UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ISIAH A. JONES, III, individually and on behalf of all others similarly situated, Plaintiff, vs. JOSEPH WILDCAT, Sr., NICOLE CHAPMAN-REYNOLDS, EDMUND PETERSON, CHRIS SOULIER, PATRICIA MARQUEZ, PHILLIP CHAPMAN, Jr., DAROLD LONDO, RANDY SOULIER, MELISSA DOUD, JESSI PHILLIPS LORENZO, and JUANITA HUGULEY a/k/a JUANITA GEORGE-HUGULEY, Defendants.	Civil Action No. 2:19-cv-02493-JS

Defendant President Joseph Wildcat, Sr. ("President Wildcat"), moves the Court to dismiss Plaintiff's Complaint as follows:

(1) under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction;

(2) under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction;

(3) under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted; and

(4) under Fed. R. Civ. P. 12(b)(7) for failure to join a party under Rule 19.

This motion is based upon the attached memorandum of law and all of the files, records, and proceedings in this case.

Respectfully Submitted,

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Dated: August 30, 3019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Isiah A. Jones, III, for himself and others similarly situated,

Plaintiff,

v. Court File No.: 19-cv-2493-JS

Joseph Wildcat, Sr.; Nicole Chapman-Reynolds; Edmund Peterson; Chris Soulier; Patricia Marquez; Phillip Chapman, Jr.; Darold Londo; Randy Soulier; Melissa Doud; Jessi Phillips Lorenzo; & Juanita Huguley a/k/a Juanita George-Huguley, all defendants named solely in their individual capacity,

Defendants.

Memorandum of Law in Support of Motion to Dismiss or Transfer Suit

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Introduction

Isiah Jones, III, applied for and received a $400 loan from an economic arm and instrumentality of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin (the Tribe), a federally recognized Indian tribe. Now, unhappy with the loan's interest rate and fees, Jones seeks redress in this Court. And in an effort to circumvent the Tribe's and its economic arm's sovereign immunity, he targets tribal officials, including President Joseph Wildcat, Sr., under the Racketeering Influenced and Corrupt Organizations Act (RICO) and state law. But Jones's allegations demonstrate that he has no claim for relief and that President Wildcat is not the real party in interest to this suit and not properly brought before this Court. Therefore, President Wildcat respectfully asks the Court to dismiss the claims against him.

Statement of Facts

According to the Complaint, in November 2017, Jones applied for and received a $400 loan from RadiantCash, an assumed name of Ishwaaswi, LLC. *Compl*. ¶¶ 30, 34; *id.* Ex. P-4. As the loan agreement states, Ishwaaswi is "an economic-development arm of, instrumentality of, and a limited liability company wholly-owned and controlled by, the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin," a federally recognized Indian tribe. *Id.* ¶ 18; *id.* Ex. P-4 at 001; *see also* Indian Entities Recognized by & Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200, 1202 (Feb. 1, 2019).[1] The relationship between the Tribe and Ishwaaswi is formed through a chain of ownership: the Tribe wholly owns the LDF Business Development Corporation, which wholly owns LDF Holdings, LLC, which wholly owns Ishwaaswi. *Compl*. ¶¶ 19-21; *id.* Exs. P-2 at 015, P-3 at 001. As will be

[1] An "economic-development arm" (also known as an "economic arm" or "arm of the tribe") is a tribally created entity—often a business or enterprise—through which a tribe engages in commerce to support its self-sufficiency. *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176 (4th Cir. 2019). An economic arm shares in its founding tribe's sovereign immunity. *Id.*

discussed further, *infra* at part V, each of these entities is an economic arm of the Tribe. They are organized under tribal law to foster the Tribe's governmental self-sufficiency and economic development. *See infra* at part V; *see also* Ch. 44a: Tribally-Owned Business Organization Code § 44a.201.[2] They operate on the Lac du Flambeau Indian Reservation. *Exs*. P-1 at 005, P-2 at 001, 008-010, P-4 at 001. They generate revenue that is used solely to foster further tribal economic development and fund the Tribe's governmental services. *Wildcat Decl*. ¶ 14.

President Wildcat is the elected Tribal Council President. *Compl*. ¶ 2; LDF Const. art. III, §§ 2-3. But he is not an officer or employee of Ishwaaswi or LDF Holdings, he does not make decisions regarding their operations, and he does not participate in processing, servicing, or collecting on their loans. *Wildcat Decl*. ¶¶ 17-21.

When Jones signed for his loan from Ishwaaswi, he agreed that "[t]he laws of the Tribe and applicable federal law will govern this Loan Agreement, without regard to the laws of any state or other jurisdiction." *Complaint*, Ex. P-4 at 003. The loan agreement calls out the applicable tribal law, specifically Chapter 94: Tribal Consumer Financial Services Regulatory Code (the Code). Under the Code, creditors can charge interest up to "fifty dollars ($50.00) per one hundred dollars ($100.00) of principal per installment period," as well as certain fees. *Code* § 8.3(d), (f). Jones does not allege that the loan agreement charged higher interest and fees than allowed under the Code, and, indeed, it did not.

The Code further provides dispute-resolution procedures, which Jones also agreed to abide by for any and all disputes, including:

- "all U.S. federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to this Loan Agreement";

[2] The Tribe's laws are publicly available. Tribal Ordinances: Table of Contents (2019), *available at* https://www.ldftribe.com/pages/23/Court-Ordinances/.

- "all claims . . . against the Tribe, Us and/or any of our employees, agents, directors, officers, governors, managers, members, parent company or affiliated entities"; and

- "all claims, disputes, or controversies arising from or relating directly or indirectly to this Tribal Dispute Resolution provision . . . , the validity and scope of this Provision and any claim or attempt to set aside this Provision."

Compl. Ex. P-4 at 004; *see* Code § 10. Under the dispute-resolution provision, Jones had three levels of review for any disputes. First, he could contact Ishwaaswi management. *Compl*. Ex. P-4 at 004; *see* Code § 10. Second, if he was dissatisfied with the resolution, he could write a request for review by the Tribal Consumer Financial Services Regulatory Authority. *Id.* Third, if he was still dissatisfied, he could file an appeal with the Lac du Flambeau Tribal Court. *Id.*

During the application process, Jones alleges that he interacted with LDF Holdings. *Compl*. ¶ 32. And he alleges that Ishwaaswi and LDF Holdings handled the application processing. *See id.* ¶¶ 31-34. Nowhere in the Complaint does Jones allege that President Wildcat had any involvement in or even knowledge of his loan application or its processing.

During performance on the loan, Jones alleges that Ishwaaswi and LDF Holdings conducted all aspects of the loan servicing. *Id.* ¶¶ 35-36, 38-40. And after he decided to stop making payments on the loan, Jones alleges that Ishwaaswi contacted him to collect. *Id.* ¶ 42. Again, Jones makes no allegation that President Wildcat had any involvement in or even knowledge of his loan or its servicing and collection.

