**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-00461-REP** |
| | : | |
| **BIG PICTURE LOANS, LLC, *et al.*,** | : | |
| | : | |
| **Defendants.** | : | |
| | : | |

**DEFENDANT MATT MARTORELLO'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL INFORMATION WITHHELD ON THE BASIS OF ATTORNEY-CLIENT PRIVILEGE [DKT. No. 340]**

## I. INTRODUCTION

Plaintiffs' Motion to Compel should be denied in its entirety. Defendant Matt Martorello has never said he intends to assert an advice of counsel defense; nor has he disclosed a single privileged communication in support of his defense. Further, he has not waived the attorney-client privilege by stating his intent to assert a good faith defense. Plaintiffs have not made the showing required to invade the attorney-client privilege through application of the crime/fraud exception. And Plaintiffs' request for an advisory finding of spoliation is premature and unsupported. Moreover, in almost every instance, Plaintiffs manipulate the record in support of their arguments. Plaintiffs rely on false and unsupported analogies to other cases unrelated to Native American tribes, baseless accusations, and misstatements of fact.[1]

[1] As Martorello has explained in a motion to intervene in the Fourth Circuit, Plaintiffs have likewise provided that court with a similarly incorrect interpretation of the *Otoe-Missouria* decision and incorrect recitation of this Court's earlier Memorandum Opinion. *See Williams, et. al. v. Big Picture Loans, et al*., No. 18-1827, Dkt. No. 78 (Ex. A) at 8-10 n.1 (4th Cir.).

Notwithstanding that the discovery process has been frustrated by the Tribal Defendants' nonparticipation, to Martorello's significant prejudice, the discovery that *has* occurred proves Plaintiffs' case to be meritless. Undisputed evidence shows that the Lac Vieux Dessert Band of Lake Superior Chippewa Indians ("LVD" or "Tribe"), with the guidance of experienced counsel, began an online lending operation that offered loans to consumers governed by tribal, not state, law before even approaching Martorello to provide consulting services to LVD's lawful lending businesses. Thereafter, LVD and Martorello, again with expert guidance and counsel, negotiated the terms of a business relationship and came together for the lawful purpose of building an online consumer lending business on LVD's reservation. Tribal members exercised authority over all business decisions and had ultimate control of the Tribe's relationship with Bellicose, including the right to voluntarily terminate Bellicose at any time. During the entire engagement, numerous outside counsel were involved on virtually a daily basis to assure the operation's legal compliance. And, not only are the loans consummated on-reservation, as this Court has found, but all substantive activities occur on LVD's reservation and in LVD's sole and absolute discretion, independent of Bellicose or Martorello, including loan origination, key decision making, oversight of its call center, customer escalations, and the collection of all consumer loans.

Furthermore, the evidence establishes that LVD derived enormous value from the business and that the sale of Bellicose to LVD was legitimate. Martorello was motivated by [redacted]. LVD was driven by [redacted]. Martorello has not been involved in LVD's lending business since the sale. And finally, LVD, like all federally recognized Native American tribes, is a nation with sovereign rights. As Congress has pronounced, and as numerous Supreme Court and lower court

decisions have established, sovereignty permits LVD to adopt laws and operate businesses in support of its economic development that are governed exclusively by tribal (and federal) law. This did not change with the Second Circuit's decision in *Otoe-Missouria.*

LVD's lending businesses are not a RICO enterprise designed to evade state usury laws, but a typical and rightful exercise in sovereignty, as supported by numerous federal policies. None of Martorello, LVD's officials, employees, banks, credit bureaus, expert tribal law attorneys, or others that did business with them, are racketeers. Put simply, tribal choice of law is not inherently unlawful, state usury laws do not apply to the loans at issue, no crime or fraud occurred, and Martorello has spoliated no evidence. Plaintiffs' motion must be denied.

## II. COUNTER-STATEMENT OF MATERIAL FACTS

### A. LVD made the independent decision to [redacted] as a means to [redacted] and to [redacted].

Stripped of Plaintiffs' hyperbole, the facts of this case are straightforward. LVD is a federally recognized Native American Tribe located in Watersmeet, Michigan. [redacted]. Ex. A, [redacted]. [redacted]. [redacted]. [redacted]. [redacted]. [redacted]. [redacted]. [redacted]. As a former member of LVD's Tribal Council and Co-Manager of its lending entities, Craig Mansfield, testified during his deposition, [redacted].

[redacted]. Ex. B, [redacted]. LVD hired Bellicose and SourcePoint to lend their expertise in the consumer lending business to LVD, as LVD learned how to operate the business on its own. *E.g.*, Ex. C, Gerber Dep. Tr. at 20:11-21:13; Ex. A, [redacted]; Ex. D, [redacted].

[redacted], Ex. B, [redacted]. Ex. A., [redacted].

With the passing of NABDA, which recognized tribes as states in Dodd-Frank in 2010, Congress specifically envisioned tribes hiring outside expertise and acquiring capital to assist in expanding their economic opportunities beyond reservation borders as the means to self-

sufficiency. Ex. E, NCAI Amicus Br. at 6-8. In Indian country, and in FinTech more broadly, there is nothing atypical about LVD's lending business, nor its relationship with Bellicose. And, contrary to Plaintiffs' unsupported assertion that LVD's purchase of Bellicose was spurred by mounting regulatory pressure, [redacted]. Ex. A, [redacted]; *see also* Ex. F, [redacted]. [redacted] Ex. G, [redacted], and as Martorello's expert has explained, [redacted]. Ex. D, [redacted] Contrary to Plaintiffs' unsupported contentions, the Court has already found that the loans at issue were originated and collected by the tribal lending entities and by those entities' employees on LVD's reservation. Dkt. No. 146 at 8, 31, 33. [redacted] *See, e.g.,* Ex. A, [redacted]; Ex. B, [redacted] Ex. C, Gerber Dep. Tr. 53:11-18; 119:19-23; *see also, e.g.*, Ex. H, [redacted].

