IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

LULA WILLIAMS, GLORIA TURNAGE, GEORGE HENGLE, DOWIN COFFY, and FELIX GILLISON, JR., *on behalf of themselves and all individuals similarly situated*,

Civil Case No. 3:17-cv-00461-REP

Plaintiffs,

v.

BIG PICTURE LOANS, LLC; *et al.*

Defendants.

BIG PICTURE LOANS' REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO EXHAUST TRIBAL REMEDIES AND UNDER THE DOCTRINE OF *FORUM NON CONVENIENS*

Specially Appearing Defendant Big Picture Loans, LLC, by counsel, hereby submits this reply in support of its motion to dismiss Plaintiffs' claims for failure to exhaust tribal remedies and under the doctrine of *forum non conveniens*.

INTRODUCTION

The Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD") enacted the Tribal Consumer Financial Services Regulatory Code ("Code") to govern tribal lending, and it established the Tribal Financial Services Regulatory Authority ("TFRSA") as a governmental regulator to enforce the Code. To ensure consumer protection, LVD included a dispute resolution process in the Code to resolve any customer complaints against all entities' operation within LVD's jurisdiction.

To avoid their contractual commitments, Plaintiffs repeatedly attack LVD's jurisdiction and the LVD Tribal Court's ("LVD Court's") jurisdiction without any compelling evidence or authority. In doing so, Plaintiffs call on this Court to use *Montana v. United States*, 450 U.S. 544

(1981), to obliterate Indian tribes' civil jurisdiction over a nonmember when that nonmember consents to such jurisdiction and then sues the tribe after such consent in federal court. To twist *Montana* in that new direction, the Court would effectively destroy the potential benefits of the internet and e-commerce to all Indian tribes.

This Court, however, need not reach such an extreme outcome. Rather, *Montana* and its progeny confirm the jurisdictional reach of tribal courts and promote the contemporary federal policy of self-determination against the ever-changing landscape of the economic development of tribes.[1] Under *Montana*, Plaintiffs' loan agreements are consensual contractual relationships with choice of law and forum selection provisions, which require application of LVD and applicable federal law in a tribal forum. Plaintiffs sued elected tribal officials and tribally-owned businesses (that are organized and operating under tribal law from LVD lands), which directly challenges LVD's self-determination by undercutting LVD's constitutional jurisdiction and ability to enact its own laws and be governed by them. Plaintiffs explicitly and voluntarily consented to tribal jurisdiction over their on-reservation agreement. To find otherwise would not only be a slight to tribal self-determination, but also militate against the long-standing authority honoring forum selection clauses in contracts more generally.

Plaintiffs' attempt to skirt their duty to exhaust tribal remedies by arguing that there is no pending tribal court action to exhaust such remedies is unsupported. While several courts have considered tribal exhaustion under circumstances that involve ongoing tribal court litigation,

[1] Memorandum letter from U.S. OFFICE OF THE SOLICITOR TO SECRETARY OF THE INTERIOR, U.S. DEPARTMENT OF THE INTERIOR, M-37045 (Jan. 18, 2017), *available at* https://www.doi.gov/sites/doi.gov/files/uploads/m-37045.pdf ("[T]he Department of the Interior's (Department's) current policy and regulatory approaches are aimed at empowering tribes to more directly manage their own resources and lands, engage in economic development opportunities based on their own strategies and priorities, and self-govern through their own independent judgment and cultural values.").

there is no requirement that a tribal court lawsuit must be filed before the requirement to exhaust tribal remedies is honored and enforced.

Plaintiffs also degrade LVD's integrity with unsupported aspersions of bias and corruption, which are insufficient to resist tribal court jurisdiction under established law. Plaintiffs improperly presume bias by the TFSRA's regulatory agents merely because of familial relationships to councilmembers. And without evidence, Plaintiffs claim that LVD enacted the Tribal Dispute Resolution Process solely to shield Defendant Matt Martorello. Despite five depositions and tens of thousands of pages of discovery, Plaintiffs continue to raise unsupported claims. The truth remains that there is no "influence and relationship" between Martorello, the TFSRA, and the LVD Court and there never has been.

