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' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL INFORMATION WITHHELD ON THE BASIS OF ATTORNEY-CLIENT PRIVILEGE

Plaintiffs, by counsel, pursuant to Rule 37 of the Federal Rules of Civil Procedure and the Court's Order dated January 22, 2019 (Dkt. 320), move for an order compelling production of all documents withheld by Defendant Matt Martorello on the basis of attorney-client privilege and the attorney work product doctrine, as well as any documents subsequently identified by Martorello as part of his renewed search to identify responsive documents.

INTRODUCTION

The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law." *Upjohn v. United States*, 449 U.S. 383, 389 (1981). The privilege is intended to "promote broader public interests in the observance of law and administration of justice" and is recognition "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Id*. Even though the privilege serves an important purpose, it also has an adverse consequence: it prevents disclosure of "otherwise pertinent information from the fact-finder, thereby impeding the full and free discovery of the truth. "*Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 271 (E.D. Va. 2004).

Because it often has adverse consequences, the attorney client privilege "is not absolute," and the Fourth Circuit has repeatedly noted that an assertion of privilege "is to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *Solis v. Food Employers Labor Relations Ass'n*, 644 F.3d 221, 226 (4th Cir. 2011). Thus, a claim of privilege is permitted "only to the very limited extent" that "excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Rambus*, 220 F.RD. at 271 (quoting *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998). And as in this case, a party may expressly or implicitly waive the privilege "if the client places the attorney-client relationship in issue, for example, by affirmatively invoking a defense of good faith reliance on advice of counsel." *United States v. Moazzeni*, 906 F. Supp. 2d 505, 512 (E.D. Va. 2012).

In this motion, Plaintiffs seek an order from the Court: (1) compelling the production of all documents withheld on Martorello's privilege logs, (2) requiring Martorello to disclose all advice (written or oral) received from any attorneys regarding: (i) the legality of the tribal business model, (ii) the legality of the LVD's lending operations, (iii) the restructure, (iv) any litigation involving any similar business models, including but not limited to any litigation involving CashCall, John Reddam, Scott Tucker, Charles Hallinan, Think Finance, and Kenneth Rees, and (3) finding a waiver of privilege and work product as to any documents destroyed as part of the sale of Bellicose Capital to the LVD, including any documents retrieved by Martorello and any attorneys who represented his companies. The attorney-client privilege and work product doctrine should not prevent disclosure of this information for three reasons.

First, Martorello asserts a subjective good faith defense to Plaintiffs' claims, maintaining that multiple attorneys advised him "about the legality of the tribal business model and LVD's

lending operations."[1] As this Court has explained, "it is settled" that where a party invokes advice of counsel "to gain an advantage in litigation, the party waives the attorney-client privilege as to all other communications relating to the same subject matter." *E.I. Dupont de Nemours & Co. v. Kolon Indus., Inc.*, 269 F.R.D. 600, 605 (E.D. Va. 2010). Put differently, Martorello may not reveal "beneficial communication[s]" but withhold other "less helpful, communication(s) on the same matter." *Id*. Martorello's good faith defense waives the privilege as to all advice—beneficial or detrimental—regarding the tribal business model, lending operations, restructure, and any litigation involving similar business models.

Second, Martorello should be prohibited from claiming any privilege or work product because Virginia law criminalizes the conduct at issue in this case and, thus, the documents are textbook examples of type of documents subject to the crime/fraud exception. *See, e.g., Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1220 (4th Cir. 1976). In particular, it is a Class 2 misdemeanor if "[a]ny person" violates or "participates in the violation" of the Virginia Consumer Finance Act, which prohibits the making of loans with interest rates greater than 12% without obtaining a license. Va. Code. §§ 6.2-1540, 1501. Further, the entire arrangement was a fraud—although Red Rock claimed to be "wholly owned" and "operated" by the LVD, it was really a vehicle designed to "shield Martorello and Bellicose from liability." *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 280 (E.D. Va. 2018). And when regulators caught on, Martorello and the Tribe continued the fraud through a restructure that allowed him to remain in control of the enterprise, to still reap the majority of its profits, but at the same time create additional layers of protection from liability by selling Bellicose to the LVD.

And third, the evidence shows that the fraud did not end with a simple change to the

[1] Ex. 1 at Int. No. 13, Dec. 28, 2018 Interrogatory Responses.

ownership. [redacted]

[redacted]

[redacted]

And the effort to defraud consumers and courts did not stop there—Bellicose's attorneys at Greenberg Trauig were also instructed to delete their documents and "communications regarding Bellicose with Mr. Martorello and other persons and entities." Ex. 3, Jan. 24, 2019 Declaration of Jennifer Weddle. This widespread, intentional destruction of evidence came when Martorello reasonably anticipated litigation against Red Rock and Bellicose. Ex. 4, Jan. 4, 2014 E-mail. Because the crime/fraud exception "capture[s] spoliation," Plaintiffs request the Court to: (1) find privilege waived as to any destroyed documents retrieved by Plaintiffs' counsel, (2) compelling Martorello and any third parties to produce any documents or communications "created for planning, or in furtherance of, spoliation." *Rambus*, 220 F.R.D., at 271, 282.

