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' REPLY IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Martorello's opposition concedes nearly all of Plaintiffs' statement of material facts, which establish the existence of a usurious lending scheme that Martorello knew about, facilitated, and benefited from. Unable to refute these objective facts—most of which come from his own email—Martorello attempts to create a factual dispute over the level of the LVD's involvement, but such "facts" are immaterial to any issue in this motion. Regardless of whether LVD had meaningful involvement, no one can genuinely dispute the key issue raised in Plaintiffs' motion—that Martorello knew and facilitated a usurious lending scheme. That's what matters, and it was objectively established in Plaintiffs' opening brief.

Martorello also attempts to avoid summary judgment by mischaracterizing the governing law about RICO liability as requiring "knowledge that the loans were unlawful." ECF No. 1218 at 32. And because Martorello claims that certain attorneys told him the lending scheme was legal, he contends that there is a genuine dispute about whether he knew that the loans were unlawful. The Court should reject this argument because "knowledge of illegality" is neither an element nor a defense to a RICO claim based on the collection of unlawful debt. *Mao v. Glob. Tr. Mgmt., LLC*, 2022 WL 989012, at *9 (E.D. Va. Mar. 31, 2022). In other words, a person may be liable for a civil RICO claim "whether they knew the debt was unlawful or not." *Id.*

Martorello also utterly disregarded Plaintiffs' request for summary judgment that: (1) an enterprise existed; (2) the loans constituted unlawful debts under RICO; and (3) persons associated with the enterprise—not necessarily Martorello—participated in the affairs through the collection of unlawful debt. ECF No. 1166 at 36. Because Plaintiffs' evidence establishes each of these elements, summary judgment should be granted (in whole or in part) as to the § 1962(c) violation.

THERE IS NO GENUINE DISPUTE OF MATERIAL FACTS

I. Martorello's response violated Local Rule 56.

Martorello first responded to Plaintiffs' Motion on May 5, 2023. ECF No. 1206. This response, however, did not contain a list the material facts in dispute with citations supporting his alleged disputes as required by the Local and Federal Rules of Civil Procedure. Loc. Civ. R. 56(B); Fed. R. Civ. P. 56(c)(1)(A). Plaintiffs consented to a replacement brief to avoid unnecessary motions practice. ECF Nos. 1216-1218. But Martorello's replacement brief still violates the rules because it fails to make genuine and material challenges to

Plaintiffs' Statement of Undisputed Facts, which contained 146 paragraphs, each supported by a specific citation to the record and was limited to the fact necessary to determine this motion. ECF No. 1166, at 5-26 ("Statement").

Even after Plaintiffs' facilitation of a replacement brief—Martorello offered only a limited set of disputes to the Statement, treating it like a Rule 8(b) general denial in an answer rather than a Rule 56 summary judgment response. *See generally* ECF No. 1218 at 15-21. There is almost no explanation supporting his "disputes." Instead, Martorello largely ignores the substance of each factual paragraph and only sporadically includes a record citation. Even then, most of the "disputes" are immaterial nits or semantics. Again, these nonspecific and unsupported denials violate the Local Rules. Loc. Civ. R. 56(B) (a summary judgment opposition "shall include a specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated and citing the parts of the record relied on to support the facts alleged to be in dispute.") Martorello is not *pro se* but is represented by sophisticated defense counsel. His violation of this requirement—after two attempts—is inexcusable.

Rather than substantively respond to Plaintiffs' material facts (supported by record citations), Martorello instead offered a "Counterstatement of Undisputed Facts" (labeled "CUF" by Defendant). This CUF, however, does not correspond to any of the specific facts in the Plaintiffs' Statement and instead lays out Martorello's own overall case facts and narrative, raising countless issues that are not irrelevant to Plaintiffs' Motion.

"A summary judgment motion with such an extensive record requires the parties to adhere to Local Rule 56(B) with special care." *Wood v. Credit One Bank*, 277 F. Supp. 3d 821, 829 (E.D. Va. 2017). Yet here, Martorello did exactly as the *Wood* defendant. *Id*. ("Credit One instead scatters citations to the record throughout its memorandum, absent any reference to whether the facts are material or in dispute."). As in *Wood*, Martorello's failure to comply with the Local Rules makes it difficult for the Plaintiffs and the Court to consider whether any of Marterollo's CUF establish a material dispute. This conduct is "unfair to its adversary . . . and its conduct is adverse to the conservation of judicial resources, which are most efficiently deployed when the parties fulfill their adversarial functions in a rigorously organized, coherent fashion." *CertusView Techs., LLC v. S & N Locating Servs., LLC*, 2015 WL 4717256, at *5 (E.D. Va. Aug. 7, 2015). Because of this, the "Court could strike [Martorello's] 'disputes' altogether and consider all of [Plaintiffs'] facts undisputed. While extreme, such sanctions would not seem unwarranted given [Defendant's] failure to even attempt a proper correction of [his] failure." *Wood*, 277 F. Supp. 3d at 830 (internal citation omitted).

II. Martorello Does Not Substantively Dispute Any Material Facts.

Beyond procedure, Martorello's response to the Statement is substantively anemic. Because Martorello could not genuinely challenge many facts, he largely attempts to manufacture a dispute by claiming that he disputes "the implication" of 49 of Plaintiffs' facts. *See* ECF No.

1218 (disputing the implication of ¶¶ 5, 6, 7, 8, 9, 10, 45, 46, 47, 48, 49, 50, 51, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 70, 71, 72, 73, 74, 75, 76, 87, 88, 89, 90, 91, 92, 93, 94, 102, 103, 104, 105, 106, 129, 131, 132, 133). Yet Martorello's dispute regarding "the legal implications of the material fact does not mean that the fact itself is disputed, nor does it prevent the court from deciding the legal implications of the fact on a motion for summary judgment." *Scott v. Kelkris Assocs., Inc.*, 2012 WL 996578, at *3 (E.D. Cal. Mar. 23, 2012). The Court, of course, can read and understand this evidence for itself and determine its implications.

Similarly, even where Martorello claims a fact is "disputed," his response is either: (1) unsupported by evidence to the contrary (*Id.* at ¶¶ 1, 21, 83, 117, 131); (2) nits or semantics (¶¶ 12, 37, 38, 53, 58, 115, 120, 124, 128); or (3) directly contradicted by the Plaintiffs' evidence (¶¶ 23, 37, 38, 95, 96-98, 128). Again, these tactics do not create a *genuine* or *material* dispute. Instead, "a dispute is 'genuine' if 'a reasonable jury could return a verdict for the moving party.'" *Reid v. Dalco Nonwovens, LLC*, 2016 WL 427948, at *1 (W.D.N.C. Feb. 3, 2016) (quoting *Dulaney v. Packaging Corp. of Am.*, 673 F.3d 323, 330 (4th Cir. 2012)). And a fact is "material" only "if it 'might affect the outcome of the suit under the governing law." *Reid*, 2016 WL 427948 at *1 (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). Martorello's unsupported assertions and nitpicking of certain word choices does not create a genuine or material dispute.