Additionally, Plaintiffs failed to address Big Picture's position that *forum non conveniens* requires dismissal. Under the circumstances here, *forum non conveniens* is a basis for dismissal independent of the tribal exhaustion doctrine. As Plaintiffs have chosen not to address the doctrine, Big Picture will rely on its Motion and opening brief.

ARGUMENT

I. Tribal exhaustion and comity do not require simultaneous tribal court litigation.

Although the Fourth Circuit has not addressed the issue, many circuits have found that ongoing tribal court actions are not a prerequisite to the tribal exhaustion doctrine. For example, the Ninth Circuit has held that federal courts must "dismiss or abstain from deciding cases in which concurrent jurisdiction in an Indian tribal court [is] asserted," and that "[w]hether proceedings are actually pending in the appropriate tribal court is irrelevant." *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991); *see also Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) (*per curiam*) ("The absence of any ongoing

litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement.").

Other circuits have similarly held that pending tribal litigation is unnecessary. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth*., 207 F.3d 21, 31 (1st Cir. 2000) ("Where applicable, this prudential doctrine has force whether or not an action actually is pending in a tribal court."); *United States v. Tsosie,* 92 F.3d 1037, 1041 (10th Cir. 1996) ("[T]he exhaustion rule does not require an action to be pending in tribal court."); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth*., 797 F.2d 668, 674 (8th Cir. 1986) ("Because a grant of federal jurisdiction based on diversity would impinge on the tribe's right to self-government, the district court did not err when it refused to assume jurisdiction and referred the case for an initial determination by the tribal court of whether the Housing Authority is a member of the tribe."); *see also Heldt v. Payday Fin., LLC*, 12 F. Supp. 3d 1170, 1180 (D.S.D. 2014) ("Here, there is no pending tribal court action between Plaintiffs and Defendants to which this Court may defer. However, the doctrine of tribal court exhaustion applies even when there is no pending concurrent tribal action.").

Within the Fourth Circuit, different district courts have addressed tribal exhaustion, but have not squarely addressed the issue of parallel proceedings. Perhaps the most detailed inquiry is in *Dillon v. BMO Harris Bank, N.A.*, No. 1:13CV897, 2015 WL 6619972 (M.D.N.C. Oct. 30, 2015), where the district court allowed jurisdictional discovery to determine whether a colorable claim of tribal court jurisdiction existed for purposes of tribal exhaustion, even though there was no tribal action pending. *Id.* at *9.[2]

[2] Other courts have stated a different position. The Second Circuit, for instance, seems to require the prerequisite of a pending tribal court action; however, it recognized that "the application of the doctrine of exhaustion of tribal remedies has not been uniform among the circuits, the general principle can be easily stated: parties who challenge,

Big Picture urges this Court to recognize the federal policies underlying comity and the tribal exhaustion doctrine and align with the First, Eight, Ninth, Tenth Circuits finding that a pending action in tribal court is not a prerequisite to dismissal. Relying on *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 82 (2d Cir. 2001), Plaintiffs urge the opposite and argue that "tribal exhaustion applies in cases where a plaintiff attempts to litigate a 'previously-filed, ongoing tribal court action' and asks the federal court 'to interfere with those tribal proceedings.'" (Opp. p. 4 (quoting *Garcia*, 268 F.3d at 80)). However, as in *Garcia*, a review of the circumstances here does not require a steadfast rule, as the facts here favor exhaustion. Here, the dispute arises over the validity of loans and enforceability of loan agreements issued by Big Picture, a tribal licensee operating pursuant to LVD law. Moreover, the parties chose to have the loan agreement governed by LVD law and applicable federal law using the Tribal Dispute Resolution Procedure.[3] Plaintiffs pose a direct attack on tribal self-determination by suing Big Picture and Ascension, LVD instrumentalities, and LVD Officials acting under LVD law—the suit challenges whether LVD can enact laws and be governed by them.

