UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PA, by Attorney General KATHLEEN G. KANE,	:	CIVIL ACTION
Plaintiff,	:	NO. 14-cv-07139-JCJ
v.	:	
THINK FINANCE, INC., et al.	:	
Defendants.	:	

ORDER

AND NOW, this ____ day of _____, 2015, upon consideration of Defendant Kenneth E. Rees's Motion to Dismiss and any opposition thereto, it is hereby **ORDERED** and **DECREED** that said Motion to Dismiss is **GRANTED** and the First Amended Complaint is dismissed with prejudice.

_____
, J.

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COMMONWEALTH OF PA, by Attorney General KATHLEEN G. KANE,	:	CIVIL ACTION
Plaintiff,	:	NO. 14-cv-07139-JCJ
v.	:	
THINK FINANCE, INC., et al.	:	
Defendants.	:	

DEFENDANT KENNETH E. REES' MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Kenneth E. Rees, through his undersigned counsel, respectfully moves the Court for an Order dismissing Plaintiff's First Amended Complaint under Rules 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure. The grounds for this motion are set forth in the accompanying Memorandum of Law.

Respectfully submitted,

By: s/ Richard L. Scheff

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MEMORANDUM OF LAW OF DEFENDANT KENNETH E. REES IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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I. INTRODUCTION

Defendant Kenneth E. Rees ("Rees") submits this memorandum of law in support of his Motion to Dismiss Plaintiff's First Amended Complaint ("FAC") pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(7). In short, the FAC must be dismissed because: (1) Plaintiff's impermissible group pleading allegations do not adequately apprise Rees as to the specific misconduct he is alleged to have engaged in across all claims within the First Amended Complaint; (2) Plaintiff has failed to plead facts that demonstrate an actionable violation of any of the consumer protection statutes Plaintiff alleges Rees violated; (3) Plaintiff has failed to allege facts that demonstrate Rees personally engaged in acts of racketeering, or participated as a principal in acts of racketeering, or participated in a conspiracy to violate Pennsylvania's Corrupt Organizations Act; (4) Plaintiff seeks improper remedies under the Pennsylvania Corrupt Organizations Act; and (5) Plaintiff's failure to join several indispensable parties requires dismissal of its claims. For these reasons, dismissal of Plaintiff's First Amended Complaint, *with prejudice*, is appropriate.

II. BACKGROUND

A. Procedural History

On November 13, 2014, the Commonwealth of Pennsylvania, acting through its Office of Attorney General and Special Counsel ("Plaintiff" or the "Commonwealth"), sued Kenneth E. Rees and various entities in Pennsylvania state court alleging violations of three statutes – the Pennsylvania Corrupt Organizations Act (18 Pa.C.S. §§ 911 *et seq.*), the Pennsylvania Fair Credit Extension Uniformity Act (73 P.S. §§ 2270.1 *et seq.*), and the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 P.S. §§ 201-1 *et seq.*).

Following the removal of this action to federal court, the Commonwealth filed its FAC, which added certain parties and a new cause of action alleging violations of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. § 5552(a)).

The heart of the FAC is the allegation that the interest rates charged on the loans made by the First Bank of Delaware ("FBD") and three Native American tribes violated Pennsylvania's Corrupt Organizations Act, as well as state and federal consumer protection laws. It is alleged that certain of the entity defendants provided various services to FBD and the tribes in support of the loans. As a result, the Plaintiff seeks to: (1) restrain Defendants from violating the laws; (2) disgorge all profits Defendants made from the allegedly unlawful lending activity to Pennsylvania consumers; (3) pay restitution to Pennsylvania consumers for the alleged harm they suffered by participating in such loans; (4) invalidate any interest in existing consumer debts owed by Pennsylvania consumers to Native American tribal entities; (5) rescind or reform contracts between Pennsylvania consumers and Native American tribal entities; (6) remove reports to credit bureaus made by the Native American tribal entities; and (7) collect civil penalties up to one million (1,000,000.00) dollars per day.

B. Factual Background

1. Kenneth E. Rees

Mr. Rees is the former Chairman of the Board and Chief Executive Officer of Think Finance, Inc. ("Think Finance"). (FAC ¶ 18.) Think Finance's business, in part, is to provide support services to banks or non-bank lenders who use Think Finance's technology to create and deliver lending products. (FAC ¶ 37.)

The 153-paragraph FAC contains only the following ***three*** factual allegations as to Rees:

- "Defendant Kenneth E. Rees is an individual residing in Texas who, until the business restructuring described below, was the President and Chief Executive Officer of Think Finance, Inc. Following the restructuring, he served as

Chairman of the Board. According to the records of the Texas Secretary of State, he is the sole registered member of Tailwind Marketing, LLC and TC Decision Sciences, LLC, under the misspelled name Ken Bees. He participated in designing and directing the business activity described herein." (FAC ¶ 18.)[1]

- "According to a 2012 interview Defendant Rees gave the Bloomberg Business service, he described Think Finance's business strategy as shifting away from direct lending, described by him as being made complicated by "byzantine state laws," towards partnering with Native American tribes that 'don't have to look to each state's lending laws…'" (FAC ¶ 45.)
- "In a 2012 interview appearing in a Dallas on-line feature on "Dallas Entrepreneurs of the Year 2012," Defendant Rees bragged that despite losing a "bank client" in 2010 – presumably referring to the rent-a-bank relationship with FBD – that had been the source of more than half of the annual revenue for Think Finance, the company managed to increase revenue by 15% in 2011 and projected a 50% increase in 2012 through its "new direction," namely, providing a so-called 'technology platform to Native American tribes with lending businesses…'" (FAC ¶ 52.)

Beyond these three statements, the FAC is devoid of individualized allegations of Rees's conduct which supposedly provides the basis for his liability to the Commonwealth which simply groups Rees with six other Defendants – the "Think Finance Defendants."[2] Indeed, Plaintiff uses this generic group pleading as to the "Think Finance Defendants" in 49 paragraphs of the Complaint. (FAC ¶¶ 2, 19, 20, 21, 32, 33, 37, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 55, 62, 67, 68, 70, 74, 75, 76, 77, 83, 96, 97, 99, 104, 105, 107, 112, 113, 114, 128, 129, 132, 134, 144, 146, 147, 148, 149, 150, 151.)

[1] The FAC's reference to Rees being the sole registered member of Tailwind Marketing, LLC and TC Decision Sciences, LLC is inaccurate. Upon receipt of the FAC, Rees investigated this allegation and discovered a filing mistake made years prior with the Texas Secretary of State, and such public records were promptly corrected. The Attorney General has been advised of this information and understands that Rees never owned any membership interest or any other equity interest in Tailwind Marketing, LLC or TC Decision Sciences, LLC. Nonetheless, even though for purposes of this motion, these allegations are accepted as true, the FAC still should be dismissed with prejudice as to Rees.

[2] This Motion to Dismiss, and Brief in Support thereof, is being filed on behalf of Defendant, Kenneth E. Rees, only. Plaintiff's choice to proceed using group pleading allegations, has required Rees to respond to all allegations against the Think Finance Defendants as if each allegation was made against him personally. To be clear, Think Finance and its related entities are represented by separate counsel, and to the extent that these entities have divergent interests and distinct legal arguments, Rees does not intend to make any factual or legal representations on their behalf by referring to the Think Finance Defendants.

2. **The Lending Relationships as Alleged in the Amended Complaint.**

Plaintiff alleges that the "Think Finance Defendants" entered in a business relationship with FBD, a state-chartered, federally insured, FDIC-regulated bank, whereby FBD acted as the nominal lender of loans to Pennsylvania consumers, with Think Finance providing "most lender functions." (FAC ¶ 37.) Defendants Tailwind Marketing, LLC, TC Decision Sciences, LLC, and TC Loan Services, LLC allegedly received fees from FBD for providing various services related to the loans made by FBD, including marketing the loans and website and other technological services. (*Id.*)[3]

After the FBD relationship ended, Plaintiff alleges that the Think Finance Defendants entered into a similar relationship with three tribes – the Chippewa-Cree of the Rocky Boy's Indian Reservation, Montana; the Otoe-Missouria Tribe of Indians; and the Tunica-Biloxi Tribe of Louisiana ("the Tribes") – in which the Tribes made installment loans and issued lines of credit to consumers and Think Finance provided the same services in support of those loans as described above with FBD. (*See* FAC at ¶¶ 43-44, 46-48.) Indeed, attached as Exhibit "D" to the FAC is a purported "Term Sheet" between Think Finance, one of the Tribes at issue in the FAC, and two other entities which are not parties to this case. The Term Sheet states that Think Finance would only "license its software to the Tribe," and "provide risk management, application processing, underwriting assistance, payment processing, and ongoing customer support coterminous with the software license agreement..." (FAC, at Ex. D.) Conversely, The Term Sheet states that the Native American tribal entities were responsible for "approv[ing] loans that it decided to offer to consumers on a nationwide basis through the internet;"

[3] As noted in Paragraph 13 of the FAC, at least one member of the Think Finance Defendants, TC Loan Service, LLC, was "registered with the Pennsylvania department of Banking" and was properly licensed to do business in Pennsylvania as a "credit services" organization. (FAC ¶ 13.) The Credit Services Act, 73 P.S. §§ 2181 *et seq.*, requires a detailed bonding and application process with the Pennsylvania Department of Banking, which as a valid licensee TC Loan Service, LLC went through.

"develop[ing] documentation for the lending process including an application, loan agreement, an adverse action letter, and other related documents that comply with the federal consumer credit code, Truth in Lending Act, the Equal Credit Opportunity Act, and the Electronic Funds Transfer Act;" and "enter[ing] into an agreement with a U.S. bank to process loan transactions using the ACH system…" (*Id.*) In short, the roles ascribed to the Think Finance Defendants vis-à-vis FBD and the tribes describe nothing other than the usual and ordinary duties assumed by service providers in most other lending relationships in the United States. *See generally* OFFICE OF THE COMPTROLLER OF THE CURRENCY BULLETIN 2013-29 (available at http://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html) (noting the multitude of ways banks properly utilize third party vendors, including, *inter alia*: "outsourcing entire bank functions to third parties, such as tax, legal, audit, or information technology operations [;] outsourcing lines of business or products[;] relying on a single third party to perform multiple activities, often to such an extent that the third party becomes an integral component of the bank's operations[;]working with third parties that engage directly with customers.").[4]

The loan documents signed by Pennsylvania consumers provide that the transactions are subject to tribal law and are not subject to the laws of any State of the United States. (*See, e.g.*, FAC, at Ex. F-H.) The loan documents Pennsylvania consumers all entered into state that the borrowers "consent to the sole subject matter and personal jurisdiction" of the lending tribe and "further agree that no other state or federal law or regulation" applies to the loan agreement, its enforcement, or any interpretation. (*Id.*) These agreements expressly state that they are not

[4] This Court may consider an indisputably authentic government document maintained on a government website even when considering a Motion to Dismiss. *See, e.g., Macauley v. Estate of Nicholas*, 7 F. Supp. 3d 468, 478 n.7 (E.D. Pa Mar. 25, 2014) (Tucker, C.J.) (in resolving a motion under 12(b)(6) a court may properly look at sources outside the complaint including public records and judicial records even where outside the complaint); *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 705 n.5 (3d Cir. 2004) (taking judicial notice of records available on a government website, the patent office).

subject to any state law and the third tribe's agreement included similar provisions. (*See, e.g.*, FAC at Ex. H ["MobiLoans, LLC is an entity owned and operated by the Tunica-Biloxi tribe of Louisiana, the credit issued to you and information provided under this agreement by MobiLoans is done so solely under the provisions of laws of the Tunica-Biloxi tribe of Louisiana and applicable federal law."].) Moreover, all consumers were informed that: "Neither this Agreement nor the Lender is subject to the laws of any State of the United States." (*See, e.g.*, FAC at Ex. F.)