While Martorello's failure to response to Plaintiffs' Statement under the Local Rules can be broken into the three categories outlined in the previous paragraph, Plaintiffs believe that it is important to highlight two of his "disputes." First, Martorello misleadingly attempts to dispute the Plaintiffs' facts about received from Red Rock's operations by Martorello and his trust. *See* ECF No. 1218 at ¶¶ 37-39. As support, Martorello cites to his own deposition testimony where he testified that he might not have *necessarily* received the money because, for example, it could have

stayed in a capital account at Bellicose. Ex. 1 at 106:25-107:12. Martorello further confirmed that the allocation amount on the spreadsheet would have been reflected on his tax returns as the owner of Bellicose—even if the money stayed at the corporate level in a capital account (as opposed to Martorello's personal bank account). Ex. 1 at 107:2-23. Martorello's entitlement to the money and ownership for tax purposes is receipt of the money under the plain meaning of the word. Thus, Martorello's superficial distinction regarding actual receipt versus legal entitlement does not create a genuine dispute of material fact. And to put this matter to rest, attached are Martorello's sworn interrogatory responses, which indicated that he received [redacted] from in salary and/or distributions as of October 2, 2017. Ex. 2 at 3.

Second, Martorello also disputes that SourcePoint VI "was owned by Martorello." *See* ECF No. 1218 at ¶ 32 (citing Martorello Ex. AAAAA at 105:17 – 106:6). The cited evidence, however, is Martorello's deposition testimony where he admitted that "Me and/or some entity under [his] trust collectively had 100 percent" interest in Bellicose VI and SourcePoint VI. *Id*. at 105:17-22. Martorello's convoluted corporate structure does not create a genuine or material dispute of fact.

III. Response to Martorello's Counterstatement of Undisputed Material Facts.

As explained above, the Court cannot fairly consider the Defendant's "CUF" because it would require Court to guess which CUF fact corresponded to a numbered fact in Plaintiffs' Statement. Even so, Martorello's statement of facts can be addressed in groups:

Paragraphs 1-7: None of these purported facts are material to Plaintiffs' motion.[1] Here, Martorello attempts to establish that LVD had a genuine desire to enter the tribal lending industry

[1] In support of this section, Martorello cites to Exhibit D, which the same declaration by Michelle Hazen that this Court has already found to contain misrepresentations. *Williams*, 2020 WL 6784352, at *12. Martorello has indicated that Ms. Hazen will not be appearing trial (Dkt. 1238) and, thus, Plaintiffs object to the use of her declaration as it is inadmissible.

and insinuates that this genuine desire predated his first communication with Rob Rosette, who brokered the deal between Martorello and LVD. While Plaintiffs disagree with Martorello's characterizations, they are irrelevant to the pending motion.

Paragraphs 8-16: All these purported facts are immaterial to Plaintiffs' motion. Here, Martorello attempts to establish: (1) the LVD had a genuine interest in entering the tribal lending industry before its introduction to Martorello (*see* ¶¶ 8-11), and (2) that attorneys were involved to develop the relationship and structure of the enterprise (*see* ¶¶ 13-16). While Plaintiffs disagree with these characterizations, these facts are immaterial to the three issues on which Plaintiffs seek summary judgment.[2]

Paragraphs 17-23. None of these purported facts are material to Plaintiffs' motion. In this section, Martorello attempts to establish that: (1) the LVD had an office on the reservation where it originated the loans (¶ 17); (2) the Servicing Agreement delegated origination determinations to Red Rock (¶ 18); and (3) the LVD participated in certain decisions about the lending operations (¶¶ 19-23). None of these "facts" refute that Martorello knew of the overall objective of the conspiracy and facilitated the scheme. Put differently, Martorello cannot refute his knowledge and facilitation by simply pointing to the role of others.[3]

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[2] Although these facts are irrelevant, Plaintiffs note that they are a variation of the false narrative already rejected by this Court after a two-day evidentiary hearing. *Williams v. Big Picture Loans, LLC*, 2020 WL 6784352, at *4 (E.D. Va. Nov. 18, 2020). For example, this Court has already found that Martorello's claim that LVD identified and approached him "were not true. In fact, the record shows that Martorello sought out a connection with the LVD so that he could get into the Tribal lending business." *Id*. The Court further added: "The testimony of Pete and Merritt, supported by the documentary record, demonstrate that this Court incorrectly found that there was a lending operation underway when the Tribe was put in touch with Martorello and that the Tribe had identified Martorello as a potential consultant." *Id*. at *5. Thus, while Plaintiffs dispute Martorello's characterizations, who approached who is irrelevant to Martorello's liability.

[3] Although these proffered facts are irrelevant to whether Martorello knew about and facilitated the scheme, Plaintiffs again note that this Court has already rejected these "facts." *Williams*, 2020

Paragraphs 24-42. None of these purported facts are material to Plaintiffs' motion. In this section, Martorello attempts to support his good faith reliance on the advice of counsel defense. While Plaintiffs disagree with many of Martorello's characterizations, they are immaterial to the three issues on which Plaintiffs seek summary judgment because, as explained below, Plaintiffs do not have to prove "knowledge of illegality," or whether Martorello "knew that debt was unlawful or not." *Mao*, 2022 WL 989012, at *9.

Paragraphs 43-62. None of these purported facts are material to Plaintiffs' motion. In this section, Martorello vaguely discusses the negotiations related to the sale to create the appearance that it was LVD—not Martorello—who had a sincere and strong interest in the Bellicose sale. Martorello's narrative in this section again misses the point. Plaintiffs' citation to contrary evidence on this point was not to show bad intention, but merely to demonstrate Martorello's knowledge and facilitation of the restructure, as well as its design to provide non-tribal members (including Martorello) with continued involvement in the enterprise.

But even if these purported facts were relevant (they aren't), the Court should disregard them because they are wrong. As detailed in their opening brief, the evidence shows that Martorello was the impetus behind the sale of Bellicose to the LVD and that he aggressively pursued the sale to insulate himself from legal liability. ECF No. 1166 at 13-19. In fact, he approached Rob Rosette, LVD's counsel, about the restructure on October 14, 2013—a mere two

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WL 6784352, at *5-9. At this Court found, "at the time of the initial formation of Red Rock, Martorello understood that his company, Bellicose, would operate the lending business in which Red Rock was to be engaged completely and that the 'Tribe's managers are not involved in the business.'" *Id*. at *5. The Court also found that the Tribe's co-managers paid a "rather meaningless role" and that neither the Tribal Entities nor its employees established the underwriting criteria or made the decision to make the loans. *Id*. at *5-6. The Court also rejected the significance of the Servicing Agreement's delegation of authority over origination to Red Rock: the "record shows that the intellectual property kept by Martorello's company, Sourcepoint, and was not known by, or available to, the Tribal entities that nominally were making the loans at issue." *Id*.

weeks after the *Otoe-Missouria* decision. ECF. No. 1166-24. This email was clear that the sale must be "structured to provide all entities sovereign immunity." *Id*. (emphasis added).

