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.

DEFENDANTS JAMES WILLIAMS, JR., GERTRUDE MCGESHICK, SUSAN MCGESHICK, AND GIIWEGIIZHIGOOKWAY MARTIN'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, PERSONAL JURISDICTION, AND ARTICLE III STANDING

Specially Appearing Defendants James Williams, Jr., Gertrude McGeshick, Susan McGeshick, and Giiwegiizhigookway Martin, hereby submit this reply in support of their motion pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2), and Art. III of the U.S. Constitution for an order dismissing the Plaintiffs' Class Action Complaint.

INTRODUCTION

Plaintiffs have "voluntarily" dismissed, and thus abandoned, Count I against Defendants James Williams, Jr., Giiwegiizhigookway Martin, Susan McGeshick, and Gertrude McGeshick ("LVD Officers").[1] Plaintiffs also never raised their state law claims in Counts IV and V against the LVD Officers. (Compl. ¶ 119 n. 9). Plaintiffs' claims against the LVD Officers are thus now

[1] Opposition, p. 4 ("Plaintiffs agree to voluntarily dismiss the Tribal Officials from Count One of Plaintiffs' Complaint seeking a declaratory judgment against all Defendants regarding the enforceability of the governing law and forum selection provision of the lending agreements.") Plaintiffs' "voluntary dismissal" is not compliant with Fed. R. Civ. P. 41. As Plaintiffs have voluntarily dismissed Count I, the Court may grant dismissal with prejudice as to Count I in favor of Williams, Martin, McGeshick, and McGeshick.

limited to Plaintiffs' request for injunctive relief[2] under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 USC §§ 1962(c) and (d). (Compl. ¶¶ 102, 116). That claim fails on numerous grounds.

That narrow claim is supported by only a handful of speculative and conclusory allegations, which remain wholly unsupported by any evidence. In sum, Plaintiffs have sued the LVD Officers as tribal officials in their official capacity, but they have not otherwise alleged ***any conduct*** by the LVD Officers. (*See* Compl. ¶¶ 5 n. 3, 17–20). Instead, Plaintiffs make several allegations that casually reference, the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD"). (Compl. ¶¶ 3, 13, 15, 28-32, 34, 36, 37, 41, 47–50, 53, 56, 60, 73, 80, 117). Plaintiffs acknowledge LVD is immune (Compl. ¶ 4 n. 4), but they nevertheless seek relief against LVD indirectly by enjoining its government officials. (*See* Opp. p. 1).[3]

With that background in mind, the request for injunctive relief under RICO fails for multiple reasons. First, numerous district courts have held that injunctive relief is not available, and the Fourth Circuit has noted the "substantial doubt" that such a remedy is possible under RICO. Accordingly, the only relief claimed by Plaintiffs against the LVD Officers with respect to the only remaining cause of action asserted under RICO fails, as such relief is not even available to Plaintiffs as a matter of law. That alone is dispositive and requires dismissal of the LVD Officers from this action.

[2] Complaint ¶ 95 n. 8: "For Counts II and III, Plaintiffs do not seek any monetary relief from Defendants Williams, Jr., Martin, Gertrude McGeshick, and Susan McGeshick. Plaintiffs seek injunctive relief only as to Defendants Williams, Jr., Martin, Gertrude McGeshick, and Susan McGeshick."

[3] Despite focusing their Opposition to Big Picture Loans and Ascension Technologies' Motion to Dismiss for Lack of Subject Matter Jurisdiction attempting to prove that the LVD Officers have no role in the lending operations or control over the businesses, here Plaintiffs admit otherwise—that the LVD Officers have total control over the businesses and the ability to stop LVD's online lending. As here Plaintiffs recognize that the LVD Officers have control over Big Picture and Ascension, their claims that Big Picture and Ascension are not arms of LVD subject to sovereign immunity necessarily fail.