3. **The Enterprise as Defined by Plaintiff's Amended Complaint**

For purposes of its claim under the Pennsylvania Corrupt Organizations Act, Plaintiff has identified four distinct enterprises which the Think Finance Defendants are alleged to have controlled and participated in: (1) the First Bank of Delaware; (2) Plain Green, an arm of the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation; (3) Great Plains Lending, an arm of the Otoe-Missouria Tribe of Indians; and (4) Mobiloans, an arm of the Tunica-Biloxi Tribe of Louisiana. (FAC ¶¶ 37, 44, 46, 105.) Each of the enterprises are distinct legal entities, with the First Bank of Delaware being organized under the laws of the state of Delaware, and the Native American tribal entities being organized under the laws of the respective Native American Tribal Nations.

The First Bank of Delaware enterprise, derisively referred to as the 'Rent-a-Bank' enterprise by Plaintiff, is alleged to have been begun at some unknown point in the past as a result of a contractual arrangement between one of the Think Finance Defendants and a nationally chartered, FDIC-insured bank. (FAC ¶¶ 34, 37.) The First Bank of Delaware enterprise is alleged to have marketed loans to Pennsylvania consumers through at least July, 2010. (FAC at Ex. B.) The First Bank of Delaware enterprise is also alleged to have continued to make loans to Pennsylvania consumers "beyond February 1, 2009." (FAC ¶ 39.) The First

Bank of Delaware enterprise is no longer active, with FBD having dissolved as of October 23, 2012. (FAC ¶ 41.) The Think Finance Defendants are alleged to have provided support to this enterprise through the provision of services and assistance to FBD. (FAC ¶ 105.)

The remaining enterprises, derisively referred to as the 'Rent-a-Tribe' enterprises by Plaintiff, are contractual relationships between the Think Finance Defendants and three Native American tribal entities. (FAC ¶¶ 43, 46, Ex. D.) Although Plaintiff characterizes the three tribes as 'nominal lenders,' the term sheet attached to the FAC applicable to one of the tribal entities demonstrates that not to be the case. (FAC at Ex. D.) Plaintiff alleges that "the *enterprise* has collected money on account of a debt which arose as the result of the lending of money at a rate of interest exceeding 25%." (FAC ¶ 105, emphasis added.) The Think Finance Defendants are alleged to have provided support to these enterprises through the provision of services and assistance to the individual Native American tribal entities.

III. ARGUMENT

A. Plaintiff Has Failed to State a Claim as to Kenneth Rees.

Plaintiff's group pleading is insufficient to state a claim against Kenneth Rees. Other than referring to Rees in three paragraphs of the FAC, there is not a single allegation as to Rees that forms a basis for any claim against him. Courts long ago required much more before requiring defendants to expend the time and resources necessary to defend a case brought against them. Here, there is not a single colorable factual allegation of conduct by Rees. Having now had two bites at the apple to plead claims against Rees, the Court should dismiss the FAC with prejudice.

A court may dismiss a plaintiff's complaint under Rule 12(b)(6) when it does not state a claim for relief that is "plausible on its face." *Santiago v. Warminster Twp.*, 629 F.3d 121, 128 (3d Cir. 2010) (quoting *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n.27 (3d Cir. 2010)).

All well-pleaded factual allegations contained in a plaintiff's complaint must be accepted as true and must be interpreted in the light most favorable to plaintiff. *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 74 (3d Cir. 2011). A complaint is plausible on its face when its factual allegations allow a court to draw a reasonable inference that a defendant is liable for the harm alleged. *Santiago*, 629 F.3d at 128.

To determine the sufficiency of a complaint, courts of the Third Circuit are required to perform a three-step analysis. *Santiago*, 629 F.3d at 130. First, a court must identify plaintiff's claims and determine the required elements of those claims. *Id.* Next, a court must identify, and strike, conclusory allegations contained in plaintiff's complaint. *Id.* Conclusory allegations are those that are no more than "an unadorned, the-defendant-unlawfully-harmed-me accusation, labels and conclusions, a formulaic recitation of the elements of a cause of action, or naked assertion[s]." *Argueta*, 643 F.3d at 72 (internal quotation marks omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Finally, a court must determine if the remaining factual allegations, "plausibly give rise to an entitlement for relief." *Id.* at 73.

In order to survive Defendants' Motion to Dismiss, however, Plaintiff is obligated to provide more than "a formulaic recitation of the elements of a cause of action" and its "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679 (citing *Twombly*, 550 U.S. at 556). A claim is plausible "when the plaintiff pleads factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

Rule 8(a) is violated where a plaintiff, by engaging in "group pleading," fails to give each defendant fair notice of the claims against it. Moreover, "group pleading" does not satisfy the *Iqbal*/*Twombly* pleading standards, and courts regularly dismiss such improperly pled claims. *See Pierson v. Orlando Reg'l Healthcare Sys., Inc.*, 619 F. Supp. 2d 1260, 1273 (M.D. Fla. 2009) (dismissing complaint because group-pleading method of collectively referring to individual defendants and two physician groups as "Peer Review Defendants" throughout complaint did not satisfy the "fair notice" requirement of Rule 8); *see also Japhet v. Francis E. Parker Mem'l Home, Inc.*, No. CIV.A. 14-01206 SRC, 2014 WL 3809173, at *2 (D.N.J. July 31, 2014) (dismissing Plaintiff's complaint against a corporate defendant and an individual manager employed by the defendant, and noting "Alleg[atoins] that 'Defendants' undertook certain illegal acts—without more—injects an inherently speculative nature into the pleadings, forcing both the Defendants and the Court to guess who did what to whom when. Such speculation is anathema to contemporary pleading standards."); *Targum v. Citrin Cooperman & Co., LLP*, No. 12 CIV. 6909 SAS, 2013 WL 6087400, at *6 (S.D.N.Y. Nov. 19, 2013) (noting that "'group pleading' fails to put [defendants] on notice of the specific allegations against [them]"); *Zalewski v. T.P. Builders, Inc.*, No. 10–CV–0876, 2011 WL 3328549, at *5 (N.D.N.Y. Aug. 2, 2011) ("vague group pleading" cannot serve as the basis for liability); *Am. Sales Co. v. AstraZeneca AB*, No. 10 CIV. 6062 PKC, 2011 WL 1465786, at *5 (S.D.N.Y. Apr. 14, 2011) (noting that "[a] complaint should offer 'specification' as to the 'particular activities by any particular defendant'" (quoting *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007))).

"In deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010).

1. **Federal Law Preempts All Causes of Action Challenging the Interest Rate on First Bank of Delaware's Loans.**

Plaintiff alleges that Rees, as part of the other defendants, established a relationship with First Bank of Delaware ("FBD"), whereby FBD would serve as the lender on loans to Pennsylvania consumers. (*See* FAC ¶ 37.) The Attorney General's causes of action are predicated on the assertion that the interest FBD charged on its loans was "illegal" and "usurious" under Pennsylvania law. The Depository Institution Deregulation and Monetary Control Act ("DIDA"), however, preempts application of any state law that would limit a federally insured, state-chartered bank's ability to charge interest allowed by federal law. Because FBD is such a federally insured, state-chartered bank, the Attorney General's causes of action based on FBD loans is preempted.

Section 85 of the National Bank Act ("NBA") allows a national bank to charge interest on any loan at the rate allowed by the state where the bank is located. 12 U.S.C. § 85. Section 521 of DIDA, 12 U.S.C. § 1831d, which applies to federally insured, state-chartered banks, similarly allows state banks to export the laws governing the interest rate charged from the state where the bank is located. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992) (noting that the principle of exportation is one of several principles of § 85 that were "transfused" into § 521); *see Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359, 1363 (D. Utah 2014) (holding that § 521 expressly preempts state laws regulating interest); *see also In re Cmty. Bank of N. Va.*, 418 F.3d 277, 295 (3d Cir. 2005) ("[Section] 521 of DIDA completely preempts

any state law attempting to limit the amount of interest and fees a federally insured-state chartered bank can change." (footnote omitted)). In other words, "[t]o the extent that a law or regulation enacted in the borrower's home state purposes to inhibit the bank's choice of an interest term under section 521, DIDA expressly preempts the state law's operation." *Greenwood Trust Co.*, 971 F.2d at 827.

Here, FBD was a federally insured, state-chartered bank existing under the laws of Delaware, of which § 521 of DIDA applies. (*See* FAC ¶¶ 36, 41.) Each cause of action in the FAC involving FBD turns, at least in part, on the alleged charging of illegal interest under Pennsylvania law. (*See, e.g.*, FAC ¶¶ 96, 105, 112, 126, 128, 129, and 150d.) Pennsylvania law, however, cannot prohibit a federally insured, state-chartered bank's choice of interest rate that is otherwise authorized by the parameters set forth in DIDA. FBD was authorized as a matter of federal law to charge interest on loans made to interstate customers, like Pennsylvania residents, so long as those charges are authorized under Delaware law. *See Greenwood Trust Co.*, 971 F.2d at 827; 12 U.S.C. § 1831d. Under Delaware law, a lender may charge a borrower any agreed upon interest rate. *See* Del. Code Ann. tit. 5, § 963. Accordingly, the interest charged on Pennsylvania consumers' loans were unambiguously allowed under Delaware law, and they were, therefore, authorized as a matter of federal law under DIDA.

Furthermore, to the extent that the Plaintiff attempts to argue that FBD was the lender in name only and that Rees or the other defendants performed "most lender functions," (FAC ¶ 37), it cannot artfully plead around preemption where it concedes that the loans "were originated in the name of FBD." (*Id.*) Courts conclude that even where a bank is alleged to play a limited role in a lending program, federal law still preempts plaintiff's claims predicated on state usury laws. *See Sawyer*, 23 F. Supp. 3d 1359 (plaintiff's usury and late fee claims against non-bank who

purchased receivables were preempted under § 521); *Hudson v. Ace Cash Express, Inc.*, No. IP 01-1336-C H/S, 2002 WL 1205060, at *6 (S.D. Ind. May 30, 2002); *see also Phipps v. F.D.I.C.*, 417 F.3d 1006, 1009, 1013 (8th Cir. 2005) (although plaintiff alleged the defendants conspired to give the appearance of making loans through a national bank to avoid consumer protection laws, dismissing plaintiff's unlawful fees claims as preempted by the NBA because national bank originated loan).

2. **Plaintiff Has Failed to State a Claim for Violation of the UTPCPL.**

In the FAC, Plaintiff baldly alleges that Rees engaged in various activities in violation of Sections 2(4)(i), (ii), (iii), (v), (ix), and (xxi) of the UTPCPL.[5] However, because Plaintiff fails to plead specific facts as to Kenneth Rees' alleged conduct, Count Five must be dismissed.

As Plaintiff is well aware - having just litigated and been unsuccessful on this very issue the day it filed the FAC - group pleading allegations are inappropriate under the UTPCPL and do not satisfy the standards required post-*Iqbal* and *Twombly*. *See Pennsylvania v. Exxon Mobil Corp.* (*In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*), No. 1:00-1898, 2015 WL 4092326, at *5 (S.D.N.Y. July 2, 2015) ("The remaining allegations accusing defendants—

[5] Sections 2(4)(i), (ii), (iii), (v), (ix), and (xxi) provide as follows: "**Unfair methods of competition**" and "**unfair or deceptive acts or practices**" means any one or more of the following:
(i) Passing off goods or services as those of another;
(ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;
(iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;
....
(v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;
....
(ix) Advertising goods or services with intent not to sell them as advertised;
....
(xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding. 73 P.S. §§ 201-2(4)(i), (ii), (iii), (v), (ix), and (xxi).

as a group—of engaging in deceptive conduct or otherwise violating the UTPCPL are simply too vague as to each defendant under *Twombly* and its progeny to state a claim.").