Indeed, the facts here are a sharp contrast to *Garcia*. In *Garcia*, the tribal party sought to have the matter removed to the *tribal council* despite the existence of a *tribal court*, which meant that the federal proceeding did not implicate any tribal court's jurisdiction. *Garcia*, 268 F.2d at

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under federal law, the jurisdiction of a tribal court to entertain a cause of action must first present their claim to the tribal court before seeking to defeat tribal jurisdiction in any collateral or parallel federal court proceeding." *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 65 (2d Cir. 1997) (citing Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Remedies While Expanding Federal Jurisdiction*, 73 N.C. L. Rev. 1089, 1107–08 (1995)). And, four years later, the Second Circuit retreated from its rigid rule for a broader application more in-line with the federal government's "policy of supporting tribal self-government and self-determination,' the recognition that a 'federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts,' and the view that tribal courts 'play a vital role in tribal self-government,' militate in favor of an expansion of the doctrine in this case." *Garcia v. Akwesasne Hous. Auth*., 268 F.3d 76, 82 (2d Cir. 2001) (internal citations omitted).

[3] *See* Dkt. 25; Defs.' Reply to Pls.' Opp. to Defs.' Mot. To Dismiss filed concurrently.

82-83. Additionally, the court found that because the matter could have initially been brought in state court then removed to federal court and the dispute did not concern a tribal ordinance, the substantive claim was of a non-tribal character. *Id*. at 83-84.

Moreover, it is common sense that a rule requiring a pending tribal court action in order to enforce exhaustion would be futile to the tribal exhaustion doctrine and elevate form over substance. If federal authority required a pending tribal court lawsuit as a prerequisite to a federal court's application of the tribal exhaustion doctrine, then tribal defendants could file tribal court actions upon service of a federal lawsuit against them in order to create a colorable claim of tribal court jurisdiction. For example, here, if such a prerequisite were necessary, the Tribal Defendants could simply file a declaratory action in the LVD Court for the determination of the parties' rights under the loan agreement. Such an argument is unprincipled and illogical.

II. The LVD Tribal Court has jurisdiction over Plaintiffs claims because Plaintiffs voluntarily entered into valid and enforceable loan agreements with Big Picture Loans.

A. Plaintiffs entered into a consensual, contractual relationship with Big Picture, which is the type of consensual relationship contemplated by the first *Montana* exception.

The Supreme Court has made it clear that Indian tribes retain "*some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands*," over "the activities of *nonmembers who enter consensual relationships with the tribe or its members*, through commercial dealing, contracts, leases, or other arrangements." *Montana v. U. S.*, 450 U.S. 544, 565–66 (1981) (emphasis added).[4] It is undisputed in this case that there is a consensual contractual relationship.

[4] Plaintiffs misquote the first exception in *Montana* then add emphasis to "**on reservation**," while ignoring that Montana considers jurisdiction even on non-Indian fee land. See (Opposition p 9 ("Under the first exception, a tribe

The *Montana* basis for jurisdiction has already been contemplated in an online lending scenario such as the present case:

> The Supreme Court never has addressed the issue of tribal court jurisdiction over a non-Indian when the non-Indian enters into a written contract containing clauses that select the tribal court as the forum for all disputes and by which the non-Indian consents to tribal court jurisdiction. Under the language of the first *Montana* exception, the tribal court would have jurisdiction based on 'the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.' When a nonmember enters into a commercial transaction with a tribal member or reservation-based tribal business, receives a benefit coming from the reservation as a result, and consents in a written contract to tribal jurisdiction, that nonmember seems to have engaged in the sort of 'consensual relationship with the tribe or its members, through commercial dealing' that would subject the nonmember to tribal jurisdiction.

FTC v. Payday Fin., LLC, 935 F. Supp. 2d 926, 936 (D.S.D. 2013).

However, Plaintiffs argue that *Montana* does not apply because none of their conduct occurred on LVD's reservation. Plaintiffs implication that *Montana* only applies when the non-Indian is physically present within the reservation is contrary (1) to *Montana*, which reads "*even on non-Indian fee lands*," (2) to *Payday Financial*, which says that *Montana* should apply under these circumstances, and (3) to *Hayes*, which is not a case about any tribally owned entities and is absent of any factual support or relevant legal authority.[5] Indeed, "the Supreme Court has

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may 'exercise … civil jurisdiction over non-Indians ***on their reservations*** through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts leases, or other arrangements.").

