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

GEORGE HENGLE, SHERRY BLACKBURN, WILLIE ROSE, ELWOOD BUMBRAY, TIFFANI MYERS, STEVEN PIKE, SUE COLLINS, LAWRENCE MWETHUKU, *on behalf of themselves and all individuals similarly situated*,	)	
Plaintiffs,	)	Civil Action No. 3:19-cv-250-REP
v.	)	
SCOTT ASNER; JOSHUA LANDY; SHERRY TREPPA, CHAIRPERSON OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; TRACEY TREPPA, VICE-CHAIRPERSON OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; KATHLEEN TREPPA, TREASURER OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; IRIS PICTON, SECRETARY OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; SAM ICAY, MEMBER-AT-LARGE OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL *in his official capacity*; AIMEE JACKSON-PENN, MEMBER-AT-LARGE OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; AMBER JACKSON, MEMBER-AT-LARGE OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*;	)	
Defendants.	)	

REPLY IN SUPPORT OF DEFENDANTS
SCOTT ASNER AND JOSHUA LANDY'S RENEWED MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' Opposition confirms the lack of plausible, actionable allegations against Asner and Landy. *See* ECF No. 99 ("Opp'n"). Most significantly, Plaintiffs have ***expressly withdrawn*** the key allegation added to the Amended Complaint: that even since selling the businesses to the Tribe in 2014, Asner and Landy "continue to participate in the affairs of the illegal lending enterprise, now as high-paid executives of the Tribal Lending Entities." *Id.* at 8 n.1; Plaintiffs' First Amended Complaint ¶ 3, ECF No. 54 ("FAC"). That allegation was and is false. Plaintiffs bury their withdrawal of it in a footnote and admit it was alleged ***not*** based on facts about Asner and Landy, but instead on Plaintiffs' supposed understanding of other wholly-unrelated "restructures completed by lenders in this same space." Opp'n at 8 n.1. This is par for the course in a pleading that seeks to hold Asner and Landy liable not for anything they have personally done, but rather for what other defendants in other unrelated cases allegedly did.

Shorn of this false allegation, Plaintiffs are left with nothing more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For several reasons the claims Plaintiffs allege fail. *First*, Plaintiffs cannot show that Virginia law applies here or that all necessary parties have been sued. *Second*, the state law claims are untimely because Plaintiffs fail to plead any facts showing how their claims were concealed as needed to invoke tolling and equitable estoppel. And on the merits of the state law claims, Plaintiffs perfunctorily recite the elements of the claims, but allege no ***facts*** supporting them. *Third*, as to the RICO claims, Plaintiffs do not even attempt to show that Asner and Landy directed the enterprise as necessary to plead their Section 1962(c) claim, and allege no facts plausibly supporting the assertion that Asner and Landy entered any agreement to conspire as required for their Section 1962(d) claim. Plaintiffs' RICO claims are also untimely because

Plaintiffs themselves allege that Asner and Landy sold the businesses in 2014. Plaintiffs' only response is that it is *fair to presume* that Asner and Landy maintained at least some role in the enterprise, but they cite nothing from the Amended Complaint supporting that inference because no support exists following Plaintiffs' withdrawal of the false "high-paid executives" allegation. *Finally*, Plaintiffs' Majestic Lake claims must fail because Plaintiffs plead no factual allegations connecting Asner and Landy to that entity—which was created after they sold the businesses.

At bottom, Plaintiffs' conclusory allegations make clear that they are attempting to shoehorn this case into theories they have devised for other circumstances—without the facts to support it. In particular, Plaintiffs' bizarre claim that the Tribal Lending Entities were somehow controlled by Asner and Landy, notwithstanding that five years ago Asner and Landy sold whatever indirect and partial interest they had in certain companies that merely provided call center support or purchased participation interests, does not withstand scrutiny. Whatever may be said of the other defendants in other unrelated cases, this much is clear: the allegations put forth in *this* case are insufficient to state claims against Asner and Landy.

ARGUMENT

I. Plaintiffs' Claims Apply The Wrong Law And Lack Indispensable Parties.

A. Plaintiffs' Loans Are Lawful Under The Applicable Tribal Law.

The Opposition fails to rebut that under their Loan Agreements,[1] Plaintiffs agreed that Tribal law, not Virginia law, governed their loans. As set forth in Section I of the Tribal Officials' Reply, the Loan Agreements (including the choice of law provisions) are enforceable. *Settlement*

[1] Unless otherwise indicated, capitalized terms have the meanings set forth in Asner and Landy's Renewed Motion to Dismiss.

Funding, LLC v. Von Neumann-Lillie, 645 S.E.2d 436 (Va. 2007) is dispositive.[2] Thus, Plaintiffs' state law and RICO claims alleging collection of an unlawful debt must be dismissed.

B. The Tribal Lending Entities Are Necessary Parties.

Plaintiffs' claims must also be dismissed for failure to join necessary parties, as the Tribal Officials explain in Section IV of their Reply. For two additional and independent reasons, the claims asserted against Asner and Landy must be dismissed for failure to join necessary parties. *First*, Plaintiffs effectively concede the prejudice Asner and Landy will suffer without the Tribal Lending Entities by failing to address it in the Opposition. Without those entities—which received Plaintiffs' funds and possess most (if not all) documents relevant to Plaintiffs' claims—Asner and Landy will be severely disadvantaged during discovery and prejudice will be unavoidable. Mem. Supp. Defs.' Renewed Mot. to Dismiss at 15-16, ECF No. 60 ("Mot."); s*ee* Fed. R. Civ. P. 19(b)(1) (court must consider whether absence would prejudice existing parties). *Second*, Plaintiffs' assertion that the Tribal Officials adequately represent the Tribe is unavailing as to the claims brought *solely against Asner and Landy* and underscores why the Tribe is a necessary party. Plaintiffs seek to have their loans declared null and void in connection with the claims brought against Asner and Landy alone. FAC ¶¶ 115, 126, 172. Those claims therefore omit the very party whose interests will be impaired by the remedy Plaintiffs seek—the Tribe. *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 552 (4th Cir. 2006). Plaintiffs do not address this, much less argue that Asner and Landy can adequately represent the Tribe in defending those unique claims.

