Ms. Weddle no concern and were "standard." *See* Ex. E (Weddle Dep.) at 103:1-104:3 and 105:4-10.

IV. RRTL's lending operations

18. Tribal Council member Mansfield established RRTL's office. *See, e.g.,* Ex. J (Mansfield Dep.) at 45:9-46:19; 47:3-7; Ex. GG (CM0000286); Ex. HH (CM0000287); Ex. FF (CM0000157); Ex. AA (ROSETTE_REVISED_044773). In January 2012, RRTL began originating loans, all of which were authorized and consummated by RRTL on the reservation. *See* Ex. D (Hazen Aff.) at ¶¶ 26-28; Ex. C (Williams Dec.) at ¶ 19; Ex. J (Mansfield Dep.) at 53:11-54:18; Ex. I (Wichtman Dep.) at 272:3-20; 244:2-18 Ex. P (Gravel Dep.) at 158:1-19; Ex. S (Dowd Dep.) at 74:18-75:7. *See also* Ex. PPP (ROSETTE_REVISED_034686) (illustrating the processes of a 2013 loan application from lead generation through final determination ending with RRTL deciding to originate, withdraw, or send back to the call center for more verification of a particular loan application).[3]

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[2] The Servicing Agreement was later assigned by Bellicose VI to SourcePoint VI, LLC ("SPVI"), a wholly-owned subsidiary of Bellicose Capital, LLC ("Bellicose").

[3] Ex. EEEE (ROSETTE_REVISED_046999) (Jan. 2013 emails regarding processing payments); Ex. ZZZ (ROSETTE_REVISED_037655) (Nov. 1, 2011 operations manager job description including daily origination of loans and processing ACH files); Ex. S (Dowd Dep.) at 185:15–23

19. While Bellicose provided its services, the Servicing Agreement provided that Bellicose "had no authority to engage in origination activities, execute loan documentation, or approve the issuance of loans to third parties. The Servicing Agreement makes clear that final determination as to whether to lend to a consumer "rest[ed] with [RRTL]" and further that "the criteria used to extend funds to individual borrowers remain[ed] within the sole and absolute discretion of [RRTL]" and that "[only RRTL] shall execute all necessary loan documentation." *See* Ex. O at §§ 4.1.1, 4.2.1(i)); *see also* Ex. P (Gravel Dep) at 22:20–23:04; Ex. J (Mansfield Dep.) at 60:02–61:21 (testifying that recommendations from SPVI must be approved by RRTL co-managers).

20. To that end, while SPVI used its proprietary formulas to generate prequalified leads of persons who would likely qualify for a loan, the leads—RRTL's potential customers—became RRTL's intellectual property. Ex. V (2020.07.21 Hearing Tr. at 62:02–62:07).

21. The methodology underlying the marketing campaigns and the content of the campaigns to drive pre-qualified leads to RRTL were extensively reviewed by RRTL for its feedback and approval, including the necessary approvals of both SPVI and RRTL's independent compliance boards pursuant to their compliance management systems.[4] *See also* Ex. NNN

("QQ: Did Sourcepoint ever collect on any Red Rock loan? A: No, I don't believe so"), *Id.* at 79:19–80:1 (testifying that a loan origination depended on completion of verification process).

[4] Mansfield confirmed that this process was standard. Ex. J (Mansfield Dep.) at 55:16–56:03 (testifying that "when we went through direct mail, when we went through some of the strategies for [sic] to get to the people to get the loans, acquisition of customers, the actual how – how the form of that was set for it"); *id*. at 58:15–25 (noting that the direct mail criteria "was explained to me at the time of who they were sending out to, and I approved it."); Ex. S (Dowd Dep.) at 186:2–12 (testifying that Ms. Hazen would review and approve marketing materials before they were implemented); *id.* at 191:24–192:13 (testifying that emails presenting recommendations would "precede a formal recommendation document"); *id.* at 193:14–194:02 (testifying that recommendations at RRTL were approved **by compliance** and legal before any change or action was recommended or approved).

(ROSETTE_REVISED_032369).

22. There were "a lot of instances over the years" when SPVI's recommendations were not approved. *See* Ex. S (Dowd Dep.) at 36:2-22, 37:3-20; 186:2–12. *See also* Ex. DDDD (ROSETTE_REVISED_046892) (Hazen would not approve a recommendation); Ex. MM (ROSETTE_REVISED_058722) (showing that a recommendation took nearly two weeks for approval and needed to go to RRTL's board).

23. RRTL's Co-Managers, Hazen and Williams, who were at all times members of the Tribal Council, had complete authority to manage the day-to-day operations of RRTL. Ex. CC (Williams Dec. (Galloway)) at ¶ 4; Ex. Z (Hazen Dep.) 25:15–19; Ex. NN [(LVD-DEF00016694) RRTL Operating Agreement § 5.1(a)] ("Once hired or appointed by [RRTL], the Manager may have the power and authority to do and perform all actions as may be necessary or appropriate to the conduct of the [RRTL's] business."). Hazen testified she did not ask permission from Martorello to make decisions in lending business. Ex. Z (Hazen Dep. at 99:12–100:5; *see also id.* at 14:19-22).

24. For example, RRTL's Co-Managers hired, trained and fired employees[5]; managed loan approval, origination, collections and consumer settlement offers[6]; reviewed and approved contracts and other legal documents[7], and pursued litigation in the *Otoe-Missouria* matter over

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[5] *See, e.g.,* Ex. SSSS (ROSETTE_REVISED_053208) (co-manager hiring compliance manager, Jennifer Steiner); Ex. AAAA (ROSETTE_REVISED_040016) (termination of employee by co-manager); Ex. EEEE (ROSETTE_REVISED_046999) (in January 2013, Hazen emails regarding immediate need for two open positions, with a third possible on a later date depending on availability of viable candidates).

[6] *See, e.g.,* Ex. BBBB (ROSETTE_REVISED_045131) (showing co-manager reviewing settlement offers for delinquent loan accounts);

[7] *See, e.g.,* Ex. J (Mansfield Dep.) at 47:3–07; Ex. E (Weddle Dep.) at 108:5–14; (ROSETTE_REVISED_029177–79) (customer facing online materials "need review and approval prior to production").

Martorello's objections.[8]

V. Martrello's belief that the loans are lawful and tribal law applies to RRTL's loans is repeatedly reaffirmed.

25. On or about November 30, 2012, GT issued two legal opinions after reviewing numerous relevant documents and contracts relating to RRTL's lending business and opined that RRTL's loans "are enforceable under the Tribe's laws" and that agreements with the respective third party creditors were valid, enforceable and consistent with applicable tribal and federal laws. *See* Ex. M (Martorello_012696); Ex. VVVV (ROSETTE_REVISED_001029); Ex. FFF (ROSETTE_REVISED_003832); Ex. GGG (ROSETTE_REVISED_003836).

26. Throughout 2012 and 2013, Ms. Weddle drafted, reviewed, and edited, in collaboration with RRTL's attorney Karrie Wichtman, numerous responses to letters from state attorneys general explaining the "inapplicability" of state laws and that RRTL's business was "not subject to state regulation." *See, e.g.*, Ex. JJJ (ROSETTE_REVISED_007062); Ex. RRR (ROSETTE_REVISED_035699).

27. In August 2013, New York threatened the payment processors of 35 online lenders, including RRTL's. *See Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 356-57 (S.D.N.Y. 2013), *aff'd*, 769 F.3d 105 (2d Cir. 2014) (Otoe-Missouria).

28. In response, Weddle and Martorello advised LVD to not file suit, and instead undertake government-to-government consultation and publications describing "why tribal lending is legal" *See* Ex. LLL ROSETTE_REVISED_010296; Ex. KKK ROSETTE_REVISED_007380 (Chairman Williams intends to meet with NY DFS); Ex. VV ROSETTE_REVISED_002732 (outlining how "NY takes positions offensive to Tribal

[8] Ex. QQQQ (ROSETTE_REVISED_052701); Ex. RRRR (ROSETTE_REVISED_053063).

sovereignty and legally incorrect…" and suggests explaining "exactly how DFS has it wrong").

29. On August 18, 2013, Weddle emailed Martorello and Ms. Wichtman a draft response authored by the other co-head of GT's Indian law practice, Troy Eid, which details federal Indian law and concludes that state law does not apply to tribal online lending. *See* Ex. T, Ex. CCC (ROSETTE_REVISED_002801-16 and 002819.

