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

LULA WILLIAMS, *et al*.,	)	
	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 3:17-cv-461 (REP)**
	)	
BIG PICTURE LOANS, LLC, *et al*.,	)	
	)	
Defendants.	)	
	)	

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

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Plaintiffs, by counsel, respectfully submit this Memorandum in Opposition to Defendants James Williams, Jr., Gertrude McGeshick, Susan McGeshick, and Giiwegiizhigookway Martin's (collectively the "Tribal Officials") Motion to Dismiss for Lack of Subject Matter Jurisdiction, Personal Jurisdiction, and Article III Standing ("Motion") (Dkt. 28).

INTRODUCTION

The Tribal Officials ask the Court to dismiss the claims against them pursuant to the doctrine of tribal sovereign immunity. Undeterred by binding authority on this issue, the Tribal Officials contend that the doctrine of tribal sovereign immunity extends *without limitation* to all claims against tribal officials when acting in their official capacity. The Tribal Officials' motion ignores the firmly established principle that "tribal immunity does not bar . . . a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)); *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163, at *20 (D. Vt. May 18, 2016) (denying a motion to dismiss an injunctive relief claim against tribal officials involved in an alleged rent-a-tribe scheme). Accordingly, the Tribal Officials' Motion should be denied because Plaintiffs seek "injunctive relief only as to Defendants Williams, Jr., Martin, Gertrude McGeshick, and Susan McGeshick" (Compl. ¶ 95, n. 8), which will ensure that Defendants do not continue to collect amounts arising from the illegal loans against Plaintiffs or originate any new loans in violation of Virginia's usury laws.

In addition to their sovereign immunity argument, the Tribal Officials further argue that the Court lacks subject matter jurisdiction over Plaintiffs' claims because the "alleged injury is not traceable to the LVD Officers," and "relief is not available from the LVD Officers." (Dkt. 29, Defs.' Mem. at 11). But the injunction sought would relieve Plaintiffs of any future payment

obligation and shield "them from future collection efforts," which "confers standing for purposes of Article III." *Gingras*, 2016 WL 2932163 at *3.[1]

Finally, the Tribal Officials also argue that the Court lacks personal jurisdiction because the Complaint fails to sufficiently allege the Tribal Officials' "nationwide contacts," which is the proper consideration where a federal statute authorizes nationwide service of process. *Rilley v. MoneyMutual, LLC*, No. CV 16-4001 (DWF/LIB), 2017 WL 3822727, at *2 (D. Minn. Aug. 30, 2017). As United States residents, it is nearly impossible for the Tribal Officials to show that they do not have sufficient contacts with the United States to be subject to personal jurisdiction in this country. *Bd. of Trustees, Sheet Metal Workers' Nat. Pension Fund v. Boeser, Inc.*, No. 1:14CV1458 JCC/TC, 2015 WL 402992, at *2 (E.D. Va. Jan. 28, 2015) ("As a Minnesota resident, Boeser has sufficient contacts with the United States to be subject to suit in this country.").

LEGAL STANDARD

In a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenging the Court's subject-matter jurisdiction, the burden rests with the plaintiff, as the party asserting jurisdiction, to prove that federal jurisdiction is proper. *See Int'l Longshoremen's Ass'n v. Va. Int'l Terminals, Inc.*, 914 F. Supp. 1335, 1338 (E.D. Va. 1996) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). Where, as here, a Rule 12(b)(1) motion attacks the complaint on its face and asserts that the complaint fails to state a claim upon which subject-matter jurisdiction can lie, a court assumes the truth of the facts alleged by plaintiff, thereby functionally affording the plaintiff the same

[1] The Tribal Officials admittedly have this power. (*See, e.g.*, Dkt. 23, Defs. Mem. at 8-9) ("However, TED, Big Picture, and Ascension's managers are each expressly limited to the powers identified in their organizing and operating documents and any other express limitations—that is to say that no appointee can usurp the LVD Council's authority.").

procedural protection he or she would receive under Rule 12(b)(6) consideration. *See Int'l Longshoremen's Ass'n*, 914 F. Supp. at 1338; *see also Adams*, 697 F.2d at 1219. To survive such a challenge, "[a] complaint must contain 'enough factual matter (taken as true) to suggest'" each required jurisdictional element. *Rance v. D.R. Horton, Inc.,* 316 Fed. App'x. 860, 862 (11th Cir. 2008) (per curiam) (quoting *Watts v. Fla. Int'l Univ.,* 495 F.3d 1289, 1295 (11th Cir. 2007)). "It is sufficient if the complaint succeeds in identifying facts that are suggestive enough to render the element plausible." *Id.* (quoting *Watts,* 495 F.3d at 1296).

