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,	)	
v.	)	Civil Case No. 3:19-250
SCOTT ASNER, et. al.	)	
Defendants.	)	

MEMORANDUM FOR HABEMATOLEL POMO OF UPPER LAKE CONSUMER FINANCIAL SERVICES REGULATORY COMMISSION, AS *AMICUS CURIAE* SUPPORTING DEFENDANTS

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INTRODUCTION

The Plaintiffs' characterization of the tribal defendants' business as a "scheme" to evade state regulation ignores the reality that the Habematolel Pomo of Upper Lake Tribe ("Tribe") thoroughly regulates the defendant tribal businesses. Whether and how a sovereign approaches usury limits is a policy decision that varies widely across the U.S. and is hardly indicative of a "scheme." The Plaintiffs' attempt to impose Virginia law on transactions governed by another sovereign jurisdiction's law disregards settled Supreme Court precedent and decades of federal policy.

INTEREST OF AMICUS CURIAE

Amicus Curiae, the Habematolel Pomo of Upper Lake Consumer Financial Services Regulatory Commission ("Commission") operates independently of the Tribe to enforce tribal and applicable federal consumer financial-protection laws. Accordingly, the Commission has an interest in defending its own regulatory power and the right of tribal governments to regulate their own economic entities.

No party's counsel authored any part of this brief, and no party, party's counsel, person, or entity other than the amicus curiae, its members, or its counsel contributed money toward the authorship or production of this brief.

NATURE OF THE MATTER

The Plaintiffs filed suit against, among other defendants, five economic development arms of the Tribe: Golden Valley Lending, Inc.; Silver Cloud Financial, Inc.; Mountain Summit Financial, Inc.; Majestic Lake Financial, Inc.; (the "Tribal Lenders") and Upper Lake Processing Service, Inc. ("ULPS," and together with the Tribal Lenders, the "Tribal Businesses"), then later filed suit against the Tribal Leaders in their official capacities. The Complaint alleges that the

Tribal Businesses collected debts that were unlawful under Virginia law in violation of 18 U.S.C. § 1962 (c) and (d) (Counts I and II); violated Virginia licensing and usury laws (Count IV); and were unjustly enriched by the collection of loans that were void under Virginia law (Count V).[1] The Tribal Leaders have moved to dismiss the claims. The Commission supports their motion.

STATEMENT OF FACTS

The Tribe has invested significant resources to ensure that its regulatory Commission is as robust and effective as any comparable state regulator. (Affidavit of Sherry Treppa, Dkt. 44 ("Treppa Aff."), at ¶ 69 and Ex. 7.) The Tribe created the Commission to implement its Tribal Consumer Financial Services Regulatory Ordinance (the "Ordinance"). Mr. David Tomas, who is a Tribal Member, is the current regulatory Commissioner. Commissioner Tomas is advised by two attorneys with experience in the area of financial services regulation and law enforcement (one, a former acting deputy director of enforcement at the Consumer Financial Protection Bureau; the other, a former United States Attorney for South Dakota nominated by President Obama and unanimously confirmed by the United States Senate).

The Commission is an independent regulatory agency of the Habematolel Pomo of Upper Lake Tribal government. The Tribe's Executive Council appoints the Commissioner to a renewable three-year term. The Commissioner is subject to removal by the Executive Council only for cause (*Id.* §§ 6.4, 6.6.). The enabling legislation provides for a budget, regular reporting, and ready access to the Commissioner should any need arise requiring his action, insight, or expertise.

[1] Count III does not allege a claim against the Tribal Businesses. It does, however, allege that other defendants violated the law by attempting to collect on loans issued by the Tribal Lenders because those loans did not comply with Virginia law.

Like many states and a few cities, the Commission independently regulates and controls the provision of Consumer Financial Services within tribal jurisdiction. (*Id.* § 1.1(e)-(m).) Any lender within the Tribe's jurisdiction that seeks to provide financial services must apply for a license from the Commission. (*Id.* § 5.) Each licensee must then comply with tribal and applicable federal consumer-protection laws, as set forth in the Ordinance. (*Id.* § 7.2.). the Tribe has enacted—and the Commission actively enforces—a lending code with detailed consumer protection requirements that incorporate many aspects of federal consumer protection laws and in some cases exceed the consumer protections provided under federal law.