30. In an email sent on August 22, 2013 to Mr. Martorello, Ms. Weddle attached a draft letter to RRTL's ACH process wherein she states "[t]here is no applicable state law here." Ex. HHH (ROSETTE_REVISED_004276) at 4277 (emphasis in original).

31. On September 9, 2013, Ms. Wichtman, RRTL's attorney emailed a legal opinion to Rick Gerber, CEO of Chippewa Valley Bank ("CVB") where RRTL maintained its accounts, stating that "State law is not applicable to any of the Tribe's lending entities or their activities." *See* Ex. U (Chippewa_000009).

32. Consistent with this opinion and others, Ms. Wichtman said she has always maintained her opinion that RRTL's and Martorello's conduct was lawful and she had numerous conversations with Ms. Weddle and Mr. Martorello to that effect. *See* Ex. I (Wichtman Dep.) at 48:2-51:8

33. In response to concerns voiced by banks reluctant to do business with RRTL as result of regulatory uncertainty, Martorello recommended to the Tribe that it register with the CFBP because there was "nothing to hide thanks to being fully federally compliant." *See* Ex. FFFF (ROSETTE_REVISED_047091).

34. On October 8, 2013, after the District Court issued its decision in *Otoe-Missouria*, Rob Rosette, RRTL's attorney, issued another letter to RRTL's ACH processor explaining that he believed the conclusion reached in the decision was incorrect and that tribal law applied to RRTL's

loans. *See* Ex. QQ (MidMarch_DD 000536).

35. In April 2014, Ms. Weddle published an article in The Federal Lawyer extensively detailing why tribal lending is lawful, which she shared with Mr. Martorello. *See* Ex. WWW (Weddle, April 2014).

36. On May 9, 2014, Rosette LLP issued yet another legal opinion concluding that "RRTL is a Tribally-owned and operated lending company and legal enterprise governed by Tribal laws, regulated by Tribal officials, and overseen by Tribal leadership…." And "Unless and until Congress explicitly abrogates tribal sovereignty in the arena of short-term online lending, loans made by Indian tribes within their sovereign powers and pursuant to tribal authority, procedures and regulations should be deemed lawful." *See* Ex. GGGG (ROSETTE_REVISED_047176).

37. In approximately June 2014, RRTL registered with the CFPB portal to co-regulate consumer complaints with the CFPB. *See* Ex. JJ. By May 2015, Chairman Williams even submitted a statement to the CFPB regarding its potential rules relating to small dollar lending. *See* Ex. KK.

38. On October 1, 2014, although affirming the district court's denial of a preliminary injunction, the Second Circuit confirmed the framework for evaluating the inapplicability of state law to the Tribe's lending operations as had been set forth in prior legal opinions received by Mr. Martorello from the Tribe's counsel and Ms. Weddle. *See Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.,* 769 F.3d 105 (2d Cir. 2014). That same day, the Tribe's counsel characterized the decision as a "win" and also issued a press release describing the decision as "a clear victory." *See* Ex. WW (ROSETTE_REVISED_053383). Martorello "[a]greed." *See id.*[9]

[9] The press release is at Ex. N and available at https://turtletalk.blog/2014/10/01/rosette-firm-on-the-second-circuits-decision-in-otoe-missouria-tribe/

39. Consistent with the press release issued by his office, Mr. Rosette testified that the final outcome of *Otoe-Missouria* validated the legal premise of RRTL under *Cabazon* and confirmed that he shared that opinion with Mr. Martorello. *See* Ex. H (Rosette Dep.) at: 65:6-66:13

40. Critically, Martorello did not attempt to hide or quickly sell his business after *Otoe-Missouria*. Rather, he immediately urged RRTL to engage in "[f]ace to face meetings with state DFIs (for example) to talk about this case, co-regulation and the LVD lending business." Ex. RR (ROSETTE_REVISED_001110).

41. On December 29, 2014, the Tribe entered into a Memorandum of Understanding with the New Mexico Attorney General's Office on a government-to-government basis relating to the Tribe's lending business. *See* Ex. LL (LVD-DEF00006175).

42. In April 2015, Ms. Weddle authored another article published in The Federal Lawyer detailing differences in tribal and state policy choices and stating "[i]nternet consumer lending" is an "area[] where state law has no force or effect on tribal entities" and "Congress has not acted to vest states with power over tribes [in the area of Internet consumer lending]. Instead, Congress has done the opposite…" *See* Ex. VVV (Weddle, April 2015); Ex. WWW (Martorello_012237).

43. Bellicose's in-house counsel, Daniel Gravel, similarly confirmed that he and Martorello received advice from multiple law firms that led them to believe that the loans and the business relationship between the parties was lawful. *See* Ex. P (Gravel Dep.) at 24:07–26:01, 32:03–33:07; 86:03-11. No one suggested that Martorello or any of his business entities were doing anything illegal, or that tribal law did not apply to the lending contracts. *Id.* at 71:16–72:22, 75:18–76:07, 88:05–15.

VI. LVD Purchased Bellicose and its Subsidiaries in January 2016, after Years of Negotiations and Plans for LVD to Integrate Third-Party Services.

44. Hazen and Wichtman first asked Martorello to consider selling the business to the Tribe in 2012. *See* Ex. SS (Hazen Dep. Smith) at 81:8-82:3; Ex. J (Mansfield Dep.) at 186:15-20; Ex. E (Weddle Dep.) at 227:14-229:20. Martorello suggested to sell a copy of SPVI's IP and train RRTL to use it. Ex. I (Wichtman Dep.) at 30:1-32:17; Ex. TT; Ex. IIII (Rosette_Revised_048729).

45. In 2013, after the district court decision in *Otoe-Missouria*, Martorello rejected opportunities to sell Bellicose to LVD for purely economic reasons. Ex. LLLL (ROSETTE_REVISED_052247) (December 2013, email in which Martorello rejects a potential sale transaction—opting, instead for "status quo"—for purely economic reasons).

46. In July and August 2014, LVD pursued a different sale structure, which was not, at least initially, economically advantageous for Martorello. Ex. HHHH (ROSETTE_REVISED_047747).

47. On August 14, 2014, Rosette lawyers sent Martorello new concepts, which this time "contemplate[d] a purchase price that [was] a multiple of the portfolio's existing annual revenue stream…" and Martorello was now particularly interested Ex. PPPP (ROSETTE_REVISED_052619).

48. Around the same time, LVD created Big Picture Loans, LLC ("**BPL**"), by passing LVD Council Resolution 2014-044. Ex. EE Hazen Dec. (Duggan) at ¶ 12.

49. The Tribe's decision to rebrand away from RRTL's brand was regardless of the proposed sale. Ex. UUUU (ROSETTE_REVISED_053251).

50. Still, while LVD was pressing to meet quickly, tax considerations were Martorello's priority. Ex. OOOO (ROSETTE_REVISED_052616); Ex. CCCC (ROSETTE_REVISED_046191).

51. Rather than exiting the space, Martorello also indicated that he was interested in

still launching a servicing business for another Tribe, Middletown. Ex. NNNN (ROSETTE_REVISED_052400).

52. Soon thereafter, Martorello put together a counter-offer to reflect the multiple recommended to him by the Rosette attorney and adequately capture the value of the business that LVD was intent on buying. Ex. OO (LVD-DEF00020785); Ex. XXX (ROSETTE_REVISED_037600) (August 22, 2014, email responding to LVD's July 2014 proposed term sheet seeking to gauge "interest in purchasing the necessary Servicing entities."); Ex. YYY (ROSETTE_REVISED_037605) (attachment to August 22, 2014 email).]

53. In response to Martorello's proposal, LVD inquired about the "next steps to move this forward at a rapid pace." Ex. TTTT (ROSETTE_REVISED_053244). It was the Tribe—not Martorello—who wanted to complete the sale a quickly as possible.

54. Martorello's decision as to the timing of the sale was motivated in large part by the fact that he and his wife were expecting their first child in August 2015 and wished to move back to mainland United States which would cause tax benefits in Puerto Rico to expire. Ex. W (7.22.20 Hearing Tr.) at 225:25–227:20].