[5] In a footnote, Plaintiffs also rely on *Colorado v. Western Sky Fin., LLC*, 845 F. Supp. 2d 1178 (D. Colo. 2011); *Suthers v. Cash Advance*, 205 P.3d 389, 400-01 (Colo. App. 2008); *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 782; *Parnell v. W. Sky Fin*., LLC, No. 4:14-CV-0024-HLM, 2014 WL 11460814, at *9 (N.D. Ga. Apr. 28, 2014), none of which involve entities wholly-owned by an Indian tribe; *Philip Morris USA, Inc. v. King Mountain Tobacco Co*., 569 F.3d 932, 941 (9th Cir. 2009), where *Montana* did not apply; and *Otoe-Missouria Tribe of Indians v. N.Y. State Dept. of Fin. Servs*., 769 F.3d 105, 115 (2d Cir. 2014) where there was insufficient evidence to determine whether the online lending occurred on- or off-Indian lands.

never explicitly held that Indian tribes lack inherent authority to regulate nonmember conduct that takes place outside their reservations." *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 176 (5th Cir. 2014). Plaintiffs do not allege anything more than residing in Virginia, so even the Complaint taken as true for purposes here, does not allege they were in Virginia when they took the loan, received the funds, banked in Virginia with a Virginia bank, spent the funds in Virginia, made payments on the loan from Virginia, etc.

But making a decision on tribal court jurisdiction based solely on the physical location of the non-member would render the *Montana* exceptions inapplicable to many modern-day contracts involving reservation-based businesses, and it would also completely cripple any attempts for geographically isolated tribes to further their economic standpoint.[6]

> The controlling principle[s] [of tribal civil authority over nonmembers] are broad and abstract and must be carefully applied to the myriad disparate factual scenarios they govern. Determining the contours of tribal civil jurisdiction and the boundaries of tribal sovereignty requires consideration of the historical scope of tribal sovereignty and the evolving place of the tribes within the American constitution order, careful study of precedent, and ultimately a 'proper balancing' of the conflicting interests of the tribes and nonmembers.

Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa, 609 F.3d 927, 934 (2010) (citing *Nevada v. Hicks*, 533 U.S. 353, 374 (2001)).

In addition to these economic and sovereignty concerns, "treating the nonmember's physical presence as determinative ignores the realities of our modern world that a [nonmember], through the internet or phone, can conduct business on the reservation and can affect the Tribe and tribal members without physically entering the reservation." *Payday Fin.*, 935 F. Supp. 2d at

[6] The advent of e-commerce has helped geographically isolated tribes have allowed them to steadily increase health and welfare of their members through additional streams of revenue generation while still maintaining their sovereignty. Plaintiffs argument, if accepted, will devastate hundreds of tribes across the country and their ability to provide for their members.

939. "[I]n today's modern world of business transactions through internet or telephone, requiring physical entry on the reservation particularly in a case of a business transaction with a consent to jurisdiction clause, seems to be requiring too much." *Heldt v. Payday Financial, LLC,* 12 F. Supp. 3d 1170, 1186 (D.S.D. 2014); *see also Sprint Commc'ns Co. L.P. v. Wynne,* 121 F. Supp. 3d 893, 900 (D.S.D. 2015) ("That position is inconsistent with the increasingly electronic nature of modern commerce and the overarching federal policy to encourage tribal self-government and self-sufficiency."). Here, while Plaintiffs may not have physically entered the LVD Reservation, they voluntarily applied for and received loans over the internet from Big Picture, an arm of LVD. That is sufficient. The technical distinction that is advanced by Plaintiffs is unpersuasive, especially in the context of these internet-based lending transactions.

Disregarding the illogic and negative policy consequences of their positions, Plaintiffs mistakenly rely on *Jackson v. Payday Financial, LLC*, and *Otoe-Missouri Tribe of Indians v. N.Y. State Dept. of Fin. Servs.* In *Jackson,* the court found that "[t]here simply is no allegation here that the dispute involves activities of the Plaintiffs on the reservation." *Jackson,* 764 F.3d at78, n.42 (emphasis added). In fact, whether the plaintiffs had conducted on-reservation activity was not even submitted to the *Jackson* court. In contrast here, discovery has supplied ample and unrefuted evidence of all lending conduct occurring on LVD's reservation.

Similarly, in *Otoe-Missouria*, the Second Circuit specifically noted that it did not have sufficient evidence to demonstrate where the lending conduct occurred but acknowledged that "the tribes may have built the electronic equivalent of a 'modern[,] . . . comfortable, clean, attractive facilit[y.]'" *Otoe-Missouria Tribe of Indians v. N.Y. State Dept. of Fin. Servs.,* 769 F.3d 105, 114, 116 (2d Cir. 2014) (quoting *State of California v. Cabazon Band of Mission*

Indians, 480 U.S. 202, 220 (1987)). Therefore, Plaintiffs reliance on *Jackson* and *Otoe-Missouria* is misplaced.