At some point, Jones learned that the loan agreement did not comport with Pennsylvania usury laws. Although he previously disclaimed application of those laws, *id.* Ex. P-4 at 003, he chose to seek redress under them. And instead of following the dispute-resolution provision in the loan agreement and the Code, he brought an action directly to this Court. Finally, instead of bringing his action against Ishwaaswi and LDF Holdings—both of which share the Tribe's

sovereign immunity—he brought it against tribal officials, under the theory that they conspired to violate and did violate Pennsylvania's usury laws and, therefore, also RICO. *See id.* ¶¶ 51-76.

Though President Wildcat was completely uninvolved in processing, servicing, or collecting on the loan, Jones included him among the targeted tribal officials. According to Jones, President Wildcat's "believed . . . role" in the alleged unlawful-debt-collection scheme has been threefold. First, he was allegedly responsible for "choosing board members for the LDF Tribe's business development corporation." *Id.* ¶ 3. Second, he was allegedly responsible for "authorizing, ratifying, or promoting the LDF Tribe's policy of collecting unlawful debt from citizens of Pennsylvania." *Id.* ¶ 3. Third, and finally, he allegedly had "a role in the LDF Tribe's use of funds generated by its internet lending and loan servicing businesses." *Id.* ¶ 3.

Argument

I. This Court must dismiss Jones's suit, because President Wildcat is immune from it.

Although Jones claims that he is suing President Wildcat in his individual capacity, his complaint strongly suggests otherwise. But regardless of whether this is an official-capacity suit or an individual-capacity suit, President Wildcat is immune from it.

Against an official-capacity suit, sovereign immunity is the barrier, and Rule 12(b)(1) is the vehicle for dismissal, because sovereign immunity is a jurisdictional question. *Brobst v. United States*, 659 Fed. App'x 135, 137 (3d Cir. 2016). A Rule 12(b)(1) motion may be treated as a facial or factual challenge to subject-matter jurisdiction. In reviewing a factual attack, as is the attack brought in this case, "the plaintiff has the burden of proof that jurisdiction does in fact exist, the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case, and no presumptive truthfulness attaches to the plaintiff's allegations." *Hartig Drug Co. Inc. v. Senju Pharm. Co. Ltd.*, 836 F.3d 261, 268 (3d Cir. 2016) (quotations omitted).

Against an individual-capacity suit, qualified immunity is the barrier, and Rule 12(b)(6) is the vehicle for dismissal. *See, e.g.*, *Thomas v. Independence Twp.*, 463 F.3d 285, 291 (3d Cir. 2006). In reviewing a Rule 12(b)(6) motion, "the court must accept as true all factual allegations in the complaint and draw all inferences in the light most favorable to the plaintiff." *Noonan*, 305 F. Supp. 3d at 592. But courts may also consider "exhibits attached to the complaint and matters of public record," *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993), and they are free to disregard "unsupported conclusions and unwarranted inferences." *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007). Indeed, they should not accept "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead facts to support a claim that is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Ashcroft*, 556 U.S. at 679. This standard requires both that the alleged facts be plausible, and that they support a cause of action. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive legal issue.").

A. President Wildcat shares the Tribe's sovereign immunity from suit.

A suit against governmental employees in their official capacities is the same as a suit directly against the government, and "[d]efendants in an official-capacity action may assert sovereign immunity." *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017) (internal citations omitted) (discussing distinction between governmental and personal immunities in individual-capacity action against a tribal employee). Jones alleges that he brings this action against various tribal officials, including President Wildcat, in their personal capacities, that this is an individual-

capacity suit, and that his sought relief will come solely from the named tribal officials. *See* Compl. ¶ 17. He will surely rely on *Lewis* for the argument that by naming President Wildcat and the other tribal officials in their individual capacities, he can successfully sidestep the Tribe's (including its economic arms') sovereign immunity. President Wildcat challenges Jones's allegations and overbroad reading of *Lewis*.

Lewis arose out of a car accident on an interstate highway on state lands. *Id.* at 1291. The plaintiffs brought a negligence claim against the tribal employee responsible for the accident and, notably, requested relief that did "not require action by the sovereign or disturb the sovereign's property." *Id.* Because of that, the Court ruled that sovereign immunity did not protect the employee. *Id.* at 1292. That outcome made sense, because there was no argument that the tribe directed or authorized its employees to drive negligently and, therefore, the tribe would not have to change its operations or policies to account for a judgment against the employee.

This is not *Lewis*. President Wildcat is not just an employee of the Tribe. He was elected by the Tribe's membership as Tribal Council President. *Compl*. ¶ 2; *Wildcat Decl*. ¶ 7; LDF Const. art. III, § 2. In that position, he is vested with constitutional powers and responsibilities. *See* LDF Const. art. III, §§ 2-3; LDF Bylaws art. 1, § 1. President Wildcat conducts his work on the Reservation, not state land, except as it pertains to intergovernmental relations. LDF Const. art. 1, § 2; Wildcat Decl. ¶ 8. Lastly, and most importantly, the relief Jones seeks would require action by the Tribe and its economic arms and disrupt its property.

As the head of the Executive Council, President Wildcat is charged with implementing certain policies of the Tribal Council. *Wildcat Decl*. ¶ 11. One of its policies is to generate diverse revenue streams through its economic arms. *Id.* As Justice Sotomayor has said,

> [T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe

> can raise revenues. This is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means.

Michigan v. Bay Mills Indian Community, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring).

If this Court were to grant Jones the relief he seeks, President Wildcat and the Tribal Council would be forced to direct these economic arms to cease any lending activities in Pennsylvania and perhaps elsewhere. This would significantly impair the economic arms' abilities to generate sufficient revenue for the Tribe, jeopardizing essential governmental services that the Tribe offers its members and surrounding community. *See* Wildcat Decl. ¶¶ 9-10. Thus, while Jones may argue that he only seeks relief from President Wildcat and the other named tribal officials, the relief he seeks would compel action by the Tribe and its economic arms, impair development, and impact the treasury. For this reason, President Wildcat is not the real party in interest; the Tribe and its economic arms are. Therefore, the traditional sovereign-immunity framework settled by decades of U.S. Supreme Court precedent applies.[3]

The Tribe (including its economic arms) is a sovereign nation pre-dating the U.S. Constitution, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), and is subject to suit only when Congress or the tribe has waived its sovereign immunity. *Kiowa Tribe of Oklahoma v. Mfg. Technologies*, 523 U.S. 751, 973 (1998); *see also Bay Mills*, 572 U.S. at 788-89. Significantly, "[t]he baseline position . . . is tribal immunity; and to abrogate such immunity, Congress must unequivocally express that purpose." *Bay Mills*, 572 U.S. at 790.

[3] To the extent that this Court has already relied on *Lewis* for the position that a tribal lending entity's manager can be sued in his individual capacity in *Pennachietti v. Mansfield*, No. 17-2582, 2017 WL 6311646 (E.D. Pa. Dec. 11, 2017), that prior decision is not binding precedent, *Superior Precast, Inc. v. Safeco Ins. Co. of Am.*, 71 F. Supp. 2d 438, 449 (E.D. Pa. 1999), and is, in fact, contrary to other recent decisions of this Court. *Compare Pennachietti*, 2017 WL 6311646, *with Bynon v. Mansfield*, No. 15-206, 2015 WL 2447159 (E.D. Pa. May 21, 2015), *and Pennsylvania ex rel. Shapira v. Think Finance, LLC*, No. 18-mc-169, 2018 WL 2635750 (E.D. Pa. Sept. 26, 2018).