When faced with a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing personal jurisdiction, "typically by a preponderance of the evidence." *PBM Prods. v. Mead Johnson Nutrition Co.*, 2009 WL 3175665, at *2 (E.D. Va. Sept. 29, 2009) (Spencer, J.) (citing *Mylan Labs, Inc. v. Akzo*, 2 F.3d 56, 59-60 (4th Cir. 1993)). "When, however, as here, this Court must decide a pretrial personal jurisdiction motion prior to an evidentiary hearing, the plaintiff need only make a prima facie showing of personal jurisdiction." *Id*. (citing *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989)). The Court "may look to both plaintiff and defendant's proffered proof and, when doing so, should give Plaintiff the benefit of any 'favorable inferences' supported by the record." *Id*.

ARGUMENT

I. The Tribal Officials are not immune from Plaintiffs' claims.

The Tribal Officials contend that the doctrine of tribal sovereign immunity extends without limitation to all claims against tribal officials when acting in their official capacity. (Defs. Mem. at 6). 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." *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). "Under Supreme Court precedent, that is the standard approach by which a party may

obtain declaratory or injunctive relief with respect to a sovereign entity notwithstanding sovereign immunity." *Vann v. U.S. Dept. of Interior*, 701 F.3d 927, 928 (D.C. Cir. 2012).

In determining whether *Ex Parte Young* is applicable to overcome the tribal officials' claim of immunity, the relevant inquiry is whether Plaintiffs "alleged an ongoing violation of federal law and seek[] prospective relief." *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (citing *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) ("In determining whether the *Ex parte Young* doctrine avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry' into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.")); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011) (applying *Verizon* to tribal immunity); *Vann v. Kempthorne*, 534 F.3d 741, 750 (D.C. Cir. 2008) (applying *Verizon* to tribal immunity).

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. After dismissal of the declaratory judgment claim against the Tribal Officials, there are two remaining claims against the Tribal Officials, both arising under RICO: (1) a claim for violations of RICO, 18 U.S.C. § 1962(c) and (2) a claim for violations of RICO, 18 U.S.C. § 1962(d). Plaintiffs clearly fall under the *Ex Parte Young* exception because they allege an ongoing violation of RICO and seek injunctive relief.

First, the Complaint clearly alleges an ongoing violation of RICO. The predicate conduct for both the § 1962(c) claim and the § 1962(d) claim involves the collection of unlawful debt by an illegal enterprise, which the Tribal Officials have the power to stop. The Complaint repeatedly

makes reference to the continuing nature of the enterprise and its illegal conduct. (*See* Compl. ¶¶ 107 ("This conduct began sometime as early as 2011, continues to date, and will be repeated again and again in the future to the detriment of Virginia consumers."), ¶ 15 ("The Tribe rebranded Bellicose as Ascension Technologies, which continues to operate with minimal tribal involvement or benefit to the Tribe."), ¶ 49 ("[T]he Tribe continues to accept a nominal fee in return for the use of its name."), ¶ 50 ("Ascension Technologies continues to be operated in the same manner and by the same individuals who ran Bellicose Capital.").

Second, the Complaint clearly seeks only prospective relief against the Tribal Officials, while seeking monetary relief from the remaining Defendants. (*See* Compl. ¶¶ 102, 109, 116, 118). The Fourth Circuit has yet to rule on the issue of whether injunctive relief is available under RICO; however, RICO's "unambiguous statutory language" clearly provides the availability of injunctive relief to civil Plaintiffs. *See Nat'l Org. For Women, Inc. v. Scheidler*, 267 F.3d 687, 699 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003); *Chevron Corp. v. Donziger*, 833 F.3d 74, 137 (2d Cir. 2016), *cert. denied,* 137 S. Ct. 2268 (2017) (concluding that a federal court is authorized to grant equitable relief to a private plaintiff who has proven injury to its business or property by reason of a defendant's violation of § 1962, largely for the reasons stated by the Seventh Circuit opinion *Nat'l Org. for Women, Inc. v. Scheidler*).[2]

RICO's civil remedies provision contains three parts. The first, Section 1964(a) grants district courts with jurisdiction to "prevent and restrain" RICO violations. 18 U.S.C. § 1964(a).