55. Once the terms of the proposed sale had progressed, Martorello retained counsel with expertise in such transactions, an Indian law attorney and an adjunct professor of Indian law. *See* Ex. UUU (Williams CV). Mr. Williams has testified that he drafted the documents relating to the sale of Bellicose to the Tribe based on his belief that state laws do not apply to tribal lending entities. *See* Ex. J (Williams Dep.) at 6.22.20 at 20:10-21:11; 58:20-61:4; 116:17-117:2; 120:25-123:14 126:1-9: 146-3-149:21.

56. In early 2015, LVD created Tribal Economic Development Holdings, LLC ("**TED**"), as a wholly owned and operated economic arm and instrumentality of LVD. Ex. EE

Hazen Dec. (Duggan) at ¶ 15. LVD was the sole member of TED with Michelle Hazen and Chairman Williams as co-managers. *Id.* at ¶ 15; Ex. CC Williams Dec. (Galloway) at ¶ 4.

57. LVD also formed Ascension Technologies, LLC ("**Ascension**"), as a wholly owned and operated subsidiary of TED. Ex. EE Hazen Dec (Duggan) at ¶ 15. Similar to BPL, Hazen and Williams were appointed co-managers of Ascension. Ex. D Hazen Aff. (Williams) at ¶ 19; Ex. CC William Dec. (Galloway) at ¶ 4(b); Ex. QQQ McFadden Depo (Smith) 86:15–17.

58. In 2015, the Tribal Council hired Brian McFadden as President of Ascension pursuant to LVD Tribal Council Resolution T2015-10. Ex. XX McFadden Dec. (Williams) at ¶ 6. LVD delegated to McFadden the authority to manage the day-to-day operations of Ascension and McFadden reports exclusively to Ascension's Co-Managers and the LVD Council. *Id.* at ¶¶ 7 & 9; Ex. QQQ McFadden Depo (83:19–84:01).

59. Delegating authority to McFadden was recommended by John Williams, counsel for entities held by Martorello. Ex. BB John Williams Depo (Williams & Galloway) at 116:17–117:12.

60. A sale ultimately closed in January 2016 in exchange for a variable payment note of unknown sum because it sunsets after seven years though it was capped at $300 million. *See* Ex. YY at ¶ 1.2-3.

61. As with RRTL, the distributions contemplated by the note to Eventide were routine for both tribal online lending and non-Indian online lending and fintech contracts under state law. See Ex. EEE (Merritt Dep.) at 53:4-20.

62. LVD forecasted the purchase would allow the Tribe to generate over $50 million per year by January 2023. *See* Ex. UU.

63. Also in February 2016, BPL and Ascension entered into the Intratribal Servicing

Agreement ("**ISA**"). Ex. II (LVD-DEF00002335). As Bellicose ceased to exist after it was acquired by LVD, BPL contracted with Ascension for marketing, technology, compliance, and vendor services. *See generally*, Ex. II ISA. This allowed LVD to bring "in-house" the services previously completed by third party vendors, such as Bellicose.

VII. BPL's lending operations

64. BPL is wholly owned by LVD, organized under LVD law, and operated by LVD under LVD law. Ex. DD (Hazen Dec. (Smith)) at ¶ 4. BPL's only place of business is on the LVD Reservation. *Id.* at ¶ 8. The Tribal Council created BPL to help the Tribe achieve its long-term goals of self-sufficiency and self-determination. Ex. Z (Hazen Depo (Williams)) at 34:04–35:20.

65. Under the ISA, BPL retains control over its operations. *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 183 (4th Cir. 2019) ("The Intratribal Servicing Agreement, which lays out the relationship between the two Entities, indicates that Big Picture remains in control of its essential functions."). Further, the ISA expressly provides that "[Ascension] has no authority to engage in origination activities, execute loan documentation, or approve the issuance of loans to consumers. *Id.*; Ex. II at § 4.1.

66. The Tribal Council retains significant oversight authority over BPL. Tribal council may appoint and remove managers, designate authority to appointed managers, and may waive BPL's sovereign immunity. Ex. R (BPL's 2nd AM. ROG resp. (Williams) # 19. Additionally, LVD requires monthly meetings with BPL's upper management and also requires annual business strategy planning meetings with LVD Tribal Council. *Id.*

67. As SPVI did for RRTL, Ascension provides pre-qualified leads for BPL. The ISA between BPL and Ascension assigns to Ascension the duties to provide pre-qualified leads as well as provide the "necessary credit-modeling data and risk assessment strategies" BPL can use to determine whether to make a loan. *Williams*, F.3d at 183. However, "the [ISA] also provides that

the 'criteria used to extend funds to individual borrowers will remain within the sole and absolute discretion" of Big Picture and that Big Picture 'shall execute all necessary loan documentation." *Id.* "In other words, the fact that Big Picture currently chooses to utilize Ascension's criteria does not mean that it does not have the power to choose differently in the future." *Id.*

68. All BPL loans are originated and collected on the reservation, its website hosted there, no third party participates in BPL's underwriting, collection or loan servicing processes, and no third party servicer providers are entities owned or controlled by Martorello. "Final determination as to whether to lend to a consumer rests with [BPL] and its Subsidiaries.") [ISA § 4.1].

69. Once an applicant signs the loan agreement, it still may take multiple days for the lender to accept the application. Ex. WWWW [Given Decl., Ex. 3 at 6–7, 26, 30.] see also Given Decl., Ex. 4 ("Duggan Dep.") at 84:16-85:25]; *see also id.*, Ex. 3 at 32. Loan origination is always done on the LVD Reservation—never elsewhere. Ex. SS [Hazen Depo (Smith) 50:02–19, 51:20–23].

VIII. After LVD's purchase of Bellicose, Martorello's role in the lending operations ends.

70. After LVD's purchase of Bellicose in January 2016 (disclosed in a press release issued at that time), Martorello's involvement with LVD's lending operations ended as it pertained to any consumer loan made by BPL. *See* Ex. XX (McFadden Dec.) at ¶ 10; Ex. S (Dowd Dep.) at 208:18-210:20; Ex. OOO (BPL Interrogatory Responses) at 19-20.

71. Since the sale, Martorello has had nothing to do with BPL other than being a representative of its creditor, Eventide. Ex. S (Dowd Dep.) at 207:14–209:08. Neither Eventide nor Martorello has ownership in or control over Ascension, nor have they ever participated in the day-to-day operations of Ascension. Ex. XX (McFadden Dec. (Williams)) at ¶ 10; Ex. QQQ (McFadden Depo (Smith)) at 86:18–24. Martorello is not involved in the business operations of

Ascension or BPL. Ex. SS (Hazen Dep. (Smith)) 43:21–44:02.

72. Unless Ascension needs to expand its budget for operational needs, Ascension is not required to, and does not, seek approval from Martorello or Eventide for any decisions regarding day-to-day operations including: operations, personnel, revenues, distributions, or contracts with third party vendors and service providers. Ex. XX (McFadden Dec. (Williams)) at ¶¶ 10–12.

73. Moreover, neither Martorello nor Eventide have ever provided consulting services, whether formal or informal, to Ascension or provided advice to Ascension regarding operations, personnel, marketing, underwriting, or compliance, or assisted Ascension with provisions of any services to BPL. *Id.* at ¶ 13.

74. Between about November 2018 and July 2020, TED stopped paying ECA and defaulted on its Promissory Note. *See, e.g.*, Ex. ZZ (Notice of Default); *see also* Ex. AAA (M. Martorello Dep.) at 99:25-100:2; *id.* at 101:6-8; *see also* Ex. BBB (Hazen Dep.) at 79:16-23; 80-

75. In fact, TED's failure to pay resulted in an arbitration between the parties, which resulted in restructuring the agreements between TED and ECA to fixed payments. *See* Ex. SSS at Art. 5; Ex. TTT at ¶1.

76. Plaintiffs settled with the Tribe and others over ECA's objection. *See Galloway v. Williams*, No. 3:19-cv-470, 2020 U.S. Dist. LEXIS 141856, at *20 (E.D. Va. Aug. 7, 2020).

IX. LVD's online lending business generates substantial value on the Reservation.

77. As of 2013, the Tribe's lending enterprises accounted for 46% of the Tribe's government budget and revenues from Tribal lending have been used towards housing, youth programs, health and wellness, and law enforcement. Ex. C (Williams Dec.) at ¶¶ 22–23; Ex. CC (Williams Dec. (Galloway)) at ¶ 2; Ex. XXXX (Hazen Dec. (Galloway)) ¶¶ 5, 14, 35; Ex. BB (Williams Dep. (Williams)) at 200:19–201:13; Ex. J (Mansfield Dep.) at 32:10–33:06; see Ex. X

(Martin Dep.) at 56:24–57:15.