For example, the Ordinance that governs the Tribal Businesses' lending operations imposes data security standards that exceed federal law. (Treppa Aff. Ex. 7 at §§ 9.1-9.6.) The Ordinance prohibits all misrepresentation, which sets a more stringent standard than federal law. (*Id.* § 7.3(c)(3) ("[A Licensee shall not] use or cause to be published or disseminated any advertisement that contains false, misleading or deceptive statements or representations.").)[2] The Ordinance requires particular loan disclosures (*id.* § 8.2(h)(2)), explicitly limits certain lending practices such as repeated rollovers (*id.* § 9), and specifies the computation of interest rate refunds in the event of prepayment (*id.* § 8.2(m)(2)).

The Commission examines the Tribal Businesses for compliance with the Ordinance and the federal law incorporated into the Ordinance. This includes all relevant enumerated consumers laws defined under the Consumer Financial Protection Act. (S*ee* 12 U.S.C. § 5481(12) (listing eighteen federal laws, including the Electronic Fund Transfer Act, the Fair Credit Reporting Act,

[2] Under federal law, a deception claim only exists if a misrepresentation is material. 12 U.S.C. § 5531; 15 U.S.C. § 45(a)(1); FTC POLICY STATEMENT ON DECEPTION (October 14, 1983), appended to *FTC v. Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984); *FTC v. Freecom Communs.*, 401 F.3d 1192, 1196 (10th Cir. 2005). The Ordinance does not contain a materiality requirement.

the Fair Debt Collection Practices Act, and the Truth in Lending Act)), as well as other laws like the Gramm-Leach-Bliley privacy safeguards rule (15 U.S.C. § 6801), and the Red Flags Rule (15 U.S.C. § 1681m(e), 1681w). Those examinations include an on-site review of lending records, data privacy protocols, compliance procedures, call scripts, marketing materials, consumer complaints, review of financial documents, monitoring of contact with consumers, and interviews of key employees.

Federal regulators recognize the Commission's authority. Congress defines tribes as equal to "states" in the Consumer Financial Protection Act.[3] The Consumer Financial Protection Bureau ("CFPB" or "Bureau") has had tribal consultations related to online small dollar lending with the Commission and other tribal government representatives pursuant to its tribal consultation policy.[4] The Bureau also respects that tribal regulatory authorities supervise companies that provide consumer financial products or services and encourages the authorities to use its examination manuals, which gives examiners direction on how to assess compliance with federal consumer financial laws.[5]

The CFPB's encouragement is well-taken. The Commission has indeed exercised its power to regulate all lending entities within its jurisdiction. (See, *Id.* § 4.) The Commission conducts regular examinations of the Tribe's lending operations. It has, to date, conducted multiple on-site examinations of the Tribe's operations in Upper Lake, California and Overland Park, Kansas. .

[3] 12 U.S.C. 5481(27) ("The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 479a-1(a) of Title 25").

[4] *See*, https://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf.

[5] https://www.consumerfinance.gov/tribal/.

Each on-site examination culminates in a report of examination that identifies any risks to consumers and violations of tribal or applicable federal consumer protection laws. Issues discovered in the examination are addressed through "matters requiring attention" or required "corrective actions." The Commission has the enforcement authority under tribal law to revoke licenses, enjoin conduct, and assess civil money penalties. (Treppa Aff. Ex. 7 §§ 10.2; 10.3(a).)

The examinations of and orders from the Commission reflect best practices of a Consumer Financial Protection Bureau examination and a Department of Justice investigation.

The Commission also monitors and responds to consumer complaints and complaints received from state attorneys general and other regulators. When necessary, the Commission conducts an investigation to ensure that the complaints are resolved and the root causes of the complaints are addressed. The Commission also works with law enforcement, courts, and other state and federal agencies as appropriate to investigate such matters as identity theft, imposter lenders, and other law enforcement concerns. As needed, the Commission issues regulatory guidance bulletins to help lenders and others subject to the Commission's jurisdiction proactively implement best practices.

ARGUMENT

The Plaintiffs dislike small-dollar short-term loans. In contrast, offerors and customers say the loans provide vital access to capital and emergency funds. Reasonable minds can differ on these points. But this case is not about small-dollar lending. This case and the instant motions are about the Tribe's sovereign authority to enact laws, regulate businesses subject to those laws, and engage in commerce. The Fourth Circuit, in *Williams v. Big Picture Loans*,[6] recently held that by a preponderance of the evidence that the lending entities in that case were arms of the Tribe, and

[6] Williams v. Big Picture Loans, LLC, No. 18-1827 (4th Cir. 2019).

therefore entitled to immunity from suit and the application of another sovereign's law. The defendants in this matter should earn the same judgment for many reasons, some of which are discussed herein. Further, the purpose of operating lenders under Tribal law is not to evade the law—rather, its purpose is to operate under a better set of laws that reflect the values and policy decisions of the Tribe.