MATERIAL FACTS

A. The initial structure of the rent-a-tribe enterprise.

This case involves a lending enterprise created, developed, and operated by Martorello. Through an association with the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD" or "Tribe"), Martorello and his companies funded, collected, and ran the day-to-day operations of Red Rock Tribal Lending, LLC ("Red Rock"). Although Red Rock claimed to be "solely owned and operated" by the LVD, Martorello's company was contractually entitled to handle each of the material aspects of the lending business through a servicing agreement between Red Rock and SourcePoint, a company owned by Martorello.

Under the servicing agreement, Martorello's companies were contractually entitled to exercise almost exclusive control over Red Rock's operations. For example, the servicing

agreement provides SourcePoint with the *exclusive* control to handle communications and interactions with any service providers, lenders, and agents of Red Rock. Ex. 5 at § 3.1. SourcePoint also had the contractual right to "sweep [Red Rock's] bank account into [SourcePoint's] bank account" to receive its share of the proceeds. Ex. 5 at § 3.5. SourcePoint had "*sole signatory and transfer authority* over such bank accounts." Ex. 5 at § 3.5; § 4.4. Additionally, a restrictive covenant prohibited Red Rock from providing financial services "anywhere in the world" without SourcePoint. Ex. 5 at § 3.3.

The servicing agreement further outlined the extensive duties SourcePoint performed and Red Rock's nominal role. SourcePoint was responsible for: (1) selecting and negotiating with service providers and lenders; (2) "[d]evelopment and promotion of sound and positive business relationships," including "the enforcement and termination of agreements with such service providers and lenders;" (3) preparation of regulatory, compliance, training, education, and accounting standards, as well as standards for "screening and review of" "website contents, marketing and consumer relations practices;" (4) providing "pre-qualified leads" and the "credit-modeling data and risk assessment strategies;" (5) oversight of Red Rock's call center in the Philippines; and (6) sales to third-party debt collectors. Ex. 5 at § 4.2.1. SourcePoint also had the authority to "collect all gross revenues and other proceeds connected with or arising from the operation of [Red Rock.]" Ex. 5 at § 4.9.

B. Events leading to the restructure.

The arrangement was very lucrative for Martorello, who received 98% of the net income collected on the loans. Ex. 5 at § 3.5.1. By contrast, Red Rock received 2% of the net revenue from the loans, less charge offs. Ex. 5, at § 2.25. [redacted]

The term of this arrangement was supposed to last until **December 31, 2018**. Ex. 5 at § 3.2. But less than half way into the term of the arrangement, regulators caught on to Red Rock's illegal loan products, starting with the New York Department of Financial Services issuing a cease and desist to Red Rock warning it to stop offering its illegal credit products to New York consumers. *Otoe-Missouria Tribe v. N.Y. Dep't of Fin. Servs.*, 974 F.Supp.2d 353, 356 (S.D.N.Y. 2013). Red Rock and Martorello did not shutdown the operation in response. Rather, Red Rock and the LVD filed a lawsuit in August 2013, seeking declaratory relief and a preliminary injunction that tribal businesses were inherently sovereign nations and not subject to New York law. *Id*.

The lawsuit completely backfired—the district court not only denied Red Rock's motion for a preliminary injunction, its decision jeopardized the entire business model. Most notably, in an opinion published on **September 30, 2013**, the district court found that Red Rock was "subject to the State's non-discriminatory anti-usury laws" because the "undisputed facts demonstrate[d]" that the illegal activity was "taking place in New York, off of the Tribes' lands." *Id*. at 361. In other words, as the court explained: "There is simply no basis… that the Tribes are treated differently from any other individuals or entities that enter New York to lend to New York resident." *Id*.

[redacted] But Martorello remained worried. In addition to the loss in *Otoe-Missouria*, a growing number of lawsuits and government enforcement actions against Martorello's competitors brought increased scrutiny to the tribal lending business model, including an affirmative action filed by the New York Attorney General against CashCall in August 2013.

Consumer Fin. Prot. Bureau v. CashCall, Inc., No. CV1507522JFWRAOX, 2018 WL 485963, at *10 (C.D. Cal. Jan. 19, 2018) (findings of fact and conclusions of law detailing CashCall's tribal lending involvement).[2]

Martorello was paying close attention to the litigation involving CashCall, including the case filed by the Consumer Financial Protection Bureau ("CFPB") in December 2013. *Consumer Fin. Protection Bureau v. CashCall, Inc.,* No. 1:13-cv-13167 (Mass) (complaint filed on Dec. 16, 2013). In that case, the CFPB took the same position as the district court in *Otoe-Missouria*, *i.e.*, that state usury laws applied to tribal lenders. Ex. 4, Jan. 2014 e-mail chain at LVD-DEF00018128. **On January 3, 2014**, Martorello characterized the CFPB's position as "without question a major attack on legit tribal lending operations." *Id*. Martorello also expressed concern with cooperating with the CFPB's investigate demands, explaining that it would "come with an almost identical suit against the LVD TLEs as they just did against Cash Call." Ex. 4 at LVD18129. If an "attack" on the Red Rock operation happened, he warned, "the stakes are very literally everything." Ex 4 at LVD18129.[3]

[2] *See also In Re Cashcall, Inc.*, 2013 WL 3465250, at *1 (NH Banking Dept. 2013) ("it appears that Western Sky is nothing more than a front to enable CashCall to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive business practices from prosecution by state and federal regulators."); *In re Moses*, No. 12-05563-8-RDD, 2013 WL 53873, at *4 (Bankr. E.D.N.C. Jan. 3, 2013).