The evidence further shows that—contrary to Martorello's claims—LVD was initially uninterested in the sale.[4] This is confirmed by the August 2014 email to Chairman Williams, where wrote explained that he had "to stress the urgency on [his] end" and "SPVI/BVI are looking to move very quickly on such an exit." ECF. No. 1166-32. "R]ather than putting the business on the 'auction block' to the highest bidder," Martorello stated 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*. Chairman Williams did not respond to Martorello's email that day, prompting Martorello to email Karrie Wichtman later that evening, complaining that he had not heard "anything back from the Chairman" in response to his email, nor did Martorello get "any sense of excitement from anyone[.]" Ex. 34 at Rosette_Revised_045272. The evidence showed that LVD's position changed after the Second Circuit affirmed *Otoe*. ECF. No. 1166-36 (email from Wichtman saying that the best path 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.").[5]

[4] While Martorello asserts that Hazen and Wichtman asked Martorello to consider selling in 2012, there is no documentary evidence to support this self-serving testimony. In fact, there is ample evidence to the contrary, including documents showing that the LVD was looking for a "turn-key" product, Ex. 3 at JPB00383, and Vice Chairwoman Pete's testimony that the LVD was not looking to learn the business, Ex. 4 ¶ 6.

[5] There is also substantial evidence that contradicts Martorello's self-serving contention that the sale was for tax purposes. For example, when Mr. Martorello first emailed the LVD about the concept for the Bellicose Transaction—in 2014—Mr. Martorello stated that he would "likely have a massive negative tax consequence" associated with the sale, but he was nonetheless "ready to proceed with a potential sale of the companies/discussion." Ex. 5 at Rosette_Revised_052619. Based on this and other evidence, the Court has already rejected Martorello's alleged motivations for the Bellicose sale. *Williams*, 2020 WL 6784352, at *11.

But again, whether the LVD had a sincere and strong interest in the restructure is immaterial. Instead, Plaintiffs submitted the restructuring emails to show Martorello's significant knowledge, involvement, and facilitation of the usurious lending scheme, as well as his involvement in the restructure and what it was designed to accomplish.

Paragraphs 63-68: In these paragraphs, Martorello describes the lending enterprise as fully controlled by the LVD and its Tribal Council after the Bellicose sale. None of these facts matter because "[o]nce it is proven" that a person "was a member of the conspiracy," his "'membership in the conspiracy is presumed to continue until he withdraws from the conspiracy by affirmative action.'" *United States v. Cornell*, 780 F.3d 616, 632 (4th Cir. 2015) (quoting *United States v. Bennett*, 984 F.2d 597, 609 (4th Cir. 1993)); *see also United States v. DePriest*, 6 F.3d 1201, 1206 (7th Cir. 1993) (same). Because the evidence unquestionably shows that Martorello entered into the conspiracy, he continues to remain responsible for the actions of his co-conspirators.

Moreover, Martorello's statement of "facts" relies on mischaracterizations of the transactional documents and disregards the objective evidence about non-tribal members needing to remain in control of the business until repayment of the note. As the Fourth Circuit observed: "the record shows that Martorello planned to continue running the lending operations after the Tribe restructured" through the checks and balances in the transactional documents. *Williams v. Martorello*, 59 F.4th 68, 90 (4th Cir. 2023) (citing multiple emails authored by Martorello). The Fourth Circuit further concluded that "the record supports the conclusion that Martorello retained control over the business." *Id.* (citing an email authored by Martorello about replacing Brian McFadden as manager of Ascension). As Martorello himself explained prior to the restructure: "the [tribal] Manager[s], don't really do anything," and they "are really only involved per the [operating agreement] to get feedback from" the non-tribal president of Ascension. ECF No. 1166-

39. And, of course, Martorello did not genuinely dispute the documents showing his need to approve operational changes to the lending enterprise, such as his consent to allow new office space, the hiring of employees, and reinvestment in the business. *See* ECF Nos. 1166-50, 1166-51, 1166-52, 1166-53, 1166-54, 1166-55.

Paragraphs 69-75: None of these purported facts are material to Plaintiffs' motion for the reasons explained in the previous section. In this section, Martorello attempts to establish that he did not "control" the lending enterprise after the sale of Bellicose to the LVD or participate in any of the day-to-day operations. But again, none of these "facts" matter as they do not establish that Martorello withdrew from the conspiracy. Also, Plaintiffs need not establish that Martorello controlled or participated in the day-to-day operations of the lending operation to succeed on their § 1962(d) claim; only that he knew about and facilitated it. The undisputed evidence shows that: (1) Martorello designed the restructure to continue the usurious lending activities; (2) continued to profit from them; and (3) approved operational changes to the lending enterprise. *Id.* Pointing to his involvement in the day-to-day minutiae does not create a genuine dispute of material fact.

Paragraphs 76-78: Again, none of these purported facts are material to Plaintiffs' motion. Here, Martorello states that the LVD received significant benefits from the lending enterprise. Martorello also insinuates that LVD hired him to help build a business and that this business was worth almost $25 million in equity value in 2016.[6] While Plaintiffs disagree with Martorello's implications and characterizations of the lending enterprise, none of the facts in these paragraphs are material to the three issues on which Plaintiffs seek summary judgment.

ARGUMENT

I. Martorello's federal preemption argument ignores decades of precedent from the Supreme Court, as well as the Fourth Circuit's binding decision in *Hengle*.

[6] Plaintiffs object to Martorello's use of Cowhey's expert report and valuation for the same reasons explained in their briefing regarding their Motion to Exclude Cowhey. ECF Nos. 1183, 1232.