78. LVD paid Martorello's company to help them build a business worth nearly $25 million in equity value to LVD as of date of sale in 2016 (*i.e.* in just over four years). *See* Ex. DDD (Cowhey report) at 20 (valuing LVD's equity in RRTL by the date of the sale at $24,729,000 and approaching $135,093,000 by 2023). LVD additionally took dividends from RRTL along the way, tens of millions of dollars of which provided upwards of 46% of LVD's government budget at various times. *See* Ex. C (Williams Dec.) at ¶ 22. LVD uses those dividends to fund numerous essential government services and to provide numerous jobs for LVD members, directly and indirectly. *See* Ex. OOO (BPL Interrogatory Responses) at 11-14; Ex. D (Hazen Aff.) at ¶ 31(a)-(l); Ex. C (Williams Dec.) at ¶¶ 21-23, 25.

79. By 2018, more than 44% of LVD's general fund came from BPL with profits from BPL totaling $46,397,315.04. Ex. CC (Williams Dec. (Galloway)) at ¶ 18. By this time TED, BPL and Ascension were all headquartered on the Reservation with BPL then employing fifteen individuals on the Reservation and Ascension employing thirty-one individuals, most of whom worked at Ascension's satellite offices. Ex. D (Hazen Aff.) at ¶¶ 24-25; see Ex. XXXX (Hazen Dec. (Galloway)) at ¶¶ 28–30.

ARGUMENT

Under Rule 56, summary judgment is only appropriate "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Cattrett*, 477 U.S. 317, 322 (1986); *Nguyen v. CNA Corp.,* 44 F.3d 234,236-37 (4th Cir. 1995). The reviewing court must not weigh the evidence and, instead, must draw all reasonable inferences in the light most favorable to the non-moving party. *See Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562, 570 (4th Cir. 2015). After drawing all reasonable inferences in favor or Martorello, Plaintiffs' motion should be denied.

I. FEDERAL PREEMPTION PRECLUDES APPLICATION OF VIRGINIA LAW.

If the Court concludes, as it should, that Plaintiffs' loans were governed by LVD's laws, and not Virginia's, then the loans were not unlawful and all of Plaintiffs' claims fail.

A. LVD's sovereignty rights require application of Tribal law.

Plaintiffs' Motion rests on the erroneous proposition that the Court should look to Virginia's choice of law jurisprudence to determine the applicable law. However, traditional choice of law analysis is inapplicable here.[10] "[T]he Indian Commerce Clause makes 'Indian relations . . . the exclusive province of federal law.'" *Seminole Tribe*, 517 U.S. at 60 (quoting *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985)); U.S. Const. art. I, § 8, cl. 3. To that end, the Supreme Court "has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference …." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153-54 (1982). The Supreme Court has also consistently required courts to assess the applicability of state law through an interest-weighing analysis whenever it impacts on-reservation business activity. *See, e.g.*, *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 155 (1980).

In the seminal case, *Bracker*, Arizona sought to apply its motor carrier license and fuel taxes to non-Indian logging companies that harvested and transported timber for a tribal timber company on an Indian reservation. The Supreme Court assessed whether the state's assertion of

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[10] *See Seminole Tribe v Florida*, 517 U.S. 44, 60 (1996) (quoting *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985)). ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes."); *see also White Mountain Apache Tribe v. Bracker,* 448 U.S. at 143 (1980) ("[t]he unique historical origins of tribal sovereignty make it generally unhelpful to apply…standards…that have emerged in other areas of the law.").

taxation authority over non-Indians' on-reservation activities "unlawfully infringe[d]" on tribal sovereignty. 448 U.S. at 142-45. The Supreme Court observed that "[t]his inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145. The Court found that the state's general interest in raising revenue was outweighed by the federal and tribal interests, including the "general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs,'" and the "economic burden of the asserted taxes" on the tribe, and it thus concluded that the taxes were impermissible. *Id.* at 149-51.

The interest-balancing analysis was articulated and applied again in *Cabazon*. At issue in *Cabazon* was whether California, in an effort to limit the influence of organized crime, could enforce its laws relating to high-stakes bingo games against Indian tribes who offered the games to the public, including to non-tribal members. 480 U.S. at 205. The California statute did not ban the games entirely, but regulated how they could be operated and staffed, placed restrictions on the use of game profits, and capped the size of the prizes that could be awarded. *Id.* California argued that application of the state law to the tribes, despite their sovereign status, was authorized by Congress under two federal statutes and because California's public policy interests were sufficient to justify the regulatory burden imposed on the tribes. *Id.* The Supreme Court disagreed, concluding no federal statute authorized enforcement of the state regulatory law against the tribes, and held that any interest California had in preventing the infiltration of organized crime "d[id] not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting [the games]." *Id.* at 221-22.

The Court in *Cabazon* emphasized the essential role gaming played in advancing both federal and tribal interests underpinning "traditional notions of Indian sovereignty and the congressional goal of Indian self-government…[.]" *Id.* at 216. According to the Court:

> The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. *Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members*.

Id. at 218-19 (emphasis added).

Also critical to the Court's decision regarding state interests was the fact that California did not prohibit all forms of gambling entirely, but merely regulated the circumstances under which they were permitted. *Id.* at 211 (noting "California regulates rather than prohibits gambling in general and bingo in particular"). This fact belied any suggestion that enforcing the law against the tribes was necessary to advance a public policy relating to gambling which was of sufficient importance to override the tribes' interests in self-governance and economic development. *Id.*

The Second Circuit in *Otoe-Missouria* recognized that the test set forth in *Bracker* and *Cabazon* is applicable in circumstances like this one as well. *Otoe-Missouria*, 769 F.3d at 113-14 (2d Cir. 2014).[11] While the Second Circuit denied the preliminary injunction that was sought based on the undeveloped record, it recognized that "[a] court might well find that the tribes' sovereign interest in raising revenue militate in favor of prohibiting a separate sovereign from interfering in their affairs." *Id.* at 112 n. 4. As a starting point, "[a] court must know who a regulation targets and where the targeted activity takes place." *Id.* 114 These determinations are "often dispositive."

[11] As the Court knows, LVD was one of the two tribal plaintiffs in that case who sought a preliminary order enjoining New York from threatening non-Indian New York banks from working with tribes, in an effort to choke off LVD's business.

Id. at 113 (quoting *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005)). However, "even when the 'who' and 'where' are clear, a court must still understand 'what' a regulation targets to weigh interests appropriately" because "[a] tribe's interest peaks when a regulation threatens a venture in which the tribe has invested significant resources." *Id.*

Applying the "who," "what" and "where" test described by the Second Circuit in *Otoe-Missouria* as well as the Supreme Court's precedent in *Bracker* and *Cabazon*, demonstrates why Virginia law is preempted here.

"Who" Virginia's state usury laws aim to regulate is clear: lenders, like RRTL and BPL. *See* Va. Code Ann. § 6.2-303(F) (fixing the terms under which a creditor may originate loans and holding liable "the person taking or receiving such payments" if interest is in excess of 12 percent). Virginia does not regulate a borrower's conduct through its usury laws. Instead, the "legal incidence" of the regulation would fall to LVD's lending entities. *See Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 467 (2d Cir. 2013) ("[T]he initial and frequently dispositive question in Indian tax cases is who bears the legal incidence of the tax."); *see also Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113-15 (2005) (fuel tax did not target the reservation because the legal incidence fell up on the non-Indian, which would have applied regardless of whether the fuel was transferred on or off reservation, thus interest weighting not required). Accordingly, application of Virginia's usury laws to Plaintiffs' loan agreements would result in regulation of an arm of the tribe governmental entity by the state of Virginia. The "who" portion of the balancing test weighs in favor of federal preemption.