[3] In addition to CashCall, Martorello further wrote it had "been speculated to [him] that the CFPB will sue Think Finance in a similar suit as they did to CashCall sometime in March or April." Ex 4 at LVD18129. Think Finance had a similar arrangement with the Chippewa Cree Tribe of Montana, who formed a company named Plain Green to assist Think Finance's efforts to evade usury laws. [redacted] Ex. 8, Aug. 1, 2012 E-mail. In subsequent litigation involving Think Finance, the former chief executive officer of Plain Green, Billi Anne Raining, testified that she was a "figure head" who really didn't have any control. Ex. 9, Raining Bird Depo. 53:19-54:7. Raining Bird further testified that she agreed with the characterization that Plain Green was a rent-a-tribe and that it had no meaningful role in the lending program other than pro forma review of recommendations from Think Finance. Ex. 9, Raining Bird Depo. 52:13-55:13, 102: 3-18, 139:19-141:15.

Although the term of the servicing agreement was effective until December 31, 2018, Martorello knew the business model was at risk and the consequences would be severe. *Id*. (explaining the CFPB would go after "all revenue ever collected from consumers" and that "number" was "unobtainable by every investor combined."). Over the next nine months, Martorello and his attorneys worked to develop a solution that allowed him to remain in control of the enterprise, continue to receive more than 90% of its profits, but at the same time create an ostensibly impenetrable layer of protection from liability.

The solution was to sell Bellicose Capital to the LVD through a series of complex agreements that restructured the arrangement on paper but not how the business operated in practice. [redacted]

Over the next two months, the parties did not made significant progress on the key terms and structure of the sale. But on October 1, 2014, it became urgent when the Second Circuit affirmed the district court's decision in Otoe-Missouria. In doing so, the Second Circuit made several damaging findings, including that "New York's usury laws apply to all lenders, not just tribal lenders[.]" *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs*., 769 F.3d 105, 117 (2d Cir. 2014). The Second Circuit further observed that "a tribe has no legitimate interest in selling an opportunity to evade state law." *Id*. at 114; *Washington v. Confederated Tribes of the*

Colville Indian Reservation, 447 U.S. 134, 155 (1980) ("We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.").

The Second Circuit delivered the knockout blow to Martorello and Red Rock. [redacted]

C. Overview of the restructure.[4]

To protect the business, Defendants wrapped up the entire lending operation in newly-created tribal entities. Through a series of complicated transactions, the tribe formally absorbed the enterprise: Red Rock became Big Picture, and Ascension, a new entity created by the tribe,

[4] Plaintiffs provided a detailed outline of the key restructure agreements as part of their opposition to the Corporate Defendants' sovereign immunity motion. *See generally* Dkt. 83. A detailed account of the agreements is unnecessary for the purpose of this motion.

purchased Martorello's lending company. On paper, the tribe now appeared to own the business, ostensibly shielding Bellicose from any pre-merger claims. Martorello was now a "creditor" instead of the "servicer." Other than the change in titles, things in reality just stayed the same. [redacted]

Things stayed the same because the restructuring agreements "confer on Eventide, and hence Martorello, significant control mechanisms over significant aspects of Ascension's operations." *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 279 (E.D. Va. 2018). [redacted]

[redacted]

D. Defendants destroyed Martorello and Bellicose's records to cover-up the scheme, including records in the possession of Martorello and Bellicose's attorneys.

Defendants' efforts to avoid liability did not end with the restructure, and they did not want their efforts to be in vain. [redacted] Counsel for the Corporate Defendants represented that this destruction occurred, including Martorello's emails. Ex. 19. To help eliminate any trace of evidence, Martorello's attorneys at Greenberg Traurig were also instructed to delete their documents and "communications regarding Bellicose with Mr. Martorello and other persons and entities." Ex. 3, Jan. 24, 2019 Declaration of Jennifer Weddle. Greenberg Traurig complied with this request.

ARGUMENT

1. Martorello's good faith defense waives the attorney-client privilege.

On December 28, 2018, Martorello revealed his intent to assert a good faith defense to the claims in this case. Ex. 1 at Int. No. 13. Martorello further indicated that this defense was based

"on non-privileged information provided by attorneys Jennifer Weddle, Karrie Wichtman, Blake Sims, John Williams, Jennifer Galloway, Dan Gravel, Saba Bazzazieh and Rob Rosette… about the legality of the tribal business model and LVD's operations." Ex. 1 at Int. No. 13. These attorneys "who had intimate knowledge of the entire operations of the Tribe's lending business and relationships, routinely issued opinion letters—which Martorello received… expressing the confidence in the Tribe's sovereign status, the legality of the Tribe's lending businesses…." Ex. 1 at Int. No. 15. According to Martorello, this legal advice provided him "with the assurances that the servicing relationship whereby Bellicose or SourcePoint would assist the Tribe's lending businesses was lawful in all respects." Ex. 1 at Int. No. 15.