[2] Although a 1986 case from the Ninth Circuit creates a circuit split on the issue, the Seventh Circuit observed that "recent Supreme Court precedent teaches" that the "type of legislative history" relied on by the 1986 decision "is a particularly thin reed on which to rest the interpretation of a statute." *Compare Nat'l Org. For Women, Inc.*, 267 F.3d at 699, *with Religious Tech. Ctr. v. Wollersheim,* 796 F.2d 1076, 1080–89 (9th Cir. 1986) (reading legislative history of RICO statute as foreclosing injunctions for private plaintiffs).

The section does not limit the breadth of that jurisdictional grant. The second part of the remedies provision is Section 1964(b), which states that the Attorney General may institute proceedings under Section 1964(d) and authorizes the court to enter restraining orders, prohibitions, or take such other actions as it deems proper. 18 U.S.C. § 1964(b). The third part, Section 1964(c), provides that any person injured in his business or property by a violation of the statute may sue in a district court and shall recover, *inter alia,* treble damages and attorneys' fees. 18 U.S.C. § 1964(a)-(c).

Read together Sections 1964(b) and (c) plainly provide remedies in addition to, and not in place of, the remedies provided for in Section 1964(a). *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 569 (S.D.N.Y. 2014), *aff'd,* 833 F.3d 74 (2d Cir. 2016). Section 1964(a) empowers district courts to "prevent and restrain" RICO violations, thus authorizing injunctive relief. *Id.* This section grants general jurisdiction and does not limit itself to cases brought by an Attorney General or some other public actor. *Id.* As the Second and Seventh Circuits have held:

> [S]ubsection (a) is not simply a jurisdictional section but rather is a section that "grant[s] district courts authority to hear RICO claims and then . . . spell[s] out a non-exclusive list of the remedies district courts are empowered to provide in such cases." Subsection (a) itself neither states that any category of persons may not obtain relief that is within the powers granted to the federal courts nor specifies the persons in whose favor the courts are authorized to exercise the powers there granted. In our view, this means that Congress did not intend to limit the court's subsection (a) authority by reference to the identity or nature of the plaintiff.

Chevron Corp. v. Donziger, 833 F.3d at 138 (quoting *Scheidler*, 267 F.3d at 697).

In its reply, the Tribal Defendants will undoubtedly urge the Court to follow the Ninth Circuit's decision in *Wollersheim*. 796 F.2d 1076 (relying on RICO's legislative history as foreclosing injunctions for private plaintiffs). But as explained in *Scheidler* and *Chevron*, the Ninth Circuit's use of legislative history ignored the plain language of RICO. *See, e.g.*, *Scheidler*, 267 F.3d at 699 ("we cannot agree with the Ninth Circuit's earlier view that this legislative history

trumps the otherwise plain language of § 1964."). Where, as in § 1964(a)-(c), "the language at issue has a plain and unambiguous meaning with regard to the particular dispute, that meaning controls." *Id*. (internal quotations omitted); *see also Ayes v. U.S. Dep't of Veterans Affairs*, 473 F.3d 104, 111 (4th Cir. 2006) (refusing to "venture beyond the confines of the statutory language" because "Congress says in a statute what it means and means in a statute what it says" (internal quotation marks omitted)). Any construction of § 1964(a) as prohibiting injunctive relief to private plaintiffs ignores "what Congress actually said and instead … opine[s] on what it might have 'meant.'" *Milbourne v. JRK Residential Am., LLC*, 92 F. Supp. 3d 425, 435 (E.D. Va. 2015). And if the interaction between § 1964(a) and subsections (b) and (c) created unintended consequences, "then the solution is an amendment, not judicial rewriting of a pellucid definitional clause." *Bormes v. United States*, 759 F.3d 793, 796 (7th Cir. 2014) (citing *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2033–34, (2014)).

Enforcing the plain language of § 1964(a) also comports with Congress's intent in passing RICO "not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood,* 528 U.S. 549, 557 (2000) (noting that Congressional intent was to "encourag[e] civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices"); *see also Scheidler,* 267 F.3d at 698 (quoting *Rotella* and noting that "this role for civil RICO litigation" is "fully consistent" with the view that "the statute gives private citizens the ability to seek injunctive relief as well as damages"). The Supreme Court repeatedly has rejected efforts to curtail the scope of civil RICO actions where courts ignore Congress's insistence that the statute be "liberally construed to effectuate its remedial purposes." *Scheidler*, 267 F.3d 687, 698 (7th Cir. 2001) (quoting Pub. L. No. 91–452, § 904(a), 84 Stat. 947 (1970)). "Indeed, if Congress' liberal-

construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 n.10 (1985); *see also Chevron Corp. v. Donziger*, 833 F.3d at 139. This reading is supported by the fact that in drafting RICO, Congress did not divest courts of their inherent equitable powers.[3]

Accordingly, 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*.