Second, even assuming the availability of injunctive relief, Plaintiffs have not addressed the requirements for an injunction with their allegations. S*ee e.g., Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007) (listing the elements for permanent injunctive relief). While the LVD Tribal Council provides oversight and final control over tribal lending, there is no allegation that the individual LVD Officers are themselves personally involved in lending or collecting debts, or that they otherwise contacted any person in Virginia related to an online loan. Therefore, Plaintiffs have failed to connect the LVD Officers to the alleged violation of Virginia law that is the predicate for their claimed injunctive relief under federal law.

Also, Plaintiffs have not offered any authority or attempted to explain how an injunction could restrain or compel a select four (of nine) LVD Tribal Council members to "divest themselves" of LVD's lending profits, or compel dissolution of Big Picture and Ascension. (*See* Compl. ¶¶ 102, 116). Even more, no LVD government official has any individual ownership interest in any of LVD's arms or has received direct compensation from Big Picture or Ascension for being a government official.[4] There is simply no LVD Officer conduct to enjoin.

Finally, Plaintiffs' alleged harm is not ongoing. Thus, an injunction would be ineffective relief. Plaintiffs have not pled that they any have outstanding debt or pled that there is ongoing activity that could be enjoined. Plaintiffs have not explained how they can be granted relief under Counts II through V and receive compensation for actual damages but still be harmed requiring prospective injunction relief.

Due to these deficiencies, without otherwise pleading such a claim, Plaintiffs' Opposition attempts to morph their alleged RICO claim into a new *Ex Parte Young* action for injunctive relief.

[4] At best, only Chairman Williams has received any funds from Big Picture, and that is in his service as a Compliance Board member, not in his capacity as an LVD official. Councilmember Michelle Hazen is also compensated as the Chief Executive Officer of Big Picture, however Hazen is not named in this suit.

"*Ex Parte Young* permits suits against state officers acting in their official capacity, and applies when the plaintiff 'alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Feminist Majority Found. v. Univ. of Mary Washington*, No. 3:17-CV-344-JAG, 2017 WL 4158787, at *5 (E.D. Va. Sept. 19, 2017) (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)); *Ex Parte Young*, 209 U.S. 123 (1908). However, Plaintiffs have not pled an ongoing violation of federal law by the LVD Officers—they have only alleged a violation of Virginia law by LVD's lending entity, *i.e.*, Big Picture Loans, LLC ("Big Picture"). All of the facts precluding injunctive relief under RICO against the LVD Officers would also apply with equal force under *Ex Parte Young*. Finally, until there is a final determination that online lending originating from a tribal reservation violates a state law, and that the *ongoing* violation of state law is a sufficient predicate offense to invoke a subsequent violation of federal law, injunctive relief under *Ex Parte Young* is premature.

Setting aside Plaintiffs' misguided pursuit of an injunction, Plaintiffs also have not pled any basis or supplied any evidence to support standing or personal jurisdiction of the LVD Officers in this Court. While Plaintiffs argue that RICO allows nationwide service of process, Plaintiffs still need to allege some connection between the LVD Officers and the alleged activity in order to comport with due process, but they failed to do so. The uncontroverted evidence shows that none of the LVD Officers are involved in the day-to-day operations[5] of Big Picture or Ascension.[6] Simply put, the LVD Officers did not direct any activity into Virginia and did not issues loans to Virginia customers and thus cannot redress Plaintiffs' alleged issues. The LVD Officers also,

[5] *See* Dkt. 23, n 3 (describing day-to-day operations). Indeed, LVD's business structure is well-recognized by legal scholars to be profitable and long-lasting, See also MATTHEW L.M. FLETCHER. AMERICAN INDIAN TRIBAL LAW 865 (2014) ("Harvard Project studies of tribally-owned and operated businesses on Indian reservations found that those enterprises in which day-to-day business management is insulated from tribal council or tribal presidential interference are far more likely to be profitable—and to last—than those without such insulation.").

[6] Williams Dep. 6:24–7:11; Martin Dep. 7:10–16; G. McGeshick Dep. 8:2–20; S. McGeshick Dep. 8:16–17.

therefore, could not have anticipated being sued in Virginia, as their only actions were legislative actions taken to pass and uphold tribal law, subject to the jurisdiction of LVD and no other state. Due process does not countenance personal jurisdiction under these attenuated circumstances.