The fact that the agreement *permitted* SourcePoint to do certain things is not itself proof that SourcePoint, rather than Red Rock, did them (particularly in light of the fact that the point of the agreement was for LVD to learn the business from Bellicose and SourcePoint). The record is clear that SourcePoint did not exclusively handle communications with LVD's vendors, sweep LVD's bank accounts, collect all (or any) gross revenues, sell any loan transactions, or conduct other processes connected with or arising from the operation of Red Rock. [redacted] Ex. G,

[redacted]. [redacted]

[redacted]

[redacted]

[redacted]Ex. A, [redacted]. The responsibilities assigned to both Red Rock and Bellicose/SourcePoint under the agreement were typical and appropriate and [redacted]. *See* Ex. D, [redacted]

**B. Martorello's sale of the business to LVD was not a sham and was not spurred by litigation or regulatory efforts directed to tribal lending.**

Plaintiffs' claims that Martorello's sale of Bellicose to LVD was a sham spurred by the NYDFS case and other regulatory events, like Operation Chokepoint, and that Martorello controls the business post-sale are wrong for at least four reasons. First, as explained above, LVD was not forced by Martorello to purchase Bellicose; [redacted].

Second, Martorello is not now, and has never been, involved in the operations of Big Picture Loans or Ascension Technologies since Bellicose and SourcePoint were purchased by the Tribe. James Dowd, who [redacted]

[redacted]

[redacted]

[redacted]. Ex. B, [redacted]. And while Plaintiffs make much of SourcePoint's contractual rights vis-à-vis the tribal lending entities' bank (Chippewa Valley Bank), bank personnel testified that they have not spoken to Martorello for five or six years. Ex. C, Gerber Dep. Tr. 67:7-9 ("I haven't spoken to Matt [Martorello], I don't think for – in person for – or I've never talked to him in person, but on the phone, for five or six years."). Plaintiffs have no evidence that Martorello has been involved post-sale beyond

approving certain expenditures.[2] As Martorello's expert confirms, Eventide's contractual rights post-sale, which require consent to certain actions by Big Picture Loans that may affect the payment of the promissory note, are [redacted] in seller-financing and loan agreements. *See* Ex. I, [redacted].

The fact that Ascension may have continued the lending operation post-transaction in a similar manner as before is not evidence of wrongdoing or that Martorello is in control. At most, it shows the Tribe had been learning and has continued a successful and self-sufficient business model without Martorello or his companies' involvement. Moreover, as Martorello's expert explains, in transactions such as this it is [redacted]. Ex. I, [redacted] Plaintiffs have provided no evidence to the contrary.

Third, it was not just Martorello (and his lawyers) who believed that LVD's Red Rock lending operation was legitimate and legal; [redacted]. *See, e.g.*, Ex. A, [redacted]. The bank believed it was legal (and presumably still does, given that they remain the bank for LVD's tribal lending entity). Ex. C, Gerber Dep. Tr. 68:22-69:8; 80:6-14; 105:14-21. Indeed, one of the bank's in-house lawyers concurred with an opinion letter provided by LVD's counsel. *Id*. at 126:17-127:4. The bank went so far as to voluntarily contact the FDIC for guidance, *id*. at 23:8-13, and reported

[2] The text messages cited by Plaintiffs as evidence that Martorello controls Big Picture Loans do no such thing. At most, when read in its entirety, the full text message thread [redacted]

back to Martorello that FDIC's guidance was consistent with what everyone involved believed: that "TLEs are not illegal." *Id*. at 108:4-17; Ex. J, Gerber Dep. Ex. 16.[3]

Fourth, Plaintiffs are wrong that given the December 2018 termination date of the Servicing Agreement, there was no reason for Martorello to sell Bellicose when he did. As Martorello's expert explains, the transaction [redacted] Ex. I, [redacted]

The evidence also shows that Red Rock and Big Picture have benefitted the Tribe. As Mr. Mansfield testified, [redacted]. As Martorello's expert has opined, the value of the Eventide Note to the Tribal Defendants was almost $[redacted] at the time of the transaction; today the combined value of the business exceeds $[redacted]; and in less than four years, the equity value of the business will exceed $[redacted].[4] *See* Ex. L, [redacted]. On the heels of the sale, and inconsistent with a transaction designed to shield Martorello from liability, the Tribe and Martorello issued a press release pronouncing that the purchase of Bellicose was

[3] Plaintiffs' attempt to tie the sale of Bellicose to the *Otoe-Missouria* litigation is also wrong. That litigation, brought by LVD and others, sought to vindicate sovereign rights by obtaining an injunction against certain regulatory actions they deemed inappropriate. While the injunction was denied, the Second Circuit refused to conduct a Bracker analysis to determine whether LVD's loans were legal. That question was expressly left open. And in any event, [redacted], Ex. K, [redacted] nearly a year after the district court decision in *Otoe-Missouria* and before the Second Circuit resolved the appeal. This timing and the years-long discussions related to LVD's purchase of Bellicose do not support that the sale was spurred by *Otoe-Missouria.*

[4] Further, experts have opined that the value received in exchange for the Bellicose equity was not $[redacted], but between approximately $[redacted] and $[redacted]. *See* Ex. L, [redacted]; Ex. R, [redacted]

"without question, the most important economic development in the history of our tribe." *See* Ex. M, Lac Vieux Desert Band of Lake Superior Chippewa Indians Bolsters Tribal Economic Development Portfolio with Purchase of Bellicose Capital, LLC, PR Newswire (Jan. 27, 2016, 11:37 ET).

Plaintiffs repeatedly misstate the manner in which profit distributions were made under the Servicing Agreement. Although Plaintiffs claim that Martorello personally "received 98% of the net income on the loans," and that Red Rock received only "2% of the net revenue from the loans, less charge offs," Pls. Br. at 5, the reality is much different: [redacted] Ex. N, [redacted] Ex. O, [redacted] Martorello's expert also confirms that [redacted] *See* Ex. D, [redacted]

As the above record facts establish, Plaintiffs' case is without merit. LVD's lending businesses are not a RICO enterprise designed to evade state usury laws, but a rightful exercise in sovereignty encouraged by Congress, and supported by numerous federal policies and federal

agencies. Neither Martorello nor LVD's officials and employees, banks, credit bureaus, expert tribal law attorneys, or others that did business with them or provided counsel, are racketeers.

## III. ARGUMENT

### A. Martorello has not waived the attorney-client privilege by asserting a good faith defense.

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications." *In re Cty. of Erie*, 546 F.3d 222, 228 (2d Cir. 2008) (internal quotation omitted). "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Id.* 8 (internal quotation omitted). Thus, any rules abrogating that privilege, such as waiver, must "be formulated with caution." *Id.* "The burden of breaching the privilege is thus particularly high." *Tribune Co. v. Purcigliotti*, No. 93 CIV. 7222 LAP THK, 1997 WL 10924, at *4 (S.D.N.Y. Jan. 10, 1997).