It is well settled where a party raises a defense about his good faith belief that he was following the law, he cannot prevent disclosure of any advice related to that belief. *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2nd Cir. 1991) (upholding trial court's ruling that if defendant testified about his good faith belief he was following the law, he could not also invoke the privilege regarding what his attorneys told him because "[defendant's] testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue."); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (argument that defendants cannot use attorney client privilege as both a "sword" and a "shield" has merit); *see also United States v. Moazzeni*, 906 F. Supp. 2d 505, 518 (E.D. Va. 2012) ("By placing his attorneys' representation at the center of his defense, Moazzeni has waived any privilege to communications within the scope of that issue."); *Rhone–Poulenc Rorer v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994); *see also United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir.1982) ("Selective disclosure for tactical purposes waives the attorney-client privilege.").

Martorello attempts to avoid this well-established principle by arguing that privilege is only

waived when the good faith "defense is premised upon the use of privilege information." Dkt. 299 at 3. To that end, Martorello claims that he can utilize non-privileged information, such as attorney publications, without being required to disclose the privileged information received by those same attorneys. *Id*. But the case law is clear: when a party asserts a defense based on advice received from attorneys, may not reveal "beneficial communication[s]" but withhold other "less helpful, communication(s) on the same matter." *E.I. Dupont de Nemours & Co. v. Kolon Indus., Inc.*, 269 F.R.D. 600, 605 (E.D. Va. 2010). This principle, often referred to as the at issue doctrine, is rooted in fairness—when a jury evaluates Martorello's good faith defense, it must be able to assess the full story to evaluate his belief of the legality of his conduct, not just the beneficial communications.

Martorello cannot avoid application of the at issue doctrine by limiting the disclosure of legal advice to non-privilege documents. The "at issue" doctrine does not draw a distinction between privileged and non-privileged legal advice. Instead, when a party contends it acted in good faith based on its understanding of the law, "then the extent of its investigation and the basis for its subjective evaluation are called into question." *Hege v. Aegon USA, LLC*, No. 1:10-CV-1635-GRA, 2011 WL 1791883, at *4 (D.S.C. May 10, 2011); (citing *City of Myrtle Beach v. United Nat. Ins. Co.*, No. CIV.A. 4:08-1183, 2010 WL 3420044, at *5 (D.S.C. Aug. 27, 2010) ("if a defendant voluntarily injects an issue in the case, whether legal or factual, the insurer voluntary waives, explicitly or impliedly, the attorney-client privilege."); *see also Favors v. Cuomo*, 285 F.R.D. 187, 199 (E.D.N.Y. 2012) ("forfeiture of the privilege may result where the proponent asserts a good faith belief in the lawfulness of its actions, even without expressly invoking counsel's advice.").

By injecting the issue of legal advice into this case, Martorello has opened the door to

discovery regarding the full breadth of legal advice received concerning the legality of the tribal lending business model, the LVD's operations, and the restructure. It would be patently unfair to allow Martorello to present evidence about the legal advice he received, while at the same time concealing damaging legal advice, including anything received in response to the district court and Second Circuit's opinions in *Otoe-Missouria*.

A. Scope of the waiver.

When a party relies on advice of counsel, it waives privilege "as to the subject matter of the disclosure." *E.I. Dupont*, 269 F.R.D. at 605. "[D]efining the 'subject matter,' and thus the scope of the waiver, is a critically important aspect of the waiver analysis because 'subject matter waiver does not open up the possibility of a fishing expedition of all confidential communications during the course of [an attorney's] representation." *Id.*

Although the subject matter waiver does not allow for "a fishing expedition of all confidential communications," Martorello's subjective good faith is broad. In particular, Martorello intends to assert that his conduct was shape by the legal advice he received regarding "the legality of the tribal business model and LVD's lending operation." Ex. 1 at Int. No. 13. In doing so, Martorello asserts that the "Tribe's attorneys," *i.e.*, Rosette, LLP "had intimate knowledge of the entire operations of the Tribe's lending business and relationships, routinely issued opinion letters" regarding "the legality of the Tribe's lending businesses (*i.e.*, the inapplicability of state law explicitly), the businesses' ability to make loans to consumers containing choice of law clauses selecting the laws of the Tribe, and the Tribe's control over its lending business." Ex. 1 at Int. No. 13. Martorello further adds that his "belief in the lawfulness of the business of the tribal lending entities or applicability of tribal law to the consumers loans was not impacted by legal actions against Cash Call, Western Sky or Scott Tucker" and that "Operation

Chokepoint ("OCP") did not impact Martorello's belief as to the lawfulness of the LVD lending businesses as it was widely understood that OCP was an abuse of governmental authority." Ex. 1 at Int. No. 15.

To support these assertions, Martorello produced more than a dozen documents, such as: (1) a November 30, 2012 opinion from Greenberg Traurig regarding the legality of Red Rock's operations; (2) an April 2014 publication by Jennifer Weddle of Greenberg Traurig regarding the legality of the tribal business model; (3) an April 2015 publication of Jennifer Weddle regarding the Supreme Court's decision in Bay Mills and its impact on the future of tribal lending; and (4) multiple legal opinions from Rosette regarding the legality of the tribal lending model. Exs. 20-23.