The Tribe has not waived its sovereign immunity for Jones's suit against President Wildcat. Indeed, Jones, who bears the burden of proving that subject-matter jurisdiction is present, *Government Employees Insurance Co. v. Nealey*, 262 F. Supp. 3d 153, 172 (E.D. Pa. 2017), has not pleaded any such waiver.

RICO does not unequivocally abrogate tribal sovereign immunity. In fact, it does not mention Indian tribes at all, and "there is not one example in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute." *In re Greektown Holdings, LLC*, 532 B.R. 680, 693 (E.D. Mich. 2015) (emphasis in original). Under RICO, it is unlawful for any "person" to engage in certain conduct, 18 U.S.C. § 1962, and the definition of "person" includes "any individual or entity capable of holding a legal or beneficial interest in property," 18 U.S.C. § 1961(3). Courts have repeatedly found that definitions that do not include tribes cannot be expanded beyond their plain language in light of both the strict rules about explicit abrogation of tribal sovereign immunity and the "general principle that statutes are to be interpreted to the benefit of Indian tribes." *In re Whitaker*, 474 B.R. 687, 695 (8th Cir. BAP 2012) (concluding that Congress did not unequivocally express its intent to abrogate tribal sovereign immunity in the Bankruptcy Code by waiving sovereign immunity for "governmental units," which included "foreign or domestic government[s]"); *see also Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 820, 820, 827 (7th Cir. 2016) (concluding that Congress did not unequivocally express its intent to abrogate tribal sovereign immunity in the Fair and Accurate Credit Transaction Act where "person" was defined to mean "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity" (quoting 15 U.S.C. § 1681a(b))).

One court has already concluded that RICO does not abrogate tribal sovereign immunity for tribal entities *or tribal officials*. In *Smith v. Babbitt*, the plaintiff sued the tribal governing body *and certain tribal officials*—in their official *and individual capacities*—under RICO. 875 F. Supp. 1353, 1356 (D. Minn. 1995). The court dismissed the claims against all of the defendants—including the tribal officials—explaining that "RICO contains no language which suggests Congress 'unequivocally' waived Indian tribes' sovereign immunity." *Id.* at 1365.

Because neither the Tribe nor Congress have authorized Jones's claims against President Wildcat, this Court must dismiss them for lack of subject-matter jurisdiction.

B. Alternatively, President Wildcat is entitled to qualified immunity.

Even if this Court concludes that this is an individual-capacity suit against President Wildcat, he is still immune. When sued in their individual capacities, tribal officials—like officials of state and federal governments—are protected by personal immunities when the relevant criteria are met. In *Kennerly v. United States*, the court upheld dismissal of a *Bivens* action against tribal officials because it found that, assuming tribal officials could be subject to a *Bivens* suit when acting in concert with federal officials, "the individual tribal officials would be entitled to the same qualified immunity accorded state and federal officials in section 1983 and *Bivens* actions." 721 F.2d 1252, 1259 (9th Cir. 1983). In *Penn v. United States*, the court upheld the application of personal immunity (in the form of absolute immunity) to a tribal-court judge who had issued a temporary restraining order excluding the plaintiff from the reservation. 335 F.3d 786, 789 (8th Cir. 2003). Similarly, in *Hester v. Redwood County*, the court found that a tribal police officer was entitled to qualified immunity. 885 F. Supp. 2d 934, 945 (D. Minn. 2012). Thus, tribal officials, like President Wildcat, are protected by qualified immunity the same way state and federal officials are.

"Qualified immunity is not merely a defense, but is an entitlement not to stand trial or face the other burdens of litigation." *Miller v. Clinton County*, 544 F.3d 542, 547 (3d Cir. 2008) (quotation omitted). "[A]nd like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). "Therefore, any claim of qualified immunity must be resolved at the earliest possible stage of litigation," *Miller*, 544 F.3d at 547, "to avoid subjecting government officials . . . to the costs of trial or to the burdens of . . . discovery." *Mitchell*, 472 U.S. at 526. Importantly, a plaintiff bears the burden to overcome an official's qualified immunity. *Davis v. Scherer*, 468 U.S. 193, 197 (1984).

In *Harlow v. Fitzgerald*, the Supreme Court established an objective test for applying qualified immunity: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982). Stated more succinctly, "qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017) (quotation omitted).

Courts ask two related questions when assessing a claim of qualified immunity: (1) whether "reasonable officials . . . at the relevant time could have believed, in light of what was in the decided case law, that their conduct would be lawful"; and (2) "where the officials clearly should have been aware of the governing legal principles," whether "based on the information available to them they could have believed their conduct would be consistent with those principles." *Good v. Dauphin County Social Services for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989). Significantly, "if [the Third Circuit] has not decided a particular question . . . and several other courts have reached inconsistent outcomes on relatively similar facts . . . , the right

at issue cannot be clearly established," and qualified immunity must apply. *Atkinson v. Taylor*, 316 F.3d 257, 278 (3d Cir. 2003).

Here, Jones has not and cannot show that President Wildcat violated a "clearly established right." As will be discussed, *infra* at part IV. A, Jones has not alleged that President Wildcat had any involvement in processing, servicing, or collecting on Jones's loan sufficient to implicate him in any of the claims Jones has brought. Moreover, *infra* at part IV. B, even if this Court accepted the broad conclusion that President Wildcat was involved, the loan agreement was not subject to Pennsylvania's usury laws, and, therefore, President Wildcat could not violate those laws. Furthermore, those laws cannot serve as a basis for Jones's claims against President Wildcat under RICO. Finally, *infra* at part IV.C, Pennsylvania's usury laws do not support a claim against President Wildcat, because Ishwaaswi, LDF Holdings, the LDF Business Development Corporation, and the Tribe received the alleged usury interest, not President Wildcat. And even if the Court disagrees with these arguments, Jones cannot argue that only the "plainly incompetent or those who knowingly violate the law" would have acted as President Wildcat did, because the law on these issues and facts is not settled by the Third Circuit.

Therefore, the Court must dismiss Jones's claims against President Wildcat.

II. This Court must dismiss Jones's suit, because President Wildcat is not subject to this Court's personal jurisdiction.

Under a motion to dismiss for lack of personal jurisdiction, courts must "accept as true the allegations of the pleadings and all reasonable inferences therefrom" and "resolve all factual disputes in favor of the plaintiff." *Brown & Brown, Inc. v. Cola*, 745 F. Supp. 2d 588, 602 (E.D. Penn. 2010). But courts must also consider affidavits or declarations submitted by the parties. *Id.*

Once a motion to dismiss under Rule 12(b)(2) is raised, the nonmovant must "present a *prima facie* case that jurisdiction exist[s]." *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 94 (3d

Cir. 2004). The nonmovant can meet this burden through "competent evidence that show sufficient contacts with the forum state to establish personal jurisdiction." *Cola*, 745 F. Supp. at 602. But the moving party's contacts "must be established with reasonable particularity." *Id.*

Fed. R. Civ. P. 4(e) "authorizes personal jurisdiction over non-resident defendants to the extent permissible under the law of the state where the district court sits." *Mellon Bank (E.) PSFS, Nat. Ass'n v. Farino*, 960 F.2d 1217, 1221 (3d Cir. 1990). Pennsylvania's long-arm statute "permits the courts of that state to exercise personal jurisdiction over nonresident defendants to the constitution limits of the due process clause under the fourteenth amendment." *Id.* Under that framework, courts can exercise general or specific jurisdiction over a party.