The Commission actively regulates the Tribal businesses. The Plaintiffs' repeated claim that the Tribal Businesses are unregulated (*see, e.g.*, Compl. ¶ 1 (accusing the defendants of "regulation-avoidance")) is untrue. Moreover, in light of the extensive regulation the Commission performs, the Plaintiffs' assertion that the Tribal Businesses are engaged in a "scheme" to avoid regulation is also incorrect. (*See, e.g.*, Compl., ¶¶ 1,4.)

By demonstrating its robust regulation of the Tribal Businesses, the Commission hopes to correct the record before this Court. Despite the Plaintiffs' unsupported characterizations, the Commission thoroughly regulates the Tribal Businesses—more thoroughly than federal or many state laws require. The Tribe need not adopt the same laws and regulations as the Commonwealth of Virginia or any other state. To suggest so misunderstands the extent of state authority in a federalist system and contains echoes of the paternalistic and offensive notion that Indians do not know how to govern themselves. The Plaintiffs' core notion—that Virginia law must apply to the Tribal Businesses in the absence of any other regulation—is simply not supportable in light of the Ordinance and the Commission's extensive regulation of the Tribal Businesses.

II. The application of Virginia law to loans issued by the Tribal Lenders undercuts the Tribe's sovereignty and upsets the federal government's policy to promote tribal economic development.

The Tribe, just as any other sovereign, has the power to regulate the Tribal Businesses. As discussed in the previous section, it has done so. The Tribe's laws and the Commission's authority deserve just as much legitimacy and recognition as any state's law. Moreover, the Commonwealth of Virginia is not able to impose its policy choices on any other sovereign, whether a state or a tribe. The Plaintiffs' position that Virginia law applies to loans originated by the Tribal Lenders is contrary to established law regarding tribal sovereign immunity. It would also frustrate the longstanding federal policy regarding tribal self-sufficiency and economic development.

A. Tribal sovereign immunity extends to tribal commercial activities and tribal enterprises.

The Supreme Court has repeatedly reaffirmed that tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers" as "a necessary corollary to Indian sovereignty and self-governance." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal quotations omitted); *Santa Clara Pueblo*, 436 U.S. 49, 58 (1978); *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 553 (4th Cir. 2006). This immunity derives from the well-established principle that Indian tribes are "distinct, independent political communities, retaining their original natural rights" of self-governance. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52 (1978) (describing tribes as "separate sovereigns pre-existing the Constitution."). From this inherent sovereignty, tribes derive their authority "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

That immunity bars suit against tribes unless a tribe waives its immunity or Congress specifically—and unequivocally—authorizes suit. *Bay Mills*, 134 S. Ct. at 2030-31; *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 755-56 (1998) (holding that tribal sovereignty is not subject to diminution by the states); *United States v. Wheeler*, 435 U. S. 313, 323 (1978) (unless and "until Congress acts, the tribes retain" their historic sovereign authority). It is also black-letter law that tribal immunity extends to commercial activities of a tribe, even when those activities take place off tribal land. *Bay Mills*, 134 S. Ct. at 2031; *Kiowa,* 523 U.S. at 756 (manufacturing); *Comm'n v. Citizen Band Potawatomi Tribe of Okla*., 498 U.S. 505, 509 (1991) (selling cigarettes); *Puyallup Tribe, Inc. v. Dep't of Game of Wash*., 433 U.S. 165, 167–168, 172–173 (1977) (fishing); *United States v. United States Fidelity & Guaranty Co*., 309 U.S. 506, 512 (1940) (leasing coal mines). This immunity extends to tribal corporations and tribal enterprises. *See, e.g.*, *Breakthrough Management Group v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 183 (10th Cir. 2010); *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006); *Ninigret Dev. Corp. v. Narragansett Indian Weuomuck Hous. Auth*., 207 F.3d 21, 29 (1st Cir. 2000); *Hagen v. Sisseton-Wahpeton Comty. Coll.*, 205 F. 3d 1040 (8th Cir. 2000); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993). Congress has not limited or abrogated tribal sovereignty in the context of online lending.