To evaluate this good faith defense, the trier of fact should be able to assess the totality of Martorello's knowledge, including any advice he received regarding the illegality of the tribal business model, especially after *Otoe-Missouria*. *See, e.g.*, *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (finding waiver where a defendant testified that he thought his actions were legal based on his knowledge of the law, reasoning: "His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent.").[5] By asserting a good faith defense, Martorello has opened the door to discovery and cross-examination as to any contrary advice he received so the trier of fact may assess whether Martorello honestly and reasonably followed the advice of counsel.

A number of documents on Martorello's privilege logs should be produced in light of his

[5] *See also United States v. Exxon Corp.*, 94 F.R.D. 246, 248–49 (D.D.C.1981) ("These defenses [of good faith reliance] do not solely relate to the 'objective' representations of DOE but directly concern Exxon's subjective interpretation and understanding of those representations; i.e. Exxon's corporate state of mind").

good faith defense. In particular, Plaintiffs request the Court to order production of: (1) communications between Martorello and Weddle discussing filings with the Commissioner of Financial Regulation;[6] (2) all communications between Martorello and attorneys for Hudson Cook regarding "regulatory advice,"[7] and (3) all communications on the structure changes to the lending operation and legal advice on potential changes to the structure.[8]

2. The crime/fraud exception applies to any documents pertaining to the legality of the business model, the LVD's operations, and the restructure.

"The crime/fraud exception to the attorney-client and work product privileges provides that otherwise privileged communications or work product made for, or in furtherance of, the purpose of committing a crime or fraud will not be privileged or protected." *Rambus, Inc. v. Infineon Technologies AG*, 222 F.R.D. 280, 287 (E.D. Va. 2004) (citing *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999)). While this concept is often referred to as an "exception" to privilege, in fact it is actually an "exclusion of certain activity from the prospective reach of the privileges." *Id*. The policy underlying the crime/fraud exception is that advice in furtherance of "fraudulent or unlawful goals" is "not worthy of protection." *Id*. (quoting *In re Grand Jury Subpoena*, 731 F.2d 1032, 1038 (2nd Cir. 1984).

[6] At a minimum, this would include withheld documents on the October 2, 2017 privilege log, identified as LVRMM13238, 13239, 13001. *See* Ex. 24.

[7] This would include withheld documents on the October 2, 2017 privilege log, identified as LVRMM3205, 3262, 10865, 10866, 3285, 10879, 3277, 10877, 3280, 10878, 3777, 3784, 12444, 5528, 5529. *See* Ex. 24.

[8] This would include withheld documents on the October 2, 2017 privilege log, labeled as LVRMM4203, 4205, 4209, 4211, 4215, 4217, 5246, 5247, 10891, 10892, 10894, 3358, 6019, 6357, 6440, 6889, 12637, 12071, 12072, 2620, 2623, 10480, 10484, 2870, 11598, 3393, 3394, 4848, 1753, 1754, 1755, 1756, 1757, 2861, 2889, 3539, 3556, 6019, 6889, 12475, 6577, 6578, 6579, 6580, and 6581. *See* Ex. 24. It would also include withheld documents on the October 7, 2017 privilege log, labeled as 11052, 12397, 12653-12656, 6945, 12662, 12669, 4347, 12530, 12530, 12531, 12532, 12533. *See* Ex. 25.

Though discussed as the "crime/fraud" exclusion, the concept is much broader. For example, the Fourth Circuit has even referred to it as the "the tort, fraud, or crime exception." *Duplan Corp.*, 540 F.2d at 1220. And "many courts have applied the exception to situations falling well outside of the definitions of crime or fraud." *Rambus*, 222 F.R.D. at 288 (citing *Parrott v. Wilson,* 707 F.2d 1262, 1271 (11th Cir.1983); *Cleveland Hair Clinic, Inc. v. Puig,* 968 F.Supp. 1227, 1241 (N.D. Ill. 1996)). In this case, the crime/fraud exception is easily triggered because: (A) the entire tribal lending model was a fraud designed to circumvent state laws; (B) the attorney advice and work product was "made for" and in furtherance of committing crimes, *i.e.*, evading state usury and licensing laws, as well as RICO; and (C) after regulators caught on, Defendants restructured the arrangement as part of their ongoing effort to evade state laws.

A. All legal advice provided was made for and in furtherance of a fraud.

It is no secret that "internet payday lenders have a weak history of complying with state laws." Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Wash. & Lee L. Rev. 751, 785 (2012) (providing background on payday loans and describing the rent-a-tribe model as "the most recent incarnation of payday lending companies regulation-avoidance"). Prior to the rent-a-tribe business model, some payday lenders entered into partnerships with national banks to avoid compliance with state laws—a tactic known as "rent-a-bank." Beginning in 2005, the FDIC began cracking down on rent-a-bank arrangements, and they were nearly eliminated by 2010—largely by the assessment of penalties and fines against participating banks. *Id*. In response to the crackdown on rent-a-bank arrangements, several payday lenders reincarnated the lending model through associations with Native American tribes to avoid state laws. *Id.*