In *Pennsylvania v. Exxon Mobil Corp.*, the Commonwealth of Pennsylvania sought to recover for alleged injury and threat of future injury to the waters of Pennsylvania caused by the use of the gasoline additive methyl tertiary butyl ether ("MTBE"). The Attorney General brought UTPCPL claims against more than 30 defendants, alleging that the defendants engaged in "unfair and deceptive actions" in their sale and marketing of MTBE gasoline. The defendants moved to dismiss the UTPCPL claims because the Plaintiff employed "group-wide allegations." *Id.* The district court agreed and dismissed the claim because the complaint failed to "provide a plausible factual basis to distinguish the conduct of each of the defendants" and failed to "set forth allegations that 'plausibly give rise to an entitlement for relief.'" *Id.* (quoting *Iqbal*, 556 U.S. at 679).

Similarly, in this case, Plaintiff fails to apprise Rees of the alleged actions he took that violated the statute. By lumping Rees together with the "Think Finance Defendants" and, sometimes, all "Defendants" without any differentiation, Plaintiff not only makes it impossible for Rees to formulate a response to the claim or prepare a defense, but Plaintiff entirely obfuscates the basis of its claims. Such group-wide pleading is insufficient not only under Rule 8(a) in general, but also under the UTPCPL in particular. *See Exxon Mobil Corp.*, 2015 WL 4092326, at *5 (finding that plaintiff's UTPCPL allegations "lack specificity and fail to differentiate among defendants"); *see also Kamara v. Columbia Home Loans, LLC*, 654 F. Supp. 2d 259, 265 (E.D. Pa. 2009) (dismissing UTPCPL claim that "d[id] not distinguish among [the] defendants in setting forth the alleged violations"); *Garczynski v. Countrywide Home Loans, Inc.*, 656 F. Supp. 2d 505, 515–16 (E.D. Pa. 2009) (finding that "the plaintiff must allege with

particularity the [UTPCPL] elements necessary to support a violation . . . as to a particular Defendant" (internal quotation marks omitted)); *Loften v. Diolosa*, No. 3:05-cv-1193, 2008 WL 2994823, at *8 (M.D. Pa. July 31, 2008) (dismissing UTPCPL claim that merely incorporated by reference allegations from other sections of the complaint but "failed to articulate the conduct of each Defendant alleged to constitute a violation of the UTPCPL," and did not allege "the ***particular*** provisions of the UTPCPL violated by a ***particular*** Defendant" (emphasis added)). Plaintiff's UTPCPL claims should be dismissed for this reason alone.

Moreover, nowhere in the Complaint is Rees alleged to have interacted with consumers or otherwise engaged in conduct prohibited by the relevant provisions of the UTPCPL. This is fatal to Plaintiff's UTPCPL claims. *See Commonwealth v. Parisi*, 873 A.2d 3, 9 (Pa. Commw. Ct. 2005). In *Parisi*, the Attorney General brought UTPCPL claims against a number of parties, including an individual who was alleged to have played an essential role in executing parts of the scheme at issue in that case. While the individual defendant was clearly part of the scheme, the facts alleged within the Attorney General's complaint demonstrated the individual defendant did not engage in the illegal conduct that formed the basis for a cause of action under the UTPCPL. *Id.* Although the Attorney General argued that the defendant was a critical party within the scheme, the court held that it "cannot ignore the simple fact that the Commonwealth has not alleged any illegal activity on [defendant]'s part in Count One. In order to be held accountable for the accusations contained in Count One, it must be alleged that [defendant] participated in those actions." *Id.* Here, just as with the individual defendant in *Parisi*, Plaintiff does not allege facts that demonstrate that *Rees* participated in the allegedly unlawful activity that forms the basis of its UTPCPL claim. Rather, the FAC alleges only that Rees was formerly an executive

with one of the corporate defendants. Accordingly, the UTPCPL claims against Rees must be dismissed.

Finally, even if it were proper for Plaintiff to lump Rees in with the "Think Finance Defendants" – which it is not – the Think Finance Defendants are only alleged to be providing certain "infrastructure" services (*see* FAC ¶ 47 ["Under the scheme, the loans are made in the name of a lender affiliated with one of these tribes, but the Think Finance Defendants ***provide the infrastructure*** to market, fund, underwrite and collect the loans, providing the following: customer leads, the technology platform, investors who fund the loans, and/or ***the payment-processing*** . . . ." (emphasis added)]; FAC ¶ 48 ["The Think Finance Defendants segment their participation in the scheme into different '***services***' . . . ." (emphasis added)]) and "operating [the] so-called 'technology platforms.'" (FAC ¶ 128.) However, merely operating "behind-the-scenes" services such as payment processing and technology platforms to tribal entities engaged in payday lending cannot serve as the basis for liability under the UTPCPL. Specifically, this Court, in *Andrichyn v. TD Bank, N.A.*, recently held that an entity does not engage in deceptive conduct under the UTPCPL by providing services to payday lenders. *Andrichyn v. TD Bank, N.A.*, No. 14-CV-3863, --- F. Supp. 3d ---, 2015 WL 1279492, at *12-13 (E.D. Pa. Mar. 20, 2015) (Joyner, J.) (holding that payment processor alleged to have played a role in "processing debts on Illegal Payday Loans" was not liable under the UTPCPL).

In *Andrichyn*, the plaintiff, a banking customer of TD Bank, brought a class action against TD Bank after the plaintiff received a "payday loan" from several out-of-state lenders, and TD Bank facilitated payments from the plaintiff's account to the payday lender. *Id.* at *2–3. The plaintiff specifically alleged that (1) "TD engaged in deceptive conduct by 'processing debits on Illegal Payday Loans' in violation of Pennsylvania's public policy,'" (2) "TD

deceptively 'represent[ed] that it would act in accordance with NACHA Rules and not process illegal transactions, when in fact it did not,'" (3) "TD acted fraudulently or deceptively by processing payday debits 'despite rules and laws requiring the bank to monitor and reject such transactions,'" and (4) "TD's assessment of overdraft fees resulting from payday debits was deceptive and/or fraudulent because the Account Agreement did not allow for such fees." *Id.* at *12–13. The district court dismissed the UTPCPL claim, stating that "none of [the plaintiff's] allegations presents a legally cognizable claim that TD engaged in any deceptive or fraudulent conduct." *Id.* at *13.

Every loan contract at issue in this case was entered into by a Pennsylvania consumer with a Native American tribal entity or a federally insured bank. (*See* FAC, Ex. F-H.) Rees never entered into contracts with consumers. The very term sheet Plaintiff attaches to the FAC, and cites as purported evidence of the Think Finance Defendants' control over the lending process, explicitly states that Think Finance merely provided software and logistical support to the tribal entities. And, Rees is not even Think Finance. (FAC, Ex. D.) The tribal entity, not Rees, made all of the loans, including "approv[ing] loans that it decides to offer to consumers on a nationwide basis through the internet." (*Id.*) The tribal entity, not Rees, "develop[ed] documentation for the lending process including an application, loan agreement, an adverse action letter, and other related documents…" *(Id.*) The tribal entity, not Rees, "enter[ed] into an agreement with a U.S. bank to process loan transactions using the ACH system…" (*Id.*) Given the allegations of the FAC and its Exhibits as to the role played by the "Think Finance Defendants" in the lending process, this Court's holding in *Andrichyn* requires dismissal of the UTPCPL claims, with prejudice.

3. Plaintiff Has Failed to Plead a Plausible Claim for Injunctive Relief and Damages Under the UTPCPL.

The Commonwealth claims in Count V of the Amended Complaint that, pursuant to the UTPCPL, it is entitled to a broad permanent injunction, "full restitution" to consumers, and civil penalties. (FAC ¶ 140.) However, the Commonwealth has not pleaded sufficient facts showing a plausible entitlement to either an injunction or monetary damages.

The Attorney General can only obtain a permanent injunction under the UTPCPL when "any person is *using* or is *about to use* any method, act or practice" declared unlawful by the Act. 73 P.S. § 201-4 (emphasis added). Construing the plain language of 73 P.S. § 201-4, courts have held that, in order to obtain an injunction under the UTPCPL, the Attorney General must prove: 1) that a person is ***using*** or ***about to use*** a practice declared unlawful by the UTPCPL; and 2) that such proceedings would be in the public interest. *Commonwealth v. TAP Pharm. Prods., Inc.*, 36 A.3d 1198, 1221 (Pa. Commw. Ct. 2011) (explaining that the basis for an injunction under § 201-4 is statutory and, thus, not based on common law elements); *Commonwealth v. Burns*, 663 A.2d 308, 312 (Pa. Commw. Ct. 1995). The Attorney General has not pleaded, and cannot plead, facts sufficient to satisfy these requirements.

Nowhere in the Amended Complaint are allegations that Rees is "using" or "about to use" an unfair or deceptive lending practice. To the contrary, the Amended Complaint alleges a lending "scheme" involving multiple phases, none of which involve allegations of present day lending to Pennsylvania consumers by Rees. (*See, e.g.*, FAC ¶ 77 ["the three tribal lenders affiliated with the Think Finance Defendants stopped accepting loans from new Pennsylvania consumers sometime in mid-2013."]; ¶ 70 [alleging that a website "advises visitors from computers in Pennsylvania: 'We're currently unable to serve you . . . .'"]; ¶ 21 [alleging John Doe defendants have participated in the collection of loans]; ¶ 78 [alleging that during "the

period 2012-2014, the Commonwealth has received numerous complaints from consumers about abusive collection activity by debt collectors, including Defendant National Credit Adjusters."].)

Therefore, because the Commonwealth has not pleaded a plausible claim for injunctive relief under the UTPCPL, it cannot state a claim for damages either. The UTPCPL expressly conditions any monetary recovery on the issuance of a permanent injunction. *See* 73 P.S. § 201-4.1 ("Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in [§ 201-4] above, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act . . . ."). Because the Commonwealth has failed to allege any facts that Rees presently uses or is about to use any unfair or deceptive practices that would warrant the issuance of a permanent injunction, it has not alleged facts to support any claim of recovery for damages under § 201-4.1.

4. **Plaintiff Has Failed to State a Claim for Violation of the FCEUA.**

The FAC alleges that Rees violated the Pennsylvania Fair Credit Extension Uniformity Act ("FCEUA"), 73 P.S. § 2270.1 *et seq*., through the collection of consumer debts, either as a debt collector or a creditor. (FAC ¶¶ 117-126.) However, the FAC fails to make any individualized allegations against Rees to establish its FCEUA claims. Instead, Plaintiff relies solely on speculative, conclusory group-pleading allegations, which are insufficient as a matter of law to state a claim.

The FCEUA generally prohibits "unfair methods of competition and unfair or deceptive acts or practices with regard to the ***collection of debts***." 73 P.S. § 2270.2 (emphasis added). If a "debt collector violates any of the provisions of the Fair Debt Collection Practices Act (15 U.S.C. § 1692 *et seq*.)," it constitutes a violation of the FCEUA. (73 P.S. § 2270.4(a).) The

FCEUA also proscribes certain conduct by creditors. "The FCEUA sets out prohibited debt collection practices involving communications by the creditor to the borrower." *Garczynski v. Countrywide Home Loans, Inc.*, 656 F. Supp. 2d 505, 515 (E.D. Pa. 2009) (citing 73 P.S. § 2270.4(b)).