A court has general jurisdiction if the defendant's "affiliations" with the forum state are "so continuous and systematic as to render them essentially at home in the forum State." *Isaacs v. Arizona Bd. of Regents*, 608 Fed. App'x 70, 74 (3d Cir. 2015) (quotation omitted). Here, President Wildcat resides on the Reservation in Wisconsin. *Wildcat Decl*. ¶ 2. He owns no property in Pennsylvania and does not otherwise visit or engage in personal business in Pennsylvania that would make him "at home" in that state. *Id.* ¶¶ 3-5.

A court has specific jurisdiction if it "is satisfied that the relationship among the defendant, the cause of action, and the forum falls within the 'minimum contacts' framework first announced in *International Shoe Co. v. Washington*." *Mellon Bank*, 960 F.2d at 1221.

> In general, a district court analyzing its specific jurisdiction over a particular claim must conduct a three-part inquiry. First, the court asks whether the defendant purposefully directed his activities at the forum. Second, the court determines whether the plaintiff's claim arises out of or relates to at least one of those specific activities. Third, and finally, courts may consider additional factors to ensure that the assertion of jurisdiction otherwise comports with fair play and substantial justice.

Vizant Techs., LLC v. Whitchurch, 97 F. Supp. 3d 618, 628 (E.D. Pa. 2015) (quotations omitted) (citations omitted). Even in suits under RICO, a defendant must "have sufficient minimum

contacts with the forum state in order for a district court in that state to exercise specific jurisdiction over them." *Id.* at 630. Here, President Wildcat does not have sufficient minimum contacts with Pennsylvania to support specific jurisdiction. Jones has not alleged any conduct that President Wildcat directed to Pennsylvania. Rather, based on his "belie[f]," he has alleged vague categories of conduct that, even if true, President Wildcat would have directed internally within the Tribe and the Reservation, not to Pennsylvania. For instance, *if* President Wildcat chose "board members for the LDF Tribe's business development corporation," his choices would be made on the Reservation and directed to the Tribe, not Pennsylvania. *See* Compl. ¶ 3; *see also* Wildcat Decl. ¶¶ 8, 11, 13. Similarly, *if* President Wildcat "authoriz[ed], ratif[ied], or promot[ed] the LDF Tribe's policy of collecting unlawful debt," those actions would have been directed internally to the Tribe and on the Reservation. *See* Compl. ¶ 3; *see also* Wildcat Decl. ¶¶ 8, 13, 17-22. Finally, *if* President Wildcat "ha[d] a role in the LDF Tribe's use of funds generated by its internet lending and loan servicing," that role would have been conducted on the Reservation, after those funds had already reached the Tribe's treasury in the Reservation. *See* Compl. ¶ 3; *see also* Wildcat Decl. ¶¶ 8, 9-10, 14-15. None of Jones's allegations regarding President Wildcat support the existence of personal jurisdiction.

Because President Wildcat has no contacts with Pennsylvania, this Court lacks personal jurisdiction over him and should dismiss the claims against him.

III. This Court must dismiss Jones's suit, because he agreed to a dispute-resolution clause.

Generally, "[w]hen the parties' agreement contains a valid forum selection clause designating a particular forum for settling disputes arising out of their contract, 12(b)(6) dismissal is a permissible means of enforcing that forum selection clause." *Kahn v. Am. Heritage Life Ins. Co.*, 324 F. Supp. 2d 652, 655 (E.D. Pa. 2004). And, in the circumstance "when a forum selection clause specifies a non-federal forum" a court has "*no choice but to dismiss the*

action . . . so long as dismissal would be in the interests of justice." *Salovaara v. Jackson Nat. Life Ins. Co.*, 246 F.3d 289, 298 (3d Cir. 2001) (emphasis added).

A forum-selection clause must be enforced unless (1) "the clause itself is invalid for such reasons as fraud or overreaching," (2) "enforcement would contravene a strong public policy of the forum," or (3) "the party seeking to escape his contract [shows] that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 16, 18 (1972). In their deliberations, courts should consider the parties' intentions, particularly where the consequences of the forum-selection clause figured into the negotiations. *See id.* at 13-14.

Here, Jones agreed to a dispute-resolution procedure that is called out in the loan agreement and described in the Code. *Compl*. Ex. P-4 at 004; Code § 10. The dispute-resolution clause applies to all disputes under the loan agreement, including federal- or state-law claims and claims against officers of the Tribe or its economic arms. *Compl*. Ex. P-4 at 004. It is an essential provision in the loan agreement. *See id.*

Nowhere has Jones alleged that he has complied with this provision or followed the dispute-resolution procedures in the Code. Furthermore, Jones did not allege that the dispute-resolution provision is unenforceable. Indeed, he has not alleged fraud or overreaching. He has not alleged a public policy that the dispute-resolution provision would violate. And he has not alleged that resolving his dispute under the Code would be so difficult and inconvenient as to deprive him of his day in court. Therefore, this Court must enforce the dispute-resolution provision in the loan agreement and dismiss Jones's claims against President Wildcat.[4]

[4] Additionally, Jones agreed that he was "GIVING UP [HIS] RIGHT TO SERVE AS A REPRESENTATIVE . . . AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT OR ARBITRATION." Comp. Ex. P-4 at 005.

IV. This Court must dismiss Jones's suit, because Jones has failed to state a claim.

Jones's allegations not only fail to support jurisdiction, they are woefully insufficient to support his claims against President Wildcat. As previously discussed, *supra* at part I, under Rule 12(b)(6) a court should dismiss a claim if the pleaded facts that support a cause of action, *Neitzke*, 490 U.S. at 326, that is "plausible on its face," *Twombly*, 550 U.S. at 570. In its review, a court may consider "exhibits attached to the complaint and matters of public record," *Pension Benefit Guar.*, 998 F.2d at 1196, and are free to disregard "unsupported conclusions and unwarranted inferences." *Baraka*, 481 F.3d at 195. And it should not accept "naked assertions devoid of further factual enhancement." *Ashcroft*, 556 U.S. at 678 (quotation omitted).

A. Jones has failed to allege facts sufficient to implicate President Wildcat in a violation of state law or RICO.

Jones has failed to satisfy his pleading obligation under Rule 8. His complaint lacks enough specificity to provide President Wildcat notice of the bases for the claims against him. Even those few allegations that do pertain to President Wildcat are based solely on Jones's *belief* and are so vague and conclusory that they cannot satisfy his pleading obligation.