[2] There, the Virginia Supreme Court was clear it was deciding whether the trial court should have applied "the law of the jurisdiction stipulated in the choice of law provision of a contract." *Id.* at 437; Mot. at 15.

II. Plaintiffs' State Law Claims Are Time Barred And Insufficient Under Virginia Law.

A. Plaintiffs Plead No Circumstances That Warrant Tolling.

Even assuming that Virginia law applies, Plaintiffs' state law claims against Asner and Landy are untimely under the controlling statutes of limitations. Plaintiffs' only response is that those periods were supposedly tolled by statute and equitable estoppel. Opp'n at 8-10. Thus, Plaintiffs concede that, absent tolling, any claims based on loans issued before Asner and Landy sold the relevant businesses are time barred under the applicable two (or three) year limitations period.[3] *See* Mot. at 7. For two reasons, Plaintiffs cannot rely on tolling or estoppel here.

First, Plaintiffs did not *plead facts* demonstrating that tolling or equitable estoppel apply, as is their burden. *See, e.g.*, *Neal v. Stryker Corp.*, No. 1:11-cv-62, 2011 WL 841509, at *3 (E.D. Va. Mar. 8, 2011); *Hughley v. Basham*, No. Civ.A. 2:03CV85, 2003 WL 24101521, at *3 (E.D. Va. Aug. 1, 2003). Virginia law permits tolling if a *defendant* used a "direct or indirect means to obstruct the filing of an action," Va. Code § 8.01-229(D), and equitable estoppel is available if a party "reasonably relied on the words and conduct of *the person*" in allowing the limitations period to run, *Snapp v. Lincoln Fin. Sec. Corp.*, 767 F. App'x 453, 455 (4th Cir. 2019) (emphasis added) (quotation marks omitted). Instead of pleading facts establishing these circumstances as to Asner and Landy (which, of course, do not exist), Plaintiffs resort to pure attorney argument in their Opposition, which for the first time contends that consumers were "prevented . . . from attempting to enforce their state and federal rights because they falsely believed them to be forfeit" based on the Loan Agreements' choice of law provisions. Opp'n at 10. But Plaintiffs cite not a single allegation in support, *see id.* at 9-10, and for good reason: The Amended Complaint is devoid of

[3] Plaintiffs have not alleged that Asner and Landy had any involvement in loans that post-date August 2014 or identified any plaintiffs whose loans fall within the statute of limitations. Regardless, as explained below, any timely claims must also be dismissed. *See infra* at 7-11.

any allegations about this supposed belief or any action taken by any defendant (much less Asner or Landy) to prevent Plaintiffs from filing a claim. Nor have Plaintiffs alleged what circumstances changed, enabling them to now file this untimely suit. Indeed, it is especially difficult to understand how plaintiffs Hengle and Mwethuku can make such a claim given that they, and their counsel, appear to have made a career of borrowing money from and then suing Tribal entities.[4]

Second, and in any event, the circumstances Plaintiffs claim in their Opposition are not of the sort that could establish tolling or equitable estoppel. For tolling to apply, the defendant must have taken an "affirmative act designed or intended" to "obstruct the plaintiff's right to file her action" and "consist[ing] of some trick or artifice … calculated to hinder a discovery of the cause of action by the use of ordinary diligence." *Newman v. Walker*, 618 S.E.2d 336, 338-39 (Va. 2005) (citations omitted). "Mere silence, or passive concealment, is insufficient to toll the limitations period." *Evans v. Trinity Indus., Inc.*, 137 F. Supp. 3d 877, 882 (E.D. Va. 2015). Both doctrines "require a plaintiff to exercise ordinary diligence." *Snapp*, 767 F. App'x at 455. By Plaintiffs' own admission, the representations about the applicability of tribal law and the ability to seek remedies in arbitration were clearly disclosed and apparent from the face of the Loan Agreements. *See* Opp'n at 9 (citing to Loan Agreement, ECF No. 58-1). Plaintiffs point to nothing that was concealed from or misrepresented to them by Asner or Landy—or anyone else. In fact, nothing prevented Plaintiffs within the limitations periods from doing what they have done outside of them: engage attorneys and bring suit challenging the Loan Agreements.[5] Having sat on their claims, Plaintiffs cannot

[4] *See, e.g.*, *Gibbs v. Stinson*, No. 3:18-cv-676, 2019 WL 4752792, at *3 (E.D. Va. Sept. 30, 2019) (Hengle, Mwethuku, Blackburn); *Gibbs v. Haynes Invs., LLC*, 368 F. Supp. 3d 901, 911 (E.D. Va. Mar. 22, 2019) (Mwethuku); *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 265 (E.D. Va. 2018) (Hengle).