The "where" of the *Otoe-Missouria* test also weighs in favor of preemption. Like in *Cabazon*, has invested millions of dollars of its own funds into its business and the lending business is "firmly rooted" on the Tribe's reservation and predominantly employs tribal members. *See supra*

¶¶ 18-24, 65-69; *Otoe-Missouria*, 769 F.3d at 115. The lending businesses were established under LVD's laws by the Tribe's governing body, are located on the Reservation, and are subject to the Tribe's regulatory authority. *See supra* ¶¶ 5-8. LVD's lending operations directly advance tribal and federal interests in self-governance and economic development. While borrowers submit their applications on BPL's webpage, "[t]he proper focus is on the nonmember borrower's activities or conduct [directed toward the reservation, which included applying to a reservation-based business, agreeing with a reservation based business and receiving funds from a reservation based business under a loan contract], not merely the nonmember borrower's *physical location*" *F.T.C. v. Payday Financial, LLC*, 935 F. Supp. 2d 926, 939 (D. S.D. 2013).

Finally, the "what" of test—meaning "what" a regulation targets—also weighs in favor of federal preemption. Virginia's usury laws are "rule[s]' that 'fix the time,' place, and manner [in which loan originations] may be conducted. *Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1931 (2022). Application of Virginia's usury laws to RRTL's and BPL's loans would target their ability to make loans at interests lawful under LVD's Code and undermine a business in which LVD has invested significant resources. Like the tribes in *Cabazon,* the LVD established its online lending operations in order to further its own independence and economic development. As the Fourth Circuit has already recognized, the tribal lending operation at issue here "ha[s] promoted the Tribe's self-determination through revenue generation and the funding of diversified economic development and that depriving the tribal entities of [its sovereignty] 'would weaken the Tribe's ability to govern itself according to its own laws, become self-sufficient, and develop economic opportunities for its members." *Williams*, 929 F.3d at 185.

Any public policy interests by Virginia with respect to usury regulations cannot override the tribal and federal interests in self-sufficiency, self-governance and economic development.

Like California, which did not outlaw bingo entirely, Virginia permits lenders to offer loans comparable to those entered into by Plaintiffs, and even consumer loans at interest rates in excess of the rates charged to the Plaintiffs. 1939 (2022) The provision setting forth the 12 percent rate highlights nine separate categories of "[l]aws that permit payment of interest at a rate that exceeds 12 percent per year." Va. Code Ann. § 6.2-303(B)(1)–(9). Those laws in turn set forth dozens of exceptions. *See, e.g.*, *id.* § 6.2-309–329. Accordingly, Virginia's usury laws regulate, but do not prohibit entirely, loans with interest rates above 12 percent. *Ysleta del Sur Pueblo*, 142 S. Ct. at 1939 (declining to interpret Texas's gaming laws as "both (permissible) prohibitions and (impermissible) regulations.").

Plaintiffs' attempt to import the Virginia usury statute onto the LVD Reservation is not dissimilar to California's attempt to enforce a state statute against the tribes in *Cabazon* in order to regulate how those tribes ran an otherwise legal business or Arizona's effort to tax non-Indian service providers in *Bracker*. Subjecting LVD's loans to Virginia's regulations, even if Plaintiffs had not already agreed that LVD's laws would govern (as they did here) would infringe on LVD's sovereignty and is preempted under *Cabazon*.[12] Imposition of Virginia's usury regulations would also be entirely at odds with *Otoe-Missouria* because Martorello has made the exact showing here that the Second Circuit recognized would preempt application of state regulatory laws to LVD's lending operations. Plaintiffs' Motion should be denied because Virginia law is preempted.

B. Application of Virginia law is at odds with the Native American Business Development Act ("NABDA").

Where "state law interferes with the purpose or operation of a federal policy regarding

[12] In response to *Cabazon,* Congress passed the Indian Gaming Regulatory Act, 102 Stat. 2467, 25 U.S.C. § 2701, *et. seq.* in order to give the states "some measure of authority over gaming on Indian lands." *Seminole Tribe*, 517 U.S. at 58. Congress has not, however, passed similar legislation affording states any authority to regulate online lending originating on Indian lands.

tribal interests, it is preempted," *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989), because tribal sovereignty is "dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 154 (1980). Applicable federal policy relevant here includes NABDA. *See* 25 U.S.C. § 4301 *et seq.* NABDA is required "to be liberally construed in favor of the Indians"[13] and the Supreme Court has cautioned lower courts not to give "short shrift" to policies codified in statutes, but to construe them generously.[14]

In enacting NABDA, Congress recognized the obligation of the United States to "facilitate the movement of goods to and from Indian lands and the provision of services by Indians", to promote private investment in the economies of Indian Tribes", and to "encourage intertribal, regional, and international trade and business development" (just as internet lending involves) and to "trade freely, and seek enforcement of treaty and trade rights" (just as LVD sought here). *See id.* at § 4301. Congress also recognized the obligation of the United States to create "conditions with respect to Indian lands to— (A) encourage investment from outside sources that do not originate with the tribes; and (B) facilitate economic ventures with outside entities that are not

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[13] *See, Cheyenne River Sioux Tribe v. Jewell*, 205 F. Supp. 3d 1052, 1062 (D.S.D. 2016) (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit")); *see Bryan v. Itasca County, Minn.*, 426 U.S. 373, 392 (1976) ("'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians'" (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918))).

[14] *See Ramah Navajo School Board Inc.,* 458 U.S. at 846-47 ("We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.' *White Mountain,* at 448 U.S. 144; *see also McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174-75, n. 13 (1973); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685,690-91 (1965).

tribal entities" (emphasis added). *Id.* Congress further found that "the twin goals of economic self-sufficiency and political self-determination for Native Americans can best be served by making available to address the challenges faced by those groups— (A) the resources of the private market [i.e. the internet]; (B) adequate capital [i.e. Eventide's financing]; and (C) technical expertise [SPVI services]." *Id.* The business relationships between companies affiliated with Martorello and the Tribe furthered the exact goals of NABDA and Virginia law is preempted to the extent it would undercut federal law, including NABDA.

C. The economics of the deals between LVD and Martorello's companies do not change the preemption analysis.

By focusing on the economics of the arrangements between LVD and Martorello's companies, Plaintiffs impermissibly attempt to encourage the Court to exercise is own business judgment over what commercial dealings tribal governments should be permitted to engage in, which is at odds with the plenary power of Congress and the federal policy of self-determination. Congress has already made clear that business arrangements that include economics similar to those at issue here are permissible in Indian country, including with respect to Low Income Housing Tax Credits[15] and New Market Tax Credits.[16] Courts have also held federal law preempted even with respect to a business relationship where the non-Indian a substantial portion of the proceeds from the business. *See, e.g., Shivwits Band of Paiute Indians v. Utah,* 428 F.3d 966 (10th Cir. 2005) (state may not enforce its billboard regulations on trust land within Indian Country, despite the non-Indian's ideation, control, operation, and outsized economics).

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[15] Because tribes are federally tax-exempt entities, non-Indian investors may own up to **99 percent** of a tribal project for the 10-year period of the tax credits. *See Low Income Housing Tax Credits 101,* Travois, Inc. (2013).

[16] The non-Indian investor may own up to **99 percent** of the tribal project for seven years. *See* 26 U.S.C. 45d.

D. The National Bank Act preemption supports application of federal law.

The National Bank Act, Rev. Stat. § 5197, as amended, 12 U.S.C. § 85, "provides that a national bank may charge interest 'on any loan' at the rate allowed by the laws of the State in which the bank is 'located.'" *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978). The FDIC even publishes "Guidance for Third-Party Lending" so that national banks may originate loans for non-banks to export rates under home state law.[17]

"[A] national bank is 'located' for purposes of § 85 in the State named in its organization certificate or in a state in which it has its main or branch offices." In addition, a bank must demonstrate, at least one significant non-ministerial action associated with the account took place in the bank's "home state." *See Citibank N.A. v. Hansen*, 28 Misc. 3d 195, 196 (N.Y. Misc. 2010). Three non-ministerial functions are the "approval, disbursal and the extension of the credit." Comptroller of Currency Interpretive Letter No. 822 at 12.

Here, Martorello has demonstrated that all three ministerial functions occur on LVD's Reservation. Approval occurs on the reservation. *See supra* ¶ 18, 24, 68-69. Disbursement occurs on the Reservation. *See id*. Extension of credit occurs on the reservation. *See id*. Virginia law is preempted.

E. The Court's prospective waiver determination as to the choice of forum clause does not render the tribal choice of law clause unenforceable.