With respect to Count I, Jones alleges that President Wildcat and the other tribal officers "played a role, directly or indirectly, in the collection of unlawful debt." *Compl.* ¶ 61. Similarly, with respect to Count III, Jones alleges that they "participat[ed] in the collection of usurious interest." *Id.* ¶ 76. But Jones does not explain *what* role President Wildcat played or *how* he participated in the collection of unlawful debt and usurious interest. He only alleges that President Wildcat is that he had "a role in the LDF Tribe's use of funds generated by its internet lending and loan servicing businesses," played "a role in choosing board members for the LDF Tribe's business development corporation," and was "responsible for authorizing, ratifying, or promoting the LDF Tribe's policy of collecting unlawful debt." *Id.* ¶ 3.

The first allegation—*use* of funds—has nothing to do with the *collection* of unlawful debt, 18 U.S.C. § 1962(c), or excess interest, 41 P.S. § 502. The second allegation—choosing board members—cannot warrant the inference that President Wildcat thereby participated in the collection of unlawful debt or excess interest. The third allegation—authorizing, ratifying, or promoting the LDF Tribe's policy of collecting unlawful debt—is conclusory on two fronts. *Ashcroft*, 556 U.S. 662, is instructive. In that case, the plaintiff alleged that the defendant "knew of, condoned, and willfully and maliciously agreed to subject him to harsh conditions of confinement as a matter of policy, solely on account of his religion, race, and/or national origin and for no legitimate penological interest" and that the defendant was the "principal architect" of the policy. *Ashcroft*, 556 U.S. at 680 (quotations omitted). The Court declined to accept these allegations as sufficient, citing their "conclusory nature." *Id.* at 681. Here, as in *Ashcroft*, Jones has alleged a policy of collecting unlawful debt, without any supporting factual context. In fact, his assertion is inconsistent with his own loan agreement, under which the Tribe's laws apply and the loan is legal. *Compl*. Ex. P-4 at 001-003; Code § 8.3(d), (f). If anything, the loan agreement and the Code suggest that the Tribe (including its economic arms) had a policy *against* collecting unlawful debt. Moreover, here, as in *Ashcroft*, Jones has alleged that President Wildcat had a significant role in that policy but, again, has provided no factual context.

That Jones has failed to adequately plead Counts I and III against President Wildcat is also supported by his affirmative allegations that LDF Holdings contacted him to set up automated-clearing-house payments and that Ishwaaswi withdraw those payments and later contacted him to collect, and that "[e]ach withdraw and *all collection* was carried out by LDF Holdings." *Compl*. ¶¶ 33, 38, 40, 42 (emphasis added). Based on Jones's insufficient pleadings, this Court should dismiss Counts I and III against President Wildcat.

With respect to Count II, Jones recognizes that he must plead a conspiracy. *Compl.* ¶ 64; 18 U.S.C. § 1962(d). So he alleges that the "Individual Defendants conspired with each other and others to operate the LDF Tribe, LDF BDC, LDF Holdings, and Radiant through the collection of unlawful debt." *Compl.* ¶ 65. He goes on to state that "the Individual Defendants are parties to an agreement to use [these entities] to collect unlawful debt." *Id.* ¶ 66. But Jones provides no factual basis for these assertions. The Third Circuit has held that "conclusory allegations of 'concerted action,' without allegations of fact that reflect joint action, are insufficient to meet this requirement." *Adams v. Teamsters Local 115*, 214 Fed. App'x 167, 175 (3d Cir. 2007). A plaintiff must allege "at least some facts which could, if proven, permit a reasonable inference of a conspiracy to be drawn," including allegations of "the conduct, time, place, and persons responsible." *Id.* (quotations omitted). Jones only alleges actual conduct by LDF Holdings and Ishwaaswi. *See* Compl. ¶¶ 18-42. President Wildcat is not even mentioned in the "Facts" section of the complaint. *See id.* ¶¶ 27-42. And Jones has made no allegations of any interaction between President Wildcat and the other tribal officers, except that he is "believed" to have chosen board members for the "LDF Tribe's business development corporation." *Id.* ¶ 3. Even then, he does not indicate that President Wildcat chose any of the other defendants in this case or that he ever chose board members to fulfill a scheme to collect unlawful debt. *See id.*

Jones has simply failed to allege any meeting of the minds between President Wildcat and the other tribal officials. But, even if he had, Jones's loan agreement contains a choice-of-law provision selecting the Tribe's laws, under which his loan was legal. *Id.* Ex. P-4 at 003; Code § 8.3(d), (f). Rather than support a conspiracy to collect unlawful debt, this suggests an intention to *avoid* collecting unlawful debt. Thus, Jones's allegation of a "conspiracy" in Count II is insufficient, and the Court should dismiss Count II against President Wildcat.

B. Jones has failed to state cognizable claims against President Wildcat under state law or RICO, because the loan was not subject to state law.

All of Jones's claims rest on the assumption that his loan was subject to and violated Section 201 of the Pennsylvania Loan Interest and Protection Law, because it charged more than the maximum interest rate under that section. But the loan agreement contains a choice-of-law provision that explicitly disclaims state laws and incorporates only the Tribe's and federal law. Complaint Ex. P-4 at 003. Jones does not challenge the choice-of-law provision, and it is enforceable with respect to all of his claims against President Wildcat.

This case involves both federal- and state-law claims. That means that two separate choice-of-law principles apply. For the federal claims under RICO, the Court must apply federal common-law choice-of-law rules. *See Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 892 (3d Cir. 1975) (stating that in non-diversity cases, a court's "decision turns upon the law of the United States, not that of any state").

The Third Circuit "lacks an established body of federal choice of law rules." *Cohen v. Independence Bule Cross*, 820 F. Supp. 2d 594, 602 (D.N.J. 2011). But in the analogous context of claims under the Employee Retirement Income Security Act, federal courts have upheld choice-of-law clauses unless they are "unreasonable" or "unfair." *See id.* (citing cases). Indeed, this Court has used reasonableness as the litmus test for this question. *See Moore v. Rite Aid Hdqtrs Corp.*, No. 13-1515, 2017 WL 6525796 at *11 (E.D. Pa. Dec. 21, 2017) (stating that "choice of law provisions will be enforced unless unreasonable" (quotation omitted)); *Wheeler v. A & M Industrial Supply Co., Inc.*, No. 98–3200, 1998 WL 754729, at *3 (E.D. Pa. Oct. 29, 1998) ("When parties have a contractual choice of law provision . . . courts generally comply with the parties' will and apply the law designated in the contract so long as the law chosen has a reasonable relationship to the parties or the transaction.").

Jones has not alleged that enforcing the choice-of-law provision in his loan agreement would be fundamentally unreasonable or unfair. And there would be nothing fundamentally unreasonable or unfair about enforcing the choice-of-law provision and applying the Tribe's and federal law to the loan agreement. The Tribe's laws are publicly accessible. The Tribe's laws clearly address ceiling interest rates and fees so that Jones was on notice about what was and was not permissible under those laws. And other jurisdictions similarly allow high interest rates in short-term loans. *See, e.g.*, Ariz. Rev. Stat. Ann. § 44-1201; Nev. Rev. Stat. § 99.050.