Courts employ a three part inquiry in determining whether a party has waived the privilege, including an assessment of whether:

> (1) the assertion of the privilege was a result of some affirmative act, such as filing suit or pleading in response to a claim; (2) through the affirmative act, the asserting party has put the protected information at issue by making it relevant to the case; and (3) the application of the privilege would have denied the opposing party access to information vital to the defense.

*In re Cty. of Erie*, 546 F.3d at 226 (internal quotation omitted) (citing *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975)). With a traditional "advice of counsel" defense, the first two prongs are routinely met because the attorney's confidential legal advice has been put directly at issue by the party asserting a defense that expressly relies, in whole or in part, on the attorney's advice.

As Plaintiffs acknowledge, however, Martorello has not asserted, and does not plan to assert, an advice of counsel defense based on privileged attorney-client communications or

confidential legal advice provided directly to him by his personal counsel or provided to him by Bellicose, SourcePoint, or Eventide's counsel in his capacity as representatives for those companies.[5] *See* Ex. P, Rev. Int. Resp. #12; Ex. Q, Rev. Resp. Doc. Req. #20. Rather, Martorello intends to assert a good faith defense based on *non-privileged* information and communications provided by other attorneys, as well as non-attorney sources, regarding the legality of the tribal business model and LVD's lending operations. *See* Ex. P, Rev. Int. Resp. #13, Ex. Q, Rev. Resp. Doc. Req. #21. These non-privileged communications and public sources include, by way of example only:

- Non-privileged opinion letters issued by LVD's counsel, Rosette, LLP, and other counsel, to third parties throughout the relevant time period, including after the NYDFS action and *CashCall*, regarding the legality of the Tribe's lending operation and the application of sovereign immunity to LVD's lending operation; *see, e.g.,* Exs. S – BB.

- Non-privileged communications from the Tribe's counsel, Rosette, LLP, to Martorello and various third parties throughout the relevant time period regarding the legality of the Tribe's lending operation, the application of sovereign immunity to the Tribe's lending operation, and the history of federal regulatory lending in small dollar lending; *see e.g.,* Exs. CC - QQ.

- Publications and other public sources of information regarding the history and legality of tribal sovereign lending; *see, e.g.,* Exs. RR - UU; *see also* Native American Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. § 4301 *et seq.*

[5] Because Martorello is not relying on confidential legal advice rendered to him in either a personal or representative capacity and has not put the advice of counsel directly at issue, this case is unlike the advice of counsel cases cited by Plaintiffs. *See, e.g.*, *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992); *United States v. Moazzeni*, 906 F. Supp. 2d 505 (E.D. Va. 2012). Moreover, in *Favors v. Cuomo,* 285 F.R.D. 187 (E.D.N.Y. 2012), the court found that publication of a communication never intended to be privileged did not waive the attorney-client privilege as to the entire subject matter of the publication. And *United States v. Jones*, 696 F.2d 1069 (4th Cir. 1982), involved waiver of the attorney-client privilege by publicizing portions of legal in brochures and other public materials. *City of Myrtle Beach v. United Nat'l Ins. Co.*, C/A No. 4:08-1183-TLW-SVH, 2010 WL 3420044 (D.S.C. Aug. 27, 2010), and *Hege v. Aegon USA, LLC,* C/A No. 8:10-cv-1578-GRA, 2011 WL 1791883 (D.S.C. May 10, 2011), involved bad faith denial of insurance coverage claims.

- Non-privileged testimony from various witnesses that they believed the Tribe's lending operations were legitimate and legal; *see, e.g*, [redacted]

These materials evidence the legitimacy of the Tribal lending model and that it was not just Martorello who believed that LVD's lending operation was legitimate and legal, LVD also believed it was legal, as did various other involved third parties.

Recognizing Martorello is not asserting an advice of counsel defense and has not put the confidential legal advice of his counsel directly at issue, Plaintiffs assert that the Court can ignore the first prong of the inquiry and pierce the privilege if the otherwise-privileged communications may potentially be relevant to rebutting Martorello's defense. The Fifth Circuit recently rejected just this over-simplistic analysis in *In re Itron, Inc.*, 883 F.3d 553, 561 (5th Cir. 2018), reinforcing that "[r]elevance is *not* the standard for determining whether or not evidence should be protected from disclosure as privileged, . . . even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue."[6] (emphasis in original) (quoting *Rhone-Poulenc Rorer Inc.*, 32 F.3d 851, 864 (3d Cir. 1994)). As the Fifth Circuit explained in finding that the district court had erred in applying a relevance standard, "a privilege that gives way whenever its contents become relevant or even 'highly relevant' to an opposing party's arguments cannot serve" its purpose because "[s]uch a defeatable 'privilege' is hardly a privilege at all." *Id.* at 556, 562. "Such a rule would also fail to protect the client's confidences when protection is needed most" and "would impair the client's ability to safely confide in counsel." *Id.* (citing *Rhone-Poulenc Rorer, Inc.*, 32 F.3d at 864).

[6] Though *In re Itron, Inc.,* addresses waiver law in Mississippi, the court's holding depends on an analysis of federal waiver law. *See In re Itron*, 883 F.3d at 561–62.

The Fifth Circuit's approach aligns with prior federal case law.[7] And, as the Third Circuit explained in *Rhone-Poulenc*, requiring parties to "take[] an affirmative step to waive the privilege . . . provide[s] predictability for the client concerning the circumstances by which the client will waive that privilege." *Rhone-Poulenc Rorer, Inc.*, 32 F.3d at 863. Such predictability best serves the purposes underlying the privilege because it will "encourage clients to consult with counsel free from the apprehension that the communications will be disclosed without their consent." *Id. at* 863-64.