[5] *See, e.g.*, *Estate of Dearing by Dearing v. Dearing*, 646 F. Supp. 903, 909 (S.D. W. Va. 1986) ("[T]he policy behind the statute of limitations required the plaintiffs to seek legal advice" because

invoke tolling now.

B. Asner And Landy Cannot Be Held Liable For Alleged Corporate Acts.

Plaintiffs may not hold Asner and Landy liable for corporate acts merely because of their alleged ownership, officership, or management roles in companies that contracted with the Tribe. *See* Mot. at 16-18. Both the Amended Complaint and Opposition make clear that this is exactly what Plaintiffs seek to do.

Plaintiffs' state law claims depend on a showing that Asner and Landy, *individually*, took or received loan payments or received a benefit from the loans. Opp'n at 17-19. But the most the Amended Complaint alleges is that Asner and Landy had only partial and indirect ownership interests in *companies* that contracted with the Tribe—companies that have not been named as defendants—and that any funds Asner and Landy received came only through their interest in those companies. *See* Mot. at 17-18; FAC ¶¶ 3, 70, 72. It is blackletter law that Asner or Landy (or other shareholders) cannot be held liable in lieu of the companies for the contractual or other obligations of the companies or for their role as corporate officials. *See, e.g.*, *Perpetual Real Estate Servs., Inc. v. Michaelson Props., Inc.*, 974 F.2d 545, 547-48 (4th Cir. 1992); *Stafford Urgent Care, Inc. v. Garrisonville Urgent Care, P.C.*, 224 F. Supp. 2d 1062, 1065-66 (E.D. Va. 2002). Plaintiffs have no answer. Instead of responding to this defect of their *state law* claims, Plaintiffs go on an extended detour concerning whether they have pled an enterprise under their *federal* RICO claim. Opp'n at 11-16. Those arguments provide no response to the fact that, for their state law claims, Plaintiffs have sued improper parties, and on that basis, the state law claims must be dismissed.

"[i]gnorance of the law d[oes] not toll the limitations period."); *accord United States v. Kubrick*, 444 U.S. 111, 123 (1979).

C. Plaintiffs' Usury Claims Against Asner And Landy Fail Because Asner and Landy Are Not Proper Defendants Under The Statute.

Plaintiffs fail to rebut that they do not plausibly allege Asner and Landy violated Virginia's usury law. Under the Virginia Code's plain language, Asner and Landy were not the persons "taking or receiving" loan payments. Va. Code § 6.2-305(A). And even if Section 6.2-305(A) did reach the receipt of money derived from the proceeds of loans (which it does not), Plaintiffs do not allege the "factual enhancement" necessary to "cross the line between possibility and plausibility of entitlement to relief." *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (internal quotation marks omitted).[6]

Section 6.2-305(A) is clearly worded: it provides a cause of action *only* against "the person *taking or receiving such payments*." Va. Code § 6.2-305(A) (emphasis added). The statute's reach is expressly limited to persons taking or receiving "such payments"—the loan payments. The statute's use of "the" before the *singular* noun "person" also makes plain that it reaches only the particular person who takes or receives the loan payments. *See Va. Polytechnic Inst. & State Univ. v. Prosper Fin., Inc.*, 732 S.E.2d 246, 250 (Va. 2012) (use of "the definite article 'the' coupled with the singular form of the noun 'address' … "reflects a legislative intent to serve process at a single address, not multiple addresses"). It is clear that the claim can proceed only against the entity that actually made the loan and received such payments, not against anyone who might have then been paid—for services rendered or otherwise—by the lender. The statute must be construed "as it is written" because "the legislature chose, with care, the words it used." *Greenberg v.*

[6] Plaintiffs' Opposition makes clear that they have abandoned any claim that Asner and Landy are liable under Virginia Code Section 6.2-1541(A) or 6.2-1541(B) (mentioned in the Amended Complaint). *See* Opp'n at 18. For good reason. As Asner and Landy explained, Section 6.2-1541(A) does not purport to provide any relief, and Section 6.2-1541(B) provides a remedy only against the "lender" of a loan—which Asner and Landy plainly are not. Mot. at 18-19.

Commonwealth ex rel. Att'y Gen. of Va., 499 S.E.2d 266, 269 (Va. 1998) (citation omitted).

Nowhere do Plaintiffs allege that Asner and Landy actually received "loan payments," as the statute requires. Indeed, the Agreements themselves and the Amended Complaint make clear they did not; payments were received by the Tribal Lending Entities that actually made the loans—which Plaintiffs have now dismissed. Plaintiffs try to avoid this fatal flaw by alleging that, through various companies, Asner and Landy have "received Plaintiffs' loan proceeds." Opp'n at 18. That is exactly the sort of argument the Virginia Supreme Court rejected in *Greenberg*, which held that the statute must be interpreted as written. One who may have received money downstream (for services rendered or otherwise) from a loan transaction is not the recipient of "loan proceeds," as the statute requires.

Plaintiffs' sole argument is that the following allegations suffice to allege usury claims specifically against Asner and Landy, *see* Opp'n at 17-18:

> 8. Accordingly, Plaintiffs and the class members seek to recover *amounts received by Landy and Asner*, plus twice the amount of such usurious interest that was paid in the two years preceding the filing of this action and their attorneys' fees and costs. Va. Code § 6.2-305(A).
>
> . . .
>
> 105. Through the Tribal Lending Entities, *the participants in the enterprise, including Asner, Landy*, and the Tribal Officials, market, initiate, and *collect* usurious loans throughout the country, including in Virginia.
>
> 106. Defendants know the subject loans were illegal under each state's usury and licensing laws, but they pursued the scheme anyway, misrepresenting that the lenders were operating "within the Tribe's reservation" and were "wholly owned and operated" by the Tribe.
>
> 107. Because of the ostensible protections created by the tribal business model, the interest rates charged on the loans were significantly greater than the amounts permitted by each state's usury and licensing laws.