The rent-a-tribe business model was developed, in large part, by attorneys in response to federal crackdowns on the rent-a-bank model. In the CFPB's litigation against CashCall, the legal advice provided by attorneys was revealed as part of CashCall's good faith defense. *CFPB v. CashCall, Inc.*, C.D. Cal. No. CV1507522JFWRAOX, 2018 WL 485963, at *3 (C.D. Cal. Jan. 19, 2018) (post-trial fact of finding and conclusion of law). This evidence showed that CashCall's attorney, Claudia Callaway, began advising her clients in January 2009 that the rent-a-bank model "was no longer viable because of pressure from regulators and, therefore, she was advising her consumer lending clients to switch to a similar business model, which involved partnering with an Indian tribal entity or member who would act in the same capacity as a state-chartered bank[.]" *Id*. "[B]ecause the loans made pursuant to the Tribal Lending Model were originated by a tribe or tribal member," Callaway advised her clients that " the loans would be made under the laws of the tribe and would not have to comply with licensing and usury laws in states where borrowers resided." *Id*.

Like CashCall, Martorello retained attorneys to assist him with launching and developing the tribal lending model with Red Rock and LVD. Martorello's attorneys, primarily Jennifer Weddle, Jennifer Galloway, and John Williams—presumably provided advice consistent with Callaway's and the overarching purpose of the model, which was to circumvent applicable state and federal laws. Over the past five years, courts across the country rejected this dubious effort to avoid regulation, leading to multi-million-dollar enforcement actions and class action settlements. *See, e.g., Hayes v. Delbert Servs. Corp.*, 3:14-cv-00258-JAG, Doc. 193 at 9-12 (Jan. 20, 2017) (approving a $15 million dollar settlement arising from CashCall/Western Sky loans).

Because of the fundamental nature of the scheme, the crime/fraud exception warrants disclosure of the legal advice received by Martorello regarding the legality of the business model,

its operations, the restructure, and any advice made pursuant to or in furtherance of this scheme. *Rambus*, 222 F.R.D. at 279 ("it is the planning and pursuit of the scheme with the advice of counsel, not the scheme's success or failure, that animates the crime/fraud exception."). Although blanket waivers of privilege are rarely appropriate, it is hard to imagine any legal advice that would not have been made in furtherance of the scheme. Put differently, any legal advice would have been "made for" or "in further" of the overarching purpose of the business model, *i.e.*, avoidance of state and federal law. The crime/fraud exception exists for situations just like this and recognizes the "commonsense notion" that privileges " 'cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise.'" *Rambus*, 222 F.R.D. at 281 (quoting Evidence § 2298 at 572 (McNaughton rev. 1961)).

B. All legal advice provided was made for and in furtherance of a crime.

Like many other states, Virginia law makes it a crime to violate or to participate in a violation of its usury statute. Va. Code § 6.2-1540. In particular, the Virginia Code provides "[a]ny person, including members, officers, directors, agents, and employees of an entity, who violates or *participates in* the violation of any provision of § 6.2-1501 is guilty of a Class 2 misdemeanor." *Id*. (emphasis added). In turn, Va. Code § 6.2-1501 provides that "[n]o person shall in engage in the business of making loans to individual . . . and charge, contract for, or receive, directly or indirectly, on or in connection with any loan interest" an amount greater than 12% without first obtaining a license from the Virginia State Corporation Commission. Va. Code § 6.2-1501(A); *see also* Va. Code § 6.2-303. Virginia's General Assembly enacted these protections in response to "money loan sharks" like Martorello who "often imposed upon the ignorant and the needy by making small loans to them upon unfair and unjust terms." *Sweat v. Commonwealth*, 152 Va. 1041, 1057 (1929); *Valley Acceptance v. Glasby*, 230 Va. 422, 429 (1985) (explaining that the "need to

scrutinize with care loans made to borrowers caught in financial distress continues to be a valid concern.").

Similarly, RICO makes a crime if a person violates § 1962 of RICO, including its prohibition against the collection of usurious debts. *See* 18 U.S.C. § 1963. If a person violates a section of § 1962, that person may be "imprisoned not more than 20 years." 18 U.S.C. § 1963(a). Like Virginia's Consumer Finance Act, RICO was expressly enacted "to seek the eradication of organized crime in the United States," including loan sharking. Pub. L. 91–452, § 1; *see also United States v. Biasucci*, 786 F.2d 504, 512 (2d Cir. 1986) ("The elimination of loansharking was one of Congress' principal aims in enacting the statute."). In the past two years, two of Martorello's contemporaries have been imprisoned for their roles in similar arrangements.[9]

Unquestionably, Martorello participated in the violation of § 6.2-1501 of the Consumer Finance Act and RICO.[10] For example, the servicing agreement indicates that Martorello's company, SourcePoint, was retained to "develop, manage, and provide operational guidelines" to Red Rock's unsecured lending business. Ex. 5 at § 1.4. Indeed, the parties went as far as to

[9] *See* The United States Attorney's Office, Southern District of New York, *Scott Tucker Sentenced To More Than 16 Years In Prison For Running $3.5 Billion Unlawful Internet Payday Lending Enterprise* (Jan. 8, 2018), https://www.justice.gov/usao-sdny/pr/scott-tucker-sentenced-more-16-years-prison-running-35-billion-unlawful-internet-payday; The United States Attorney's Office, Eastern District of Pennsylvania, *Two Men Found Guilty of Racketeering Conspiracy in Payday Lending Case*, (Nov. 27, 2017), https://www.justice.gov/usao-edpa/pr/two-men-found-guilty-racketeering-conspiracy-payday-lending-case.