District courts readily dismiss FCEUA claims where a complaint fails to allege facts connecting specific defendants to particular conduct proscribed by the FCEUA. In *Garczynski*, the court dismissed an FCEUA claim where the complaint "[did] not identify a single communication" between the creditor and the plaintiffs that constituted a violation of the statute. *See Garczynski*, 656 F. Supp. 2d at 515–16 ("Without pointing to any suspect debt collection practice that may be prohibited by the FCEUA, the FAC fails to make out an FCEUA claim, let alone a violation of the UTPCPL."). Similarly, in *Hartman v. Deutsche Bank National Trust Co.*, the court dismissed an FCEUA claim where the complaint failed to "alleged facts pertaining to [the defendant] that would even bring [the defendant] within the scope of the FCEUA." No. CIV.A. 07-5407, 2008 WL 2996515, at *4 (E.D. Pa. Aug. 1, 2008) (dismissing the FCEUA claim on a motion to dismiss where general allegations of "unfair or unconscionable collection methods" and of giving "a false impression of the character, extent, or legal status of the alleged debt" were insufficient to support an FCEUA claim).

In the FAC, Plaintiff concedes that it has no evidence or information as to whether Rees ever engaged in debt collection activity prohibited by the FCEUA. Instead, Plaintiff speculates that ***"[t]o the extent*** that any Think Finance Defendant is itself engaged in collection activity regarding consumer debt supposedly owed by Pennsylvania consumers to ThinkCash, Payday One, Plain Green, Great Plains Lending or MobiLoans, [they], too, [are] a 'debt collector' [*sic*] . . . ." (FAC ¶ 119, emphasis added). Again, Plaintiff's conclusory group allegations fail to allege

any facts indicating that ***Rees*** engaged in the collection of any consumer debts, which is the *sine qua non* of any claim under the FCEUA. *See* 73 P.S. § 2270.2 ("This act establishes what shall be considered unfair methods of competition and unfair or deceptive acts or practices *with regard to the collection of debts*." (emphasis added)). Like the allegations in *Garczynski* and *Hartman*, Plaintiff's speculative and conclusory allegations are woefully inadequate under *Iqbal* and *Twombly*. Therefore, Plaintiff's FCEUA claims against Rees must be dismissed.

Even if one of the Think Defendants was engaged in violations of the FCEUA, Plaintiff's attempt to hold Rees liable under the FCEUA because of his status as an executive and shareholder, is improper. Attempting to impose vicarious liability upon a shareholder and former employee or officer of a company under the FDCPA, the statute upon which the FCEUA is based, is without support in the law. *Cf. Pettit v. Retrieval Masters Creditor Bureau, Inc.*, 211 F.3d 1057, 1059 (7th Cir. 2000) (noting that claims under the FDCPA against "officers or shareholders" of a company, regardless of their degree of control over the company, "who are not otherwise debt collectors are frivolous and might well warrant sanctions"). The reasoning in *Pollice v. National Tax Funding, LP*, is inapposite. 225 F.3d 379, 405 n.29 (3d Cir. 2000). In *Pollice*, the court cited *Pettit* with approval, but ultimately held that a general partner could face individual liability for the acts of the partnership. *Id.* The holding in *Pollice* can be attributed to the fact that the court there was dealing with a partnership, rather than the corporate form found in *Pettit* and in the matter *sub judice*. Here, Rees is a former executive at Think Finance, former board member of Think Finance, and a shareholder in Think Finance. There are no allegations of individual conduct by Rees, or really any allegations that would support imposition of liability against Rees. As the Court in *Pettit* recognized, these claims against Rees are frivolous, and must be dismissed.

5. Plaintiff Has Failed to State a Claim for Violation of Dodd-Frank's UDAAP Provisions.

The FAC alleges that Rees violated the Dodd-Frank's UDAAP provisions by engaging in unfair, deceptive, or abusive acts or practices.[6] Plaintiff's claims against Rees under Dodd-Frank Act are deficient for many of the reasons its UTPCPL and FCEUA claims are deficient: the FAC does not allege that Rees personally engaged in any impermissible conduct under the statute, that Rees had knowledge of any violations of the statute, or that Rees controlled any entity actually engaged in violations of the Act.

Plaintiff has failed to allege any wrongdoing by Rees, instead relying upon a "common enterprise" theory of liability under the FTC Act. (FAC ¶ 151.) However, the FAC demonstrates that Plaintiff has failed to allege adequately the elements of a common enterprise theory as to Rees. As noted in the very case Plaintiff cites in support of the use of the common enterprise theory:

> In cases brought by the FTC, individual defendants are liable for the corporate defendant's violations if the FTC demonstrates that (1) the corporate defendant violated the FTC Act; (2) the individual defendants participated directly in the wrongful acts or practices or the individual defendants had authority to control the corporate defendants; and (3) the individual defendants had some knowledge of the wrongful acts or practices.

F.T.C. v. PayDay Fin. LLC, 989 F. Supp. 2d 799, 809-10 (D.S.D. 2013) (internal quotations omitted). Plaintiff fails to plead facts capable of demonstrating any of the three elements required under the common enterprise theory. There are no allegations that Rees violated the CFPA, EFTA, or any other regulation. Additionally, there are no allegations that Rees had

[6] The FAC seeks to punish allegedly unlawful conduct which occurred between 2009 and present. The Consumer Financial Protection Act ("CFPA") of Dodd-Frank became effective July 21, 2011. Courts considering this issue have concluded that the CFPA does not apply retroactively. *See, e.g., Molosky v. Wash. Mut., Inc*., 664 F.3d 109, 113, n.1 (6th Cir. 2011) ("These provisions came into effect on July 21, 2011, and have no retroactive effect with regard to the issues in this appeal. There is no explicit statement from Congress that they are meant to be retroactive, suggesting no retroactivity."). To the extent the Plaintiff's Dodd-Frank Act claim is intended to cover pre-July 21, 2011 conduct, the claim is deficient as a matter of law because it impermissibly attempts to impose liability retroactively.

knowledge of any allegedly wrongful acts, or that Rees had authority to control the *alleged enterprise*. For these reasons, Count Six must be dismissed.

6. Plaintiff Has Failed to Plead the Necessary Elements for a Corrupt Organizations Act Count.

Counts One through Three of the FAC allege violations of Corrupt Organizations Act ("Pa. C.O.A."), 18 Pa. C.S.A. §§ 911 *et seq.*, by the Think Finance Defendants. (FAC ¶¶ 91-116.) Plaintiff, through its private counsel, attempts to utilize the full weight of the Commonwealth's law enforcement powers to bring inappropriate and unsupported claims against Rees under Pa. C.O.A. Plaintiff's Pa. C.O.A. claims must be dismissed because: (1) they fail to state any factual allegations about Rees' actions as an individual defendant; (2) they fail to adequately plead facts demonstrating that Rees participated in any prohibited acts of racketeering or any other conduct the statute makes unlawful; and (3) the pleadings indicate nothing more than threadbare recitals of alleged Pa. C.O.A. violations by Rees and the other Think Finance Defendants. Given Plaintiff's failures to meet even the most basic pleading requirements, the Pa. C.O.A. claims must be dismissed.

The Pennsylvania Corrupt Organizations Act was inspired by and modeled after the federal Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §§ 1961 *et seq.*, and the statutes share similar goals.[7] *Id.* Substantive provisions of Pa. C.O.A. are often identical, word-for-word, to substantive provisions of RICO. *Compare*, *e.g.*, 18 U.S.C. § 1962(d) ("It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.") *with* 18 Pa. C.S.A. § 911(b)(4) ("It shall be unlawful for any person to conspire to violate any of the provisions of paragraphs (1), (2) or (3) of this

[7] The Pennsylvania Legislature enacted Pa. C.O.A. just one week after Congress enacted RICO, and the statutes share almost identical language and purposes. *Commonwealth v. Brady*, 368 A.2d 699, 719 (Pa. 1977); 18 Pa. C.S.A. § 911(a).

subsection."). And, Pennsylvania courts have held that federal cases interpreting RICO law are instructive, but not controlling, in interpreting similar statutory provisions within Pa. C.O.A. *Commonwealth v. Dennis*, 618 A.2d 972 (Pa. Super. Ct. 1992); *Commonwealth v. Goodman*, 500 A.2d 1117, 1126-27 (Pa. Super. Ct. 1985) ("In reaching this interpretation of section 911, we have found some enlightenment from federal decisions interpreting the Racketeer Influenced and Corrupt Organization Provisions…Although these cases are not controlling and the Pennsylvania and federal acts are not identical, both are directed at curbing illegal racketeering activities."). Pennsylvania courts also rely on federal case law interpreting RICO when Pennsylvania case law on certain issues is not developed. *See Commonwealth v. Cassidy*, 620 A.2d 9, 13 (Pa. Super. Ct. 1993) ("In deciding this case of first impression, we are nevertheless guided and persuaded by a similar federal case involving the Federal RICO Act.").

Pennsylvania courts have expressly considered Pa. C.O.A.'s preamble to help determine whether a defendant's liability under the statute is appropriate. *See, e.g.*, *Goodman*, 500 A.2d at 1126 (holding that the Attorney General could not investigate an attorney for a corrupt organizations offense, based on attorney's use of an illegal telephonic "blue box" used in the course of the attorney's legal practice because that use of "blue box" did not constitute a corrupt organizations offense); *see also Commonwealth v. Bobitski*, 632 A.2d 1294 (Pa. 1993) (holding that Corrupt Organizations Act was not applicable to defendant who took advantage of his position in company to solicit bribes for his own benefit while employed by legitimate enterprise where Commonwealth conceded that neither defendant nor his employer had ties to "organized crime" as that term is defined within statute and defendant's actions were that of ordinary white-collar criminal.). Because Pa. C.O.A. is a penal statute, its terms must be strictly construed. *Bobitski*, 632 A.2d at 1296 (citing *Commonwealth v. Heinbaugh*, 354 A.2d 244 (Pa. 1976)).

Unlike the federal RICO statute, there is no private cause of action under the Pa. C.O.A. *Fed. Ins. Co. v. Ayers*, 741 F. Supp. 1179, 1183 (E.D. Pa. 1990) (citing *Odesser v. Cont'l Bank*, 676 F. Supp. 1305, 1316 (E.D. Pa. 1987)).

a. **Plaintiff's Group Pleading Allegations Are Insufficient to Allege Any Cause of Action Against Rees**

The FAC should be dismissed because it fails to make any individualized allegations of wrongdoing against Rees, and, as such, the Court cannot reasonably infer that Rees is responsible for the misconduct alleged in the FAC. No less than any other type of case, civil RICO plaintiffs are required to plead, with "some specificity," facts sufficient to plausibly give rise to entitlement to relief. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 369-370 (3d Cir. 2010). "[T]he concern expressed in *Twombly* is just as applicable to a RICO case, […] RICO cases, like antitrust cases, are 'big' cases and the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim." *Macauley v. Estate of Nicholas*, 7 F. Supp. 3d 468, 488 (E.D. Pa. 2014) (quoting *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 370). Though the standard is only plausibility of relief, a plaintiff must still allege facts sufficient to permit an inference that a defendant is the cause of the harm for which relief is sought. *See Santiago v. Warminster Twp.*, 629 F.3d 121, 128 (3d Cir. 2010). The FAC contains only the most barebones of allegations against Rees: that he was formerly the CEO and on the board of Think Finance, he was involved in the business of Think Finance, and, while employed as CEO of Think Finance, Rees was interviewed by two news outlets. (FAC ¶¶ 18, 45, 52.) Outside of these scant allegations, the FAC simply lumps Rees, an individual, within group pleading allegations regarding an assortment of corporate defendants. Such generic group pleading is insufficient to require Rees to answer to the claims under Pa. C.O.A., or any other

statute. Being the CEO of a company is not a violation of law, and Rees should not be made to guess as to what he is alleged to have done.