Indeed, it would be fundamentally unreasonable and unfair to *not* enforce the choice-of-law provision. Ishwaaswi offers loans in many states across the country. *Cf. Compl*. Ex. P-1 at 005. It reasonably requires application of the Tribe's and federal law, in part because its operations are permissible under those laws; therefore, it, the Tribe, the Tribe's other economic arms, and all of their officers and employees can conduct their businesses without risk. *Cf. Bremen*, 407 U.S. at 14 ("There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." (footnote omitted)). For Jones to accept the choice-of-law provision, obtain the benefit of the loan agreement, and then turn around and sue a handful of tribal officers that he "believe[s]" had a role in processing, servicing, and collecting on the loan is extremely prejudicial. Under these circumstances, it would work an injustice for President Wildcat if this Court allowed Jones to sidestep the choice-of-law provision.

For these reasons, the Court should uphold the choice-of-law provision and apply the Tribe's and federal law with respect to Jones's claims under RICO. Under those laws, Jones's loan is not usurious or illegal. Consequently, President Wildcat could not collect an unlawful

debt or conspire to do so, as required for Jones's claims under RICO. *See* 18 U.S.C. § 1962(c)-(d). Therefore, Jones's claims under RICO must be dismissed.

For the state-law claim, this Court must apply Pennsylvania's choice-of-law rules. *System Operations, Inc. v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1136 (3d Cir. 1977). Under those rules, courts "generally honor the intent of the contracting parties and enforce choice of law provisions in contracts executed by them." *Kruzitz v. Okuma Mach. Tools, Inc.*, 40 F.3d 52, 55 (3d Cir. 1994) (quotation omitted). Only in two exceptional circumstances will a court not enforce a choice-of-law provision:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Kaneff v. Delaware Title Loans, Inc., 587 F.3d 616, 621-22 (3d Cir. 2009) (applying Pennsylvania choice-of-law principles, which originate in the Restatement (Second) of Conflicts of Law § 187 (1971)) (alteration omitted). Again, Jones has not alleged any reason why the choice-of-law provision in his loan agreement is unenforceable. Regardless, it is.

As to the first exception, the loan explicitly states the Tribe's and federal law applies and disclaims state law. *Compl*. Ex. P-4 at 003. The Tribe obviously bears a substantial relationship to Ishwaaswi, LDF Holdings, and the LDF Business Development Corporation, because they are all economic arms of the Tribe that operate on the Reservation. *Id.* Exs. P-1 at 005, P-2 at 001, 008-010, P-4 at 001. Moreover, the Tribe bears a substantial relationship to the transaction, because it is the ultimate beneficiary of the transaction. *Id.* ¶¶ 3, 67.

Turning to the second exception, it is doubtful that Pennsylvania law would apply to the loan agreement in the absence of the choice-of-law provision. While these loans were initiated

over the internet, Ishwaaswi accepted the loan application from within the Lac du Flambeau Indian Reservation (the Reservation). *Id.* Ex. P-4 at 001 ("We cannot commit to make a loan to you unless your completed application is approved by our underwriting department, located on the Tribe's Reservation."). That is the situs of the contract formation. *See* Restatement (Second) Conflicts of Law § 188(2)(a). Moreover, the Tribe, the LDF Business Development Corporation, LDF Holdings, Ishwaaswi all operate from the Reservation. Compl. Exs. P-1 at 005, P-2 at 001, 008-010, P-4 at 001; Restatement (Second) Conflicts of Law § 188(2)(c).

Even if Pennsylvania law would apply by default, the choice-of-law provision is still enforceable. The Third Circuit has found that Pennsylvania's "antipathy to high interest rates . . . represents . . . a fundamental policy," to which Jones's loan would be contrary. *Kaneff*, 587 F.3d at 624. But Pennsylvania does not have a "materially greater interest" than the Tribe in determining this issue.

In *Gay v. CreditInform*, involving a claim under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, the plaintiff challenged to a choice-of-law provision. 511 F.3d 369, 374, 390 (3d Cir. 2007). The Third Circuit rejected the challenge based on the competing state interests in the outcome: "Though it certainly is true that Pennsylvania has an interest in protecting its consumers, we cannot say that Virginia has a lesser interest in protecting businesses located in it." *Id.* Similarly, in *Stone Surgical, LLC v. Stryker Corp.*, involving a dispute over a non-compete clause, the plaintiff challenged a choice-of-law clause, relying on Louisiana's "interest in protecting its employee from unfair non-compete clauses." 858 F.3d 383, 390-91 (6th Cir. 2017). The Sixth Circuit rejected the challenge, noting that Louisiana's interest was "not *materially* greater than Michigan's interest in protecting its businesses from unfair competition." *Id.* (emphasis in original). Other courts have similarly looked to whether a forum

state's interest is *materially* greater than the chosen state, in its application of the same choice-of-law rules. *See, e.g.*, *Collins on behalf of herself v. Mary Kay, Inc.*, 874 F.3d 176, 184 (3d Cir. 2017); *DCS Sanitation Management, Inc. v. Castillo*, 435 F.3d 892, 895-97 (8th Cir. 2006).

The Tribe's interests in the outcome of this issue are even greater than those discussed in *Gay* and *Stone Surgical*. The Tribe, like any government, has a strong interest in protecting businesses operating within its jurisdiction. *See Compl*. Exs. P-1 at 005, P-2 at 001, 008-010, P-4 at 001. As Jones acknowledges, the Tribe owns and operates the LDF Business Development Corporation, LDF Holdings, and Ishwaaswi as its economic arms. *Id.* ¶¶ 19-21. These entities generate revenue that fosters further economic development for the Tribe, as well as fund the Tribe's operations. *See id.* ¶¶ 3, 67. "[T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues," because often "there is no stable tax base" and, even if there were, tribal taxation "would discourage economic growth." *Bay Mills*, 572 U.S. at 810-11, 813 (Sotomayor, J., concurring) (quotations omitted); *see also id.* at 790-91; *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754-55 (1998) (citing *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977).

If Jones prevails, particularly if he successfully certifies a class, the Tribe will effectively be precluded from benefitting on outstanding loans its economic arms have issued in Pennsylvania, and perhaps elsewhere. The result would be a sharp blow to the Tribe's treasury and future revenue stream, which would jeopardize essential governmental services offered by the Tribe. While Pennsylvania may have an interest in protecting its residents from high interest rates, that interest is not greater than—and certainly not *materially* greater than—the Tribe's interest in protecting its treasury and its revenue stream, which supports its essential

governmental services and economic development. *Stone Surgical*, 858 F.3d at 391 (concluding that, "[a]bsent such evidence that Louisiana's interest was not just greater but materially greater, there is no reason to disturb the parties' choice").

Because Jones's loan agreement contained an enforceable choice-of-law provision that called for the Tribe's and federal law and expressly disclaimed state law, his loan agreement does not violate Pennsylvania law or support a claim under them. Furthermore, those laws cannot form the basis for Jones's claims under RICO. Therefore, this Court must dismiss those claims.