[10] The burden required for the application of the crime/fraud exception does not require a concession or success on the merits. Instead, Plaintiffs are only required to make a *prima facie* showing that the legal advice or work product at issue here was obtained in furtherance of illegal activity or misconduct. *In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991*, 33 F.3d 342, 348 (4th Cir. 1994) ("the government had to make a *prima facie* showing that the communications sought fell within the crime-fraud exception."); *Rambus*, 222 F.R.D at 285. The statement of material facts satisfy the prima facie showing, and the Court has already found that the companies "were intended to be vehicles that would shield Martorello and Bellicose from liability." *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 280 (E.D. Va. 2018).

acknowledge and agree "that the success of the business [was] based in large part upon the services provided to" Red Rock by SourcePoint. Ex. 5 at § 1.4. One of those services was collecting "all gross revenues and other proceeds connected with or arising from the operation of" Red Rock, which made loans to consumers without obtaining a license. Ex. 5 at § 4.9.

The crime/fraud exception warrants disclosure of the legal advice received by Martorello regarding the legality of the business model, its operations, the restructure, and any advice made pursuant to or in furtherance of this scheme. *Rambus*, 222 F.R.D. at 279 ("it is the planning and pursuit of the scheme with the advice of counsel, not the scheme's success or failure, that animates the crime/fraud exception."). Although blanket waivers of privilege are rarely appropriate, it is hard to imagine any legal advice that would not have been made in furtherance of the scheme. Put differently, any legal advice would have been "made for" or "in further" of the overarching purpose of the business model, *i.e.*, avoidance of state and federal law. The crime/fraud exception exists for situations just like this and recognizes the "commonsense notion" that privileges " 'cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise.'" *Rambus*, 222 F.R.D. at 281 (quoting Evidence § 2298 at 572 (McNaughton rev. 1961)).

In the case against Tucker, the United States District Court for the Southern District of New York applied the crime/fraud exception. *United States v. Tucker*, No. 16-CR-91 (PKC), 2017 WL 2470836, at *1 (S.D.N.Y. June 6, 2017). In that case, the indictment charged Tucker with "conspiracy to collect unlawful debts" and "collection of unlawful debts," through several payday lending businesses that Tucker managed and controlled, but "were nominally owned by American Indian tribes, including the Miami Tribe of Oklahoma." *Id*. Just like this case, the government alleged that "Tucker entered into sham relationships with the Indian tribes in order to invoke tribal immunity and continue lending practices that would otherwise be unlawful." *Id*. In finding certain

documents were not privileged due to the crime/fraud exclusion, the court observed that the "continuation of an unlawfully usurious lending business was the crime or fraud attempted, and the communications and documents concerning *Tucker v. AMG* were in furtherance thereof because they were part of an effort to baselessly invoke the protections of tribal immunity." *Id*.

C. The restructure of the arrangement is a continuance of the fraud.

As explained in the Material Facts, the term of the arrangement between Martorello and Red Rock was supposed to last until December 31, 2018. Ex. 5 at § 3.2. But less than half way into the term of the arrangement, regulators caught on to Red Rock's illegal loan products, starting with the New York Department of Financial Services issuing a cease and desist to Red Rock warning it to stop offering its illegal credit products to New York consumers. *Otoe-Missouria Tribe v. N.Y. Dep't of Fin. Servs.*, 974 F.Supp.2d 353, 356 (S.D.N.Y. 2013). Shortly thereafter, Red Rock and the LVD challenged the cease and desist, resulting in a decision that threatened the entire business model. In particular, the district court found that Red Rock was "subject to the State's non-discriminatory anti-usury laws" because the "undisputed facts demonstrate[d]" that the illegal activity was "taking place in New York, off of the Tribes' lands." *Id*. at 361.

Around the same time of the *Otoe-Missouria* litigation, a growing number of lawsuits and government enforcement actions against Martorello's competitors brought increased scrutiny to the tribal lending business model.[11] Martorello was particularly worried about the case filed by the CFPB against CashCall in December 2013. *See Consumer Fin. Protection Bureau v. CashCall,*

[11] *See also In Re Cashcall, Inc.*, 2013 WL 3465250, at *1 (NH Banking Dept. 2013) ("it appears that Western Sky is nothing more than a front to enable CashCall to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive business practices from prosecution by state and federal regulators."); *In re Moses*, No. 12-05563-8-RDD, 2013 WL 53873, at *4 (Bankr. E.D.N.C. Jan. 3, 2013).

Inc., No. 1:13-cv-13167 (Mass) (complaint filed on Dec. 16, 2013). In that case, the CFPB took the same position as the district court in *Otoe-Missouria, i.e.*, that state usury laws applied to tribal lenders. Ex. 4, Jan. 2014 e-mail chain at LVD-DEF00018128.