The foundations of the tribal lending model revolve around two distinct—but often blended—concepts. First, participants in the tribal lending industry have argued that making online loans constitutes "on the reservation" activity. *See, e.g., Hengle v. Treppa*, 19 F.4th 324, 348 (4th Cir. 2021). This was one of the cornerstones of the tribal lending model because if online lending were considered on-reservation activity, it would negate the general rule 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." *Id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–149 (1973)). Every court to consider this first issue has held that online lending activities "clearly constitute off-reservation conduct subject to nondiscriminatory state regulation." *Hengle*, 19 F.4th at 349 (gathering cases and quoting *Hengle v. Asner*, 433 F. Supp. 3d 825, 876 (E.D. Va. 2020)). Because "substantive state law applies to off-reservation conduct," tribal officers and their business partners may be sued for online loans that violate state laws. *Id.*

Even though online lending constitutes off-reservation conduct, the fight has not ended there. Instead, participants in the tribal lending industry have pushed a fallback argument—that generally applicable state law may be waived through choice-of-law provisions that elect tribal law to govern the loans. *Hengle*, 19 F.4th at 349. Courts have routinely rejected this argument, largely on two grounds. First, the tribal contracts and tribal codes—which were largely crafted by the same law firm (Rosette)—prospectively waive borrowers' rights and remedies. *See, e.g., Hengle*, 19 F.4th at 336-339 (examining the prospective waiver doctrine and its application to prior tribal lending contracts). And second, courts have applied generally applicable defenses to choice-of-law provisions, including whether enforcement of the choice-of-law provision would violate a state's public policy. *See Hengle*, 19 F.4th at 349-350; *see also W. Sky Fin., LLC v. State ex rel.*

Olens, 300 Ga. 340, 347, (2016) (rejecting the defendants' argument that tribal choice-of-law provision prohibited the application of Georgia's usury laws).

As explained in Plaintiffs' opening brief, Plaintiffs are entitled to summary judgment on both issues. First, under the controlling precedent in *Hengle*, it cannot be genuinely disputed that the online loans at issue "clearly constitute off-reservation conduct subject to nondiscriminatory state regulation." *Hengle*, 19 F.4th at 349. It also cannot be disputed that the tribal choice-of-law provisions are unenforceable on two independent grounds: (1) the contracts and tribal code violate the prospective waiver doctrine as determined by this Court and the Fourth Circuit at the class certification stage; or (2) enforcement of the provisions would violate Virginia's compelling public policy against usurious lending as determined in *Hengle*.

Left with this reality, Martorello makes several frivolous arguments that contradict existing law. Out of caution, Plaintiffs will address each argument in turn.

A. Federal law prohibits the enforcement of the choice-of-law provision.

Martorello's overarching point is that Plaintiffs' motion "rests on the erroneous proposition that the Court should look to Virginia's choice of law jurisprudence to determine the applicable law." ECF No. 1218 at 21. Against this backdrop, Martorello makes several arguments that urge the Court to ignore the traditional conflicts of law framework that "[f]ederal courts, ***when exercising their diversity or pendent jurisdiction over state law claims***, must of course, apply the choice of law rules applicable in the forum state." *ITCO Corp. v. Michelin Tire Corp., Com. Div.*, 722 F.2d 42, 49 (4th Cir. 1983), *on reh'g*, 742 F.2d 170 (4th Cir. 1984) (emphasis added).

As a threshold matter, this argument fails because Plaintiffs moved for summary judgment on claims arising under federal law: RICO. Where, as here, "federal question jurisdiction is invoked," courts "generally apply federal common law principles to resolve choice of law

disputes." *JAAAT Tech. Servs., LLC v. Tetra Tech Tesoro, Inc.*, 2017 WL 4003026, at *6 (E.D. Va. Sept. 11, 2017) (quoting *Nat'l Fair Hous. All, Inc. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 62 (D.D.C. 2002)). As explained in Plaintiffs' opening brief, choice-of-law clauses are unenforceable *under federal law* if 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)).[7]

One *federal* 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). Applying this doctrine, 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 Fourth Circuit affirmed this, holding that "the doctrine renders the class-action waiver unenforceable because the waiver itself, 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." *Williams v. Martorello*, 59 F.4th 68, 81 (4th Cir. 2023) (emphasis added). Because of this, tribal law cannot apply as a matter of federal law.[8]

[7] 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)).

[8] Martorello attempts to distinguish this Court and the Fourth Circuit's determination by claiming that it was limited to the choice of forum clause, not the choice of law clause. ECF No. 1218 at 30-31. Martorello also claims that the choice-of-law provision "in Plaintiffs' loan agreements does

B. The foundation of Martorello's argument rests on the test for conduct occurring on the reservation.

Martorello's argument that tribal law applies must also be rejected because it revolves around a mischaracterization of federal law. *See* ECF No. 1218 at 19-20. According to Martorello, the Supreme Court has "consistently required courts to assess the applicability of state law through an interest-weighing analysis whenever it impacts on-reservation business activity." *Id*. at 22. In his view, this balancing test shows why Virginia law is preempted here. *Id*. at 22.

The Court should reject this argument because it relies on the wrong standard of law when the conduct at issue constitutes off-reservation activity. As the Second Circuit explained, the "breadth of a state's regulatory power depends upon two criteria—the location of the targeted conduct and the citizenship of the participants in that activity." *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 113 (2d Cir. 2014). When the location of the targeted activity is "beyond the reservation boundaries," tribes and their members "must comply with "state laws as long as those laws are "non-discriminatory [and] ... otherwise applicable to all citizens of [that] State." *Id*. (quoting *Mescalero Apache*, 411 U.S. at 148–49).

By contrast, "once a state reaches across a reservation's borders its power diminishes and courts must weigh the interests of each sovereign—the tribes, the federal government, and the state—in the conduct targeted by the state's regulation." *Otoe-Missouria*, 769 F.3d at 113. As the Supreme Court explained, "[w]hen on-reservation conduct involving only Indians is at issue, state

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not disavow federal law and, instead, specifically provides that is it governed by applicable federal law." *Id*. at 30. These arguments are frivolous. First, both this Court and the Fourth Circuit analyzed the whole contract (as well as the Tribal Code) when determining that it prospectively waived federal law. *See, e.g., Williams*, 59 F.4th at 81. And second, the Fourth Circuit also expressly rejected Martorello's reliance on the "applicable federal law" clause, explaining that "[s]uch a provision," the Fourth Circuit explained, "must be viewed in context to determine its actual meaning." *Id.* at 84 (citing *Hengle*, 19 F.4th at 341). This "context" was the repeated waivers and deprivations created by tribal law. *Id.* at 85.

law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (emphasis added). "More difficult questions arise" where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." *Id*.