C. Jones has failed to state a cognizable state-law claim against President Wildcat, because he did not collect the alleged usury interest.[5]

Even if Jones has sufficiently pleaded a claim for relief under Pennsylvania's usury laws, President Wildcat is not a proper defendant. "When interpreting a statute, courts should read the sections of the statute together and construe them to give effect to all of the statute's provisions. . . . [Courts] should not interpret statutory words in isolation, but must read them with reference to the context in which they appear." *Roethlein v. Portnoff Law Associates, Ltd.*, 81 A.3d 816, 822-23 (Pa. 2013) (construing 41 P.S. § 502 by reviewing 41 P.S. §§ 101, 201, 301, 401-08, 501, 603) (citation omitted).

Section 504—under which Jones brings his state-law claim—provides that a "person affected by a violation of [Pennsylvania's usury laws] shall have the substantive right to bring an action." Section 502, clarifies that the person can bring the action "*the person who has collected such excess interest or charges*." (Emphasis added.)

[5] While Jones has failed to adequately plead a state-law claim for the reasons discussed under this heading, if the Court dismisses Jones's claims under RICO, it can dismiss the state-law claim without addressing it at all. *See* 28 U.S.C. § 1367(c)(3) (providing that federal courts may "decline to exercise supplemental jurisdiction over" a state-law claim if "the district court has dismissed all claims over which it has original jurisdiction").

Here, Jones has alleged that Ishwaaswi was the lender that entered into the loan agreement with him. *Compl*. ¶ 34; *id.* Ex. P-4. And he has alleged that the parties who received the alleged usurious interest were Ishwaaswi, LDF Holdings, the LDF Business Development Corporation, and the Tribe. *Compl*. ¶¶ 3, 67. These are the "person[s] who ha[ve] collected [the] excess interest or charges." Nowhere has Jones alleged that President Wildcat received any of the alleged usurious interest. Therefore, Jones's allegations do not support a claim under Pennsylvania's usury laws against President Wildcat, and this Court should dismiss it.

V. This Court must dismiss Jones's suit, because the Tribe, the LDF Business Development Corporation, LDF Holdings, and Ishwaaswi are necessary and indispensable parties that Jones cannot join.

Even if Jones's action could survive the previously discussed defects, it must be dismissed, because he has failed to join the Tribe, the LDF Business Development Corporation, LDF Holdings, and Ishwaaswi, all indispensable parties. Under a Rule 12(b)(7) motion to dismiss for failure to join a necessary and indispensable party under Rule 19, courts "must accept as true the allegations in the complaint and draw all reasonable inferences in the non-moving party's favor." *Scottsdale Ins. Co. v. RSE Inc.*, 303 F.R.D. 234, 236 (E.D. Penn. 2014). But "[w]hen making a Rule 19 determination, [courts] may also consider evidence outside the pleadings." *Id.* In assessing a motion under Rule 12(b)(7), courts must ask three questions: (1) whether the absent party is necessary; (2) if so, whether joinder is feasible; and (3) if not, whether the absent party is indispensable. *Huber v. Taylor*, 532 F.3d 237, 247 (3d Cir. 2008).

In addressing the first question, "the Court must consider the effect, if any, that resolution of the dispute among the named parties will have on an absent party." *Id.*; Fed. R. Civ. P. 19(a)(1)(B). Here, the Tribe, the LDF Business Development Corporation, LDF Holdings, and Ishwaaswi are all necessary parties because they have a direct interest in the issues of whether the loans that Ishwaaswi issues and LDF Holdings services are subject to state law, set up claims

against their officials and employees under RICO, contain enforceable dispute-resolution and choice-of-law clauses, and, in general, are enforceable. LDF Holdings and Ishwaaswi generate considerable revenue for all of these entities. *Wildcat Decl*. ¶ 10, 14-15. That revenue funds the Tribe's essential governmental services and economic development. *Id.* ¶¶ 10, 14. Without that revenue, many of the Tribe's essential governmental services would experience funding cuts. *Id.* ¶ 16. This goes well beyond a mere pecuniary interest. It goes to the Tribe's ability to function as a government and serve its members and the surrounding community.

Ishwaaswi is a necessary party for another reason, on which *Gregoria v. Total Asset Recovery, Inc.*, No. 12-4315, 2015 WL 115501 (E.D. Pa. Jan. 8, 2015), is instructive. In that case, the plaintiffs sued a debt collector under RICO for repossessing their vehicle after they defaulted on a usurious loan. *Gregoria*, 2015 WL 115501, at *1-2. The debt collector moved to dismiss under Rule 12(b)(7), arguing that the lender was an indispensable party. *Id.* at *1. While this Court ultimately denied the motion, it concluded that the lender was a necessary party. *Id.* at *6. It reasoned that "the rights and liabilities of the parties are premised on the loan agreement between [the lender] and plaintiffs," and "'[w]here rights sued upon arise from a contract all parties to it must be joined.'" *Id.* (quoting *Ward v. Deavers*, 203 F.2d 72, 75 (D.C. Cir. 1953)).

In this case, as in *Gregoria*, the rights and liabilities of Jones and President Wildcat are premised on the loan agreement. Ishwaaswi was the lender in that loan agreement. Compl. ¶ 34; *id.* Ex. P-4. Therefore, Ishwaaswi is a necessary party and "must be joined."

With respect to the second question, joinder in this case is not feasible, because the Tribe is a federally recognized Indian tribe. And as discussed, *supra* at part I.A, it is entitled to sovereign immunity, which it has not waived and Congress has not abrogated. Similarly, the

LDF Business Development Corporation, LDF Holdings, and Ishwaaswi (the Tribal Entities) are economic arms of the Tribe and, therefore, share its sovereign immunity.

Federal courts have consistently recognized that economic arms of Indian tribes share in their sovereign immunity. *See, e.g.*, *United States v. Bly*, 510 F.3d 453, 465 (4th Cir. 2007); *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010); *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014); *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011). In fact, this Court has twice accepted this principal. *Commonwealth of Pa. v. Think Finance, Inc.*, No. 14-cv-7139, 2016 WL 183289, at *3 n.2 (E.D. Pa. Jan. 14, 2016); *Pa. by Shapiro*, 2018 WL 4635750, at *3, 6.

In *Williams v. Big Picture Loans, LLC*, the Fourth Circuit addressed the very issue presented here: whether tribal lending entities are entitled to a tribe's sovereign immunity. 929 F.3d 170, 174 (4th Cir. 2019). The court adopted a five-part test, under which it evaluated "(1) the method of the entities' creation; (2) their purpose; (3) their structure, ownership, and management; (4) the tribe's intent to share its sovereign immunity; [and] (5) the financial relationship between the tribe and the entities." *Id.* at 177. In assessing all of these factors, the court gave great consideration to "the extent to which a grant of arm-of-the-tribe sovereign immunity promotes the purposes of tribal sovereign immunity." *Id.* In this case, all five factors weigh in favor of extending the Tribe's sovereign immunity to the Tribal Entities.[6]

Turning to the first factor—method of creation—all three entities were formed by the Tribal Council under the Tribe's laws—Chapter 44a: Tribally-Owned Business Organization Code—not under state law. *Wildcat Decl*. Exs. D, G, I.