FAC ¶¶ 8, 105-107 (emphasis added). Paragraphs 106 and 107 do not even reference receipt of proceeds from the loans. And Paragraphs 8 and 105 refer only in the most conclusory terms to "amounts received" or "collect[ed]" by all "participants," including Asner and Landy, but make

no specific allegations about what or how Asner or Landy received any funds. Plaintiffs also cite Paragraphs 116 thorough 123, but each of those paragraphs state that "Defendants" *generally* received amounts from each of the named plaintiffs; they provide no details about Asner and Landy. *Id.* ¶¶ 116-123.

All that Plaintiffs allege throughout the Amended Complaint is that Asner may have been a passive investor in companies that purchased participation interests and that Landy was a part owner of companies that purchased participation interests and ran a call center. That fails to meet the statutory requirement of receiving "loan payments" as distinct from money generally. Plaintiffs' allegations here are a far cry from even the minimal allegations that courts in other cases have concluded plausibly alleged a claim that a non-lender "received" payments (notwithstanding the actual language of the Virginia Code). *See* Mot. at 20. Although "generous," Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79. The usury claims must be dismissed.

D. Plaintiffs Have Not Alleged That Asner Or Landy Were Unjustly Enriched.

Plaintiffs also fail to rebut that they have not pleaded an actionable unjust enrichment claim against Asner and Landy. Under Virginia law, a plaintiff must allege: (1) that he "conferred a benefit" on the defendant; (2) that the defendant "knew of the benefit and should reasonably have expected to repay" the plaintiff; and (3) that the defendant "accepted or retained the benefit without paying for its value." *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 165-66 (4th Cir. 2012) (quotation marks omitted).

Plaintiffs wholly fail to allege that Asner or Landy, *individually*, received or accepted a benefit. Plaintiffs again invoke allegations that are nothing more than "[t]hreadbare recitals of the elements of a cause of action." *Iqbal*, 556 U.S. at 678. Paragraph 173—the primary allegation

Plaintiffs point to—simply repeats verbatim the elements of an unjust enrichment claim. FAC ¶ 173. The other referenced allegations either recite the elements of Plaintiffs' *RICO* claim, *id.* ¶¶ 139-140, or allege in the most general terms that "Defendants" or Asner and Landy "received amounts" collected from consumers, *id.* ¶¶ 116-123, 125, 163. These bare-bones allegations may be "plainly worded," Opp'n at 19, but they do not contain sufficient ***facts*** to plead a claim.

This case thus is on all fours with *Hyundai Emigration Corp. v. Empower-Visa, Inc.*, No. 1:09-cv-124, 2009 WL 10687986, at *1 (E.D. Va. June 17, 2009), where the court dismissed an unjust enrichment claim against an individual who operated companies allegedly involved in the scheme but who did not directly receive the payments at issue. *Id.* at *7-8. Plaintiffs attempt to evade *Hyundai* only by selectively quoting and mischaracterizing it. Plaintiffs claim *Hyundai* is distinguishable because it found that the plaintiffs had *not* alleged facts showing that any payments were made to the individual defendant or that the individual defendant received any portion of the payments. Opp'n at 20-21. Yet, Plaintiffs omit the fact that Hyundai *had* attempted to allege, in conclusory terms, that Hyundai had transferred funds to both the individual defendant and an entity (Empower). 2009 WL 10687986 at *8 ("Hyundai alleges that it 'transferred approximately $1.3 million to Defendants Empower and Yoon'" (brackets omitted)). Despite that allegation, the court noted that the complaint elsewhere alleged funds were transferred only to the company and—importantly—that the written contract agreement "expressly provided that all payments were to be transferred directly to [the company's] bank account" and "does not provide for payments to [the individual defendant]." *Id.* The court found the agreement "dispositive absent factual allegations to the contrary." *Id.*

So too, here. Plaintiffs allege in conclusory terms that Asner and Landy "received amounts collected from Plaintiffs." FAC ¶ 125. But the relevant agreements, which are essential to

Plaintiffs' claims, definitively contradict these allegations: the Loan Agreements direct Plaintiffs to pay the Tribal Lending Entities (not Asner and Landy), and the Participation Agreements direct that proceeds from loans went to particular companies (again not Asner and Landy). *See* ECF No. 58-1 at 1-2; ECF Nos. 44-17, 44-19 – 44-20, 44-22 – 44-25. As in *Hyundai*, these documents are fatal.[7]

III. Plaintiffs Fail To State RICO Claims Against Asner And Landy.

A. Plaintiffs Do Not Adequately Allege That Asner and Landy Collected Unlawful Debt.

Plaintiffs hollowly claim to "allege again and again that Asner and Landy obtained money from Plaintiffs loans [sic] that violated Virginia law." Opp'n 21. But Plaintiffs cite only the same conclusory recitations of legal elements, discussed above, that fail to plausibly plead how Asner or Landy were involved—at all—in the collection of such debt. And for the reasons discussed above, (1) Tribal law applies such that the loans are not usurious, *see supra* at 2-3; and/or (2) the Virginia usury claims against Asner and Landy must be dismissed, *see supra* at 7-9. Accordingly, Asner or Landy have not collected unlawful debt.[8]

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[7] In a confusing attempt to show that Asner and Landy somehow knew or should have known of a benefit that Plaintiffs have not pleaded, Plaintiffs cite a number of circumstances that supposedly show Asner and Landy knew that "the rent-a-tribe business model was always of questionable legality." Opp'n at 20. These alleged facts are irrelevant to whether Asner and Landy had *knowledge of a benefit* from the alleged enterprise. Just as fatal, nearly all of the allegations refer to lending arrangements *in other unrelated matters*; none claim that Asner and Landy themselves had knowledge of the alleged illegality of these other arrangements or the alleged "rent-a-tribe business model." *See* FAC ¶¶ 29-37, 47-48, 80-83, 89-93.