Moreover, as the court explained in *Beneficial Franchise Co., Inc. v. Bank One, N.A.*, 205 F.R.D. 212 (N.D. Ill. 2001), in rejecting the notion that "merely asserting a defense or a claim is sufficient, without more, to waive the privilege," a rule requiring waiver in every instance where a defendant's state of mind is at issue is impractical. *Id.* at 217-19. "Were it otherwise, then any party asserting a claim or defense on which it bears the burden of proof would be stripped of its privilege and left with the draconian choice of abandoning its claim and/or defense or pursuing and protecting its privilege." *Id.* at 217. As the court further explained, "[t]he impracticality of such a rule is revealed when viewed in reverse: waiver of the privilege would apply not only to assertions of affirmative defenses but also by parity of reasoning to claims raised by a plaintiff

[7] *See, e.g., Rhone-Poulenc Rorer, Inc.*, 32 F.3d at 863 ("Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner."); *In re Cty. of Erie,* 546 F.3d at 229 ("We hold that a party must *rely* on privileged advice from his counsel to make his claim or defense.") (emphasis in original); *Banco de Brasil, S.A.*, *v. 275 Wash. St. Corp.*,No. 09-11343-NMG, 2011 WL 3208027, at *3 (D. Mass. July 27, 2011) (The "mere fact that the [defendant] believes that it acted in good faith under its lease agreement, and that its counsel was involved in the process, does not constitute a waiver of the attorney-client privilege"); *United States v. Ohio Edison Co.*, No. C2-99-1181, 2002 WL 1585597 at *5 (S.D. Ohio July 11, 2002) ("[M]erely pleading the defense of equitable estoppel in a patent case without relying upon advice of counsel is not sufficient to imply waiver.").

that require proof of a mental state—such as, a fraudulent inducement claim" and "would exact too stiff a price for the assertion of commonly-pled claims and defenses." *Id.*

Martorello intends to assert a good faith defense. He has not disclosed privileged communications to prove or otherwise aid this defense and has made clear he does not intend to rely on such privileged communications for his defense. Accordingly, Martorello has not waived the privilege and Plaintiffs' motion should be denied.

**B. The scope of any waiver must be narrowly construed.**

If the Court were inclined to find a waiver of attorney-client privilege in this case, which it should not, Plaintiffs' overly broad requests for production of documents and information should nonetheless be denied or, at a minimum, limited only to attorney-client communications discussing the legality of the tribal business model or the legality of LVD's lending operations.

"[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.'" *E.I. Dupont de Nemours and Co. v. Kolon Indus., Inc.*, 269 F.R.D. 600, 605 (E.D. Va. 2010) (addressing scope of work product waiver where manufacturer included statements in public press release). And "[a] party cannot artificially expand the scope of the subject matter to create a waiver that is broader than that of the disclosure that waives the protection." *Id.* at 607. Thus, "the scope of the waiver is measured by the substance of the protected information that has been publicly disclosed." Any such "waivers of the attorney-client privilege are to be narrowly construed." *Beneficial Franchise Co., Inc.*, 205 F.R.D. at 216.

Plaintiffs do not explain how Martorello's assertion of a good faith defense based on non-privileged communications regarding the legality of the tribal business model and LVD's lending operations would possibly entitle them to all documents identified on Martorello's privilege logs,

all privileged communications related to the restructure, and privileged communications related to other litigation involving similar business models. Plaintiffs' requested scope would encompass not only privileged communications with multiple counsel advising Martorello in this matter, but also privileged communications between Martorello and his counsel in *Galloway* and *Cumming et al. v. Big Picture Loans, LLC et al.*, No. 5:18-cv-03476 (N.D. Cal.), a class-action lawsuit with allegations nearly identical to those asserted here. Similarly, Plaintiffs fail to explain how Martorello's assertion of a good faith defense would entitle them to all privileged communications, regardless of subject matter or date, between Martorello and Hudson Cook or other counsel. And Plaintiffs have not explained the relevance of documents or advice related to various legal issues stemming from the restructure of the lending operation, such as potential tax implications, to Martorello's good faith belief in the legality of the tribal lending business model.

Because Martorello is not asserting an advice of counsel defense and has not put the confidential legal advice of his counsel directly at issue, Plaintiffs' motion should be denied. If not denied in its entirety, the scope of any waiver should be narrowly limited to communications related to the legality of LVD's ability to make loans enforceable exclusively by LVD laws from October 1, 2014, the date the circuit court decided *Otoe-Missouria,* to September 14, 2015, the date the sale transaction was engaged.

**C. There is no basis to apply the crime/fraud exception in this matter.**

Plaintiffs bear the burden of proving that the crime/fraud exception applies in this matter. To meet their burden, Plaintiffs must make a *prima facie* showing that: (1) Martorello was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme; and (2) the documents containing the privileged materials bear a close relationship to his existing or future scheme to commit a crime or fraud. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999). Plaintiffs have not met, and cannot meet, their burden.

Martorello (and LVD) sought out highly regarded counsel to assist them with structuring a lawful business relationship and ultimate sale transaction. Martorello (and LVD) secured multiple formal and informal opinions from counsel opining that the LVD tribal lending model was viable and that Indian sovereign immunity would apply, precluding the application of state and federal laws. It was not improper for Martorello to seek legal advice regarding the labyrinthine legal and regulatory environments related to tribal lending. Indeed, as courts have recognized, the attorney-client privilege exists to promote and protect those kinds of endeavors. Likewise, structuring a business transaction to limit liability is not sufficient to establish the crime-fraud exception. For these reasons, as more fully explained below, Plaintiffs' motion fails.

**1. Plaintiffs have not established that Martorello was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel.**

Under prong one of the crime/fraud analysis, Plaintiffs must provide "evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed." *In re Grand Jury Proceedings #5*, 401 F.3d at 255. Mere speculation as to a crime or fraud is insufficient. *See Billings v. Stonewall Jackson Hosp.*, 635 F. Supp. 2d 442, 446-47 (W.D. Va. 2009) (declining to apply crime/fraud exception where plaintiff's assertion that defendant's attorney submitted a false document to the EEOC was "supposition without any basis"); *see also United States v. Tucker*, 254 F. Supp. 3d 620, 622 ("[T]he crime-fraud exception applies only when there is probable cause to believe that the communications with counsel were intended in some way to facilitate or to conceal the criminal activity.") (internal quotation omitted). In other words, "[t]he exception applies if there exists enough evidence to support a verdict in favor of the party making the claim." *Atlantis Consultants Ltd. Corp. v. Terradyne Armored Vehicles, Inc.*, Civil No. 1:15-cv-439-CMH-MSN, 2015 WL 9239808, at *6 (E.D. Va. Dec. 16, 2015) (internal quotation omitted).