Determining the appropriate test requires a court to identify "who a regulation targets and where the targeted activity takes place." *Otoe-Missouria*, 769 F.3d at 114. "Only then can" a court "either test for discriminatory laws," for off the reservation conduct "as in *Mescalero I*, or balance competing interest, as in *Bracker*." *Id*. Here, this analysis is easy: *Hengle* has conclusively determined that online lending activities "clearly constitute off-reservation conduct subject to nondiscriminatory state regulation." *Hengle*, 19 F.4th at 349. Accordingly, it is unnecessary to engage in the interest-weighing analysis from *Bracker*, which involved attempted state regulation of activities *on a reservation*.[9]

And even if interest-weighing analysis applies, it should not change the result as it cannot be genuinely disputed that Martorello, a non-tribal member, was the key architect of the lending operations, as well its primary beneficiary. In other words, "a tribe has no legitimate interest in selling an opportunity to evade state law." *Otoe-Missouria*, 769 F.3d at 114. And although Martorello characterizes the application of Virginia law as an affront to tribal sovereignty, it is the opposite. It is the tribe (and really, Martorello) who desires to infringe on one of fundamental components of Virginia's sovereignty: its ability to regulate and protect its residents within its

[9] Similarly, Martorello cites (ECF No. 1218 at 27) the Ninth Circuit's decision in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989), which noted that if "state law interferes with the purpose or operation of a federal policy regarding tribal interests, it is preempted." But that case involved attempted state taxation of timber harvested on the reservation, thereby implicating the "[f]ederal laws and policies" supporting "the harvest of timber on tribal lands." *Id*. at 559.

boundaries. Neither the LVD's sovereignty, nor its own poverty provides it with a free pass to operate "as payday lenders to reach far beyond their sovereignty and violate state consumer protection statutes with impunity." *Hengle v. Asner*, 433 F. Supp. 3d 825, 877 (E.D. Va. 2020).

C. NABDA does not authorize tribes and their business partners to conduct business outside the reservation without conforming to state law.

Martorello also summarily contends that "the business relationships between companies affiliated with Martorello and the Tribe" further the goals of the Native American Business Development Act, Trade Promotion, and Tourism Act ("NABDA") and so "Virginia law is preempted to the extent it would undercut federal law, including NABDA." ECF No. 1218 at 28.

Although Martorello broadly cites the NABDA, he fails to point to any provision of the Act that preempts state usury laws. *Muscogee (Creek) Nation v. Henry*, 867 F. Supp. 2d 1197, 1214 (2010) (holding that NABDA did not preempt Oklahoma's tax statutes on non-tribe members who bought cigarettes), *aff'd sub nom. Muscogee (Creek) Nation v. Pruitt,* 669 F.3d 1159 (10th Cir. 2012). This is because NABDA "even when given the broadest reading to which [it is] fairly susceptible," does not provide any authorization or "discernable regulatory framework for the activity that is the subject" of this case. *Tulalip Tribes v. Washington,* 349 F. Supp. 3d 1046, 1055 (W.D. Wash. 2018) (citations and quotations omitted).

Indeed, after the passage of NABDA, the Supreme Court has expressly acknowledged that there are a "panoply of tools" available to "shutter, quickly and permanently" unlawful conduct involving tribes. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014). One example of those tools is a suit for "*injunctive* relief against individuals, including tribal officers, responsible for unlawful conduct." *Id*. (emphasis added) (citations omitted). Another example provided by the Supreme Court was denying "a license to Bay Mills for an off-reservation casino." *Id*. (citing Mich. Comp. Laws Ann. §§ 432.206–432.206a (West 2001)). And if the tribe "went ahead anyway," the

Supreme Court said that Michigan "could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gaming without a license" in violation of Michigan's gaming laws. *Id*. (citing Mich. Comp. Laws Ann. § 432.220).

In sum, the "purpose of Congress is the ultimate touchstone in every preemption case." *Scott v. GMAC Mortg., LLC*, 2010 WL 3340518, at *3 (W.D. Va. 2010) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Without express preemptive language in a statute, courts have "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Id*. (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Here, there is no preemption clause in NABDA, nor is there any language in the statute remotely suggesting that Native American businesses may operate outside the reservation without complying with state law.[10]

D. Virginia choice-of-law rules govern the choice-of-law rules for Plaintiffs' claims arising under state law.

Throughout this case, Martorello has argued that Virginia choice-of-law rules governed the enforceability of the choice of law provisions. *See, e.g.*, ECF No. 37 at 10-14 (Martorello's initial motion to dismiss arguing that the Virginia Supreme Court's decision in *Settlement Funding* required an application of tribal law). In his opposition, Martorello has now abandoned this position following the Fourth Circuit's decision in *Hengle*, which held that enforcement of the choice of law provisions would violate Virginia's public policy. Martorello should be judicially estopped from now taking a contrary position from his earlier submissions. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (explaining that the doctrine of judicial estoppel prohibits "parties from deliberately changing positions according to the exigencies of the moment.") (*quoting United States v. McCaskey*, 9 F.3d 368, 378 (C.A. 5 1993)).

[10] Martorello further argues that the National Bank Act "supports application of federal law." Dkt. 1218 at 28-29. This two-paragraph argument is undeveloped and does not make any sense. And, of course, the National Bank Act does not cover the companies in this case.

If the Court considered Martorello's new position—that Virginia choice-of-law rules do not apply—it should be rejected as it is well settled that "[f]ederal courts, when exercising their diversity or pendent jurisdiction over state law claims, must of course, apply the choice of law rules applicable in the forum state." *Michelin Tire Corp.*, 722 F.2d at 49; *see also Harrell v. Colonial Holdings, Inc.*, 923 F. Supp. 2d 813, 821 (E.D. Va. 2013) (same). This well-established approach has been applied in tribal lending cases, and Martorello offers no reason to depart from the same. *See, e.g., MacDonald v. CashCall, Inc*, 2017 WL 1536427, at *8 (D.N.J. Apr. 28, 2017), *aff'd*, 883 F.3d 220 (3d Cir. 2018).

II. Martorello did not respond to Plaintiffs' request for summary judgment as to his affirmative defense that tribal immunity bars the cause of action.

Plaintiffs also moved for 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." ECF No. 1166 at 31. Martorello did not acknowledge or provide any response to this request. Accordingly, summary judgment should be granted on this affirmative defense. *Akzo Nobel Coatings, Inc. v. Pearl Ave. USA, Ltd.*, 2010 WL 11564919, at *1, n. 1 (E.D. Va. Oct. 6, 2010) ("Pursuant to Fed. R. Civ. P. 56(e)(1), where an opposing party fails to respond to a motion for summary judgment, judgment should, if appropriate, be entered against that party."). Here, it is appropriate to enter summary judgment on this defense because it is a misstatement of the law as explained in Plaintiffs' opening brief.

III. Partial summary judgment should be granted on Plaintiffs' RICO conspiracy claim because mistake of law is not a defense.

As explained in Plaintiffs' opening brief, "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). In his opposition, Martorello offers a puzzling reason why he should be able to avoid liability on this claim. According to Martorello, "RICO requires knowledge that the loans were unlawful." ECF No. 1218 at 31. And because Martorello claims that there is a genuine dispute about whether he knew the loans were unlawful, summary judgment should be denied.