As this lawsuit is now reduced to Plaintiffs' effort to enjoin the LVD Officers from things that they do not do, and personal jurisdiction and standing are based on conduct attributed entirely to other Defendants, the LVD Officers must be dismissed.

ARGUMENT

I. Plaintiffs cannot overcome the LVD Officers' immunity.

Plaintiffs are seeking injunctive relief on two bases. The first is the request actually plead in the Complaint for injunctive relief under RICO, which is the only remaining claim against the LVD Officers after Plaintiffs' concession of dismissal as to the other claims against the LVD Officers. The second is the unplead *Ex Parte Young* theory. If, *arguendo*, injunctive relief is available under RICO, then *Ex Parte Young* has no place. The same holds true in the opposite circumstance. If the Court allows an *Ex Parte Young* action to proceed, there is no need to consider injunctive relief under RICO. Put another way, authority for injunctive relief arises either under RICO or *Ex Parte Young*—the statute and the legal "fiction"[7] are wholly independent of one another. Plaintiffs have, therefore, unnecessarily complicated their Opposition, which the LVD Officers unwind here. Regardless, there is no basis for either form of injunctive relief.

A. The LVD Officers are immune from an injunction under civil RICO.

With the remaining claims against the LVD Officers dismissed by agreement, the Complaint pleads only a civil RICO injunctive relief theory of liability. In their Motion to Dismiss for Lack of Subject Matter Jurisdiction, Personal Jurisdiction, and Article III Standing ("Motion"),

[7] *See, e.g.*, *Lytle v. Griffith*, 240 F.3d 404, 408–09 (4th Cir. 2001) (recognizing *Ex Parte Young* as a legal fiction).

the LVD Officers addressed the absence of authority to allow injunctive relief under RICO and cited the Fourth Circuit's decision in *Dan River, Inc. v. Icahn,* 701 F.2d 278 (4th Cir. 1983), which noted the "substantial doubt" as to whether civil RICO authorized injunctive relief. *Id.* at 290. *See also Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 4 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 562 (1979). Indeed, based on that Fourth Circuit authority, district courts have squarely held that injunctive relief ***is not permitted*** in civil RICO actions. *See Minter v. Wells Fargo Bank, N.A.*, 593 F. Supp. 2d 788, 789 (D. Md. 2009). Plaintiffs spend significant effort citing other circuits to show RICO may allow injunctive relief, but those decisions are neither well-reasoned nor control. (*See* Opp., pp. 5–8). Thus, the claims against the LVD Officers can be dismissed on that basis alone. The Court can end its analysis here.

Even more, and regardless of the issue regarding the remedial limits of RICO, the matter may be dismissed because Plaintiffs have not pled or proven the elements necessary for injunctive relief. Plaintiffs only allege financial harm related to usurious loan, which only allows damages of interest collected beyond 12% and potentially statutory fines. *See Christopher Phelps & Assocs., LLC v. Galloway,* 492 F.3d 532, 543 (4th Cir. 2007) (listing the elements for permanent injunctive relief) (citing *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)). That type of harm that is reparable through monetary damages, and Plaintiffs have not proven any irreparable hardship. Moreover, the public's interest is certainly in favor of upholding valid forum selection and choice of law clauses, even when the chosen law is contravention to the laws of the state that would otherwise apply. *Settlement Funding, LLC v. Von Neumann–Lillie*, 274 Va. 76, 81 (2007). Thus, policy does not support an injunction. Further, respecting the laws of another sovereign *that no court has ever found to be unlawful* is in the interest of the United States' long-standing policy regarding tribal self-determination and self-sufficiency.

B. *Ex Parte Young* does not apply.

Despite their pleading, Plaintiffs attempt to rely in their brief on *Ex Parte Young* instead of RICO, asserting that "because Plaintiffs alleged an ongoing violation of federal law and properly seek only prospective relief for their claims, Plaintiffs' suit is permitted under the doctrine of *Ex Parte Young*." (Opp. p. 8; *see also id.* at p. 3 ("However, it is well established that, under the doctrine of *Ex Parte Young*, 'tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.'").