II. Plaintiffs have Article III standing.

To meet the "case-or-controversy" requirement of Article III, a plaintiff must establish that he has standing to bring suit. *Raines v. Byrd,* 521 U.S. 811, 818 (1997) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992)). Standing, broadly speaking, requires a plaintiff to demonstrate a "personal stake in the outcome of the litigation." *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 543–44 (1986). Formulated as a three-part test, a plaintiff must show that "(1) [he] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or

[3] *S. New England Tel. Co. v. Global NAPs,* 624 F.3d 123, 135 (2d Cir. 2010) ("Because we presume that 'Congress legislates against the backdrop of existing jurisdictional rules that apply unless Congress specifies otherwise, a clear statement from Congress is required before we conclude that a statute withdraws the original jurisdiction of the district courts . . ." (citations and internal quotation marks omitted)). Article III of the Constitution provides that the judicial power of the United States extends "to all Cases, in Law *and Equity.*" U.S. Const. art. III, § 2 (emphasis added). Congress implemented Article III in 1789 by conferring "jurisdiction over 'all suits . . . in equity.'" *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 318 (1999) (quoting Judiciary Act of 1789, § 11, 1 Stat. 78). The Supreme Court has rejected efforts to curtail the equitable powers of district courts in cases in which they otherwise have subject matter jurisdiction unless "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946) (stating that the "comprehensiveness" of a court's "equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command"); *see also Mitchell v. Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 291 (holding that, where the statute provided that "the [d]istrict [c]ourts are given jurisdiction . . . 'for cause shown, to restrain violations'" of a statute, district courts have full equitable powers).

imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180–81 (2000).

Here, the Tribal Officials only challenge Plaintiffs' ability to meet the second and third elements of standing, traceability and redressability. Each challenge is addressed in turn below.

A. Plaintiffs' injuries are traceable to the LVD Officers.

In order to establish standing, a plaintiff must assert that the injury suffered is "fairly traceable to the defendants' allegedly unlawful conduct." *Dep't of Comm. v. U.S. House of Representatives,* 525 U.S. 316, 329 (1999). As discussed above, in *Ex parte Young,* 209 U.S. 123 (1908), the U.S. Supreme Court allowed suits against state officials for the purpose of enjoining the enforcement of an unconstitutional state statute. A plaintiff, however, is not free to randomly select a state official to sue in order to challenge an allegedly unconstitutional statute. Instead, the individual state official sued "must have some connection with the enforcement of the act." *Ex parte Young,* 209 U.S. at 157. "This connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Los Angeles Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). If a challenged statute is not of the type to give rise to enforcement proceedings, a state official nonetheless may be named as a defendant under *Ex parte Young* if he has responsibility to "give effect" to the law. *See, e.g.*, *Eu,* 979 F.2d at 704.

The affidavits that the Tribal Officials have submitted in support of their motion establish that they did in fact engage in the activity that lead to Plaintiffs' injuries. In fact, James Williams, Jr.'s affidavit states that the LVD Tribal Council, led by the Tribal Officials, directs all aspects of

LVD tribal lending and that the Council has passed over 100 resolutions related to its tribal lending businesses. (Dkt. No. 29-2 at ¶ 7). According to Mr. Williams, these resolutions include:

a. The creation of consumer financial service companies;
b. The entering into and termination of agreements between the businesses and service providers, vendors, investors, and other parties;
c. Decisions related to the overall structure of the lending operation;
d. Evaluations of the risks and benefits of bringing vendor services in-house;
e. Acquisitions and mergers of several of the early participants in its lending operation;
f. Execution of documents, including those containing limited waivers of immunity;
g. Enactments of and amendments to LVD law related to businesses and regulation;
h. Oversight of LVD's regulatory body; and
i. Budget approvals.