Post *Iqbal* and *Twombly*, courts have not hesitated to dismiss RICO claim(s) where, as here, the complaint fails to allege specific conduct by each individual defendant. *Kerrigan v. ViSalus, Inc.*, No. 14-CV-12693, --- F. Supp. 3d ---, 2015 WL 3679266, at *16 (E.D. Mich. June 12, 2015) (Holding that "'shotgun' allegations of general misconduct by a group of thirty-one different Defendants are not sufficient to state RICO claims against each of them."); *Lima LS PLC v. PHL Variable Ins. Co.*, No. 3:12-CV-1122 WWE, 2013 WL 3327038, at *11 (D. Conn. July 1, 2013) (granting Motion to Dismiss RICO claim where "the complaint lack[ed] specific allegations as to actual acts specific to each of the Individual Defendants."); *Prime Partners IPA of Temecula, Inc. v. Chaudhuri*, No. 5:11-CV-01860-ODW, 2012 WL 1669726, at *11 (C.D. Cal. May 14, 2012) (dismissing substantive RICO count because plaintiff indiscriminately lumped together several defendants and thus failed "to delineate how any of these individual defendants independently participated in the operation or management of the enterprise, much less how they did so through the alleged pattern or patterns of racketeering activity."); *Croskey v. Cnty. of St. Louis*, No. 4:14CV 00867 ERW, 2014 WL 3956617, at *5 (E.D. Mo. Aug. 13, 2014) (dismissing conspiracy claims where complaint consisted of nothing more than "generic allegations that fail to distinguish between the defendants...."); *Specht v. Google, Inc.*, 660 F. Supp. 2d 858, 865 (N.D. Ill. 2009) (dismissing as insufficient, plaintiff's complaint where complaint treated individual defendants as a collective whole and did not identify any specific act of wrongdoing by any single defendant); *Gross v. Waywell*, 628 F. Supp. 2d 475, 495 (S.D.N.Y. 2009) ("In particular, lumping the defendants into collective allegations results in a

failure to demonstrate the elements of § 1962(c) with respect to each defendant individually, as required.").

As noted above, the FAC contains only *three* specific factual allegations as to Rees: he was previously an executive and Chairman of the Board for Think Finance; and, while an executive at Think Finance, was interviewed by Bloomberg Business service and Dallas Magazine about Think Finance's business with Native American Tribes. (FAC ¶¶ 18, 45, 52.) The FAC does not make *any* other factual assertions about Rees, or how Rees, as an individual, engaged in any conduct the Pa. C.O.A. makes unlawful or is allegedly responsible for causing any harm alleged within the FAC. Indeed, there are *no* allegations about specific actions Rees took while employed by Think Finance, how he participated in a Pa. C.O.A. enterprise, that he collected any debts, or had contact with a single consumer. Instead, the FAC avoids putting Rees on notice of the claims against him by simply including him within a broader category of 'Think Finance Defendants': an amorphous combination of seven separate Defendants with no discernable differentiation in the factual allegations made against them. As explained above, because there is not a single individualized allegation of wrongdoing by Rees, the FAC is woefully deficient and must be dismissed for failure to state a claim.

From what few individualized allegations there are in the FAC, there can be no reasonable inference that Rees is responsible for any wrongdoing. Instead, Rees' inclusion in this lawsuit is likely due to a single factor: his prior association with a company within an industry that Plaintiff dislikes and the fact that he was its chief executive officer for a period of time.[8] Regardless of Plaintiff's disdain for the so-called "Payday lending industry," Rees' "mere

[8] Plaintiff's distaste for the lending activity engaged in by other entities, and the support some defendants provide to that industry, is not a basis for imposition of liability under *any* statute. Defendants may only face punishment for conduct that is expressly proscribed by law. *Commonwealth v. Cosgrove*, 648 A.2d 546, 548 n.8 (Pa. Super. Ct. 1994), *aff'd*, 680 A.2d 823 (Pa. 1996). "A citizen may not be subjected to punishment for conduct which a

association with an enterprise does not violate [RICO]." *In re Aetna UCR Litig.*, No. CIV. 07-3541, 2015 WL 3970168, at *28 (D.N.J. June 30, 2015) ("[M]ere association with an enterprise does not violate the statute." (citing *Ins. Brokerage Antitrust Litig.*, 618 F.3d at 370)); *Macauley v. Estate of Nicholas*, 7 F. Supp. 3d 468, 483 (E.D. Pa. 2014) (Tucker, C.J.) (same); *see also, Kamran Khan v. Vayn*, No. 13-CV-1294, 2014 WL 550552, at *5 (E.D. Pa. Feb. 12, 2014) (Joyner, J.) (Defendant's significant ownership interest in RICO enterprise did not serve as evidence that Defendant, personally, "committed any of the proscribed predicate acts or employed or conducted that affairs of [enterprise] improperly much less through a pattern of racketeering activity"); *Allstate Ins. Co. v. Seigel*, 312 F. Supp. 2d 260, 275-76 (D. Conn. 2004) ("[A] defendant will not be found to participate in the management or operation of the enterprise simply because he enjoys substantial persuasive power to induce the alleged enterprise to take certain actions." (quoting *Vickers Stock Research Corp. v. Quotron Sys., Inc.*, No. 96 CIV. 2269(HB),1997 WL 420265, at *4 (S.D.N.Y. July 25, 1997))).

Without any individualized factual allegations as to Rees' acts, omissions, or other activity that could support liability, Plaintiff's claims against Rees must be dismissed.

b. **Plaintiff Cannot Allege Defendant Rees Engaged in Any Acts of Racketeering and, Accordingly, All Substantive Pa. C.O.A. Claims Must Be Dismissed**

The FAC's failure to allege that Rees engaged in illegal racketeering activity is fatal to all of Plaintiff's substantive Pa. C.O.A. claims. To be clear, all substantive claims under Pa. C.O.A. require that a defendant have engaged in two or more acts of racketeering that constitute a pattern. 18 Pa. C.S.A. § 911(b)(1)-(3); 18 Pa. C.S.A. § 911(h)(4); *Commonwealth v. Wetton*, 591 A.2d 1067, 1073 (Pa. Super. Ct. 1991), *aff'd*, 641 A.2d 574 (Pa. 1994); *Commonwealth v.*

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prosecutor or editor, or even a neighborhood, or even a majority of the citizenry, perceives as offensive or wanting in style or taste or demeanor-*nullum crimen sine lege*." *Id.*

Stocker, 622 A.2d 333, 340 (Pa. Super. Ct. 1993). The pattern of racketeering offenses is a distinct element of a substantive Pa. C.O.A. violation, *not* the violation itself. *See Commonwealth v. Traitz*, 597 A.2d 1129, 1133 (Pa. 1991) ("It is the course of illegal conduct, not the underlying individual criminal acts, that are the focus of the two statutes.").

The FAC does not allege that Rees personally engaged in acts of racketeering.[9] Rees, like all of the other defendants, is only alleged to have violated 18 Pa. C.S.A. § 911(h)(1)(iv), the collection of an unlawful debt. (FAC ¶¶ 92, 105.) Section 911(h)(1)(iv) defines racketeering activity as, "the collection of any money or other property in full or partial satisfaction of a debt which arose as the result of the lending of money or other property at a rate of interest exceeding 25% per annum or the equivalent rate for a longer or shorter period, where not otherwise authorized by law." *Id.*

Though the FAC points to various services that the Think Finance Defendants, which may or may not include Rees, provided to the enterprises, these do not, and cannot, meet the statutory definition of racketeering activity under Section 911(h)(1)(iv). The FAC alleges that the Think Finance Defendants assisted the different enterprises by performing such acts as: providing web services to Native American tribal entities, assisting with banking and lending services for the enterprise, and entering into arms-length business transactions with Native American tribal entities to provide other necessary services. (FAC ¶ 105.) None of these activities involve the *collection* of an unlawful[10] debt, and thus do not meet the statutory

[9] The statute delineates the predicate offenses that can serve as racketeering activity, including, *inter alia*, homicide, insurance fraud, human trafficking, and narcotics offenses. *See* 18 Pa. C.S.A. §§ 911(h)(1)(i)-(v).

[10] Though the FAC makes much of LIPL's six percent interest cap, the loan contracts the Plaintiff takes issue with were legal at the time they were made under the laws of the State of Delaware, the Chippewa Cree Tribe, the Otie-Missouria Tribe of Indians, and the Tunica-Biloxi Tribe. Pa. C.O.A. applies only to the collection of debts, "not otherwise authorized by law." 18 Pa. C.S.A. § 911(h)(1)(iv). Pa. C.O.A.'s definition of racketeering activity further cautions that the act only applies to extraterritorial racketeering acts where "such acts would have been in violation of the law of the jurisdiction in which they occurred." 18 Pa. C.S.A. § 911(h)(1). Indeed, as one Pennsylvania court

definition of racketeering activity.[11] Instead, Plaintiff seeks to hold all defendants accountable for the alleged racketeering acts of the enterprise as a whole – including acts taken by members of the enterprise that Plaintiff has purposefully left out of this suit.

Plaintiff's contention that the various enterprises engaged in acts of racketeering is meaningless – to establish that *Rees* violated Pa. C.O.A., the FAC must allege that *Rees* engaged in conduct that violates the statute, including at least two acts of racketeering. To face liability, each individual defendant associated with the enterprise must engage in at least two predicate racketeering acts. *Stocker*, 622 A.2d at 340 (Commonwealth required to demonstrate each element of at least two predicate acts before liability attaches); *Crest Const. II, Inc. v. Doe*, 660 F.3d 346, 358 (8th Cir. 2011) (civil RICO claim must, at a minimum, identify two specific predicate acts for each Defendant.); *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027 (8th Cir. 2008) ("The requirements of § 1962(c) must be established as to each individual defendant." (citing *Sedima S.P.R.L v. Imrex Co.*, 473 U.S. 479, 496 (1985))); *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001) ("The requirements of section 1962(c) must be established as to each individual defendant."); *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987) ("The focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise…"); *Gross v. Waywell*, 628 F. Supp. 2d 475, 485 (S.D.N.Y. 2009) (RICO complaint must demonstrate that

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has held, "to prosecute a defendant successfully under this statute […] a pattern of racketeering activity must be proven to have taken place within this Commonwealth." *Commonwealth v. Braham*, 30 Pa. D. & C.3d 537, 540 (Pa. Com. Pl. Wash. Cty. 1983). As is abundantly clear from the FAC, and the loan documents attached thereto, all loans entered into were entirely legal under the laws of the individual Native American tribes and the state of Delaware, and no alleged racketeering activity occurred within the Commonwealth of Pennsylvania.

[11] Plaintiff cannot manipulate the definition of racketeering activity to include activities that are not otherwise expressly contained within the plain text of the statute. The statutory definitions of racketeering activity are exhaustive, and to allow acts other than what is expressly provided in the statute to serve as a basis for liability would be to usurp the role of the Legislature. *Cf. Annulli v. Panikkar*, 200 F.3d 189, 200 (3d Cir. 1999), *overruled on other grounds by Rotella v. Wood*, 528 U.S. 549 (2000) (holding same under RICO's exhaustive definition of racketeering activity).

each defendant, conducted or participated in the affairs of the enterprise through two or more acts of racketeering.). It is the person, not the enterprise, who is charged with racketeering and must engage in a pattern of racketeering activities. *Traitz*, 597 A.2d at 1133 ("The conduct to be examined, therefore, is the conduct of an individual evincing a pattern of racketeering activity."); *see also United States v. Bergrin*, 650 F.3d 257, 267 (3d Cir. 2011) ("It is the 'person' charged with the racketeering offense—not the entire enterprise—who must engage in the 'pattern of racketeering activity.'" (citing *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 244 (1989))); *Crabhouse of Douglaston Inc. v. Newsday Inc.*, 801 F. Supp. 2d 64, 74 (E.D.N.Y. 2011) (citing *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994)) (same).

The FAC does not contain any allegations that Rees personally collected any consumer debts (legal or illegal), personally spoke with any consumer, or otherwise personally engaged in the business practices to which the Plaintiff objects. Instead, the FAC alleges only that "the enterprise" collected money in violation of Section 911(h)(1)(iv). (FAC ¶ 105; *see also* Doc. 42-1, at 18 ["The necessary elements of these claims are (1) an 'enterprise' charging consumers more than 25% to borrow money, and proof that (2) the defendants are either conducting or directing the affairs of this enterprise…"].) This is plainly not enough.