III. Big Picture has asserted LVD Tribal Court jurisdiction in good faith.

The Supreme Court has held "that examination [of whether a tribal court has jurisdiction] should be conducted in the first instance in the Tribal Court itself." *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Indeed, the Court has held that tribal exhaustion will "provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge"; serve "the orderly administration of justice in the federal court . . . by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed"; "encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction"; and "provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 856–57.

"When a nonmember plaintiff sues a tribal member defendant, the suit in effect seeks to regulate the tribal member, implicating the 'right of the Indians to make their own laws and be governed by them.'" *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1247 (10th Cir. 2017) (citing *Hicks*, 533 U.S. at 361). The LVD Court has jurisdiction over Plaintiffs' claims under the LVD Constitution and the Code, as well as by the parties' loan agreements. Plaintiffs quote the LVD Constitution, which clearly states that the LVD Court's jurisdiction extends to "all cases, matters or controversies arising under this Constitution and the laws, ordinances, regulations, customs, and judicial decisions." (Opp. p. 15 (quoting LVD Constitution Art. V § 2(a))). That provision does not exclude jurisdiction over federal law

claims. What is more, the Code expressly grants jurisdiction for all claims arising under the Code. (*See, e.g.*, Code §§ 1.1(c), (e); 2.4; 3.1; 5.1(c); 7.2(a); 8.1; 10.5.)

LVD's jurisdiction over this matter, as well as the jurisdiction of the LVD Court and the TFSRA, are discussed further in the Tribal Defendants' briefs seeking dismissal under Rule 12(b)(6) pursuant to the parties' choice of law and forum selection provision as well as under *forum non conveniens*. These briefs clearly explain that all consumer complaints related to Big Picture are governed by applicable federal law as well as LVD law and explains that the TFSRA is not bound by superseded regulations or limited in any way to remedy any violations of tribal or federal law.[7]

LVD enacted the Code in an effort to "legalize lending over the internet provided that such lending is consistent with federal and Tribal laws and regulations," and "to ensure [LVD] adequately regulates loan operations on [LVD's] Reservation land." (Dkt. 23, Ex. 5). Under the Code, the TFSRA is required to protect the public interest and ensure the maintenance of public confidence in Tribal lending. Dkt. 23, Ex. 4 at § 3.1. The Plaintiffs' assertions that the TFSRA will act unfairly to consumers are both unsupported by evidence and not consistent with the requirements of the Code. (*See* Opp. p. 17).

A. Martorello never had any control over the TFSRA.

Despite gathering substantial evidence to the contrary, Plaintiffs resort to two emails in an attempt to show that Martorello somehow controls the TFSRA. (Opp. p. 17, Ex. 1 and 2). The emails, circulated among lending and vendor employees are about the TFSRA and do not include the TFSRA regulatory agents. Rather, the emails reflect an internal discussion between employees of dissolved companies about upcoming meetings scheduled with the TFSRA. (*See*

[7] *See* Defs.' Reply to Pls.' Opp. to Defs.' Mot. To Dismiss filed concurrently.

generally Opp. Ex. 1-3). Their strategy comments on how they interact with the TFSRA and their "general discontent" with the TFSRA does not show control over the TFSRA.

Moreover, no evidence exists that shows any of the discussions were ever shared with the TFSRA or implemented by the TFSRA. In fact, the evidence shows much of the pre-meeting communication was not discussed with the TFSRA. (*See. e.g*., Opp. Ex. 3 summarizing the "caucus" meeting with the TFSRA.)

B. Plaintiffs allegations of bias on the part of the TFSRA alone are insufficient to show bad faith.

"The Supreme Court has declined to permit parties to excuse themselves from the exhaustion requirement by *merely alleging* that tribal courts will be incompetent or biased." *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1301 (8th Cir. 1994) (citing *Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. 9, 18-19 (1987) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 n.21 (1978)). Indeed, a party "cannot merely assume that it would not receive a fair trial in tribal court – it must present evidence of bias." *Fine Consulting, Inc. v. Rivera,* 915 F. Supp. 2d 1212, 1229 (D.N.M. Jan. 10, 2013). "Speculative allegations of bias or futility do not excuse exhaustion of tribal remedies." *Id.* That is all that is alleged here.