Plaintiffs effectively concede that other than the limited instances where *Ex Parte Young* may be used to enjoin a government official while acting in an official capacity from ongoing violations of federal law, the LVD Officers are immune. *See Feminist Majority Found. v. Univ. of Mary Washington*, No. 3:17-CV-00344-JAG, 2017 WL 4158787, at *5 (E.D. Va. Sept. 19, 2017) ("*Ex Parte Young* permits suits against state officers acting in their official capacity, and applies when the plaintiff 'alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"). Thus, *Ex Parte Young* is required to overcome that immunity. That *Ex Parte Young* claim, however, also fails on multiple grounds.

i. The *Ex Parte Young* theory was never plead, which precludes its consideration.

As framed by the Opposition, the issue now before the Court is whether injunctive relief is appropriate under an *Ex Parte Young* theory. That theory was never plead, and it thus fails on that basis alone. *See Berlyn, Inc. v. Gazette Newspapers*, 223 F. Supp. 2d 718, 732 (D. Md. 2002) (a complaint cannot be amended through briefing).

ii. The standard for relief under *Ex Parte Young*.

Procedural defects aside, as noted above, *Ex Parte Young* is an exception to a governmental official's immunity that "permits suits for prospective injunctive relief against . . . officials acting

in violation of federal law." *Perry-Bey v. Virginia*, No. 3:12CV704, 2013 WL 2476491, at *6 (E.D. Va. June 7, 2013); (quoting *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (citing *Ex Parte Young*, 209 U.S. at 157)). Here, to prove a violation of federal law, Plaintiffs must first prove a violation of Virginia law as a predicate offense to sustain their RICO allegations,[8] and then further prove the RICO offense in order to sustain their *Ex Parte Young* action.

Additionally, for *Ex Parte Young* to apply, the "officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Harris v. McDonnell*, 988 F. Supp. 2d 603, 606 (W.D. Va. 2013). In other words, "there must be a 'special relation between the [] officer sued and the challenged statute . . . ." *Harris*, 988 F. Supp. 2d at 606 (quoting *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001). "'[S]pecial relation' under *Ex parte Young* has served as a measure of proximity to and responsibility for the challenged state action." *Harris*, 988 F. Supp. 2d at 606 (quoting *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008) (emphasis omitted)).

"This 'special relation' requirement ensures that the appropriate party is before the federal court, so as not to interfere with the lawful discretion of state officials. Primarily, the requirement has been a bar to injunctive actions where the relationship between the state official sought to be enjoined and the enforcement of the state statute is significantly attenuated." *Harris*, 988 F. Supp. 2d at 606-607 (quoting *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir.2008).

Finally, "general authority to enforce laws . . . is not sufficient to make government officials the proper parties to litigation challenging the law." *Perry-Bey v. Virginia*, No. 3:12CV704, 2013 WL 2476491, at *6 (E.D. Va. June 7, 2013) (quoting *Waste Mgmt. Holdings*, 252 F.3d at 331); *see*

[8] Plaintiffs admit their claims are dependent on state law violations.

also McBurney v. Cuccinelli, 616 F.3d 393, 399 (4th Cir. 2010) ("This requirement of proximity to and responsibility for the challenged state action is not met when an official merely possesses general authority to enforce the laws of the state.") (internal quotations and citations omitted).

iii. The standards for the application of *Ex Parte Young* have not been met.

The Court need only consider the handful of allegations against the LVD Officers to conclude that at all times alleged, the LVD Officers acted with general authority as government officials.[9] Stated differently, Plaintiffs have not pled any special relation to connect the LVD Officers to any conduct that violates federal law.