On January 3, 2014, Martorello characterized the CFPB's position as "without question a major attack on legit tribal lending operations." *Id*. Martorello also expressed concern with cooperating with the CFPB's investigate demands, explaining that it would "come with an almost identical suit against the LVD TLEs as they just did against Cash Call," Ex. 4 at LVD18129. If an "attack" on the Red Rock operation happened, he warned, "the stakes are very literally everything." Ex. 4 at LVD18129. Martorello knew the consequences would be severe. *Id*. (explaining the CFPB would go after "all revenue ever collected from consumers" and that "number" was "unobtainable by every investor combined.").

Other than anticipated litigation, Martorello had no reason to propose any material changes to the arrangement. [redacted] The term of the arrangement still had over four years left, Ex. 5 at § 3.2, and it prohibited Red Rock and the LVD from hiring another servicer or creating another business involved in consumer lending. Ex. 5 at §§ 3.1, 3.3. [redacted].[12] Less than two months later, the Second Circuit affirmed the district court's decision and parties started taking steps to restructure

[12] [redacted]

the business even though the parties had not reached an agreement in principle to the major terms of the restructure.

Again, the burden required for the application of the crime/fraud exception does not require a concession or success on the merits. Instead, Plaintiffs are only required to make a *prima facie* showing that the legal advice or work product at issue here was obtained in furtherance of illegal activity or misconduct. The evidence before the Court satisfies the prima facie burden. Indeed, the Court has already found that "Plaintiffs have presented credible evidence that, following th[e] decision [in *Otoe-Missouria*], Martorello and the Tribe looked for ways to restructure Red Rock's lending operation in order to reduce exposure to liability." *Williams*, 329 F. Supp. 3d at 272. The Court further found that "the impetus behind the formation of Big Picture and Ascension was Martorello and Bellicose's desire to avoid liability, more so than the Tribe's interest in starting its own business." *Id*. Because the restructure was in further of the illegal misconduct, Plaintiffs request the Court to find that the crime/fraud doctrine applies to the sale and order production of all legal advice or work product related to the same.

3. The crime/fraud exception applies to any documents destroyed as part of the sale of Bellicose, as well as any communications planning or in further of the destruction.

In *Rambus*, this Court held that holds that the crime/fraud exception extends to materials or communication created for planning, or in furtherance of, spoliation. *Rambus*, 220 F.R.D. at 283 (citing *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590–91 (4th Cir. 2001). In doing so, the Court explained that it "is self-evident" that protecting "any communication between lawyer and client respecting spoliation is fundamentally inconsistent with the asserted principles behind the recognition of the attorney-client privilege, namely, 'observance of law' or the 'administration of justice.'" *Id*. at 283. This is because "an attorney who counsels a client to spoliate evidence is not advancing the observance of the law, but rather counseling misconduct." *Id*.

[redacted]

The Corporate Defendants' counsel has confirmed that the deletion occurred, including the deletion of Martorello's emails. Ex. 19.

None of the Defendants, including Martorello, have provided any explanation for why the emails were deleted in connection with the merger other than it was a term of the merger. The enterprise's loss in *Otoe-Missouria*, coupled with the growing litigation against its competitors, makes it inconceivable that this provision was included for a purpose other than to intentionally destroy evidence of Martorello and Bellicose's misconduct. And the effort to defraud to obstruct justice did not stop with the destruction of Martorello's records—his attorneys at Greenberg Trauig were also instructed to delete their documents regarding the arrangement, including "communications regarding Bellicose with Mr. Martorello and other persons and entities." Ex. 3, Jan. 24, 2019 Declaration of Jennifer Weddle.

This widespread, intentional effort to destroy evidence warrants a severe sanction. *Silvestri*, 271 F.3d at 590–91 (noting that district courts may impose a wide range of remedies for spoliation). Before requesting the sanction, however, Plaintiffs believe it is necessary to exhaust all efforts to attempt to restore the information, including retaining an independent expert to examine all possible sources for the information. Plaintiffs further believe it is necessary to obtain any communications regarding the spoliation, as well as deposition testimony of those involved.

Accordingly, Plaintiffs request the Court to make a finding that spoliation occurred and order: (1) production of all communications concerning the destruction of any of Martorello or his companies' information; and (2) that privilege is waived as to all such communications, as well as any documents retrieved as part of Plaintiffs' efforts to restore the destroyed information.

CONCLUSION

For the foregoing reasons, Plaintiffs request the Court to grant this motion and enter an order: (1) compelling the production of all documents withheld on Martorello's privilege logs, (2) requiring Martorello to disclose all advice (written or oral) received from any attorneys regarding: (i) the legality of the tribal business model, (ii) the legality of the LVD's lending operations, (iii) the restructure, (iv) any litigation involving any similar business models, including but not limited to any litigation involving CashCall, John Reddam, Scott Tucker, Charles Hallinan, Think Finance, and Kenneth Rees, and (3) finding a waiver of privilege and work product as to: (i) any evidence destroyed as part of the sale of Bellicose Capital to the LVD, including any documents retrieved by Martorello and any attorneys who represented his companies; and (ii) any communications or information created in the planning of or in furtherance of the spoliation.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th of January, 2019, 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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