Furthermore, "[i]t must be the tribal court that acts in bad faith to exempt the party from exhausting available tribal court remedies," *Norton*, 862 F.3d at 1249; *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc*., 715 F.3d 1196, 1201 (9th Cir. 2013) (interpreting *Nat'l Farmers* 471 U.S. 845). And it must be proven by plaintiffs that the tribal court is acting in bad faith because, "under a contrary reading, '[a] party would need only allege bad faith by the opposing party, or a third party, to remove the case to federal court.'" *Norton*, 862 F.3d at 1249 (quoting *Grand Canyon Skywalk*, 715 F.3d at 1201). "Comity principles require that we trust that our

tribal court counterparts can identify and punish bad faith by litigants as readily as we can." *Id.* The exception does not apply in this instance as the Plaintiffs have not made bad faith allegations on the part of the LVD Court. *Id.*

Plaintiffs accuse the TFSRA regulatory agents of an inherent bias claiming that consumers will never receive a fair resolution to a dispute. Plaintiffs based their insulting accusations solely on the familial relationships between two councilmembers and two TFSRA regulatory agents. However, "allegations of bias alone are insufficient to make a showing of bad faith." *Ares v. Blue Lake Rancheria*, No. 16-CV-05391-WHO, 2017 WL 733114, at *2 (N.D. Cal. Feb. 24, 2017), *aff'd*, 692 F. App'x 894 (9th Cir. 2017). Plaintiffs have presented no evidence of bias. Without evidence, there is no reason for this Court to presume bias, and indeed, to do so would demonstrate prejudice to the Tribe and its sovereign authority.

Significantly, any perceived bias may be raised by appeal to the LVD Court, which gives deference to the TFSRA's reasonable interpretation and application of the Code, but is in no way bound by "conclusions of law and factual findings of Chairman Williams' sister and Treasurer McGeshick's nephew," as somehow claimed by Plaintiffs. (Opp. p. 19.) Federal courts have addressed similar pejorative arguments in the past:

> We also reject the officers' arguments that they will suffer undue bias and a lack of due process if subjected to tribal jurisdiction. The officers offer little support for their allegations, which boil down to baseless 'attacks' on the competence and fairness of the Ute Tribal Court. The Supreme Court has already explained that such arguments are contrary to federal policy and thus have no bearing on our tribal exhaustion analysis. The Court has also 'repeatedly' recognized tribal courts 'as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.'

Norton, 862 F.3d at 1249 (internal citations omitted.). BRIEF FOR THE CHEROKEE NATION, THE CHICKASAW NATION, THE CHOCTAW NATION OF OKLAHOMA, THE MUSCOGEE (CREEK) NATION,

THE SEMINOLE NATION OF OKLAHOMA, AND THE INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES AS AMICUS CURIAE, pp. 16–26, *Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016).

There is a sufficient basis to find a colorable claim of tribal court jurisdiction to allow the LVD Court to preside over the matter. And after the *ad hominem* and unsupported claims are removed from Plaintiffs' arguments, it is clear there is no basis to find bad faith. The Court should promote comity and dismiss this matter under the doctrine of tribal exhaustion.

IV. *Forum non conveniens* requires dismissal.

Plaintiffs merely summarize their "prospective waiver" arguments in an effort to combat the assertion of *forum non conveniens*.

As discussed above, with a colorable claim of tribal court jurisdiction, Plaintiffs' speculation about a prospective waiver must be first determined by the LVD Court. As this issue has been heavily briefed above and in the Tribal Defendants' Motion to Dismiss pursuant to Rule 12(b)(6), Big Picture similarly summarizes its arguments that the Governing Law and Forum Selection provision is valid and the matter should be dismissed under *forum non conveniens*.

CONCLUSION

For the foregoing reasons, Big Picture Loans, LLC respectfully requests that the Court: (1) grant its motion, thereby dismissing the case against it; and (2) grant it such other and further relief as may be appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will then send a notification of such filing (NEF) to the following:

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