Plaintiffs offer no evidence that Martorello was engaged in ongoing criminal or fraudulent activity when he sought the advice of Attorneys Jennifer Weddle, Jennifer Galloway, or John Williams (the only attorneys specifically identified by Plaintiffs in their Motion); nor do Plaintiffs offer any evidence that he was about to commit a crime or fraudulent activity when he sought such advice. Stripped of its rhetoric, Plaintiffs' crime/fraud theory rests on: (1) their mischaracterization of the evidence in this matter; (2) their characterizations about payday lenders' and Native American-owned lending companies' historical compliance with state laws; and (3) their presumption that Attorneys Weddle, Galloway, and Williams provided Martorello advice similar to the advice Claudia Callaway provided to her clients in *CashCall*. None of the foregoing supports application of the crime/fraud exception in this matter.

First, as explained above, Plaintiffs' statement of facts is replete with misstatements from which they draw incorrect legal conclusions. The overwhelming evidence shows the sale of Bellicose to a tribal entity was not a sham transaction. Rather, [redacted]. *See supra* Section II.A. [redacted] *Id*. Section II.B.

In addition, as Martorello and his expert have explained, [redacted] *See, e.g.*, Ex. O, [redacted]; Ex. A, [redacted]; *accord* Pls.' Ex. 5,

[redacted]. The lending businesses are not a RICO enterprise, nor can Martorello, LVD's officers and employees, their bank, vendors, law firms, or anyone else who supported or counseled LVD be deemed a racketeer or co-conspirator. Plaintiffs fail to show that Martorello engaged in a crime or fraud and therefore, the crime/fraud exception does not apply.

Plaintiffs' reliance on the restructuring of the arrangement is of no import. Assuming (improperly) that Martorello took action to restructure the arrangement due to concerns about his or the Tribe's potential liability, such conduct does not support application of the crime/fraud exception. As the Ninth Circuit explained in rejecting a similar argument in *In re Napster Inc. Copyright Litigation*, 479 F.3d 1078, 1097-98 (9th Cir. 2007), structuring a business transaction to limit liability is not sufficient to establish the crime-fraud exception.

In *In re Napster,* the plaintiffs contended that the defendant used its lawyers to construct a sham loan transaction designed to hide the defendant's equity ownership in Napster in order to limit its liability for Napster's copyright violations. As the Ninth Circuit found in rejecting application of the crime/fraud exception in relation to the loan transaction:

> If a party could establish the crime-fraud exception simply by showing that an opponent structured a business transaction to limit its liability, the attorney-client privilege would be worth little, for under this standard many commercial disputes could be recast as fraud on the court. Such a standard would defeat a primary purpose of the attorney-client privilege, which is to encourage individuals to seek legal counsel to guide them through the thickets of complex laws.

*Id*. at 1097 (internal quotation omitted).[8]

Moreover, Martorello's email regarding the CFPB's complaint against CashCall evidences that even if he did take steps to restructure the arrangement to avoid or limit his or the TLE's liability in light of the CFPB's actions (which he did not), Martorello and others disagreed with the CFPB and believed that they had a legal basis to do so: [redacted][9] Pls.' Ex. 4 at LVD-DEF00018128. As discussed above in connection with the good faith defense, the evidence demonstrates that Martorello and his attorneys understood tribal lending and LVD's business to be lawful—a view shared by LVD, LVD's attorneys, and LVD's bank. "Because fraud is a crime of specific intent, the exception is applicable only if the opponent of the privilege can demonstrate that the advice was sought for a 'knowingly unlawful end.'" Paul R. Rice, et al., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 8.6 (2018-19 ed.). Plaintiffs have not, and cannot, make such a showing in this case. There is no evidence that Martorello believed the tribal lending operation was unlawful at the time he sought legal advice.

Plaintiffs also contend that the Court's finding made in relation to the Tribal Defendants' Motion to Dismiss that Big Picture and Ascension (not Red Rock or Duck Creek as Plaintiffs

[8] The formation of Bellicose Capital, LLC, is likewise of no import because, again, structuring a business transaction to limit liability is not sufficient to establish the crime/fraud exception. Moreover, Plaintiffs' unsupported insinuation that Bellicose Capital was formed in response to the NYDFS action is illogical. Formation of Bellicose Capital had no impact on where the lending activity occurred**,** nor did it insulate Martorello from liability.

[9] Plaintiffs mischaracterize Martorello's email. As the email illustrates, Martorello was not concerned that LVD's lending business was illegal, he was concerned about LVD's decision to proactively pursue a memorandum of understanding with the CFPB and the financial impact potential protracted litigation with the CFPB could have on LVD if an MOU was not reached. Martorello, [redacted]

misleadingly suggest by the term "companies") were formed to shield Martorello and Bellicose from liability satisfies their burden of making a *prima facie* showing that Martorello was engaged in a crime or fraud at the time he sought legal advice. Plaintiffs are wrong. The Court's statements, which were made in the context of a jurisdictional finding, do not establish a crime or fraud by Martorello. And Plaintiffs never explain how implementing an entity restructure to avoid or limit liability (assuming *arguendo* that was the purpose behind the restructure, which it was not) proves a crime, fraud, or fraudulent intent—a contention expressly rejected by the Ninth Circuit in *In re Napster* and rebutted by the record evidence discussed above that Martorello, LVD, their attorneys, and others all believed in 2012, and continue to believe, that their conduct was lawful.

Second, Plaintiffs' historical recitation of the payday lending and Native American lending models based on law review articles, press releases, and other criminal, civil, and regulatory matters *that did not involve Martorello* is of no probative value and cannot support a finding that Martorello's conduct here was either criminal or fraudulent. Notably, Plaintiffs do not compare the specific facts of this case to the specific facts of the other matters cited in their brief, likely because Plaintiffs understand the cases are not comparable. Foremost, unlike LVD, in the cases involving Scott Tucker, John Paul Reddam (CashCall) and Charles Hallinan, the tribes had no control and received nothing but a few dollars, and the loans made to consumers were not made under tribal law or tribal oversight.