[8] Plaintiffs claim otherwise by citing a case in which the court stated that RICO makes it unlawful to also "use money" derived from racketeering activity to invest in an enterprise or to acquire control of an enterprise through racketeering activity. Opp'n at 21 (citing *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 839 (4th Cir. 1990)). But those are elements of the RICO statute's other subsections: (a) and (b). *Busby*, 896 F.2d at 839. Plaintiffs have *not* alleged counts against Asner and Landy under 18 U.S.C. § 1962(a) or (b)—only subsections (c) and (d). FAC ¶¶ 131-144.

B. Plaintiffs' Section 1962(c) Claim Fails To Plead That Asner And Landy Conducted Or Participated In The Conduct Of The Alleged Enterprise.

Plaintiffs purport to allege a claim under Section 1962(c), FAC ¶¶ 131-144, but that section only reaches persons who are "employed by or associated with" an enterprise *and who* "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." 18 U.S.C. § 1962(c). The Amended Complaint fails to make this showing—for any time period.[9]

To be liable under Section 1962(c), a defendant must have "some part *in directing* [an enterprise's] affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (emphasis added). It is not enough to allege "almost any involvement in the affairs of an enterprise"; instead Congress' specific use of the verb "to conduct" in Section 1962(c) "indicates some degree of direction." *Id.* at 177-78. "[O]ne is not liable" under Section 1962(c) "unless one has participation *in the operation or management of the enterprise itself*." *Id.* at 183 (emphasis added).[10]

Plaintiffs mistakenly claim that "[a]s to Asner and Landy's Section 1962(c) lack-of-participation argument, it is settled that involvement in the enterprise can be minimal to support a RICO claim." Opp'n at 23. In so doing, Plaintiffs conflate Section 1962(c) with the conspiracy claim under *Section 1962(d)* that Plaintiffs separately allege in Count Two of the Amended Complaint (and which fails for the independent reasons set forth below). FAC ¶¶ 145-154. Both cases Plaintiffs cite involve the necessary showing to support a conspiracy claim, and not a

[9] As discussed below, the Amended Complaint fails to allege that Asner and Landy ever were involved in *directing* the alleged enterprise's affairs. So Plaintiffs cannot save the Section 1962(c) claim by attempting to bootstrap prior actions through their withdrawal argument.

[10] Plaintiffs selectively quote *Reves*—and only once—for the proposition that an enterprise may be operated "not just by upper management but also lower rung participants under the direction of upper management." Opp'n at 26 (quoting *Reves*, 507 U.S. at 184). True enough. For liability to lie under Section 1962(c), however, those "lower rung participants" must still be involved in *directing* the enterprise's affairs. *Reves*, 507 U.S. at 179.

predicate claim under Section 1962(c) that the defendant himself "conduct[ed] or participate[d] … in the conduct of [the] enterprise's affairs." 18 U.S.C. § 1962(c).[11]

Plaintiffs point to no allegations alleging that Asner or Landy were involved in *directing* the alleged enterprise's affairs. *Reves*, 507 U.S. at 179. That is because there are none. Instead, Plaintiffs' claim appears to have been fueled by the now-withdrawn allegation that Asner and Landy participated in the alleged enterprise post-sale as "high-paid executives of the Tribal Lending Entities." Opp'n at 8 n.1; FAC ¶ 3. That allegation was (and is) false. Plaintiffs' Section 1962(c) claim was flawed even with that allegation (which said nothing about what Asner or Landy alleged did after 2014), and with that allegation withdrawn, it falls even further below the threshold for an actionable claim.

Plaintiffs' remaining allegations merely recite the legal elements of a RICO claim (shorn of supporting alleged facts), FAC ¶¶ 7, 105, 139, or do not demonstrate direction. As to Landy, Plaintiffs allege that prior to the sale of the businesses he supervised employees providing outside service to the Tribal Lending Entities. FAC ¶ 75. The provision of *outside* services to the enterprise does not show *direction* of the enterprise. *See, e.g., In re Am. Honda Motor Co. Dealerships Relations Litig.*, 941 F. Supp. 528, 560 (D. Md. 1996); *see also* Mot. at 25 (citing cases). As to Asner, the Amended Complaint alleges no involvement with the lending operations at all—zero—just his signature on certain corporate documents in the context of the August 2014 sale of NPA. FAC ¶ 20. Indeed, Plaintiffs acknowledge Asner had no "direct involvement with the lending operations," but claim that they need only show Asner participated "in the enterprise at-large."

[11] *See United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) (discussing how "a defendant can conspire to violate RICO and violate § 1962(d)" without himself undertaking predicate acts); *Smithfield Foods, Inc. v. United Foods & Commercial Workers Int'l Union*, 633 F. Supp. 2d 214, 231 (E.D. Va. 2008) (discussing a "*conspiracy to violate* Section 1962(c)," as distinct from a separate count alleging a Section 1962(c) claim (emphasis added)).