The Commission supports the motion to dismiss based on tribal sovereignty. Tribes cannot be sovereign and yet be required to follow laws enacted by states. Allowing this matter to proceed will displace tribal law and the designated tribal financial regulator—the Commission—in contempt of well-settled Supreme Court precedent regarding tribal sovereignty.

B. Tribal lending enhances federal policy of tribal economic development and political self-determination.

Congress states the federal policy regarding tribal economic development in its twelve findings outlined in the *Native American Business Development, Trade Promotion, and Tourism Act of 2000 ("Business Development Act")*,[7] which created programs in the Department of Commerce to support tribal enterprise access to domestic and international markets. Among the findings, Congress explicitly recognized that the United States has an, "obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes."

The federal government knows well the challenges faced by tribes who are forced to live in assigned and often remote locales in order to keep their cultures intact. Indian tribal citizens remain mired in unemployment, poverty, and low income. According to the 2010 Census, real per capita income on reservations is $11,400, compared to $26,900 off reservation. The family poverty rate on reservations is 32% and child poverty rate is 44%, compared to 10% and 20% respectively off reservation. The unemployment rate on reservations is 20%, while off reservations the rate is 8%.[8] Congress recognized in the *Business Development Act* that strong tribal governments and economies are "[h]indered by the inability of Indian tribes to engage communities that surround Indian lands and outside investors in economic activities…."

The solution proposed by Congress—and acted upon by the Habematolel Pomo Tribe of Upper Lake—is to address these persistent conditions through tribal enterprises and economic development that employ tribal citizens and raise revenues for tribal governments to provide

[7] 25 U.S.C. §§ 4301 et seq.

[8] RANDALL K. Q. AKEE & JONATHON TAYLOR, Social and Economic Change on American Indian Reservations, A Databook of the U.S Censuses and the American Community Survey, 1990-2010 (May 15, 2014).

much needed services and programs for their citizens while also contributing greatly to their state and regional economies. "[T]he twin goals of economic self-sufficiency and political self-determination for Native Americans can best be served by making available to address the challenges faced by those groups— (A) the resources of the private market; (B) adequate capital; and (C) technical expertise." 25 U.S.C. §4301(a).

Even the U.S. Supreme Court recognizes that tribal sovereignty as a tool of economic development that promotes longstanding federal policies. "A key goal of the Federal Government is to render Tribes more self-sufficient and better positioned to fund their own sovereign functions, rather than relying on Federal funding." *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring).

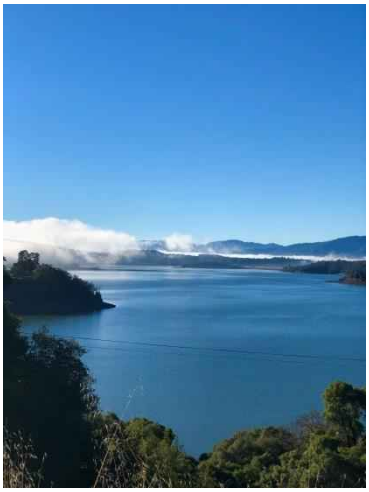
Outside of grants, tribal enterprises are the primary means for raising revenue to support tribal governmental functions, programs, and services for tribal citizens and for participation in and contributions to regional economies. *See* MONTANA BUDGET AND POLICY CENTER, Policy Basics: Taxes in Indian Country, Part 2, (November 2017) ("While tribal governments operate many of the same public services as other levels of government, they must operate without the usual tax revenue other levels of government rely on. . . [M]any tribes must rely on their natural resources and tribally owned business enterprises as their only source of revenue outside federal dollars."); *see also*, NATIONAL CONGRESS OF AMERICAN INDIANS , Securing our Futures Report, (2013) ("The increasing contributions of tribes demonstrate that in many locations tribal nations are a major economic force.").

If tribes could not generate revenue for basic and essential governmental functions from tribally owned businesses, tribes are left with only the impractical options of taxing income of tribal members, who are often at the low end of the income ladder, or taxing economic activity

within their jurisdictions, which is often already subject to state taxation, thereby resulting in double taxation and discouraging outside investment on tribal lands. *See Bay Mills*, 572 U.S. at 807. ("Tribes face a number of barriers to raising revenue in traditional ways. If Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal."); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008). Tribally-owned businesses are often left as the best or only option for funding governmental services.