Plaintiffs incorrectly assert that the Court has already determined that the choice of law provision in Plaintiffs' loan agreements is unenforceable as a prospective waiver. *See* Plaintiffs' MOL at 27-28. Not so. Instead, the Court has held that "[w]hen viewed in the context of the Tribal Financial Services Regulatory Authority Code (the 'Code') and the loan agreement as a whole, *the*

[17] *See* FDIC Examination Guidance for Third-Party Lending As of July 29, 2016 at https://www.fdic.gov/news/news/financial/2016/fil16050a.pdf

'Waiver of Jury Trial' provision clearly amounts to a substantive waiver of federally protected rights." *Williams v. Big Picture Loans, LLC*, No. 3:17-cv-461, 2021 U.S. Dist. LEXIS 130251, at *17 (E.D. Va. July 12, 2021) (emphasis added). The Court has therefore ruled on the question of whether the jury trial waiver and class action waiver in Plaintiffs' loan agreements are enforceable, but not whether LVD law in general, including its laws with respect to interest rates, is unenforceable. In affirming the Court's class certification decision, the Fourth Circuit did not expand on the Court's decision and, instead, merely affirmed it. *See Williams v. Martorello*, 59 F.4th 68, 85 (4th Cir. 2023) ("We therefore agree with the district court's application of the prospective waiver doctrine and hold the class-action waiver unenforceable." (emphasis added)).

As the court in *Hengle v. Asner* noted, the inquiry with respect to the enforceability of the choice of forum and choice of law clauses is separate and a holding that the choice of forum clause is a prospective waiver does not automatically render the choice of law clause unenforceable. *See Hengle v. Asner*, 433 F. Supp. 3d 825, 864 (E.D. Va. 2020) ("The Court disagrees [with plaintiffs] that the offending language in the Arbitration Provision renders the loan agreements' general Choice-of-Law Provision unenforceable."). The court further found that the choice of law provision itself was not a prospective waiver because it did not expressly disavow federal law. *See id.* at 865. Rather, the provision was "analogous to other choice-of-law provisions that select the law of another state to govern the interpretation and enforcement of a contract while implicitly allowing for the application of relevant federal statutes." *Id.* In the appeal of *Hengle v. Asner*, the Fourth Circuit also conducted separate analyses regarding the choice of forum and choice of law clauses in the agreements. *Compare Hengle v. Treppa*, 19 F.4th 324, 334-44 (4th Cir. 2021), *with id.* at 349-53.

The choice of law provision in Plaintiffs' loan agreements does not disavow federal law

and, instead, specifically provides that is it governed by applicable federal law. Therefore, as in *Hengle v. Asner*, the Court's prior holding that the choice of forum and class action waiver provisions in Plaintiffs' loan agreements were unenforceable as prospective waivers does not mandate the same decision as to the choice of law provision. And, for the reasons set forth above, the Court should find that LVD law, not Virginia law, applies.

F. *Hengle v. Treppa* is distinguishable and, therefore, not controlling.

Despite Plaintiffs' argument to the contrary, the Fourth Circuit's decision in *Hengle v. Treppa* is distinguishable, and, therefore, not controlling here. *See* Plaintiffs' MOL at 28-32 (citing *Hengle*,19 F.4th at 349). In that case, the parties agreed that Virginia's choice of law rules should direct the court's inquiry. *Id.* ("The parties agree that Virginia's choice-of-law rules direct our inquiry."). Here, as set forth above, Martorello submits that the Court's analysis should be informed by Indian commerce clause jurisprudence, including the Supreme Court's decision in *Cabazon*, as well as federal policy, including NABDA, without reference to principles of conflicts of laws. The Fourth Circuit's prior decision, which did not address the preemption argument raised here, does not mandate application of Virginia law. The Court should instead engage in the test espoused by *Otoe-Missouria* and deny Plaintiffs' Motion.

II. Material Issues of Fact Remain as to Plaintiffs' RICO Claims.

The Court's determination that Virginia law does not apply here will dispose of Plaintiffs' claims in their entirety. *See, e.g.*, *See Jackson v. BellSouth Telecomms*, 372 F.3d 1250, 1269 (11th Cir. 2004) ("parties cannot be found guilty of conspiring to commit an act that is not against the law."). However, even if Plaintiffs overcome the impact of Indian Commerce Clause policy and jurisprudence to convince the Court that Virginia's law applies to Plaintiffs' loans, Plaintiffs Motion on the RICO claims still fails. Issues of material fact remain including with respect to whether Martorello knew the loans were unlawful, whether Martorello knew that the loans were

more than twice the enforceable rate in Virginia, whether there was a co-conspirator with Martorello that knew the loans were unlawful, and whether Martorello directed the affairs of the enterprise. Because these myriad material fact issues remain, Plaintiffs are not entitled to the summary judgment that they seek and the Motion should be denied.

A. Material issues of fact remain regarding Plaintiffs' and the Class Members' § 1962(d) claim.

1. RICO requires knowledge that the loans were unlawful.

In a transparent attempt to downplay the high burden they face to prevail on their § 1962(d) claim, Plaintiffs attempt to write out the requirement that they show Martorello and a co-conspirator knowingly and willfully agreed to engage in unlawful conduct. Instead, Plaintiffs suggest that Martorello can be liable if he "had an awareness of the scheme" and "further[ed] or facilitate[ed] the scheme" apparently without any knowledge that it was unlawful. *See* Plaintiffs' MOL at 33-36. Plaintiffs are wrong.

To prevail on their § 1962(d) claim on summary judgment, Plaintiffs must establish that there are no material disputed facts "[1] that an enterprise affecting interstate commerce existed; [2] 'that each defendant *knowingly and intentionally* agreed with another person to conduct or participate in the affairs of the enterprise; and [3] . . . that each defendant *knowingly and willfully* agreed that he or some other member of the conspiracy would commit at least two *racketeering acts*.'" *United States v. Barnett*, 660 F. App'x 235, 240 (4th Cir. 2016) (quoting *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012)) (emphasis added). As the Department of Justice instructs federal prosecutors, liability for a RICO conspiracy requires a showing that the defendant "*knew that the debt was unlawful* and that the rate charged was at least twice the legally enforceable rate." *Criminal RICO:* 18 U.S.C. §§ 1961-1968*, A Manual for Federal Prosecutors*, p. 136 (6th

rev. ed. 2016).[18] In short, RICO requires "*conscious* wrongdoing." *Charron v. Wiener*, 731 F.3d 241, 253 (2d Cir. 2013) (emphasis in the original). That RICO liability requires a showing of knowingly unlawful conduct makes good sense given that the Supreme Court has described the penalties for a RICO violation as "drastic." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 233, 109 (1989). For this same reason, the Fourth Circuit has held that courts must "exercise caution" in effectuating the "remedial purposes" of RICO. *US Airline Pilots Ass'n v. AWAPPA, LLC*, 615 F.3d 312, 317 (4th Cir. 2010)

Recently, the Second Circuit highlighted the importance of scienter in RICO cases involving the collection of unlawful debt. The court noted that it had previously said that RICO imposes no additional *mens rea* requirement beyond that required by the predicate state usury statute. But, because some civil usury statutes lack any scienter requirement, this could result in a RICO violation that carries no scienter requirement at all. "[U]nder certain circumstances, [this would] authorize conviction under RICO of a defendant who neither knew the rate of interest charged nor that the rate charged was illegal." *United States v. Grote*, 961 F.3d 105, 119 (2d Cir. 2020). This result, the court said, appears to contradict the Supreme Court's "presumption in favor of a scienter requirement" for criminal statutes. *Id.* at 118-19.[19] The Court underscored that, "[i]f

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[18] Available at https://www.justice.gov/archives/usam/file/870856/download and excerpted at Ex. B.

[19] The Second Circuit cited *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), in which the Supreme Court construed 18 U.S.C. § 2252, which prohibits the knowing transportation, receipt or distribution of "any visual depiction involving the use of a minor engaging in sexually explicit conduct." The court reasoned that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct and that "the age of the performers is the crucial element separating legal innocence from wrongful conduct." *Id.* at 73. Therefore, it concluded that the term "knowingly" in § 2252 extends both to the sexually explicit nature of the material and to the age of the performers. *Id.* at 78.

RICO liability . . . applies where unenforceability under state law depends on only the interest rate (without regard to state of mind) . . . , this can produce criminal liability for racketeering for unexceptionable conduct." *Id.* at 121. It expressed "serious doubts that such a rule appropriately 'separate[s] wrongful conduct from otherwise innocent conduct.'" *Id.* (citation omitted). However, the court did not decide the issue because the plain error standard applied in that case and the evidence that defendants had acted willfully was overwhelming.