For example, Western Sky, the lending entity at issue in *CashCall,* was not owned by a Tribe. *See CashCall, Inc.*, 2018 WL 485963 at *4. Although the defendants were urged by their attorneys to "firm up its structure to fit in the arm of the tribe box," they never did. *See id.* at *4-9. Moreover, although the *CashCall* court found that the defendants had "clearly sought at the

outset to avoid state licensing requirements and usury laws," the court found that the defendants did not knowingly or recklessly violate the law. *Id.* at *15. As the court explained, "at its inception, there was nothing inherently unlawful about the Western Sky Loan Program. It was not until this Court found that CashCall—not Western Sky—was the true lender that [d]efendants could have understood that they may be liable under the CFPA." *Id.* Notably, the court reached this conclusion despite the dozens of lawsuits with regulators that came before its decision, including the Second Circuit's decision in *Otoe-Missouria*.

As the court further noted, the defendants had sought out highly regarded regulatory counsel to assist them with structuring to lawfully accomplish their objective and had secured multiple formal and informal opinions from their counsel opining that the structure was viable and would provide the defendants with Indian sovereign immunity, precluding the enforcement of state and federal laws, at a time when "there was no case law that clearly established that the Tribal Lending Model was not a lawful model or that any attempt to adopt and implement the Tribal Lending Model would subject [d]efendants to liability." *Id.* Thus, the court could not conclude that the defendants "should have known that the structure of the Western Sky Loan Program would subject them to liability under the CFPA or that it was obvious they would be subject to such liability." "At best, the CFPB established that the [d]efendants were willing to accept the business risks associated with structuring a lending model that would avoid relevant state and federal laws and employed legal counsel to assist with this endeavor." *Id.* at *15. Accordingly, the court found that only a Tier One penalty was appropriate. *Id.*

Just as the defendants in *CashCall* could not be said to have knowingly or recklessly violated the law when they formed and proceeded to make loans through Western Sky in 2009

and later, Martorello cannot be said to have knowingly engaged in a crime or fraud with respect to LVD's tribal lending operations in this case.

*Tucker* is also inapposite. *Tucker* involved a sham lawsuit in Kansas that was intended to give retroactive effect to an acquisition after the entities involved failed to observe the necessary formalities years earlier. *Tucker*, 254 F. Supp. 3d at 621. The government supported its request for application of the crime/fraud exception with emails and other evidence showing that Tucker and his attorney initiated the litigation in order to retroactively consummate the acquisition by fraudulent means, including by causing one of the entities involved to fail to appear in the proceedings. *Id.* 623-24. Plaintiffs, by contrast, cannot and do not contend that Martorello did anything improper with respect to effectuating the restructuring transactions. As discussed above, the restructuring transactions were [redacted].[10] Moreover, Tucker and Hallinan were not indicted until after the January 2016 sale and therefore, could not have been the motivation behind the restructuring.

Third, even if Plaintiffs could properly rely on the "presumption" that Martorello's attorneys provided advice consistent with the advice Claudia Callaway provided to her clients, as Plaintiffs contend on page 24 of their Motion, the most such presumption would establish is that the attorneys provided advice to Martorello with respect to how to reduce or avoid his exposure to liability. Again, as the Ninth Circuit explained in *In re Napster,* seeking legal advice in regard to restructuring a business transaction to limit liability is not sufficient to support application of the crime/fraud exception. *In re Napster Inc. Copyright Litigation*, 479 F.3d at 1097. And as the

[10] Further distinguishing *Tucker*, unlike Plaintiffs' universal demand for all privileged documents and information in this case, in *Tucker,* the government only sought documents and communications relating specifically to the sham lawsuit allegedly orchestrated by the defendant and his attorneys. *See id.* at 621.

*CashCall* court found with respect to the advice rendered by Callaway to her clients, discussed above, at its inception, there was nothing inherently unlawful about the Western Sky Loan Program, the tribal lending model or the advice rendered by Callaway and other attorneys in relation thereto. *See CashCall*, 2018 WL 485963 at *15.

Plaintiffs apparently think it sufficient that because Martorello's entities consulted for a Native American owned lending business they can presume such involvement constituted, and any communications between Martorello and his attorneys were intended to be in furtherance of, criminal or fraudulent conduct. Plaintiffs' proposition, however, only holds true if one accepts the faulty premise that Native American tribes are inherently disavowed of their sovereign immunity and fundamental right to choose Tribal law in its contractual relations.

Plaintiffs also do not explain how privileged legal advice about Martorello and LVD's rigorous compliance with federal lending laws, as well as other legal issues relating to the lending business, were made in furtherance of *unlawful conduct*. As another federal court has explained, "[b]usiness entities, . . . operating in today's labyrinthine legal and regulatory environments, routinely seek legal advice about how to deal with all sorts of matters." *In re Sulfuric Acid Antitrust Litigation*, 235 F.R.D. 407, 424 (N.D. Ill. 2006). "There is nothing inherently suspicious about officers of a corporation seeking such advice, and the attorney-client privilege exists to promote and protect those kinds of endeavors." *Sulfuric Acid*, 235 F.R.D. at 424 (rejecting plaintiffs' argument that the defendant had created a sham agency to circumvent antitrust laws because the plaintiffs' argument "merely beg[ged] the question to be decided"). Plaintiffs assume the question to be decided, contrary to the facts, *i.e.*, whether Martorello's involvement in the tribal lending business was criminal or fraudulent and whether Martorello's communications with his attorneys were in furtherance of such activity.

Finally, the case on which Plaintiffs principally rely, *Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 280 (E.D. Va. 2004), is inapposite. In *Rambus,* the moving party, as in most cases involving the crime/fraud exception, sought only a limited class of documents relating to the plaintiff's document retention policy. *Id*. at 286. Plaintiffs, by contrast, demand privileged material essentially without limitation. Moreover, in *Rambus* it was undisputed that the plaintiff had intentionally destroyed relevant, discoverable documents at a time when it was obligated to preserve such material. *Id*. at 287. The question then became whether the plaintiff's proffered justifications for destroying the documents were legitimate. *Id*. at 298. After extensive briefing of the issue, evidentiary analysis, and an *in camera* review of the relevant privileged documents, the court determined that the plaintiff lacked a legitimate basis for destroying the documents, had engaged in spoliation, and that the crime/fraud exception therefore applied to documents relating to the development of the plaintiff's document retention policies. *Id*. at 296-98.