Furthermore, even if this Court were to grant an unreasonable inference that Rees somehow conspired to collect an unlawful debt by assisting the enterprise, such actions are explicitly excluded from the statutory definition of racketeering activity under Pa. C.O.A. Unlike every other type of racketeering activity under 18 Pa. C.S.A. §§ 911(h)(1), the Pennsylvania Legislature specifically excluded conspiring to collect unlawful debts from the statutory definition of racketeering activity. 18 Pa. C.S.A. § 911(h)(1)(iii). The Legislature's

decision to treat collection of unlawful debts differently from all other acts of racketeering under subsection (h)(1)(iii) must be given effect. It follows, therefore, that to adequately allege a defendant has engaged in racketeering activity by collecting unlawful debts, he or she must personally collect those debts, and not merely conspire or assist others in doing so. Accordingly, even if Rees helped facilitate prohibited collections, conspiring to do so does not serve as a racketeering offense in and of itself under Pennsylvania law. Because the FAC does not allege that Rees engaged in *any* acts of racketeering, dismissal of the substantive Pa. C.O.A. counts is appropriate.

c. **The First Amended Complaint Does Not Allege Facts Demonstrating Rees Violated 18 Pa.C.S.A. 911(b)(3)**

Count Two of the FAC alleges Rees, as part of the Think Finance Defendants, violated 18 Pa. C.S.A. § 911(b)(3) by participating in, and being associated with, an enterprise that collected consumer debts with interest rates in excess of six percent. (FAC ¶¶ 102-109.) Plaintiff's theory reflects a fundamental misunderstanding of liability under Pa. C.O.A., one that ignores the plain text of the statute and elements of the offense. In short, because the Section 911(b)(3) claim contains no allegations that Rees controlled the affairs of the enterprise, nor are there any facts in the FAC from which that inference can be drawn, Count Two must be dismissed.

In pertinent part, section 911(b)(3) makes it "unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 Pa. C.S.A. § 911(b)(3).[12] To state a violation of Section 911(b)(3), Plaintiff must allege: (1) the existence of an enterprise;

[12] Analogous to 18 Pa. C.S.A. § 911(b)(3), and practically identical in text, is RICO section 1962(c). *See* 18 U.S.C. §1962(c). Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise […] to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity…" 18 U.S.C. § 1962(c).

(2) Rees was associated or employed by the enterprise; (3) Rees conducted or participated in the conduct of the enterprise's affairs; (4) via; (5) two or more acts of racketeering. *Commonwealth v. Wetton*, 591 A.2d 1067 (Pa. Super. Ct. 1991), *aff'd* 641 A.2d 574 (Pa. 1994); *accord Kahn v. Vayn*, No. 13-CV-1294, 2014 WL 550552, at *4 (Joyner, J.) ("In order to state a viable claim under [18 U.S.C. 1962(c)], a plaintiff is required to plead: (1) the existence of an enterprise affecting interstate commerce, (2) that the defendant was employed by or associated with that enterprise, (3) that the defendant participated, either directly or indirectly in the conduct of the affairs of the enterprise and (4) that the defendant participated through a pattern of racketeering activity that must include the allegation of at least two racketeering acts.").

Nowhere is the Plaintiff's misapprehension of the purpose and operation of Pa. C.O.A. more apparent than in Paragraph 107 of the FAC. There, the Plaintiff alleges that Rees and the other Think Finance Defendants violated 18 Pa. C.S.A. § 911(b)(3) "Through their above-described participation in and conduct of the enterprises…" (FAC ¶ 107.) As set forth in Section III.A.5.a, violations of the statute require something more than mere association with an enterprise. To face liability, a defendant must exercise control or direct *the enterprise*.[13] *Reves v. Ernst & Young*, 507 U.S. 170, 178-179 (1993) (rejecting aiding and abetting theory of participation under identical language in 18 U.S.C. § 1962(c), and holding that "in order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs"); *accord In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 371 ("More precisely, one is not liable under [§ 1962(c)] unless one has participated in the operation or management of the enterprise itself." (internal quotation omitted)). Providing

[13] Plaintiff has previously conceded that to adequately allege a claim, a defendant must be alleged to have directed the affairs of the enterprise. (Dkt. 42-1, at 18 ["The necessary elements of these claims are (1) an 'enterprise' charging consumers more than 25% to borrow money, and proof that (2) the defendants are either **conducting or directing** the affairs of this enterprise…"] (emphasis added)). Though the Plaintiff glosses over several other required elements of claims under Pa. C.O.A., even they adopt the language of *Reves*.

beneficial goods and services to an enterprise, or "attending board meetings," does not demonstrate control or direction of an enterprise. *Univ. of Md. at Balt. v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539 (3d Cir. 1993). Decision-making alone, without more, does not satisfy this requirement. *Id.* at 1538-1539 (Under *Reves*, "not even action involving some degree of decision making constitutes participation in the affairs of an enterprise").

The FAC alleges that the Think Finance Defendants provided various services to the Native American tribal entities that made loans to Pennsylvania consumers. The FAC specifically states that the Think Finance Defendants: (1) provided support to the enterprises by designing web-platforms, marketing assistance, and other necessary services to the enterprises; (2) engaged in lending arrangements that enabled the enterprise to make loans to consumers; and (3) provided banking assistance to the enterprises. Courts confronting these very issues under RICO have held that they are insufficient to demonstrate direction or control of the enterprise.

Providing services to an enterprise, no matter how essential to its operations, does not in and of itself demonstrate that the particular defendant directed or controlled the enterprise. *Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008) (noting that "[s]imply performing services for the enterprise does not rise to the level of direction"); *United Food & Commercial Workers Unions & Emp'rs Midwest Health Benefits Fund v. Walgreen Co.*, 719 F.3d 849, 855 (7th Cir. 2013) (post *Iqbal/Twombly* plaintiffs must allege that the defendants engaged in a degree of cooperation beyond normal commercial relationships); *In re Aetna UCR Litig.*, No. 07-3541, 2015 WL 3970168, at *28 ("Providing goods or services to an alleged RICO enterprise is insufficient to compel liability."); *Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 307–08 (S.D.N.Y. 2010) (stating that "it is not enough to allege that a defendant provided services that were helpful to an enterprise, without alleging facts that, if proved, would demonstrate some

degree of control over the enterprise."). Similarly, loaning money and providing financial support to an enterprise does not demonstrate control over the enterprise. *Berry v. Deutsche Bank Trust Co. Americas*, No. 07CIV.7634(WHP), 2008 WL 4694968, at *6 (S.D.N.Y. Oct. 21, 2008), *aff'd*, 378 F. App'x 110 (2d Cir. 2010) ("Lending money to an enterprise does not establish a role in 'directing the enterprise[']s affairs.'"). And, providing banking services to an enterprise, even with knowledge of an enterprise's fraudulent activity, does not demonstrate control over the enterprise. *Indus. Bank of Latvia v. Baltic Fin. Corp.*, No. 93 CIV. 9032 (LLS), 1994 WL 286162, at *3 (S.D.N.Y. June 27, 1994) ("[P]rovid[ing] banking services [to an enterprise]—even with knowledge of the [enterprise's] fraud—is not enough to state a claim under § 1962(c).").

Similarly, Rees' former position with Think Finance alone does not provide a basis for his individual liability under Pa. C.O.A. Specifically, a plaintiff must allege more than just that a defendant had knowledge and gave tacit approval to the enterprise's conduct. *In re Aetna UCR Litig.*, 2015 WL 3970168, at *30 n.13. Rather, to proceed on a claim under Pa. C.O.A., the complaint must allege that Rees "conducted or participated in the conduct of the '*enterprise's* affairs,'" not simply that he engaged in his own duties and responsibilities as an employee of a single member of the enterprise. *Reves*, 507 U.S. at 185; *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 371. Because the FAC is altogether deficient in its attempts to impute control of the enterprise to Rees, and it does not allege any facts demonstrating Rees' control over the *enterprise's* affairs, the claim under Section 911(b)(3) must be dismissed.

Liability requires something more than just the commission of the predicate racketeering acts – it requires that the racketeering acts be the means through which a defendant operated or controlled the enterprise. Here, the only predicate act any Defendant is alleged to have engaged

in is the collection of unlawful loans under Section 911(h)(1)(iv). Liability for Rees, therefore, requires facts demonstrating that Rees participated in the alleged criminal enterprise *through, or by means of,* collecting a series of unlawful loans. As the Third Circuit has made clear in interpreting identical language under RICO, "the plain language of the statute requires that the 'pattern of racketeering activity' be a means by which the defendant 'participates, directly or indirectly, in the conduct of the enterprise's affairs.'" *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 371. To satisfy this element, a defendant must conduct or participate in the enterprise's affairs "through — that is, by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of — a pattern of racketeering activity." *Id.* at 372 (internal quotation and citation omitted).[14] The predicate acts of racketeering must be the 'means' through which a defendant conducts or controls the enterprise, and not the other way around. *Id.* at 372 n.69 (declining to adopt the First Circuit's holding in *United States v. Brandao*, 539 F.3d 44, 53 (1st Cir. 2008), which stated that a sufficient nexus existed where a defendant was able to commit the predicate acts because of his association with an enterprise.). To interpret the statute any other way would transform commonplace violations of unrelated statutes into racketeering claims – a result neither the Pennsylvania Legislature, nor Congress, intended, nor which is supported by

[14] The case of *United States v. Cummings*, 395 F.3d 392 (7th Cir. 2005), is particularly instructive on the correct application of this principle. In *Cummings*, defendants were a 'skip-tracer' and several employees of a state-agency that administered unemployment compensation. *Id.* at 394. The employees of the state agency were paid by the skip tracer to help him locate delinquent debtors using their access to the unemployment database. *Id.* at 395. The government charged defendants with conspiring to violate 1962(c) through the 'enterprise' of the state agency, with the underlying racketeering offenses being bribery. *Id.* at 398. The defendants admitted their actions violated state bribery laws, but stated they did not conspire to conduct the affairs of an enterprise in accepting bribes. *Id.* The Seventh Circuit overturned defendants' jury convictions because they failed to provide evidence of a necessary element of a RICO offense: that the defendants controlled the enterprise *through* their acts of bribery. *Id.* at 395.

The court noted that the defendant employees and the skip tracer defendant did not engage in a scheme of bribery to control the state-agency enterprise, but instead merely to gain access to confidential information held in the possession of the agency. *Id.* at 398-99. Thus, there was no evidence that Defendants exerted control over the enterprise through their racketeering acts. *Id.* Furthermore, that the skip-tracer defendant 'controlled' his fellow defendants through bribes was irrelevant to the inquiry. *Id.* at 399. The defendants did not control or manage the affairs of the state agency through their racketeering acts. *Id.* To hold otherwise, the Seventh Circuit held, would be to transform all garden-variety acts of bribery into RICO violations. *Id.* at 400.

the law. *See, e.g.*, *Commonwealth v. Goodman*, 500 A.2d 1117, 1127 (Pa. Super. Ct. 1985); *Cummings*, 395 F.3d at 400. To be clear, the substantive offense under Section 911(b)(3) is a defendant's control or participation in an enterprise through a pattern of racketeering, *not* simply engaging in the individual acts of racketeering.