Opp'n at 27. Because Section 1962(c) requires direction, this is wrong as a matter of law and fatal to Plaintiffs' claim as to Asner. Any ownership interest in certain entities that Asner or Landy allegedly had as passive investors is also not enough to show direction of the alleged enterprise. FAC ¶¶ 19, 20, 63-71, 125; *see Dahlgren v. First Nat'l Bank of Holdrege*, 533 F.3d 681, 690 (8th Cir. 2008). The allegations here stand in stark contrast to those found sufficient in other cases to demonstrate direction. *Compare, e.g., Gibbs v. Stinson*, No. 3:18-cv-676, 2019 WL 4752792, at *32 (E.D. Va. Sept. 30, 2019) (defendants allegedly "dominated and controlled" the lending businesses, "alter[ed]" and revised "its business model," and "directed, reviewed, and approved key business decisions").[12]

C. Plaintiffs' Section 1962(d) Claim Fails To Allege The Knowing Agreement To Participate And Causation Necessary To Sustain Conspiracy.

To sustain the Section 1962(d) conspiracy claim, Plaintiffs must (but have failed to) plausibly plead that Asner and Landy "knowing[ly] 'agree[d] to participate in an endeavor'" which would violate the statute. *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) (quoting *Goren v. New Vision Int'l Inc.*, 156 F.3d 721, 732 (7th Cir. 1998)). This requires more than "mere association with an enterprise"; each defendant must have (i) "knowingly and intentionally agreed with another person to conduct or participate in the affairs of the enterprise," *id.*, and (ii) "kn[own] of and agreed to" the enterprise's "overall objective." *Solomon v. Am. Web Loan*, No. 4:17cv145, 2019 WL 1320790, at *11 (E.D. Va. Mar. 22, 2019). Each element's required *agreement* is absent.

The entirety of the allegations purporting to show Asner and Landy agreed to participate in the affairs of the alleged enterprise are: that Asner and Landy were former owners of NPA, a

[12] Plaintiffs also fail to plead the separate element that Asner and Landy were "employed by or associated with" the enterprise, 18 U.S.C. § 1962(c), because "'outsiders' who have no official position within the enterprise" may be liable only where they associate with an enterprise to "participate in the conduct of *its* affairs" and "not just their *own* affairs." *Reves*, 507 U.S. at 185.

company that allegedly provided services to the Tribal Lending Entities, FAC ¶¶ 72, 19, 20; that one of Landy's responsibilities was to oversee NPA employees in Overland Park and that Landy was a signatory on bank accounts for NPA and other entities, *id.* ¶¶ 75-76; that Asner signed certain corporate documents for NPA and other entities, *id.* ¶¶ 77-78; and that revenue went to the companies allegedly partially and indirectly owned by Asner and Landy, *id.* ¶¶ 70, 125. As a matter of law, these allegations show no more than insufficient "mere association with the enterprise." *Mouzone*, 687 F.3d at 218. "Under settled law, a plaintiff must allege more than routine contractual relationships among defendants to establish a RICO enterprise." *Singh v. NYCTL 2009-A Trust*, No. 14 Civ. 2558, 2016 WL 3962009, at *11 (S.D.N.Y. July 20, 2016). The fact that Asner and Landy were partial and indirect owners of companies that provided services to the lending entities does not, alone, show that they agreed to participate in the affairs of the alleged enterprise.[13]

Plaintiffs further fail to plead Asner and Landy's knowing and intentional agreement to the overall objective of the alleged enterprise. Plaintiffs do not plead any facts establishing whether (and if so, how and when) Asner and Landy specifically agreed to participate in and further the goals of the alleged enterprise, or that Asner and Landy knew of or intended to further allegedly unlawful aims. *Compare Solomon*, 2019 WL 1320790, at *9 (complaint alleged defendants knew lending activities were illegal after one investor backed out and another raised legal concerns); *Gibbs*, 2019 WL 4752792, at *33 (conspiracy plausibly alleged where, among other things, defendants "alter[ed] [the enterprise's] business model in response to growing legal pressures" and

[13] In *Goren*, the Seventh Circuit affirmed dismissal where a plaintiff alleged the defendant was "a part-owner" and "personally responsible for" the company's policies but "[b]eyond this blanket statement" failed to allege "any facts indicating an agreement" to participate in the RICO enterprise. 156 F.3d at 732-33. In addition, while two corporate defendants were "alleged to have performed certain services" for the company, the complaint was "utterly devoid of allegations indicating … a specific agreement … to participate in the affairs of the enterprise." *Id.*

the complaint alleged "detailed negotiations between co-conspirators").[14] The *sole* allegation is that "Defendants" generally (not Asner and Landy, specifically) "entered into a series of agreements" to violate Section 1962(c). FAC ¶ 153. This threadbare allegation is insufficient to state a claim. *See, e.g.*, *Parm v. Nat'l Bank of Cal., N.A.*, 242 F. Supp. 3d 1321, 1350 (N.D. Ga. 2017) (dismissing complaint which "contends, in conclusory fashion" that defendants "reached an agreement to use their respective roles within the Unlawful Debt Collection Enterprise to profit by facilitating payday loans to borrowers residing in states that banned the practice and collecting usurious interest rates").[15] Courts routinely dismiss claims containing no more than a conclusory allegation of an agreement to participate in the conspiracy.[16]