Here, Plaintiffs seek to establish that Martorello participated in criminal or fraudulent conduct based on general references to other tribal lending-related lawsuits and weightless observations about internet payday lenders. Plaintiffs' vague and conclusory allegations fail to meet the evidentiary burden applied in *Rambus* and do not stand up to the record in this case. Plaintiffs have not met their burden of establishing a *prima facie* case that Martorello was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel and therefore, have failed to establish the first prong of the crime/fraud analysis.

**2. Plaintiffs have not shown that the privileged communications at issue bear a close relationship to an existing or future scheme to commit a crime or fraud.**

Under prong two, Plaintiffs must show that the privileged communications at issue bear a close relationship to the alleged existing or future scheme to commit a crime or fraud. *In re Grand Jury Proceedings #5*, 401 F.3d at 255. In making this determination, the Court must

either review the privileged documents *in camera* or have some other means to determine that the communications at issue are connected to the alleged crime or fraud, such as by reviewing summaries of the privileged communications or through testimony or an appropriate proffer. *See id.* (holding that trial court abused its discretion in applying crime/fraud exception because the trial court did not review the relevant communications and had no basis on which to conclude that the documents were connected to a crime or fraud).

Once again, Plaintiffs rely on broad, unsupported statements that this prong is met simply by the nature of the lending business being Native American and governed by tribal law. According to Plaintiffs, because this matter involves a tribal lending business, any act Martorello took in relation to the lending business must have been criminal and any attorney-client communication related to the business must have been in furtherance of such criminal activity. Plaintiffs thus claim all attorney-client and work product privileges are extinguished, but do not even attempt to show a relationship between any specific documents or information they seek and the purported criminal or fraudulent activity allegedly engaged in by Martorello. Simply because Plaintiffs demand everything does not mean they can succeed while proving nothing.

Further, as previously noted, Plaintiffs simply *presume* that Martorello's attorneys provided advice similar to the advice provided by Callaway in *CashCall.* Plaintiffs cannot meet their burden through mere conjecture as to the content and purpose of Martorello's consultations with his attorneys. *See Stonewall Jackson Hosp.*, 635 F. Supp. 2d at 446-47 (W.D. Va. 2009) (rejecting application of crime/fraud exception based on mere speculation). And again, even if the content and purpose of Martorello's consultations with his attorneys were similar to the advice rendered in *CashCall,* that by itself is insufficient to show that the advice was sought or

provided in furtherance of a crime or fraud. Because Plaintiffs fail to satisfy the second prong of the analysis, their demand for disclosure under the crime/fraud exception must be rejected.

Relatedly, Plaintiffs also make no effort to limit their overbroad request for forced disclosure of privileged material based on date or subject matter. Even if Plaintiffs were able to make a *prima facie* case under the crime/fraud exception, which they cannot, their demand leaves no room for distinguishing between communications that bear a relationship to the alleged misconduct and other communications, such as communications addressing past misconduct to which the crime/fraud exception does not apply. *See United States v. Zolin*, 491 U.S. 554, 562 (1989) (observing that the purpose of the attorney-client privilege is that "clients be free to make full disclosure to their attorneys of past wrongdoings"). Martorello's involvement in the lending business ended in 2016. Therefore, any privileged materials or work product made after that time would fall outside the scope of the crime/fraud exception.

Plaintiffs' demand for disclosure also seeks to compel production of attorney work product, including opinion work product. While the crime/fraud exception typically looks only to the mental state of the client to determine when the privilege has been waived, the opinion work product privilege is held both by the client *and* the attorney, and therefore "those seeking to overcome the opinion work product privilege must make a prima facie showing that 'the attorney in question was aware of or a knowing participant in the criminal conduct.'" *In re Grand Jury Proceedings #5*, 401 F.3d at 252. Not surprisingly, Plaintiffs' sweeping demand for privileged documents makes no distinction between the types of work product that it claims should be disclosed and does not address whether the relevant attorneys possessed the necessary mental state for their opinion work product to be disclosed.

Accordingly, because Plaintiffs have failed to carry their burden of making a *prima facie* showing that the crime/fraud exception applies, their motion to compel on that basis must be denied. But even if the Court could find that Plaintiffs have made a *prima facie* showing under the exception, the scope of the waiver would need to be narrowly circumscribed and limited only to documents and information bearing a close relationship to the purported crime or fraud.

**D. Plaintiffs' request for a finding of spoliation is premature and unsupported.**

Plaintiffs' request for an advisory finding of spoliation is premature and unsupported. First, the Court recently issued an Order, Dkt. No. 326, expressly providing for additional discovery on this issue, including several depositions regarding the location of potentially relevant documents and information, the process by which such information has or can be gathered, and the identities of third parties who may be in possession of information that can be restored. The Order further provides that should additional parties with knowledge of these topics be identified, such individuals may also be deposed. Although these depositions likely will not fully answer why the Tribal Defendants destroyed Martorello's emails after Bellicose was sold to the Tribe, it is anticipated that the depositions will establish that Martorello was not involved in that decision-making process and did not otherwise spoliate evidence.

Second, Plaintiffs' request is based on the singular assertion that *to date*, none of the Defendants have explained why Martorello's emails were deleted *by LVD or the Tribal Defendants* shortly after LVD acquired Bellicose. Plaintiffs try to impute the Tribal Defendants' conduct to Martorello through a contorted interpretation of the Merger Agreement's requirement that upon closing of the sale transaction, all Bellicose information, including the valuable intellectual property, models, and procedures that they purchased, was to be provided to LVD and any copies were to be deleted *by the transferor*—a standard and commonsense provision in transaction documents such as this. Plaintiffs do not cite any testimony, fact or expert, to support

their contention that the only possible purpose for such a provision is the nefarious destruction of documents or that the provision is anything other than standard merger agreement language.

Plaintiffs bear the burden of proving spoliation. *E.I. du Pont de Nemours & Co. v. Kolon Indust., Inc.*, 803 F. Supp. 2d 469, 498 (E.D.Va. 2011). To meet their burden, Plaintiffs must show: (1) that Martorello destroyed, altered, or failed to preserve evidence; (2) that he did so at a time when he had an obligation to these Plaintiffs to preserve that evidence; (3) that he did so with a culpable mental state; and (4) that the spoliated evidence was "relevant." *Goodman v. Praxair Servs., Inc.,* 632 F. Supp. 2d 494, 509 (D.Md. 2009). Plaintiffs must adduce probative evidence, not "the hyperbole of argument." *E.I. du Pont*, 803 F. Supp. 2d at 498.