In fact, Plaintiffs allege the opposite of any special relation. Plaintiffs allege that "the Tribe is merely a front" with "no control" over the lending operations and "did not participate in the day-to-day operations." (*See, e.g.*, Compl. ¶¶ 30, 31, 33; *see also arguendo* Pls.' Mem. in Opp. to Defs.' Big Picture Loans, LLC and Ascension Technologies, LLC's Mot. to Dismiss for Lack of Subject Matter Jurisdiction, Dkt. 90, pp. 12–16 arguing "[t]he lack of involvement of Tribal Council . . . ."). According to the pleadings, the LVD Officers did not have direct authority over the collection of any debt, and instead the allegations claim they were not responsible. Thus, the pleading cannot support a claim for injunctive relief under *Ex Parte Young*. *See, e.g. Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093 (9th Cir. 2007) (finding only an official with direct control over enforcing tribal law could be enjoined under *Ex Parte Young*).

Moreover, there is no allegation that Big Picture or Ascension operated unlawfully under LVD law. Rather, the LVD Officers, as government officials, oversaw Big Picture and Ascension

[9] *E.g.*, compare Plaintiffs' allegations here, identifying each LVD Officer as officer of LVD (Compl. ¶¶ 17–20), with *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163, at *2 (D. Vt. May 18, 2016), where plaintiffs did not sue an Indian tribe, tribal governmental official, or an arm of the tribe but instead sued members of a tribal arm's Board of Directors seeking an *Ex Parte Young* injunction.

according to LVD law.[10] To put it differently, the predicate offense alleged here is the violation of Virginia law, not LVD law. *Ex Parte Young* has not been used to enjoin government officials from acting to enforce laws unless the enforcement violates *federal* law. Thus an *Ex Parte Young* injunction is not the proper avenue to resolve the supposed conflict between Virginia and LVD law. By analogy, it would be absurd for Plaintiffs to seek an *Ex Parte Young* injunction against a governor or legislature because Plaintiffs took a loan from an entity in another state that allows an interest rate in excess of Virginia law.[11] Thus for all alleged conduct, the LVD Officers were acting under a general authority with no connection to the Plaintiffs' accusations.

II. Plaintiffs lack standing to sue the LVD Officers.

Plaintiffs also lack standing to seek to enjoin the LVD Officers. Generally, "[t]he basic purpose of the standing doctrine is to ensure that the plaintiff has a sufficient personal stake in the outcome of a dispute that judicial resolution of that dispute would be meaningful and appropriate." *Taubman Realty Grp. Ltd. P'ship v. Mineta*, 198 F. Supp. 2d 744, 755 (E.D. Va. 2002), *aff'd*, 320 F.3d 475 (4th Cir. 2003). Standing requires that a plaintiff show that "(1) it has suffered an injury in fact that is concrete, particularized, and imminent; (2) that injury is fairly traceable to, or caused by, the challenged action of the defendant; and (3) it is likely, rather than conjectural, that the injury will be redressed by a favorable decision." *Id.* The injuries asserted here, however, are neither traceable nor redressible by the LVD Officers.

As to traceability, Plaintiffs pled and argue that the LVD Officers are removed from the lending, which consequently means that for the Plaintiffs' to prevail against Big Picture and Ascension, they necessarily cannot prevail over the LVD Officers. This inherently-contradictory

[10] *See, e.g.*, Dkt 23, Attach. #18, § 5; Attach. #31, § 5, Attach. #34, § 5.

[11] Rather, the Court would require Plaintiffs to follow the laws consented to in the loan agreement. *See generally*, *Settlement Funding, LLC v. Von Neumann-Lillie*, 274 Va. 76, 81 (2007).

position cannot be reconciled to maintain claims against Big Picture and Ascension, while also asserting standing against the LVD Officers. Either Plaintiffs are correct in their Opposition, *e.g.*, that Chairman Williams' affidavit confirms that he "did in fact engage in the activity that led to Plaintiffs' injuries," (Opp. pp. 9–10) thus proving tribal control over lending, or that LVD "admittedly had no involvement with the day-to-day operations" and "relinquished control." (Dkt. 90, p. 25). With irreconcilable arguments, the Court should look back to the pleading, which controls in this Rule 12(b)(6) posture, and which does not allege injury traceable to the LVD Officers. Indeed, Plaintiffs appear to recognize their self-inflicted catch-22:

> The Tribal Officials cannot have it both ways. They cannot argue that they participated in all of these activities regarding LVD's rent-a-tribe scheme but that they did not engage in any of the activities that led to Plaintiffs' injuries. If Mr. William's declaration is true, then the Tribal Officials, in part, caused Plaintiffs' injuries. Additionally, Defendants repeatedly argue that Tribal Council possesses the ultimate power over the tribal entities.