(Dkt. No. 29-2 at ¶ 7). 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. (*See, e.g.*, Dkt. 23, Defs. Mem. at 8-9) ("However, TED, Big Picture, and Ascension's managers are each expressly limited to the powers identified in their organizing and operating documents and any other express limitations—that is to say that no appointee can usurp the LVD Council's authority.").

B. Granting an injunction against the LVD Officers will redress Plaintiffs' injuries.

The third prong of the standing test—redressability—has been interpreted to mean that a plaintiff's standing depends on the form of relief requested. *See Friends of the Earth,* 528 U.S. at 185 ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). In seeking prospective relief like an injunction, a plaintiff must show that he can reasonably expect to encounter the same injury again in the future—otherwise there is no remedial benefit that he

can derive from such judicial decree. *City of L.A. v. Lyons*, 461 U.S. 95, 102–05 (1983) (collecting cases). Past injury alone does not establish a present case or controversy for injunctive relief. *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974); *Deshawn E. by Charlotte E. v. Safir,* 156 F.3d 340, 344 (2d Cir. 1998). Rather, "the injury alleged must be capable of being redressed through injunctive relief 'at that moment.'" *Robidoux v. Celani,* 987 F.2d 931, 938 (2d Cir. 1993) (quoting *County of Riverside v. McLaughlin,* 500 U.S. 44, 51 (1991)).

Here, Plaintiffs seek an injunctive order under RICO against the Tribal Officers that would prohibit the continued collection of their loans and the issuance of any new loans to the putative class members without complying with Virginia's usury laws. (Compl. ¶ 5 ("Plaintiffs also seek an injunction against all Defendants, prohibiting them from lending or collecting loans in Virginia…")). This relief would address future harm that Plaintiffs are facing—future repayment obligations and continued collection of the unlawful debt. None of Plaintiffs have repaid their loans in full (*see, e.g.*, Compl. ¶¶ 62–65 (alleging that most of Plaintiffs' payments went towards interest or other fees, and not towards the loan principal)), and thus, they are subject to future collection of the usurious loans, including illegal fees and interest rates. Another court considering this identical issue held that this was sufficient to confer standing against Indian tribal officials sued for injunctive relief pertaining to a similar rent-a-tribe scheme. *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163, at *7 (D. Vt. May 18, 2016) ("The specific relief sought by Plaintiffs demonstrates their direct, personal stake in the dispute. They seek declaratory relief under statutes including the Vermont Consumer Fraud Act. Such relief could relieve them of any future repayment obligation. They seek repayment of any interest collected above a legal rate. And they seek an injunction shielding them from future collection efforts. (Doc. 18 at 43.) As these claims

make clear, Plaintiffs' interest in the subject matter of this lawsuit and the clear potential for relief in their individual cases confers standing for purposes of Article III.").

Next, regarding Plaintiffs' RICO claims, injunctive relief is available under RICO as discussed above in Part I. Injunctive relief under RICO would prohibit the Tribal Officers from collecting the unlawful debt and dissolve the tribal entities associated with the unlawful debt collection enterprise. This relief would clearly redress Plaintiffs' alleged injuries.

Finally, Plaintiffs' Complaint makes clear that they do not seek any recovery—injunctive or otherwise—from the Tribal Officers in connection with their usury and unjust enrichment claims. (Comp. ¶ 119 n.9). Therefore, the Tribal Officials' arguments that Plaintiffs lack standing to bring these claims (Defs.' Mem. at 14) should be disregarded.

Accordingly, Plaintiffs have more than sufficiently alleged their standing to bring their claims for injunctive relief against the Tribal Officers and demonstrated their personal stake in the outcome of this litigation. Therefore, the Court should deny the Tribal Officials' motion.

III. The Court has personal jurisdiction over the Tribal Officials.

Section 1965(a) provides that "[a]ny civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(a). Section 1965(b) authorizes nationwide service of process. *Id*. at § 1965(b). Because RICO authorizes nationwide service of process, "the only limit on this Court's ability to exercise personal jurisdiction" are "those imposed under the Fifth Amendment's due process requirements." *Myers v. Lee*, 2010 WL 2757115, at *8 (E.D. Va. July 12, 2010) (citing *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997) ("Because they have been validly served pursuant to RICO's nationwide service provision, 18 U.S.C. § 1965(d), *in personam* jurisdiction over them is