This theory should be rejected because "knowledge of illegality" is not an element of a RICO claim. *Mao*, 2022 WL 989012, at *9. A person who engages in the forbidden conduct—conspiring to collect usurious debt—may be liable for a civil RICO claim "whether they knew the debt was unlawful or not." *Id*.

A. Martorello's theory defies the plain language of RICO.

Martorello's theory ignores the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010) (quoting *Barlow v. United States*, 7 Pet. 404, 411, 8 L.Ed. 728 (1833)). "Our law is therefore no stranger to the possibility" that a person may be civilly liable "even if the actor lacked actual knowledge that her conducted violated the law." *Jerman*, 559 U.S. at 581.

For this reason, "when Congress has intended to provide a mistake-of-law defense to civil liability," it has "often done so [] explicitly." *Id*. at 582. For example, the Federal Trade Commission Act's administrative penalty provisions applies "only when a debt collector acts with 'actual knowledge or knowledge fairly implied on the basis of objective circumstances' that its action was 'prohibited by the FDCPA.'" *Id*. at 583-584 (quoting 15 U.S.C. §§ 45(m)(1)(A), (C)). By way of another example, Congress often triggers liability on "willful violations, a term more often understood in the civil context to excuse mistakes of law." *Id*. at 584 (internal quotations and citation omitted). Examples of this would include the Age Discrimination in Employment Act and

the Fair Credit Reporting Act. *Id*. at 584 (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125–126 (1985) as an example that "civil damages for "willful violations" of Age Discrimination in Employment Act of 1967 require a showing that the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited" (internal quotation marks omitted)); *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 57 (2007) (same under FCRA)).

Indeed, "even in the criminal context," Congress' "reference to a 'knowing' or 'intentional' 'violation' or cognate terms has not necessarily implied a defense for legal errors." *Id*. at 585 (citing, *e.g*., *Bryan v. United States*, 524 U.S. 184, 192 (1998) (" '[T]he knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law' ") (internal quotations and citation omitted); *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 559 (1971) (holding that criminal liability for those who " 'knowingly violat[e]' " regulations governing transportation of corrosive chemicals did not require 'proof of [the defendant's] knowledge of the law'").

Contrary to these principles, Martorello asks the Court to adopt a categorical rule that a person may only be held liable for a RICO violation if the participant knew the conduct violated the law. ECF No. 1218 at 31-33. Rather than supporting his argument with the statutory text of RICO, Martorello selectively cites several sources out of context in support of his position, such as the Department of Justice's manual for federal prosecutors. ECF No. 1218 at 32 (citing *Criminal RICO*: 18 U.S.C. §§ 1961-1968, *A Manual for Federal Prosecutors*, p. 136 (6th rev. ed. 2016)). But "[a]s always, the starting point for any issue of statutory interpretation is the language of the statute itself." *D.B. v. Cardall*, 826 F.3d 721, 734 (4th Cir. 2016) (citations and internal quotations omitted). Where, as here, the "language at issue has a plain and unambiguous meaning with regard to the particular dispute, that meaning controls." *Id*. (internal quotations omitted).

Here, the issue presented by Martorello's opposition is a simple question of statutory interpretation: does RICO require knowledge that loans were unlawful to impose civil liability? To answer this question, "the first task of the court" is "to look to the plain language of the statute." *Milbourne v. JRK Residential Am., LLC*, 92 F. Supp. 3d 425, 434 (E.D. Va. 2015). To determine "whether the language is plain," courts should consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 248 (4th Cir. 2004); (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). If the language is plain, "that language must ordinarily be regarded as conclusive." *Milbourne*, 92 F. Supp. 3d at 435 (quoting *Consumer Product Safety Comm'n et al. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

The relevant statutory text of RICO provides that it "shall be unlawful for any person to conspire to violate any provisions of subsection (a), (b), or (c)" of § 1962. 18 U.S.C. § 1962(d). In turn, § 1962(c) provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). By their terms, neither of these provision require "knowing," "willful," or "intentional" violations; they simply requires a person to conduct or participate in the affairs of an enterprise engaged in the collection of unlawful debt or conspire with someone to do so. The same is true for the predicate act of collection of "unlawful debt," which is defined as a debt:

> (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or 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). None of the language in this statutory definition, nor the requirements of RICO support Martorello's construction that a defendant must know his conduct was illegal.

The Supreme Court's decision in *United States v. Feola* illustrates this point. 420 U.S. 671 (1975). In that case, the Supreme Court considered whether the government needed to show that a defendant was "aware that his intended victims were undercover agents" to "successfully prosecute him for conspiring to assault federal agents" in violation of 18 U.S.C. § 371. *Id*. at 686-687. In rejecting the defendant's argument, the Supreme Court held that the statute offered "no textual support for the proposition that to be guilty of conspiracy a defendant in effect must have known that his conduct violated federal law." *Id*. at 687. Rather than reading such a requirement into the statute, the Supreme Court determined that there was "nothing on the face" of the statute "that would seem to require that those agreeing to the assault have a greater degree of knowledge." *Id*. Thus, it reasoned that a "natural reading of these words" confirmed that one could violate the statute "simply by engaging in the forbidden conduct." *Id*. The same is true for RICO.

And even if the text of the statute leaves room for doubt, the context and history of RICO provide more support for construing these provisions to exclude a mistake-of-law defense. As the Supreme Court has explained, "RICO is to be read broadly"—"not only" because of "Congress' self-consciously expansive language and overall approach," but also because of "its express admonition that RICO is to be 'liberally construed to effectuate its remedial purposes." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985) (citation omitted); *see also Clodfelter v. Republic of Sudan*, 720 F.3d 199, 211 (4th Cir. 2013) (explaining that remedial statutes "should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers."). Given that the "elimination of loansharking was one of

Congress' principal aims in enacting the statute," *United States v. Biasucci*, 786 F.2d 504, 512 (2d Cir. 1986) (S.Rep. No. 617, 90th Cong., 2d Sess. 78–80; H.R.Rep. No. 1574, 90th Cong., 2d Sess. 5), it would be shocking that Congress intended to allow participants to avoid *civil liability* even if they lacked actual knowledge that their 800% APR loans violated the law.

For these reasons, this Court has rejected a virtually identical argument that "if Defendants did not know the debts were illegal," they could not be held liable under RICO. *Mao*, 2022 WL 989012, at *9; *compare with* ECF No. 1218 at 33 (arguing that "Plaintiffs must prove that Martorello knew that the loans were unlawful and, with that knowledge, intentionally conspired with co-conspirators to collect them."). In doing so, this Court concluded that "knowledge of illegality" is not an element of a RICO claim and so a person may be liable for a civil RICO claim "whether they knew the debt was unlawful or not." *Id*. Multiple other cases have reached the same conclusion. *Brice v. Haynes Investments, LLC*, Case No. 18-cv-1200-WHO, Aug. 10, 2021 Final Pretrial Order (barring any evidence or argument about attorney communications because "a good faith defense" is not "relevant to any of the claims to be presented to the jury"). Thus, Martorello's lone defense to summary judgment should be rejected.