(Opp. p. 10). But, it is the Plaintiffs who carry the burden to prove their claims and that standing exists. Moreover, Big Picture and Ascension's existence as arms of LVD is completely consistent with the LVD Officer's position that they have retained capable management and delegated authority for the day-to-day operations of the lending businesses.

Finally, as discussed above, an injunction against the LVD Officers will not redress Plaintiffs' alleged injuries. Plaintiffs rely on *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163, at *7 (D. Vt. May 18, 2016), to argue that an injunction would redress their perceived harms. (Opp. pp. 2, 11). However, *Gingras* is distinguishable. In *Gingras*, Plaintiffs sued business Board officers "Joel Rosette[12], who is the Chief Executive Officer of Plain Green, and Ted

[12] Defendant Joel Rosette is the Chief Executive Officer of Plain Green and is sued in his official capacity. Rosette is responsible for all operations of Plain Green. Article 7.6 of the current Articles of Organization of Plain Green, LLC grants Rosette the power "to manage the Company on a daily basis." Rosette also has the authority to "hire and terminate employees when necessary. As a result, Rosette is responsible for and can stop the illegal activity described

Whitford[13] and Tim McInerney[14] (the "Tribal Defendants"), who are members of Plain Green's Board of Directors." *Gingras*, No. 5:15-CV-101, 2016 WL 2932163, *at* *2. The Court in *Gingras* considered a very similar standing argument, but the pleadings and allegations in *Gingras* against business Board members are wholly distinguishable from the pleadings here identifying the LVD Officers as government officials and arguing against any connection to the lending.

While Plaintiffs claim now that the "predicate conduct . . . involves the collection of unlawful debt by the [alleged] illegal enterprise which the Tribal Officials have power to stop," (Opp. p. 4), Plaintiffs never support the claim with any factual allegations to show how four officials can somehow control a nine-person council to stop activity authorized by tribal law.

III. Plaintiffs lack personal jurisdiction over the LVD Officers.

Plaintiffs' Opposition to personal jurisdiction over the LVD Officers stretches their pled allegations well beyond any reasonable interpretation. It is true that the LVD Officers are residents of the United States. (Opp. p. 14). However, beyond that single fact, the Complaint does not align with the Opposition arguments.

"As noted above, the Fourth Circuit has applied a three-part test for determining whether a defendant can be hailed into a state court without violating constitutional due process protections. The court must 'consider (1) the extent to which the defendant has purposefully availed itself of

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in this Complaint. In his position as Chief Executive Officer, Rosette has the authority to prevent the credit reporting and illegal keeping of a loan balance for the Plaintiffs. Rosette is a citizen of Montana and not a citizen of Vermont. FIRST AM. COMPL., *Gingras*, No. 5:15-CV-101, 2016 WL 2932163, at ¶ 6.

[13] Defendant Ted Whitford is a member of Plain Green's Board of Directors and is sued in his official capacity. The Board of Directors has the power to fire the CEO of Plain Green and appoint a new CEO who will comply with the law. Whitford is a citizen of Montana and not a citizen of Vermont. FIRST AM. COMPL., *Gingras*, No. 5:15-CV-101, 2016 WL 2932163, at ¶ 7.

[14] Defendant Tim McInerney is a member of Plain Green's Board of Directors and is sued in his official capacity. The Board of Directors has the power to fire the CEO of Plain Green and appoint a new CEO who will comply with the law. McInerney is a citizen of Montana and not a citizen of Vermont. FIRST AM. COMPL., *Gingras*, No. 5:15-CV-101, 2016 WL 2932163, at ¶ 8.

the privilege of conducting activities in the state; (2) whether the plaintiffs' claims arise out of those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable.'" *Long v. Chevron Corp*., No. 4:11CV47, 2011 WL 3903066, at *11 (E.D. Va. Sept. 2, 2011) (quoting *ALS Scan, Inc. v. Digital Serv. Consultants, Inc*., 293 F.3d 707, 712 (2002)).