Therefore, Plaintiffs must prove that Martorello knew that the loans were unlawful and, with that knowledge, intentionally conspired with co-conspirators to collect them. *See United States v. Vastola*, 899 F.2d 211, 229 (3d Cir.), *vacated on other grounds*, 497 U.S. 1001 (1990); *United States v. Battle*, 473 F. Supp. 2d 1185, 1212 (S.D. Fla. 2006). They have not done so.

2. Plaintiffs have not demonstrated that Martorello knew the loans were unlawful.

Plaintiffs have not met their burden to show that Martorello (or any other alleged conspirator) knew that the loans were unlawful. *See Gilbert v. MoneyMutual, LLC*, No. 13-cv-01171-JSW, 2018 WL 8186605, at *14 (N.D. Cal. Oct. 30, 2018) (granting summary judgment because plaintiffs could not prove that defendants knew the tribal loans were unlawful). Because proof of a defendant's knowledge or intent is often circumstantial, summary judgment is inappropriate where the evidence supports competing inferences about that issue. *See Smithfield Foods, Inc. v. United Food and Comm. Workers Int'l Union*, 585 F. Supp. 2d 789, 807 (E.D. Va. 2008). Here, the evidence shows that Martorello believed that any loans issued by the Tribe's lenders – including those issued to Plaintiffs – were governed by LVD's laws and were legal under its laws. Martorello's state of mind was informed by, and was shared by attorneys for Bellicose and the Tribe. Public sources of information regarding the history of tribal sovereign lending, statements of state and federal agencies and the beliefs of other layman involved in the deal also

informed Martorello's state of mind.

a) Attorneys for Bellicose and the Tribe consistently advised that the loans were lawful

The law in this situation is clear:

> [I]f a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of loaning money to applicants under [a particular law], and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of a crime which involves willful and unlawful intent; even if such advice were an inaccurate construction of the law.

Williamson v. United States, 207 U.S. 425, 453 (1908). "[R]eliance on the advice of counsel need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant's scienter." *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004). Moreover, Martorello does not have to prove that he relied on counsel; rather, Plaintiffs must prove that he did not. *See United States v. Scully*, 877 F.3d 464, 478 & n.6 (2d Cir. 2017); *United States v. Greenspan*, 923 F.3d 138, 146 (3d Cir. 2019) (advice of counsel is not an affirmative defense).

There is ample evidence in the record to support a jury finding that Martorello did not "knowingly and willfully agree[] that he or some other member of the conspiracy would commit at least two racketeering acts." *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012).[20] There is no dispute that a highly esteemed team of nearly a dozen attorneys of relevant specialized expertise from Greenberg Traurig advised Martorello and his companies and carefully created the entire structure, then co-authored more than a dozen letters to some states stating that the loans

[20] In their renewed motion for class certification, even Plaintiffs acknowledged that the lending operation was created based on the "belief that Martorello could control operations so long as the final act of loan origination occurred on the reservation, *see* Dkt No. 968 at p. 3, and that "in their view, the structure was legitimate . . ." *id.* at p. 4.

were lawful and issued multiple legal opinions maintaining that the loans are lawful. *See supra* ¶¶ 13-14, 25-26, 29-30. Daniel Gravel, who was inside counsel for Bellicose, also testified that both he and Martorello were consistently advised by multiple outside counsel that the loans were governed by Tribal law and were lawful. *See supra* ¶ 43. He testified that based on his otherwise attorney-client privileged conversations and interactions, that Martorello believed the loans were lawful. *See id.*

The Tribe was represented by Rosette, LLP, a national law firm that specializes in representing tribal governments and tribal entities. Both Rob Rosette and Karrie Wichtman were involved in the representation, with Rosette heavily involved in the formation of the applicable regulations and Wichtman heavily involved in the actual operations. They also consistently took the position that the loans at issue were valid and enforceable under Tribal law and were not subject to state usury laws. *See supra* ¶¶ 31-32, 36, 38-39. They maintained this position in their communications with banks, creditors, credit bureaus, ACH processors as well as in their communications with Martorello. *See id.*

It is true that tribal lending, as with tribal gaming in its early years, was under legal and regulatory attack in some quarters throughout the relevant period of time (though never under Virginia law) and that Martorello kept an eye on those developments. But Plaintiffs have not presented any materially undisputed evidence that he ever ceased relying on the advice of counsel with whom he dealt with, or that he came to know that the tribal loans were unlawful. Indeed, the notion that Martorello, a layman, "should have known better" than to rely on counsel in this situation is fanciful. *See Arena Football League, Inc. v. Roemer*, 9 F. Supp. 2d 889, 898 (N.D. Ill. 1998); *S.E.C. v. Goldsworthy*, No. 06-10012-JGD, 2008 WL 8901272, at *5 (D. Mass. June 11, 2008) ("there is no evidence that [defendant], when faced with the superior knowledge of the

accountants and attorneys evaluating the situation, nevertheless knew that the misrepresentations were material."). As is particularly the case given the abstract and complex nature of Federal Indian law articulated in the legal opinions repeatedly shared with Martorello, "laws are 'complex and often uncertain' [and] 'the layman [i.e., a non-lawyer] has no real choice but to rely on counsel.'" *Howard*, 376 F.3d at 1148 n.20 (citation omitted).

The evidence submitted by Plaintiffs in support of their Motion shows, at most, that Mr. Martorello had concerns when interests between two sovereign tribes and a state clashed as to whether the loans could be found lawful (never under Virginia law) and sought reassurance on that score. But "concerns do not constitute knowledge." *Roby v. County of Los Angeles*, No. LA CV16-07879 JAK (PJWx), 2017 WL 11635479, at *9 (C.D. Cal. Oct. 20, 2017); *accord Richardson v. Oppenheimer & Co., Inc.*, No. 2:11-cv-02078-GMN-PAL, 2014 WL 1304343, at *9 (D. Nev. Mar. 31, 2014) ("a concern about the market conditions is not knowledge of the market's future demise …."); *In re Medicis Pharm. Corp. Securities Litig.*, 689 F. Supp. 2d 1192, 1211 (D. Ariz. 2009) (evidence of concern about an accounting methodology was "insufficient to satisfy the scienter requirement for securities fraud"). Moreover, later evidence demonstrates that Martorello was reassured by counsel for both Bellicose and the Tribe that the loans were lawful. *See supra* ¶ ¶ 33-42. In short, far from there being no material undisputed fact that Martorello knew the loans were unlawful as would be necessary for the Court to grant Plaintiffs' Motion, there is ample evidence to the contrary. The Motion should, therefore, be denied as to Plaintiffs' RICO claims.

b) Public sources of information and opinions of other lay people furthered Martorello's belief that the loans were lawful.

Martorello's good faith belief that the loans were lawful is also supported by public sources of information, typical business structures and practices similar to the business structure between Bellicose and the Tribe, analogous regulatory framework, and the opinions of other lay people

involved in the deal. *See, e.g., Howard v. SEC*, 376 F.3d at 1147 (holding that defendant's state of mind can be shaped by the advice of counsel who do not represent him personally but are participants in structuring the transactions at issue); *In re Processed Egg Prods. Antitrust Litig.*, No. 2002 08-md-02002, 2014 U.S. Dist. LEXIS 160747, at *26 (E.D. Pa. Nov. 17, 2014) (holding good faith defense could be based on information learned from non-attorney personnel). Public sources of information, for example, include two articles published in The Federal Lawyer that were written by Jennifer Weddle, counsel for Bellicose. *See supra* ¶¶ 35, 42; *see also* NABDA, 25 U.S.C. § 4301 *et seq.*

Other business structures also supported Martorello's understanding. *See supra* p. 25 (discussing business arrangements with Native Americans where the non-Indian received a substantial portion of the proceeds); p. 26-27 (discussing rules and regulations under the National Bank Act).

Separately, various witnesses have also testified that they, too, believed the Tribe's lending operations were legitimate and legal; *see, e.g.,* Ex. J (Mansfield Dep.) at 33:17-34:7; Ex. Q (Gerber Dep.) at 68:22-69:8; 80:6-14; 105:14-21. These materials evidence the legitimacy of the Tribal lending model and that it was not just Martorello who believed that LVD's lending operation was legitimate and legal; LVD also believed it was legal, as did various other involved third parties. Given this evidence, summary judgment should be denied.