B. None of Martorello's cited authorities hold that RICO requires knowledge that the loans were unlawful.

Martorello's opposition ignores the plain language of the statute, as well as multiple decisions rejecting his theory. *See generally* ECF No. 1218 at 31-33. Consistent with this, Martorello never takes a position about what word or phrase in RICO makes willfulness or specific intent an element of the violation at issue. *Id*. Is it the definition of "unlawful debt"? Or is it in the element of §§ 1962(c)-(d)? Martorello's failure to tether his argument to the statutory language is telling. Rather than identify the statutory text, Martorello's brief cites three authorities in support

of his claim that Plaintiffs must prove Martorello had actual knowledge of the illegality of his conduct. ECF No. 1218 at 33.

First, Martorello cites two criminal cases from the Fourth Circuit, which stated: "to satisfy § 1962(d), the government must prove that an enterprise affecting interstate commerce existed; 'that each defendant ***knowingly*** and ***intentionally*** agreed with another person to conduct or participate in the affairs of the enterprise; and ... that each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts.'" *See, e.g.*, *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) (emphasis added). Without any support, Martorello suggests that the Fourth Circuit's inclusion of the words "knowingly and willfully" means that RICO liability requires a showing of knowingly unlawful conduct. ECF No. 1218 at 31-32. Neither of these words—even assuming they apply to a civil claim for collection of unlawful debt—impose the requirement posited by Martorello.

Instead, the term " 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Bryan v. United States*, 524 U.S. 184, 193 (1998). Put differently, "the term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law." *Id*. at 192. Instead, even when the term is used *in a statute*, "the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law." *Id*.; s*ee also RSM, Inc. v. Herbert*, 466 F.3d 316, 320 (4th Cir. 2006) (" 'Knowingly' typically refers only to one's knowledge of the facts that make his conduct unlawful, not to one's knowledge of the law."). For example, "a charge that the defendant's possession of an unregistered machinegun was unlawful required proof 'that he knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun." *Id*. (quoting *Staples v. United States*, 511 U.S. 600, 602 (1994). If the person knew about the characteristics of the

machinegun, it is unnecessary "to prove that the defendant knew that his possession was unlawful." *Id*. The same is true here—it is Martorello's knowledge regarding the characteristics of the loans that matters, not whether lawyers told him that they were legal.

The "word 'willfully' is sometimes said to be a 'word of many meanings' whose construction is often dependent on the context in which it appears." *Id*. at 191. When willfulness is *not* a condition to civil liability, the "word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental." *Id*., n. 12; *see also RSM, Inc. v. Herbert*, 466 F.3d 316, 320 (4th Cir. 2006) (explaining that "[a]t its core," the term willfulness "describes conduct that results from an exercise of the will, distinguishing 'intentional, knowing, or voluntary' action from that which is 'accidental' or inadvertent."); *United States v. Blankenship*, 846 F.3d 663, 672 (4th Cir. 2017) (same); *United States v. McBride*, 908 F. Supp. 2d 1186, 1205 (D. Utah 2012) ("In civil contexts involving a requirement to report or disclose certain information to the IRS, willfulness has been defined as conduct which is voluntary, rather than accidental or unconscious."). By contrast, "where willfulness is a statutory condition of civil liability," it has generally covered "not only knowing violations of a standard, but reckless ones as well." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007).

The plain language of RICO does not condition liability on a person who "willfully" violates the statute. 18 U.S.C. § 1962(d); *compare with, e.g.*, 15 U.S.C. § 1962(n)(a). Thus, the Court should not interpret the Fourth Circuit's "bare use of the word 'willfully'" in *Mouzone* to "signal that the statute implies a requirement that the defendant act with knowledge that his conduct was prohibited by law." *Council on Am.-Islamic Rels. Action Network, Inc. v. Gaubatz*, 31 F. Supp. 3d 237, 265, n. 10 (D.D.C. 2014). This is all the more true because *Mouzone* was a

criminal case, rather than a civil action where "willful conduct is most often defined simply as that which is intentional, rather than inadvertent or accidental." *Id*.

Along with *Mouzone*, Martorello also selectively cites the Department of Justice's manual for federal prosecutors as support for his position that Plaintiffs must prove that Martorello had actual knowledge his conduct violated the law. ECF No. 1218 at 32 (citing Criminal RICO: 18 U.S.C. §§ 1961-1968, A Manual for Federal Prosecutors, p. 136 (6th rev. ed. 2016)). Yet this manual expressly acknowledges that: "Every court that has considered the issue has held that RICO does not require any mens rea or scienter element beyond what the predicate offenses require. ***Therefore, willfulness or other specific intent is not an element of a RICO offense***; however, if any of the predicate offenses require proof of willfulness or specific intent then such requirement must be met regarding that predicate offense." *Id*. at 331 (emphasis added). Despite this, the manual adds that "it is the policy of the Organized Crime and Gang Section to allege and prove at least that the RICO defendant acted knowingly or intentionally to eliminate any issue that the RICO defendant did not have the requisite criminal intent." *Id*. at 331-332. Once this policy is understood, it provides the context for the portion trumpeted by Martorello, which merely recites the internal policy to seek to prove a defendant knew the debt was unlawful. *Id*. at 136.

Finally, Martorello also cites (ECF No. 1218 at 32-33) the Second Circuit's decision in *Grote*, which expressed "no view on whether willfulness or awareness of unlawfulness was required for" the criminal convictions of two individuals involved in a tribal lending scheme. *United States v. Grote*, 961 F.3d 105, 119 (2d Cir. 2020)). In *dicta*, however, the Second Circuit expressed concern with its prior holding in *Biasucci* and its potential to result in a conviction where "high interest rates can result from application of reasonable service fees to small debit balances," such as where a store owner mailed a "monthly bill that charged $15 fee where the customer's

unpaid balance was sufficiently small." *Id*. at 120-121.[11] The court added: "If RICO liability requires no proof of state of mind other than what is required to show that the loan is unenforceable" under state law, "this can produce criminal liability for racketeering for unexceptionable conduct" such as the store owner imposing the late fee. *Id*. at 121. The Second Circuit, however, declined to adopt a rule to address this issue because the defendants partook in "predatory lending practices" quite different from the hypothetical store owner. *Id*. at 120.