Plaintiffs also fail to allege causation and wrongly suggest that *any* "but for" connection to the defendants' conduct suffices under RICO. Opp'n at 25. But it is not enough for a plaintiff's injury to be proximately caused by any act done "in furtherance of a conspiracy"; the injury must

[14] Plaintiffs' claim that the intent element is "minimal under RICO" misrepresents the cited case law. Opp'n at 24 & nn.2, 3. Those cases merely stand for the proposition that courts cannot require additional scienter elements "beyond th[ose] found in the predicate crimes." *See, e.g.*, *United States v. Biasucci*, 786 F.2d 504, 512 (2d Cir. 1986). But the basis of a conspiracy claim under Section 1962(d) is the *agreement* to join the conspiracy and a knowing and willful agreement to further its objectives must be shown. Moreover, RICO is a "specific intent" offense; "[a]llegations that the defendants should have known [are] not enough to establish a conspiracy." *Singh*, 2016 WL 3962009, at *10 (internal quotation marks omitted).

[15] And the Amended Complaint "cannot be saved by its many conclusory and vague allegations concerning the collective conduct of the 'defendants'" because, "to state a viable RICO conspiracy claim against a particular defendant, a RICO plaintiff must allege that that defendant entered into [an] agreement." *Goren*, 156 F.3d at 733.

[16] *See, e.g.*, *Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777, 785 (7th Cir. 1999) (affirming dismissal where no "facts indicating an act of agreement among the alleged conspirators or what roles the various defendants would play in the conspiracy" were pled); *Parm*, 242 F. Supp. 3d at 1350; *Barry Aviation, Inc. v. Land O'Lakes Municipal Airport*, 366 F. Supp. 2d 792, 806 (W.D. Wis. 2005) (dismissing complaint alleging defendants "engaged in a conspiracy" but failing to plead "any facts indicating an act of agreement among defendants, what roles each defendant would play or what agreement defendants reached to commit two predicate acts of racketeering"); *Singh*, 2016 WL 3962009, at *10.

be caused specifically by the act that was "independently wrongful under RICO." *Beck v. Prupis*, 529 U.S. 494, 505-06 (2000). In other words the injury must "'flow[] from' the predicate acts." *Solomon*, 2019 WL 1320790, at *11 (citation omitted). Here, Plaintiffs plead only that Asner and Landy indirectly received funds through investments in various companies and provided certain services to the lending entities—not that Asner and Landy participated in the actual "collection of unlawful debt." Thus, causation is lacking as to Asner and Landy. *Compare Solomon*, 2019 WL 1320790, at *11 (causation established where defendants participated in "extensive ongoing monitoring and rigorous oversight regarding its loan" to the enterprise, had "thorough knowledge" of the lending scheme, and "sufficient control" to "incentivize the profitability of those loans").

D. Plaintiffs' RICO Claims Exceed The Four-Year Statute Of Limitations And Are Not Saved By Alleged Pre-2014 Participation By Asner and Landy.

Any supposed involvement in the alleged enterprise by Asner and Landy ended in August 2014, upon the sale of certain businesses to the Tribe, FAC ¶¶ 94-104—outside the four-year statute of limitations applicable to civil RICO claims, *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). Plaintiffs' claims involving pre-August 2014 loans thus are time barred. Because that time bar is apparent on the face of the Amended Complaint, the RICO claims must be dismissed. *See, e.g., Ott v. Md. Dep't of Pub. Safety & Corr. Servs.*, 909 F.3d 655, 658 (4th Cir. 2018).

Plaintiffs have not plausibly pleaded any involvement by Asner and Landy after August 2014—withdrawing the only allegation that served as the supposed support for post-2014 conduct because that allegation was admittedly false. Opp'n at 8 n.1. Tellingly, Plaintiffs do not dispute the Amended Complaint's silence on any post-2014 role. Instead Plaintiffs try to use the Opposition to sweep in the post-2014 time period by advancing a purported lack of withdrawal from the alleged conspiracy. Opp'n at 6-8. That argument proves the deficiency of the allegations

in the Amended Complaint and is unavailing for three reasons.

First, withdrawal is entirely irrelevant to the Count One Section 1962(c) claim that Asner and Landy "conduct[ed] or participate[ed], directly or indirectly, in the conduct of" the enterprise. 18 U.S.C. § 1962(c); *see* FAC ¶¶ 131-144. That count is distinct from the conspiracy claim, and requires that Plaintiffs show that, *throughout* the period, Asner and Landy had "some part in directing [the enterprise's] affairs." *Reves*, 507 U.S. at 179. Plaintiffs fail to allege any such conduct, during any time period, and certainly not after 2014. *See supra* at 12-14.

Second, for the Count Two Section 1962(d) conspiracy claim, Plaintiffs have not pleaded the required knowing agreement to participate necessary to demonstrate that Asner and Landy ever conspired with the alleged enterprise at all. *See supra* at 14-17. It follows that Asner and Landy need not have withdrawn from a conspiracy that *they never participated in* in the first place.