established, provided that such jurisdiction comports with the Fifth Amendment.")).[4] Rather than using a state as the relevant forum, the Fifth Amendment requires the Court to consider "the defendant's contacts within the United States as a whole and ask whether the defendant would be 'unduly burdened' if subjected to jurisdiction." *Id*. Rather than examining a defendant's contacts with the state where the plaintiff filed the lawsuit, the national contacts test looks at whether a defendant "availed himself of the privileges of American law and the extent to which he could reasonably anticipate being involved in litigation in the United States." *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 372 (3rd Cir. 2002); *Rilley v. MoneyMutual, LLC*, No. CV 16-4001 (DWF/LIB), 2017 WL 3822727, at *2 (D. Minn. Aug. 30, 2017) ("Here, Plaintiffs have brought a claim against Defendants under the RICO Act, which allows for nationwide personal jurisdiction. Thus, the question for the Court is whether Defendants have sufficient minimum contacts with the United States instead of any particular state."). As United States residents, it would be nearly impossible for the Tribal Officials to show that they do not have sufficient contacts with the United States to be subject to personal jurisdiction in this country. *Bd. of Trustees, Sheet Metal Workers'*

[4] Defendants claim that "[e]very other federal circuit court and federal district court to consider this issue has disagreed with the Fourth Circuit's analysis in light of the foregoing analysis." (Defs.' Mem. at 16 n.7). This statement is not only irrelevant, it is grossly inaccurate. *Rilley v. MoneyMutual, LLC*, No. CV 16-4001 (DWF/LIB), 2017 WL 3822727, at *2 (D. Minn. Aug. 30, 2017) ("When a federal statute dictates whether the court has personal jurisdiction, courts' due-process analysis is pursuant to the Fifth Amendment's Due Process Clause instead of the Fourteenth Amendment." (citing *ESAB*, 126 F.3d at 626)); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 55 (D.C. Cir. 2017) ("The only difference in the personal-jurisdiction analysis under the two Amendments is the scope of relevant contacts: Under the Fourteenth Amendment, which defines the reach of state courts, the relevant contacts are state-specific. Under the Fifth Amendment, which defines the reach of federal courts, contacts with the United States as a whole are relevant."); *In re Uni-Marts, LLC*, 399 B.R. 400, 406–07 (Bankr. D. Del. 2009) ("However, in bankruptcy cases 'the forum' is the United States in general, not the particular forum state. Accordingly, the Court will apply a 'national contacts' standard, and not merely a 'Delaware contacts' standard, in determining whether the Court's exercise of personal jurisdiction over Sahakian is proper.").

Nat. Pension Fund v. Boeser, Inc., No. 1:14CV1458 JCC/TC, 2015 WL 402992, at *2 (E.D. Va. Jan. 28, 2015).

Here, it is uncontested that the Tribal Officials are residents of the United States. They reside near Watersmeet, Michigan. (Defs.' Mem. at 1.) As part of the Tribal Council, 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. (Compl. ¶ 40; *see also* https://www.bigpictureloans.com/requirements (lasted visited Dec. 6, 2017) (stating that in order to qualify for a Big Picture loan, a consumer must be a resident of the United States). In addition, Plaintiffs pled that the rent-a-tribe scheme collected tens of millions of dollars, two percent of which was paid to the Tribe. (Comp. ¶ 3 n.1). This is more than sufficient to satisfy the national contacts test.

Contrary to the Tribal Officials' assertions, they are not immune from these provisions because of LVD's sovereign immunity. As discussed above, "tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." *Bay Mills Indian Cmty.*, 134 S. Ct. at 2034 (2014) (citing *Santa Clara Pueblo*, 436 U.S. at 59); *see also Gingras*, 2016 WL 2932163 at *7. Because Plaintiffs seek only injunctive relief for an ongoing violation federal law pursuant to the doctrine of *Ex Parte Young*, sovereign immunity does not protect the Tribal Officials from Plaintiffs' claims. Nor are the Tribal Officials immune from Virginia law. Instead, because the loans were made off of the tribal reservation and without a lending license, they are subject to Virginia's usury laws. *Bay Mills*, 134 S. Ct. at 2034 (holding that when not on Indian lands, tribal officials "are subject to any generally applicable state law."); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015) (holding that *Bay Mills* establishes that "tribal officials may be subject to suit in federal court for violations of

state law under the fiction *of Ex Parte Young* when their conduct occurs outside of Indian lands."); *see also Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 171 (1977) (holding that that sovereign immunity did not prevent suit to enjoin off-reservation violations of state law by individual tribe members).