Here, Plaintiffs have not made any showing that the LVD Officers purposefully availed themselves to any activity in Virginia or that that personal jurisdiction would be constitutionally reasonable. "In short, the Due Process Clause requires a court to determine whether a defendant 'should reasonably anticipate being hailed into court there.'" *Taltwell, LLC v. Zonet USA Corp*., No. 3:07CV543, 2007 WL 4562874, at *6 (E.D. Va. Dec. 20, 2007) (quoting *LSI Indus., v. Hubbell Lighting, Inc*., 232 F.3d 1369, 1375 (Fed. Cir. 2000)). A finding that jurisdiction is not reasonable and fair should be "limited to the rare situation in which the plaintiff's interest and the state's interest in adjudicating the dispute in the forum are so clearly attenuated that they are clearly outweighed by the burden of subjecting the defendant to litigation within the forum." *Taltwell*, No. 3:07CV543, 2007 WL 4562874, at *9 (E.D. Va. Dec. 20, 2007) (quoting *Akro Corp. v. Luker*, 45 F.3d 1541, 1549 (Fed. Cir. 1995)).

Plaintiffs' Opposition argues that "the Tribal Officials are involved in internet lending to consumers in multiple states, including Virginia, which they specifically targeted as part of the rent-a-tribe scheme," and cites their Complaint ¶ 40 and Big Picture's website. (Opp. pp. 14, 16). However, Complaint ¶ 40 specifically alleges that "Bellicose Capital sent correspondences to the home of the consumer in Virginia," and that "Bellicose Capital's lead generation procedures were developed by Martorello and Gravel," in ¶ 42. Bellicose Capital is dissolved and is not a party. As to Big Picture's website, Plaintiff correctly points out that for a Big Picture loan, a consumer

must be a resident of the United States, but that does not give rise to jurisdiction in Virginia.[15] (Opp. pp. 14, 16).

Other than Big Picture's website and allegations against dissolved companies, Plaintiffs offer no other allegation or evidence to show personal jurisdiction here comports with Due Process. Out of 139 allegations, five depositions, and thousands of pages of evidence, Plaintiffs cannot show how allegations about Bellicose and revenue distributed to LVD could have put the LVD Officers on notice that they could be hailed into court in Virginia. *See also, e.g.*, *Bristol-Myers Squibb Co. v. Superior Court of Ca.*, 137 S. Ct. 1773, 1781 (2017) ("What is needed – and what is missing here – is a connection between the forum and the specific claims at issue."). Plaintiffs' allegations and arguments instead establish the opposite—that the LVD Officers were uninvolved in the day-to-day operation of the lending businesses.

CONCLUSION

For the foregoing reasons, the Tribal Officers respectfully request that the Court: (1) grant their Motion to Dismiss, thereby dismissing the claims against the Tribal Officers with prejudice; and (2) grant them such other and further relief as may be warranted.

[15] "The maintenance of a website designed solely and exclusively to provide information to browsers does not bestow upon the Court general jurisdiction over the website's owner." *Long*, No. 4:11CV47, 2011 WL 3903066, at *9 (internal citation omitted) (citing *ALS Scan*, 293 F.3d at 715 ("We are not prepared at this time to recognize that a State may obtain general jurisdiction over out-of-state persons who regularly and systematically transmit electronic signals into the State via the Internet based solely on those transmissions.")); *see also Proprietors of Strata Plan No. 36 v. Coral Gardens Resort Mgmt., Ltd*., No. 1:09-CV-550 AJT-TRJ, 2009 WL 3366929, at *4 (E.D. Va. Oct. 16, 2009) ("A website that provides information, including toll-free phone numbers, is not sufficiently interactive to form a basis for personal jurisdiction.") (citing *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc*., 334 F.3d 390, 400 (4th Cir. 2003)).

JAMES WILLIAMS, JR., GERTRUDE MCGESHICK, SUSAN MCGESHICK, AND GIIWEGIIZHIIGOOKWAY MARTIN

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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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