[6] Before applying the factors, it is important to note that one court has already found that the LDF Business Development Corporation is an arm of the Tribe. *Bruguier v. Lac du Flambeau Band of Lake Superior Chippewa Indains*, 237 F. Supp. 3d 867, 873-74 (W.D. Wis. 2017).

Turning to the second factor—purpose—this weighs in favor of extending immunity when the tribal entity furthers the "broader goals of tribal self-government." *Big Picture Loans*, 929 F.3d at 178. That can include funding governmental services, as well as "tribal economic development." *Id.* at 178, 182. Here, the creation documents for each entity clearly indicate that their purpose is to further tribal economic development for the Tribe and its members. *Wildcat Decl*. Exs. E art. 5, H art. 5, J art. 5. With respect to LDF Holdings and Ishwaaswi, their creation documents expressly reference Chapter 44a, *id.* Exs. H art. 5, J art. 5, under which the Tribal Council can form tribally-owned entities for "[t]he purpose of . . . provid[ing] for economic development of the Tribe," Ch. 44a § 44a.102. Jones does not allege that these entities do not satisfy their purposes, and, indeed, they do. *See* Wildcat Decl. ¶¶ 14-16.

Turning to the third factor—structure, ownership, and management—each of the entities is wholly owned by the Tribe, either directly, or through a chain of subordination. *See* Compl. ¶¶ 19-21; *Wildcat Decl*. Exs. E art. 10, H art. 12, J art. 11. The Tribal Council must approve the bylaws for the LDF Business Development Corporation, the parent entity for LDF Holdings and Ishwaaswi. *Wildcat Decl*. Ex. E art. 6. Under the approved bylaws, the board of directors must include two Tribal Council members serving *ex officio*, and three additional members appointed by the Tribal Council. *Id.* Ex. F art. 3. All three entities have registered offices on the Reservation and operate on the Reservation. *Id.* Exs. E arts. 2-4, H arts. 2-4, J arts. 2-4; *see* Compl. Exs. P-1 at 005, P-2 at 001, 008-010, P-4 at 001.

Turning to the fourth factor—the Tribe's intent—the LDF Business Development Corporation's creation documents clearly state, "It is the intent of the Tribe to extend the sovereign immunity of the Tribe to the Corporation for tribal, federal and state law purposes." *Wildcat Decl*. Ex. E art. 9. And under Chapter 44a, the LDF Business Development

Corporation's sovereign immunity extends to its subordinate entities, including LDF Holdings and Ishwaaswi. Ch. 44a § 44a.309. Moreover, their creation documents also express the Tribe's intent to extend its sovereign immunity to them. *Wildcat Decl*. Exs. H art. 9, J at art. 10.

Turning to the fifth and final factor—financial relationship—the Fourth Circuit has recognized that "direct tribal liability for an entity's actions is neither a threshold requirement for immunity nor a predominant factor in the overall analysis." *Big Picture Loans*, 929 F.3d at 1084 (quotation omitted). It is relevant that "a judgment against an entity would reach the tribe's assets." *Id.* Additionally, "courts consider the extent to which a tribe depends on the entity for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities." *Id.* (quotation omitted).

Here, the Tribe offers a plethora of essential governmental services to its members and the surrounding community, including law enforcement, water and sewer services, clinical medical and dental care, natural resources management, public roads management, wildlife conservation, fire and ambulance service, land management, early childhood education, general assistance programs, and domestic-abuse protective services. *Wildcat Decl*. ¶ 9. Roughly 45-50% of these services are funded by revenue from tribal businesses, including the Tribal Entities. *Id.* ¶ 10. The Tribal Entities generate significant revenue used solely to fund these essential governmental services and foster further tribal economic development. *Id.* ¶ 14. Importantly, a judgment against these entities—particularly a large one, such as that sought by Jones's putative class action—would negatively impact the Tribe's treasury and necessitate funding cuts for the essential governmental services it offers its members and the surrounding community. *Id.* ¶ 16.

Under the totality of these circumstances, the purposes of tribal sovereign immunity would be best served by extending the Tribe's immunity to the Tribal Entities. *Big Picture*

Loans, 929 F.3d at 177. Moreover, it would be fundamentally contrary to the policies underlying tribal sovereign immunity not to extend the Tribe's sovereign immunity and allow Jones to impair its ability to offer the essential governmental functions that its members and the surrounding community rely on. *Id.*

In addressing the third question, courts "shall determine whether, in equity and good conscience, the action should proceed among the parties" before it. Fed. R. Civ. P. 19(b). Courts must consider four factors in reaching this determination: (1) "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties"; (2) "the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures"; (3) "whether a judgment rendered in the person's absence would be adequate"; and (4) "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b). Rule 19 "does not accord a particular weight to any" of the factors. *Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 706 (3d Cir. 1996). But courts must evaluate them "in terms of the facts of a given case and in light of the governing equity-and-good-conscience test." *Id.* (quotation omitted).

Admittedly, Jones could receive an adequate remedy without the presence of the Tribe and the Tribal Entities. But Jones could pursue adequate remedies through the loan agreement's dispute-resolution provision, as well. And the other factors weigh against proceeding.

President Wildcat, the Tribe, and the Tribal Entities would be unfairly prejudiced if the case proceeded. On the one hand, an unfavorable judgment would necessarily jeopardize all existing loans in Pennsylvania, potentially leading to private class actions in other states, and ultimately pressuring Ishwaaswi and LDF Holdings to discontinue their lending operations. This would result in a significant blow to the Tribe's revenue and impair its ability to self-govern. On

the other hand, if the Tribe directed the Tribal Entities to continue issuing and servicing loans in Pennsylvania and elsewhere, President Wildcat would face the predicament of choosing between violating his constitutional oath to implement the Tribe's policies or risking continued individual liability. No measures could be taken to mitigate these prejudices.

Under the totality of these circumstances, the Tribe and the Tribal Entities are all indispensable parties. Therefore, this Court should dismiss the claims against President Wildcat.

Conclusion

Jones's allegations demonstrate that he has no claim for relief and that President Wildcat is not the real party in interest to this suit and not properly brought before this Court. Therefore, President Wildcat respectfully asks the Court to dismiss Jones's claims against him.

Respectfully Submitted,

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Counsel for President Joseph Wildcat, Sr.

Dated: August 30, 3019

CERTIFICATION

The undersigned certifies that the instant motion was discussed with Plaintiff's counsel via email exchange on or about August 29, 2019 and Plaintiff's counsel indicated that he did not believe that the Complaint, as drafted, had any defects and he disputed that there was any basis for the instant motion. Plaintiff's counsel was invited by the undersigned to participate in a telephonic conference today, August 30, 2019, to discuss further the basis for the instant motion and the potential that Plaintiff could cure any defects. However, at the time and place for the call, Plaintiff's counsel did not participate.

/s/ *SHANNON MILLER*
_____
SHANNON MILLER

Dated: August 30, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record registered to receive electronic service by operation of the court's electronic filing system.

/s/ *Shannon Miller*
Shannon Miller