Third, even if Plaintiffs' allegations somehow could establish initial agreement to the conspiracy by Asner and Landy, they withdrew upon the sale of the businesses. In "the context of a business conspiracy," where the conspiracy "is carried out through the regular activities" of a business enterprise, a conspirator abandons the conspiracy when he "retire[s] from the business, sever[s] all ties to the business, and deprive[s] the remaining conspirator group" of its services. *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 839 (11th Cir. 1999). Courts repeatedly find that the *sale* of a business entity or resignation from such an entity is sufficient to withdraw from a conspiracy.[17] Only where the defendant fails to "sever[] all ties to the business"

[17] *See, e.g.*, 198 F.3d at 839 (withdrawal from price-fixing conspiracy "upon the sale of [the company's] dairy" effective where company "did nothing more to assist or participate in the price-fixing activities," and "totally severed" ties); *Krause v. Perryman*, 827 F.2d 346, 351 (8th Cir. 1987) (president's resignation and sale of stock showed withdrawal, despite buyout payment, because "receipt of monies paid to him as consideration for the sale of his interest in an enterprise hardly can be viewed as evidence of his continuing post-sale participation in the enterprise").

despite the sale is withdrawal ineffective. *Id.* The Amended Complaint contains no allegation establishing ongoing ties between Asner and Landy and the Tribal Lending Entities. Plaintiffs concede as much when they implore in the Opposition that "*it is fair to presume* that Asner and Landy maintained at least some role" after 2014. Opp'n at 7 (emphasis added). But "conclusions built on inadequately pleaded assumptions unadorned with facts" cannot survive a motion to dismiss. *Hicks v. Powell Staffing Solutions, Inc.*, No. 3:12CV439–HEH, 2012 WL 5040715, at *3 (E.D. Va. Oct. 17, 2012). Without pleading such ongoing ties, Plaintiffs cannot avoid the statute of limitations because withdrawal "starts the [limitations] clock running" and "provides a complete defense when the withdrawal occurs beyond" the limitations period. *Smith v. United States*, 568 U.S. 106, 111 (2013).[18]

IV. Plaintiffs' Claims Against Asner And Landy Related To Majestic Lake Fail.

True to form, Plaintiffs again point only to conclusory allegations that "Defendants," generally, received repayment on loans issued by Majestic Lake and that Plaintiffs now "seek to recover from Asner and Landy" amounts repaid on loans from all Tribal Lending Entities. Opp'n at 29; FAC ¶¶ 116-117, 119, 174. But, Majestic Lake did not begin operating until 2015 (*after* Asner and Landy sold the businesses) and is expressly excluded from the Tribal Lending Entities to which those businesses supposedly provided services to or received revenue from. FAC ¶¶ 67, 70. Without a factual predicate tying Asner and Landy to Majestic Lake, these conclusory allegations cannot state a claim as to that entity and must be dismissed.

[18] Plaintiffs contend that because the Amended Complaint does not use the magic word "withdraw," "nothing address[es] Asner and Landy's withdrawal from the conspiracy." Opp'n at 7. If Plaintiffs were correct, defendants would find themselves in an impossible catch-22 based on allegations artfully drafted to avoid satisfying the requirements of a RICO claim. Fortunately, the law is otherwise. Plaintiffs expressly plead that Asner and Landy sold the businesses to the Tribe in August 2014. FAC ¶ 97. That sale constitutes withdrawal in light of Plaintiffs' failure to further plead any ongoing ties. As a result, Plaintiffs' RICO claims must be dismissed as untimely.

V. Defendants Have Not Established Personal Jurisdiction Over Asner And Landy.

Because the RICO claims are "wholly immaterial [and] insubstantial," Plaintiffs cannot rely on RICO's nationwide service of process. *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 629 (4th Cir. 1997). And under Virginia's long-arm statute, Asner and Landy have no continuous and systematic contacts with Virginia that could support jurisdiction. Mot. at 28-29. Despite bearing the burden to demonstrate personal jurisdiction, *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989), Plaintiffs offer no argument for why jurisdiction would be proper under Virginia's long-arm statute, Opp'n at 29-30. Accordingly, if the RICO claims are dismissed (as they must be), the state law claims must be dismissed for lack of personal jurisdiction.

VI. Dismissal With Prejudice Is The Only Appropriate Remedy.

The Amended Complaint leaves in place Plaintiffs' bare-bones, conclusory allegations concerning Asner and Landy's purported role in the lending enterprise, notwithstanding notice of these defects in the earlier filed motion to dismiss.[19] After *multiple* chances to mount allegations against Asner and Landy, Plaintiffs fail to come forward with anything more than speculation. Yet another attempt would severely prejudice Asner and Landy and "unduly subject" them to "continued time and expense." *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 461 (4th Cir. 2013). The Amended Complaint must be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Defendants Scott Asner and Joshua Landy respectfully request that the Court grant their Motion to Dismiss.

[19] It bears emphasis that Plaintiffs have now withdrawn the only substantive allegation added to the Amended Complaint—that Asner and Landy are allegedly "high-paid executives of the Tribal Lending Entities," Opp'n at 8 n.1; FAC ¶ 3—conceding that that the allegation is baseless and founded only on Plaintiffs' understanding of other lending restructures in other unrelated cases.

Respectfully submitted,

Dated: October 4, 2019

/s/ Jan A. Larson

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CERTIFICATE OF SERVICE

I certify that on October 4, 2019, I have electronically filed the REPLY IN SUPPORT OF DEFENDANTS SCOTT ASNER AND JOSHUA LANDY'S RENEWED MOTION TO DISMISS with the Clerk of Court using the ECF system which will send notification of such filing to the following:

George Hengle
Sherry Blackburn
Willie Rose
Elwood Bumbray
Tiffani Myers
Steven Pike
Sue Collins
Lawrence Mwethuku
Sherry Treppa
Tracey Treppa
Kathleen Treppa
Iris Picton
Sam Icay
Aimee Jackson-Penn
Amber Jackson

Dated this October 4, 2019.

/s/ Jan A. Larson
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