Liability requires something more than just the commission of the predicate racketeering acts. Here, the only predicate act any Defendant is alleged to have engaged in is the collection of unlawful loans under Section 911(h)(1)(iv). Even if the Court were to credit Plaintiff's conclusory allegations as supporting an inference that Rees directed or controlled the alleged enterprises, there is no basis for the Court to infer that Rees did so *through* the collection of an unlawful debt. As explained *supra.*, Rees never collected a debt or otherwise engaged in racketeering activity. Because the FAC does not establish the requisite nexus between acts of racketeering and Rees' control of an enterprise, Count Two must be dismissed.

d. **The First Amended Complaint Does Not Allege Facts Demonstrating Rees Violated 18 Pa.C.S.A. 911(b)(1)**

Plaintiff's claim under Section 911(b)(1) is similarly deficient in that it fails to allege that Rees participated in acts of racketeering as a principal, Rees derived income from those acts, or that Rees invested those funds into another enterprise. Because the FAC fails to allege facts that go to the very essence of a Section 911(b)(1) claim, Count One of the FAC must be dismissed.

Count One of the FAC alleges Rees violated of 18 Pa. C.S.A. § 911(b)(1). (FAC. ¶¶ 91-101.) In pertinent part, Section 911(b)(1) makes it:

> unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity in which such person participated as a principal, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise…

18 Pa. C.S.A. § 911(b)(1).[15]

To state a claim against Rees for violating Section 911(b)(1), Plaintiff must demonstrate: (1) Rees was in receipt of income; (2) the income had been derived directly or indirectly from a pattern of racketeering activity; (3) Rees had participated as a principal in the racketeering activity; and (4) Rees used or invested, directly or indirectly, part of this income, or the proceeds of such income, in the acquisition of an interest in or the establishment or operation of, any enterprise. *Commonwealth v. Lavelle*, 555 A.2d 218, 223 (Pa. Super. Ct. 1989); *see also, generally Commonwealth v. Rickabaugh*, 706 A.2d 826, 842 (Pa. Super. Ct. 1997).

In only the most conclusory of allegations, Plaintiff alleges that "The Think Finance Defendants derived income from such racketeering activity and used or invested that income into the operation of an 'enterprise,' as defined by 18 Pa. C.S.A. § 911(h)(3), such enterprises being, among others, ThinkCash, Inc., Think Finance, Inc., Elevate Credit, Inc. and GPL Servicing, Ltd." (FAC ¶ 97.) Such an allegation is precisely the type of conclusory, formulaic recitation of the elements, this Court is required to ignore in determining the sufficiency of the complaint. *Santiago*, 629 F.3d at 130. In fact, the FAC is devoid of any allegations that Rees received *any* income, let alone that the income was obtained through acts of racketeering or that Rees subsequently invested those proceeds in another enterprise. And, as is set forth *supra.*, Rees never engaged in a single act of racketeering.[16] Because Rees never engaged in any acts of

[15] Analogous to 18 Pa. C.S.A. § 911(b)(1), and practically identical in text, is RICO section 1962(a). *See* 18 U.S.C. §1962(a). Section 1962(a) makes it unlawful "for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity [...] to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce [...]" 18 U.S.C. § 1962(a).

[16] Plaintiff's attempt to implicate Rees through the aiding and abetting language of 18 U.S.C. § 1962(a) and 18 U.S.C. § 2 is unavailing. As the Plaintiff flatly admits in the FAC, the plain text of PA. C.O.A. diverges from the plain text of RICO in this limited circumstance. (FAC ¶ 94.) Plaintiff's argument, therefore, ignores the Pennsylvania Legislature's purposeful divergence from a statute that was otherwise "copied almost verbatim from [RICO]." *Commonwealth v. Brady*, 368 A.2d 699, 719 (Pa. 1977). Had the Legislature wished to extend liability to

racketeering, he could not have derived or invested any income tainted by racketeering activity. Without this basic element, dismissal of Count One is appropriate.[17]

e. **Plaintiff Cannot Allege Defendant Rees Violated 18 Pa.C.S.A. 911(b)(4) by Conspiring to Violate 18 Pa.C.S.A. 911(b)(1) or 18 Pa.C.S.A. 911(b)(3)**

Plaintiff's conspiracy claim under Pa. C.O.A. is equally flawed in that it fails to allege facts demonstrating Rees' agreement or participation in the conspiracy, an underlying substantive violation of Pa. C.O.A., or that Rees purposefully and knowingly participated in the conspiracy. Because these are all essential elements of a claim under Section 911(b)(4), Count Three of the FAC must be dismissed as to Rees. In pertinent part, section 911(b)(4) makes it "unlawful for any person to conspire to violate any of the provisions of paragraphs (1), (2) or (3) of this subsection." 18 Pa. C.S.A. § 911(b)(4).[18] Any claim under Section 911(b)(4) "requires an agreement to violate [a substantive provision of Pa. C.O.A.] and an overt act in furtherance of

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both principals and accomplices, it would have done so explicitly as it has elsewhere in the crimes code. Given the clear conflict between the plain text of PA. C.O.A. and the plain text of RICO, there can be no doubt that the plain text of PA. C.O.A. controls. To face liability under 18 Pa. C.S.A. § 911(b)(1), a defendant must receive income from acts of racketeering in which he or she personally committed. Aiding and abetting is not enough.

[17] Assuming, *arguendo*, the FAC alleged a fact that permitted an inference that Rees received some form of income, courts have held that the receipt of income – even if it is obtained through acts of racketeering – is not what is prohibited under Section 911(b)(1). Rather, this section prohibits the *investment* of that tainted income into a new entity. *See Lavelle*, 555 A.2d at 223. This interpretation is in accord with the vast majority of federal courts interpreting the identical language under RICO. *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991) (a violation of the statute occurs "only when [defendant] uses or invests the proceeds of that [racketeering] activity in an enterprise."); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149 (10th Cir. 1989)) (emphasis in original) *cert. denied*, 493 U.S. 820 (1989) ("The statute does not state that it is unlawful to *receive* racketeering income; rather, as the italicized language underscores, the statute prohibits a person who *has received* such income *from using or investing it* in the proscribed manner."); *Abraham v. Singh*, 480 F.3d 351, 354 (5th Cir. 2007) (in the simplest terms, 1962(a) states that "a person who has received income from a pattern of racketeering activity cannot invest that income in an enterprise."); *Khan v. Vayn*, No. 13-CV-1294, 2014 WL 550552, at *3 (E.D. Pa. Feb. 12, 2014) (Joyner, J.) ("Congress enacted Section 1962(a) in an attempt to halt investment of racketeering proceeds into legitimate businesses, including the practice of money laundering."); *Ammirato v. Duraclean Int'l, Inc.*, 687 F. Supp. 2d 210, 222 (E.D.N.Y. 2010) ("The basic purpose of section 1962(a) is to prevent racketeers from using their ill-gotten gains to operate, or purchase a controlling interest in, legitimate businesses.").

[18] Analogous to 18 Pa. C.S.A. § 911(b)(4), and practically identical in text, is RICO section 1962(d). *See* 18 U.S.C. §1962(d). Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d).

that conspiracy." *Wetton*, 591 A.2d at 1073.[19] The FAC fails to allege either. Instead, the FAC attempts to hoist liability upon Rees solely because the Think Defendants "enter[ed] into the above described rent-a-bank and rent-a-tribe arrangements and facilitate[ed] – and profit[ed] from – lending activity that they know is illegal in Pennsylvania." (FAC ¶ 112.) Such an allegation, standing alone or in combination with other facts stated in the FAC, is deficient for several reasons.

First, the exhibits attached to the FAC demonstrate that Rees never entered into any agreements with either FBD or any of the Native American tribal entities. (*See, e.g.*, FAC at Ex. E.) While an agreement to violate Pa. C.O.A. may be inferred from the circumstances, *see Commonwealth v. Urbina-Nevarez*, No. CP-06-2745-2005, 2009 WL 2055953 (Pa. Com. Pl. Feb. 27, 2009), there are no facts within the FAC that would permit such an inference *with respect to Rees*.

Second, as a matter of law, none of the agreements attached or referred to in the FAC, can serve as the basis for a Pa. C.O.A. violation. To allege a substantive violation of Pa. C.O.A., at least *some* racketeering activity must be alleged. *Wetton*, 591 A.2d at 1073; *Stocker*, 622 A.2d at 340. Without an allegation of racketeering activity there can be no substantive violation of the statute, and therefore there can be no conspiracy to violate the statute. *Cf. Macauley*, 7 F. Supp. 3d. at 485-486 (dismissing plaintiff's RICO conspiracy claims where the complaint did not allege a violation of any substantive provision of RICO). Just as in *Macauley*, the FAC's failure to allege an actionable violation of Pa. C.O.A. is fatal to any conspiracy claim. All the lending activity described in the FAC was otherwise authorized under the laws of Delaware and the

[19] This is a significant departure from federal RICO case law, which does not require an overt act in furtherance of a conspiracy. *Salinas v. U.S.*, 552 U.S. 52, 63 (1997).

individual Tribal Nations, and thus all of Plaintiff's Pa. C.O.A. claims fail for failing to allege a pattern of racketeering activity.

Third, there are no overt acts in furtherance of the alleged conspiracy alleged in the FAC.

Fourth, agreeing to provide wholly legitimate services to an enterprise engaged in racketeering cannot serve as the basis for conspiratorial liability. A conspirator must "purposefully and knowingly" provide services to an enterprise before liability will attach. *Smith v. Berg*, 247 F.3d 532, 538 n.11 (3d Cir. 2001) (Liability under section 1962(d) will only result if a defendant/conspirator provides services that "were purposefully and knowingly directed at facilitating a criminal pattern of racketeering activity"); *see also United States v. Useni*, 516 F.3d 634, 646 (7th Cir. 2008) ("To be convicted of conspiracy under § 1962(d), one must knowingly agree to facilitate the activities of those who are operating an enterprise."); *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000) (Holding to find liability, the "agreement must be to knowingly facilitate the activities of the operators or managers to whom [18 U.S.C. § 1962] (c) applies. One must knowingly agree to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner."). All of the services the Think Finance Defendants provided to the enterprise were legitimate, lawful, and provided to entities performing lending in accordance with the laws of their home state or sovereign. There are no allegations within the FAC that Rees had any knowledge of a criminal pattern of racketeering, or that his actions facilitated the same. To the contrary, the FAC and Plaintiff's candid characterization of their claims[20], plainly acknowledge that Rees and the Think Finance Defendants were nothing more than service providers to the lenders.

[20] "As pleaded, the Commonwealth's claims focus on the conduct of the Defendants, not the lender named in the underlying loan documents. These claims are directed to activity other than "lending" *per se*." (Dkt. 48, page 3.)

Fifth, even accepting the Plaintiff's conclusory allegations, the FAC does not allege a conspiracy to violate a substantive provision of Pa. C.O.A.; rather the FAC alleges a conspiracy to commit predicate acts of racketeering. Thus, in order to conspire to violate Section 911(b)(1) or 911(b)(3), a defendant must either conspire to invest prohibited racketeering income into a legitimate enterprise or conspire to control an enterprise through a pattern of racketeering. *See, e.g., Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 539 (3d Cir. 2012) ("RICO conspiracy is not a mere conspiracy to commit the underlying predicate acts. It is a conspiracy to violate RICO—that is, to conduct or participate in the activities of a corrupt enterprise."); *Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 961 (7th Cir. 1996) ("Section 1962(d)'s target, like that of all provisions prohibiting conspiracies, is the agreement to violate RICO's substantive provisions, not the actual violations themselves." (quoting *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344, 348 (7th Cir. 1992))); *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir.1978) ("[T]he object of a RICO conspiracy is to violate a substantive RICO provision here, to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity."). The FAC makes no such allegations against Rees, and Count Three must be dismissed.

B. Disgorgement Is Not a Remedy Available under Pa. C.O.A.

Plaintiff seeks an impermissible remedy under Pa. C.O.A. – Disgorgement. Disgorgement is in an inappropriate remedy under Pa. C.O.A. because it goes far beyond the

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"The COA claims allege that, apart from what the apparent lender might be doing, Defendants themselves are deriving income from a scheme they are operating to collect from Pennsylvania consumers more than 25% interest." (Dkt. 48, page 4.)