The Second Circuit's decision in *Grote* offers no help to Martorello. For starters, it never remotely suggests that RICO requires proof of actual knowledge that their conducted violated the law. Nor did it examine the plain language of the statute. It also did not overturn the Court's prior holding from *Biasucci*, which held that "RICO imposes no additional mens rea requirement beyond that found in the predicate crimes." *United States v. Biasucci*, 786 F.2d 504, 512 (2d Cir. 1986). The *Grote* court also did not canvass whether the hypothetical store owner could be civilly liable for the imposition of improper late charges.

C. Other than his erroneous mistake of law defense, Martorello did not oppose that he knew about and agreed to facilitate the scheme.

As explained in Plaintiffs' opening brief, a conspiracy claim under RICO "does not require that a defendant have a role in directing an enterprise." *Mouzone*, 687 F.3d at 218. Rather, in the Fourth Circuit, "simply agreeing to advance a RICO undertaking is sufficient." *Id*. "Once 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). *See United States v. Brooks*, 957 F.2d 1138, 1147 (4th Cir. 1992) (emphasis added). A "slight connection" is satisfied by showing "knowledge of the essential nature of the plan." *United States v. Morrow*, 914 F.2d 608,

[11] It is unclear why this example troubled the Second Circuit as RICO's unlawful debt provision only applies to debt incurred in connection with "the business of lending money," not a store who imposes late charges on the failure to return goods. 15 U.S.C. § 1961(6).

612 (4th Cir. 1990). Put differently, once a defendant knows of the conspiracy, he "could, for example" be liable if it is proven "that the defendant agreed to facilitate a scheme by providing tools, equipment, cover, or space." *United States v. Zemlyansky*, 908 F.3d 1, 12, n.6 (2d Cir. 2018).

In his opposition, Martorello does not—and cannot—contest that he has far more than a slight connection to the usurious lending scheme. While the parties disagree on the level of meaningful involvement of the LVD, it does not matter to Martorello's liability as no one disputes that Martorello had a major connection to this longstanding scheme. Because Martorello concedes that he knew about and facilitated the usurious lending activities, partial summary judgment should be awarded to Plaintiffs as to each of the liability elements of their § 1962(d) conspiracy claim.

IV. Martorello did not respond to Plaintiffs' request for summary judgment that: (1) an enterprise existed; (2) the loans constituted unlawful debts; and (3) persons associated with the enterprise engaged in the collection of unlawful debt in violation of § 1962(c).

Plaintiffs' opening brief sought partial summary judgment that a violation of § 1962(c) occurred. ECF No. 1166 at 36. More specifically, Plaintiffs sought summary judgment as to each of the core elements of § 1962(c) claim, *i.e.*, that (1) an enterprise existed; (2) the loans constituted unlawful debts under RICO; and (3) persons associated with the enterprise—not necessarily Martorello—participated in the affairs through the collection of unlawful debt. *Id*.

Granting summary judgment—in whole or in part—as to certain elements is a routine practice in federal courts. *See, e.g.*, *Wallace v. Love's Travel Stops & Country Stores*, 2022 WL 3021019, at *17 (E.D. Va. July 20, 2022) (granting summary judgment on the first element of plaintiffs' claim of negligence per se); *Gemalto Pte Ltd. v. Telecommunications Indus. Ass'n*, 2009 WL 464484, at *7 (E.D. Va. Feb. 24, 2009) (granting summary judgment on one element of plaintiff's negligence claim); *Dreher v. Experian Info. Sols., Inc.*, 71 F. Supp. 3d 572, 584 (E.D.

Va. 2014) (granting "partial summary judgment on the willfulness liability issue" of the plaintiffs' FCRA claims), *vacated on the grounds*, 856 F.3d 337 (4th Cir. 2017).

Partial summary judgment on each of these issues should be awarded because Martorello did not acknowledge or respond to Plaintiffs' request as to any of these elements. *Akzo Nobel Coatings*, 2010 WL 11564919, at *1, n. 1 ("where an opposing party fails to respond to a motion for summary judgment, judgment should, if appropriate, be entered against that party."). Instead, in a two-page section entitled "Plaintiffs have not demonstrated that Martorello 'directed' the affairs of the alleged RICO enterprise as required under § 1962(c)," Martorello contends that his participation "never rose to the level required to create RICO liability under *Reves*." ECF No. 1218 at 39. This misses the mark as it was never argued or asserted in Plaintiffs' opening brief that Martorello violated § 1962(c). *See generally* ECF No. 1166.

Because Plaintiffs' motion for partial summary judgment establishes all the elements of a substantive violation *by some members of the enterprise*, there is no need to prove that Martorello himself committed the substantive violation under the Supreme Court's decision in *Salinas v. United States*, 522 U.S. 52, 61 (1997). There, the jury acquitted the defendant "on the substantive count" under § 1962(c), but convicted him of conspiracy under § 1962(d). *Id*. at 62-63. The defendant challenged the conviction on the theory that the jury should have been "instructed that he must have committed or agreed to commit two predicate acts himself." *Id*. at 63. In other words, the defendant argued that the § 1962(d) conviction could be upheld only if he was also convicted of a substantive violation of § 1962(c).

The Supreme Court rejected held that the defendant's "interpretation of the conspiracy statute" was "wrong," and explained that there was "no requirement of some overt act or specific act in the statute" unlike "the general conspiracy provision applicable to federal crimes." *Id*. The

Supreme Court further added that "partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of the each other." *Id*. at 64. Put differently, a person "may conspire for the commission of a crime by a third person," and 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." *Id*. at 64-65 (citation omitted).

With these principles in mind, the Supreme Court affirmed the conviction because even if the defendant "did not accept or agree to accept bribes" in violation of § 1962(c), there was still "ample evidence that he conspired to violate subsection (c)." *Id*. at 65. This evidence showed that the defendant's co-conspirator "committed at least two acts of racketeering activity when he accepted numerous bribes," and that the defendant "knew about and agreed to facilitate the scheme." *Id*. at 66 (emphasis added). Nothing more is required. And following *Salinas*, courts have repeatedly rejected arguments that a defendant must commit a substantive violation of RICO to be liable under RICO's conspiracy provision. *See, e.g.*, *Smith v. Berg*, 247 F.3d 532, 534 (3rd Cir. 2001); *United States v. Fernandez*, 388 F.3d 1199 (9th Cir. 2004) (same).

So too here. Even if Martorello did not participate in the management of the affairs, partial summary judgment may be awarded on the conspiracy claim that he knew about and facilitated the scheme. Similarly, the undisputable evidence also shows that (1) an enterprise existed; (2) the loans constituted unlawful debts under RICO; and (3) persons associated with the enterprise—not necessarily Martorello—participated in the affairs through the collection of unlawful debt. ECF No. 1166 at 36-39. Accordingly, partial summary judgment should be awarded as to each of these core elements of Plaintiffs' claim, thereby leaving a jury to determine: (1) whether Martorello also participated in the management; and (2) the proper amount of damages.

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

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