Plaintiffs do not identify a single document, email, or other piece of relevant information that Martorello allegedly destroyed, altered, or failed to preserve, let alone provide sufficient evidence to establish that Martorello spoliated any evidence. The only destruction they cite in support of their motion is the destruction of Martorello's emails *by LVD or the Tribal Defendants* and Greenberg Traurig's deletion of their client files *at the direction of LVD*. *See* Pls. Mot. at 19, 25. Martorello expects that the upcoming deposition of former Ascension employee Adil Karam will show that the email from the Tribal Defendants' lawyer about what the Tribal Defendants may have done with Martorello's emails after the sale (Pls.' Ex. 19) is not even correct as to why Martorello's emails were apparently deleted.

With respect to Greenberg Traurig, Plaintiffs disingenuously ignore that portion of Attorney Weddle's declaration in which she explicitly states that it was LVD, not Martorello, that directed Greenberg Traurig to delete its client files:

> 7. Upon receipt of notice of the merger from Bellicose, I contacted counsel for the Tribe, as the acquirer, and inquired if the Tribe wished to retain Greenberg Traurig as counsel for Bellicose and if not, I requested to know the Tribe's instructions as to its files in Greenberg Traurig's custody. The Tribe advised me

> that it would not engage Greenberg Traurig going forward and did not desire to review or transfer our files because they understood them to be working files and/or duplicative of documents they had already acquired as a result of the 2015 sale. *The Tribe directed that we delete the files in our possession* consistent with the sale documents, with respect to which GT represented no party and was provided only after the transaction closed.

*See id.,* Ex. 3, Weddle Decl. ¶ 7 (emphasis added).

But even if Plaintiffs had provided evidence of Martorello's deletion or alteration of evidence (which they have not), such actions would be irrelevant absent Plaintiffs also establishing that, at the time he allegedly did so, Martorello was under a duty to these Plaintiffs to preserve that evidence. While Plaintiffs' present a hash of dates, Plaintiffs never actually proffer, let alone prove, a specific date on which an alleged duty to preserve attached. At its core, Plaintiffs' argument appears to be that Martorello was on notice of regulatory action and other litigation affecting certain members of the small-dollar lending industry at some time in 2013 and 2014. This fact, however, falls far short of establishing a duty to preserve.

Generalized notice of possible regulatory action does not trigger an omnibus duty to preserve. Plaintiffs must, but have not, established that Martorello owed *Plaintiffs* a duty to preserve prior to Plaintiffs initiating this lawsuit. Even if it could be said based on an email dated more than two years prior to the completion of the data transfer to LVD that Martorello "reasonably anticipated" regulatory action, his concomitant duty to preserve would run to the regulators, not Plaintiffs. *See, e.g. In re Delta/Air Tran Baggage Fee Antitrust Litigation,* 770 F.Supp.2d 1299 (N.D. Ga. 2011) (private plaintiffs in later antitrust lawsuit could not enforce putative preservation duty arising out of earlier DOJ investigation); *Point Blank Solutions, Inc. v. Tyobo Am., Inc.,* 2011 WL1456029, at *23 (S.D. Fla. April 5, 2011) (preservation duties owed to Governmental entities and other private plaintiffs did not extend to plaintiff); *Brigham Young Univ. v. Pfizer, Inc.*, 282 F.R.D. 566, 572 (D. Utah 2012) (similar) . While Plaintiffs might argue

that a preservation duty, once allegedly triggered, runs to all potential claimants, that overbroad notion has been flatly rejected. *See, e.g., Brigham Young Univ.*, 282 F.R.D. at 572 (rejecting asserting that the duty to preserve runs to the legal system generally).

Finally, Plaintiffs cannot meet their burden of demonstrating the relevance of any documents allegedly destroyed by Martorello because there is no evidence Martorello spoliated evidence. Given the absence of proof of all of the required elements, Plaintiffs' request for a finding that spoliation occurred is nothing more than an appeal for an advisory ruling based on what Plaintiffs hope they may, but are unlikely to find during the upcoming depositions. Such a request is improper and should be summarily rejected.

## IV. CONCLUSION

LVD, like all federally recognized Native American tribes, is a nation with sovereign rights. That sovereignty permits LVD to adopt laws and operate businesses in support of its economic development that are governed by Tribal law and not state law. LVD's lending businesses are not a RICO enterprise designed to evade state usury laws, but a rightful exercise in sovereignty, and supported by numerous federal policies. Neither Martorello nor LVD's officials and employees, banks, credit bureaus, attorneys, or others that did business with them, are racketeers, nor have they engaged in any crime or fraud in this matter. Put simply, state usury laws do not apply to the loans at issue, no crime or fraud occurred, and Martorello has spoliated no evidence. Accordingly, Plaintiffs' motion must be denied.

Respectfully submitted,

By: /s/ *John M. Erbach*

**ARMSTRONG TEASDALE LLP**
Richard L. Scheff (pro hac vice)
Jonathan P. Boughrum (pro hac vice)
Michael C. Witsch (pro hac vice)
1500 Market St., 12th Fl., East Tower

Philadelphia, PA 19102
(215) 246-3479
rscheff@armstrongteasdale.com

Michelle L. Alamo (pro hac vice)
4643 S. Ulster Street, Suite 800
Denver, CO 80237
malamo@armstrongteasdale.com

**SPOTTS FAIN, PC**
M.F. Connell Mullins, Jr. (VSB No. 47213)
cmullins@spottsfain.com
Hugh McCoy Fain, III (VSB No. 26494)
hfain@spottsfain.com
John Michael Erbach (VSB No. 76695)
jerbach@spottsfain.com
411 East Franklin St., Suite 600
Richmond, VA 23219
Telephone: (804) 697-2000
Facsimile: (804) 697-2100

**CERTIFICATE OF SERVICE**

The undersigned counsel of record hereby certifies that on this 11th day of February, 2019, I filed the foregoing and all associated exhibits electronically using the Court's CM/ECF system, which will notify all counsel of record accordingly.

/s/ *John M. Erbach*
John Michael Erbach (VSB No. 76695)
jerbach@spottsfain.com
SPOTTS FAIN, P.C.
411 East Franklin Street, Suite 600
Richmond, VA 23219
Telephone: (804) 697-2000
Facsimile: (804) 697-2100