"If it does turn out, after remand, that Defendants are able to persuade the state court that they were mere service providers to legitimate lenders, or that the loans are imbued with some form of federal protection immunizing Defendants from liability, then such *defenses* may be successful." (Dkt. 48, page 5.)

purpose and limited remedies available under the subsection granting jurisdiction to the courts to hear matters seeking civil remedies. 18 Pa. C.S.A. § 911(d)(1). The Pennsylvania Legislature has limited the court's jurisdiction on civil enforcement of Pa. C.O.A. solely to remedies that "prevent and restrain violations of [18 Pa. C.S.A. § 911(b)]…" *Id.* Interpreting the nearly identical provision under RICO, 18 U.S.C. § 1964(a), courts have repeatedly held that disgorgement is an inappropriate remedy because it does nothing to prevent or restrain violations of the statute.

The D.C. Circuit addressed this issue head-on in its discussion of the Government's RICO case against the tobacco companies and held that disgorgement was not available as an equitable remedy in an action brought under section 1964(a). *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1202 (D.C. Cir. 2005). The court in that case held that because RICO's express language only permitted an injunction insofar as it could "prevent or restrain" violations of RICO, it was intended to prevent future violations of RICO and not remedy past violations. *Id*. at 1199; *accord United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995) ("The jurisdictional powers in § 1964(a) serve the goal of foreclosing future violations, and do not afford broader redress. The section does not authorize the government to recapture all the losses of those wronged by civil RICO violators."). This interpretation, the court held, was confirmed by the examples detailed within the provision that "are all aimed at separating the RICO criminal from the enterprise so that he cannot commit violations *in the future*." *Id.* at 1198; *see also United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 233 (3d Cir. 2005) (distinguishing the FDCA act from RICO because "RICO listed several specific types of relief aimed at making it difficult or impossible for a violator to commit future violations."). The language of RICO is functionally identical to the statutory provisions of Pa. C.O.A. that provide that the courts have

jurisdiction solely "to prevent and restrain violations of subsection (b)…" 18 Pa. C.S.A. § 911(d)(1). Thus, under the plain text of 18 Pa. C.S.A. § 911(d)(1), just as under the plain text of 18 U.S.C. § 1964(a), disgorgement is inappropriate because it fails to "prevent or restrain" violations of the statute.

Plaintiff's citation to Section 911(c), titled "Grading" (FAC ¶ 101), as its basis to support disgorgement as an allowable remedy is misplaced. Section 911(c), in its entirety, states: "Whoever violates any provision of subsection (b) of this section is guilty of a felony of the first degree. A violation of this subsection shall be deemed to continue so long as the person who committed the violation continues to receive any benefit from the violation." 18 Pa. C.S.A. § 911(c). As Pennsylvania courts have found, however, Section 911(c) applies to the use of Pa. C.O.A. in the context of a criminal prosecution, where the statute of limitations is an issue. *See, e.g.*, *Lavelle*, 555 A.2d at 222. In the context of this civil case, Section 911(c) has no applicability. Because courts only have jurisdiction to "prevent and restrain" violations of Pa. C.O.A., Plaintiff's request for disgorgement and other equitable remedies seeking compensation for past harms to Pennsylvania consumers must be dismissed.

C. The Tribal Lenders Are Necessary Parties and the Complaint Must Be Dismissed if They Are Not Joined.

Much like a 12(b)(6) motion, courts reviewing motions to dismiss under Fed. R. Civ. P. 12(b)(7) are required to accept all well pleaded allegations as true and draw all reasonable inferences in favor of plaintiff. *Oldcastle Precast, Inc. v. VPMC, Ltd.*, 2013 WL 1952090 (E.D. Pa. May 13, 2013). "The moving party bears the burden of showing that a non-party is both necessary and indispensable under Rule 19." *Travelers Cas. & Sur. Co. of Am. v. Alambry Funding Inc.*, No. CIV.A. 11-4758, 2011 WL 6133885, at *3 (E.D. Pa. Dec. 8, 2011). In making

determinations under Rule 19, a court may properly consider evidence submitted by the parties outside of the four corners of the complaint. *Id.*; *see also In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 954 F. Supp. 2d 360, 378 (W.D. Pa. 2013) ("In addition, a Court may consider 'relevant, extra-pleading evidence' during its evaluation of a Fed.R.Civ.P. 12(b)(7) motion.") (quoting *Citizen Band Potawatomi Indian Tribe of OK v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994)).

Plaintiff's failure to include the sovereign Native American tribal entities whose contractual rights the FAC seeks to alter requires the FAC's dismissal for failing to join an indispensable party. Under Federal Rule of Civil Procedure 19, the court engages in a two-step process to determine if the failure to join a party necessitates dismissal. *Radian Guar. Inc. v. Bolen*, 18 F. Supp. 3d 635, 640 (E.D. Pa. 2014). First, the court determines if an absent party is "necessary" under Fed. R. Civ. P. 19(a)(1) or (a)(2). *Id*; *see also, Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 316 (3d Cir. 2007) (even if relief can be granted amongst named defendants under subsection (a)(1), "a court still may deem a party 'necessary' under subsection (a)(2) of Rule 19."). If the absent party is necessary to the litigation but cannot be joined, the court determines if the action can continue in the absence of the party, or if dismissal of the action is appropriate. Fed. R. Civ. P. 19(b). Here, the FAC seeks to reform the contractual rights of absent Native American tribal entities. (FAC at prayer for relief.) Because this relief would substantially impair the rights of the Native American tribal entities, and those entities cannot be joined due to their sovereign status, dismissal of all claims is appropriate.

The absent Native American tribal entities are essential parties to this action under Fed. R. Civ. P. 19(a)(1)(B)(i) because they possess valid legal rights in the consumer contracts that Plaintiff seeks to have the court revise. Throughout the FAC, Plaintiff seeks the remedy of

"recession or reformation of loan contracts…" for Defendants' alleged violations. (*See, e.g.*, FAC ¶ 152.) And, as this Court has already recognized, any determination of the Plaintiff's consumer protection claims will "turn on whether the Commonwealth's legal position regarding the validity of the [contractual terms] is correct." (Order, Dkt. 53, page 2.)

The loan contracts Plaintiff seeks to have reformed are contracts between consumers and one of three Native American tribal entities: Plain Green (being an arm of the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation), Great Plains Lending (being an arm of the Otoe-Missouria Tribe of Indians), or Mobiloans (being an arm of the Tunica-Biloxi Tribe of Louisiana). (FAC ¶¶ 46, 53, 60, 67, Ex. F-H.) Reforming a contract in the absence of a party to that contract is precisely the type of situation that Rule 19(a)(1)(B)(i) mandates joinder of the absent party. *See Camacho v. Major League Baseball*, 297 F.R.D. 457, 462 (S.D. Cal. 2013) (holding that where a court is asked to determine the validity and effect of a contract, Rule 19(a)(1)(B)(i) requires all parties to the contract to be joined as essential because, "as a party to the […] contracts, the [Defendants] […] are necessary parties").

When a party is 'necessary' under Fed. R. Civ. P. 19(a), "joinder must occur if feasible." *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 319 (3d Cir. 2007). If a necessary party cannot be joined, a court must determine if the action can continue or, if the necessary party is indispensable to the litigation, dismissal is appropriate. *Gen. Refractories*, 500 F.3d at 319. Guiding this inquiry are four relevant, but non-exhaustive, factors:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment; shaping the relief;
>
> (B) or other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Alambry Funding, 2011 WL 6133885, at *4 (citing Fed. R. Civ. P. 19(b)). All factors counsel that dismissal is appropriate because the tribal entities are indispensable parties. Where, as here, sovereign immunity concerns are implicated by an absent necessary party, "the action must be dismissed if the claims of sovereign immunity are not frivolous and 'there is a potential for injury to the interests of the absent sovereign.'" *Two Shields v. Wilkinson*, 790 F.3d 791, 798 (8th Cir. 2015) (quoting *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008)).

First, as explained in the analysis under Rule 19(a)(1)(B), any judgment this Court renders would necessarily prejudice the legal rights of the absent Native American tribal entities. *See Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024-25 (9th Cir. 2002) ("Not surprisingly, the first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a)."). Plaintiff's requested relief necessarily implicates the valid, contractual rights of the Native American tribal entities. Reforming the loan contracts and invalidating beneficial interests held by Native American tribal entities, without their presence, is clearly prejudicial.

Second, the prejudice suffered by the absent Native American tribal entities, goes to the heart of the tribal entities' legal business practices. The Court cannot lessen or avoid the very relief, and implications that flow from such relief, that Plaintiff requests this Court to grant. *See, Id.* at 1025 (a court has no ability to adequately shape relief where "[t]ermination of existing compacts is central to this litigation"). Though the Court could alert the Native American tribal entities of this action and encourage them to appear, *see Wilson v. The Canada Life Assur. Co.*, No. 4:08-CV-1258, 2009 WL 532830, at *9 (M.D. Pa. Mar. 3, 2009), the Native American tribal

entities all enjoy sovereign immunity and only they can decide if and when it chooses to appear and intervene. *Wilkinson*, 790 F.3d at 799. This would not be an effective method of lessening or avoiding the clear prejudice the Native American tribal entities would suffer, and therefore does not weigh in favor of continuing this action. *Wilson*, 2009 WL 532830, at *10.

Third, the court cannot render an adequate judgment in the absence of the Native American tribal entities because any judgment would not bind the absent sovereign entities, and would be repugnant to the "efficient administration of justice." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 870-871 (2008). Furthermore, though Plaintiff might be able to obtain a judgment it would be satisfied with, such a judgment would not be *adequate* because it "would be at the cost of [the Tribe]." *Friends of Amador Cnty. v. Salazar*, 554 F. App'x 562, 565-66 (9th Cir.) (unpublished), *cert. denied sub nom. Friends of Amador Cnty. v. Jewell*, 135 S. Ct. 717 (2014) (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990)). Thus, even this factor does not weigh in favor of continuing in the absence of the Native American tribal entities.

Finally, though dismissal would ultimately leave Plaintiff without a remedy at law, "this result is a common consequence of sovereign immunity, and [the Tribe's] interest in maintaining [its] sovereign immunity outweighs the [Appellants'] interest in litigating their claims." *Id.* (quoting *Am. Greyhound Racing, Inc.*, 305 F.3d at 1025). The Native American tribal entities are free to assert their valid sovereign immunity, and they remain the only party that can decide where and when to waive such immunity. *Cf. Wilkinson*, 790 F.3d at 799. That Plaintiff is left without the ability to seek relief due to sovereign immunity should not weigh against dismissal; to the contrary, because the claims of sovereign immunity are non-frivolous, the Supreme Court has held that dismissal is the appropriate result. *Pimentel*, 553 U.S. at 867.

Plaintiff, as master of its complaint, must accept that its requested relief necessarily implicates the rights of sovereign Native American Tribes. Accordingly, because Plaintiff cannot join the sovereign tribal entities, and those parties are indispensable, dismissal of the FAC under Rule 19 is appropriate.

IV. CONCLUSION

For the reasons stated herein, Defendant Kenneth E. Rees' Motion to Dismiss First Amended Complaint should be granted.

Date: August 28, 2015

Respectfully submitted,

By: s/ Richard L. Scheff

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CERTIFICATE OF SERVICE

I, Richard L. Scheff, hereby certify that on this 28th day of August 2015, I filed electronically a copy of the foregoing *Defendant Kenneth E. Rees' Motion to Dismiss Plaintiff's First Amended Complaint*. This document is available for viewing and downloading from the ECF system and electronic notification has been sent to all counsel of record.

s/ Richard L. Scheff
Richard L. Scheff