3. Plaintiffs have not met their burden to show the Martorello knew the legally enforceable rate.

Plaintiffs have not submitted any evidence to show that Martorello knew that the rate charged on the loans at issue was at least twice the legally enforceable rate in Virginia. *See generally* Plaintiffs' MOL ¶¶ 1-146. There is no evidence whatsoever that shows Martorello knew (or even saw or considered) what the legally enforceable rate in Virginia was at the time the loans

were made.[21] This is not a picayune detail. Rather, it is "the crucial element separating legal innocence from wrongful conduct." *X-Citement Video*, 513 U.S. at 73. It is "proof 'that the defendant know the facts that make his conduct illegal.'" *United States v. Ford*, 821 F.3d 63, 68 (1st Cir. 2016) (citation omitted). Such proof is absent here and requires denial of Plaintiffs' motion on the § 1962(d) claim.

4. Plaintiffs have not met their burden of proving there was a co-conspirator who knew the loans were unlawful.

Plaintiffs are also not entitled to summary judgment on the conspiracy claim for an independent but related reason: at minimum, fact issues remain regarding whether a second person, apart from Martorello, knew that (1) the loans were governed by Virginia law and were unlawful thereunder, and (2) the interest rate being charged was twice the legally enforceable rate. *See United States v. Battle*, 473 F. Supp. 2d at 1212 (holding that, to establish a conspiracy under 18 U.S.C. § 1962(d), plaintiff must prove that two or more persons knew that the loans were unlawful and, with that knowledge, intentionally conspired to collect them).

Every single witness involved in the lending operations has testified that their intention was to make lawful loans subject to tribal law, and that they believed LVD's operation was lawful. *See, e.g.*, *supra* ¶¶ 14, 32, 39, 43. And, as discussed above, ample evidence shows that the tribal loan operation was carefully structured by outside counsel who represented the tribal entities and counsel who represented Martorello's companies, respectively. Counsel consistently advised the tribal entities and Martorello that the loans are governed by LVD law (and federal law) and that the loans comply with all such laws and outside information and factors also informed Martorello's state of mind. *See supra* ¶¶ 14, 25-43

[21] It makes sense that Martorello never considered Virginia law, given that none of the half-a-dozen attorneys who have testified ever advised anything other than the inapplicability of state laws under the principals of federal Indian law.

Nor can Plaintiffs sidestep this showing by contending that Mr. Martorello and Eventide conspired with each other. *See Rhodes v. Consumers' Buyline, Inc.*, 868 F. Supp. 368, 377 (D. Mass. 1993) ("the majority rule—and, in the court's opinion, the better rule—is that, for purposes of § 1962(d), a corporate entity is incapable of 'conspiring' with its own officers and employees."); *Walters v. McMahen*, 795 F. Supp. 2d 350, 358-59 (D. Md. 2011) (same), *aff'd*, 684 F.3d 435 (4th Cir. 2012); *District 1199P Health and Welfare Plan v. Janssen, L.P.*, No. 06-3044 (FLW), 2008 WL 5413105, at *14 (D.N.J. Dec. 23, 2008) ("The majority of courts within this Circuit agree that a corporation cannot conspire with its agents and/or employees under § 1962(d) of RICO.").

Because Plaintiffs have not proffered evidence, let alone evidence that is not disputed, that two separate alleged conspirators had the requisite knowledge that the loans were unlawful, Plaintiffs' motion on the § 1962(d) claim must be denied.

B. Material issues of fact remain with respect to Plaintiffs' § 1962(c) claim.

To prevail on a civil RICO claim against an individual like Martorello, Plaintiffs must establish each of the following elements: "(i) that [Martorello] is associated with an enterprise (ii) that engages in or affects interstate or foreign commerce, (iii) that [Martorello] conducted or participated in the conduct of the enterprise's affairs (iv) through a pattern of racketeering activity [or collection of an unlawful debt], (v) and that this pattern of racketeering activity [or collection of an unlawful debt] caused the property damage to the RICO plaintiffs." *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 597 (E.D. Va. 2009).

1. Plaintiffs have not met their burden to demonstrate that Martorello "directed" the affairs of the alleged RICO enterprise.

Liability under Section 1962(c) is not boundless. Rather, the statute only imposes liability on those who "conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs…[.]" *Reves v. Ernst & Young*, 507 U.S. 170 (1993). To be liable under the statute, "one

must have [had] some part in *directing*" the affairs of the enterprise. *See id*. (emphasis added). "Mere participation in the activities of the enterprise is insufficient; the defendant must participate in the operation or management *of the enterprise.*" *Thomas v. Ross & Hardies*, 9 F. Supp. 2d 547, 554 (D. Md. 1998) (emphasis added). For Plaintiffs to prevail on this claim requires an "exacting showing." *Goodweather v. Parekh*, No. 1:20-cv-06 (RDA/IDD), 2021 U.S. Dist. LEXIS 173736, at *23 (E.D. Va. Sept. 10, 2021)

Plaintiff alleges the consulting services provided by Martorello to the tribal lenders (through Bellicose and/or SourcePoint) are evidence of his involvement in the alleged "enterprise." However, merely providing advisory services, *without directing or participating in the conduct of the enterprise,* is insufficient to state a claim under RICO. *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F. Supp. 248, 254 (S.D.N.Y. 1997) ("[I]t is well established that the provision of professional services by outsiders…to a racketeering activity is insufficient to satisfy participation requirement of RICO, [which] requires some part in directing the affairs of the enterprise itself."); *In re American Honda Motor Co., Inc. Dealerships Relations Litig.*, 941 F. Supp. 528, 559 (D. Md. 1996) (noting the "distinction between acting in an advisory capacity (even if in a knowingly fraudulent way) and acting as a direct participant in corporate affairs.").

Although Martorello's role with respect to the Tribe and its lenders ebbed and flowed during the relevant time period (before ending entirely in January of 2016), it never rose to the level required to create RICO liability under *Reves*. Martorello was never an owner or manager of Red Rock, and no company he owned or managed ever served in either capacity. Neither Martorello nor any of his companies ever originated a loan on behalf of Red Rock, nor did they take any actions to collect upon any such loan. *See supra* ¶¶ 18-24. Similarly, neither Martorello, nor any of his companies, ever owned or obtained an interest, legal or equitable, in any consumer

loan originated by Red Rock. Rather, Martorello's companies were paid a performance-based servicing fee by Red Rock. Most importantly, Plaintiffs have not proffered any facts to suggest that Martorello himself exercised any ultimate decision-making authority on behalf of Red Rock. Although RRTL received advice and consulted with Martorello (through Bellicose and SourcePoint) about its lending operations, all final decisions were made solely by Red Rock's managers. *See id.*

Martorello's involvement with BPL was even less. Martorello never provided any consulting services or advice ***of any type*** to BPL regarding how to operate its business. He also never made decisions regarding whether to lend to any customer, nor did he suggest marketing strategies, underwriting criteria, or any other policies or procedures. Moreover, since January 26, 2016, the date of TED's purchase of Bellicose, Martorello's only involvement with the LVD or BPL has been in the capacity of an executive of the Tribe's creditor. *See supra* ¶¶ 70-76. The fact that the Tribe ceased paying Eventide for nearly 18 months and later settled this lawsuit over Eventide's objection belies any argument that Martorello continues to manage or control the Tribe's lending operations. *See supra* ¶¶ 74-76.

2. Fact issues remain regarding whether Martorello possessed the requisite intent under required for liability under § 1962(c).

In order to establish liability for the substantive RICO claim under 18 U.S.C. § 1962(c), Plaintiffs must prove that Martorello acted with specific intent and that he knowingly and willfully conducted or participated in the affairs of the "enterprise" through the collection of an unlawful debt. *See United States v. Aucoin*, 964 F.2d 1492, 1498 (5th Cir. 1992). As set forth above, Plaintiffs have not met their burden to establish that Martorello acted with the requisite intent necessary to impose RICO liability. *See supra* p. 29-36.

Dated: May 5, 2023

/s/ John David Taliaferro
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CERTIFICATE OF SERVICE

I certify that on this 5th day of May, 2023, a true and correct copy of the foregoing was served upon all parties that are registered to receive electronic service through the Court's ECF notice system in the above case.

/s/ John David Taliaferro
John David Taliaferro (Va. Bar. 71502)