This leaves the only remaining issue for the Court to determine whether or not the Fifth Amendment requirements prevents the exercise of personal jurisdiction in this case. Courts, including the Fourth Circuit and this Court, have repeatedly found that "it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern" when the defendant is a United States resident and the national contacts test applies. *Trustees of the Plumbers & Pipefitters Nat. Pension Fund v. Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th Cir. 2015) ("Normally, when a defendant is a United States resident, it is 'highly unusual . . . that inconvenience will rise to a level of constitutional concern.'" (quoting *ESAB*, 126 F. 3d at 627)); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997) (same). This is a high burden, and courts should only conduct the analysis when a defendant challenging jurisdiction has "present[ed] a compelling case that . . . would render jurisdiction unreasonable," *see Burger King*, 471 U.S. at 477.

Here, the Tribal Officials have raised a number of reasons they believe that the assertion of personal jurisdiction over the LVD Officers would be unfair, inconvenient, and have harmful consequences to the Tribe. (Defs.' Mem. at 21-24.) None of these arguments are convincing or robust enough to raise issues of constitutional concern. However, Plaintiffs will address each of the Tribal Officials' arguments in turn.

First, the Tribal Officials allege that the exercise of personal jurisdiction over them would be unfair because the Tribal Officers could not have reasonably anticipated being hailed into any

Court in the United States and because Plaintiffs have not plead any "nationwide contacts" that the LVD Officers had with the United States regarding Plaintiffs' claims. This is simply not true. As outlined above, the Tribal Officials have authority over the businesses, which makes loans throughout the United States. (Compl. ¶ 40; *see also* https://www.bigpictureloans.com/requirements (lasted visited Dec. 6, 2017) (stating that in order to qualify for a Big Picture loan, a consumer must be a resident of the United States). In addition, through the tribal businesses, the scheme has collected tens of millions of dollars from U.S. consumers. (Comp. ¶ 3 n.1). This activity was more than sufficient to put the Tribal Officials on notice that they may be hailed into court for claims arising from those activities.

Second, at least one other court has permitted civil litigants to pursue a civil RICO claim against tribal officials for their role in a rent-a-tribe scheme. *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163, at *37 (D. Vt. May 18, 2016). And, because Plaintiffs are seeking injunctive relief against the Tribal Officials seeking to prohibit them from collecting on the usurious loans, Plaintiffs' RICO allegations do not merely pertain to Big Picture, but directly implicate the Tribal Officials as well. Furthermore, where Congress has provided for nationwide service of process, courts should presume that nationwide personal jurisdiction is necessary to further congressional objectives. *Republic of Panama*, 119 F.3d at 948.

Third, regarding the Tribal Officials' arguments that Plaintiffs' interests in obtaining relief are already adequately protected by the choice-of-law and forum selection clauses in the loan contract, Plaintiffs incorporate their arguments that these clauses are invalid. (Dkt. 84).

Finally, the Tribal Officials argue that a trial in Virginia would be unreasonably burdensome, including because it would require the Tribal Officials to travel in order to defend this case. But this is simply not the case under the relevant standard—there is nothing inherently

burdensome about crossing a state line. *Republic of Panama*, 119 F.3d at 946. In fact, courts have held that "modern means of communication and transportation have lessened the burden of defending a lawsuit in a distant forum." *Id.* (internal citations and quotation omitted); *see also World–Wide Volkswagen*, 444 U.S. at 292–93 (noting that due process protections against inconvenient litigation have been substantially relaxed). The burden is on the defendant to demonstrate that the assertion of jurisdiction in the forum will "make litigation 'so gravely difficult and inconvenient' that [he] unfairly is at a 'severe disadvantage' in comparison to his opponent." *Burger King*, 471 U.S. at 478 (citations omitted). The Tribal Officials have not met this burden because, other than time and out-of-state travel to Virginia (irrelevant burdens under the national contacts test), they have not provided any concrete details regarding the burden that they will face as a result of litigating this case *in the United States*. Additionally, all of these same burdens would exist if Plaintiffs filed the case in a more convenient federal court, such as a district court in Michigan—none of which are remotely close to the reservation in Watersmeet.

Accordingly, consistent with RICO's nationwide service-of-process provision and the strictures of the Fifth Amendment, this Court has personal jurisdiction over the Tribal Officials.

CONCLUSION

For the reasons discussed above, the Court should deny the motion.

Respectfully submitted,
PLAINTIFFS

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th of December 2017, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record.

/s/
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