C. The Lending Businesses Significantly Support the Tribe and Align with Tribal Values

A challenge to the Tribe's right to develop and grow businesses that operate as "arms" of the tribe threatens Tribes' ability to survive. Upper Lake operates a financial services business for reasons that are essential to preserving their lands and culture. Upper Lake is located in a remote section of California, Lake County. It has fewer that 50 people per square mile. Due to its surrounding hilly terrain, Lake is the only one of California's 58 counties never to have been served by a railroad line. No business that relies on transportation or foot traffic could be especially successful in this region.



The Tribe cannot exploit natural resources, like some other tribes do. Lake County houses the oldest warmwater lake in North America and has habitats for a variety of rare species including the uncommon herb, *Legenere limosa*, the rare *Eryngium constancei*, and the *tule elk*. Waterfowl, bear, and other wildlife abound in the Clear Lake basin. Below is a picture of the Clear Lake taken during an on-site examination of the Tribe's California

call center. Protecting this environment and safeguarding Clear Lake and its inhabitants is essential to the Tribe.

A financial services business causes no waste or environmental impact on Tribal lands, and they can be run from the most remote Indian reservations and supported by off-site employees connected by the internet. Aspects of the business—like call center jobs—are ideal for the presently available tribal member workforce. The Tribe recently built a new office complex to house an expanded call center and increase jobs on Tribal land. The prospects of high-tech ecommerce and financial services jobs are more likely to keep talented young tribal members living and working near tribal lands. These types of "coding" and computer science jobs are taught online and at community colleges in Lake County. For members that wish to pursue professional positions elsewhere, the Tribe can now support their career growth through internships and scholarships supported by the Tribal Businesses.

This is critical to the Tribe. To keep cultures intact, tribes must keep their members nearby or integrally connected. Funds must exist to pay for cultural programs. The Tribal Businesses have accomplished this by providing significant revenues for projects like native language programs and the repurchase of ancient burial grounds.

In addition, the Tribe has plans to offer a greater number of products than simply consumer loans. What the Plaintiffs cast as evasion of state law is in fact a vision for the future of the Tribe.

Subjecting the Tribal Businesses to state laws and depriving the Tribal Businesses of their immunity—as Plaintiffs seek to do in this case—will take away the Tribe's ability to create and drive economic development using a business model that serves its needs and values. In addition, permitting the Plaintiffs' claims to proceed will engender a fundamental disrespect for

tribes as sovereigns that will threaten confidence in tribal law and reduce the ability of tribes to self-govern in all aspects of commerce.

III. The application of Virginia law to loans issued by the Tribal Lenders upsets long-standing federal policy on home-state lending.

Some states, such as the Commonwealth of Virginia, have enacted usury laws. Other states have chosen not to place a cap on interest rates, and some states have different regulations depending on the type of loan at issue. In short, states have a myriad of policy approaches to lending regulations and policy. No approach is inherently right or wrong, and each sovereign is entitled to make its own choice.

The Plaintiffs' attempted enforcement of state usury and licensing laws in this case would impermissibly impose the law of one sovereign on another. This theory would effectively displace tribal lending and licensure laws and substitute the laws of other states on a consumer-by-consumer basis. Under the Plaintiffs' theory, loans issued by the Tribal Lenders to consumers in states without a usury limit would be permissible, but those same loans become illegal if extended to consumers living in states with a usury limit.

As a practical matter, lenders, whether licensed by state or tribal authorities, will no longer be able to transact business outside the jurisdiction in which they are licensed. Congress recognized the undesirability of this restriction on commerce when it enacted the National Bank Act in 1864. *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978) ("Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that . . . Congress intended to facilitate . . . a 'national banking system.'). The National Bank Act allows banks to charge customers the interest rate allowed by the law of the state where the bank is located, regardless of where the consumer is located. 12

U.S.C. § 85; *see also id.* at 301 (allowing a Nebraska bank to charge its Minnesota credit card customers interest greater than that allowed under Minnesota law because the bank was located in Nebraska, which permitted the higher rate). Importantly, this holds true even if consumers use some means of interstate commerce and never actually set foot in the bank's home state. *Marquette Nat'l Bank*, 439 U.S. at 311.

The home-state approach has sound rationale. In *Marquette National Bank*, the Supreme Court recognized the importance of predictability in bank transactions:

> If the location of the bank were to depend on the whereabouts of each credit card transaction, the meaning of the term "located" would be so stretched as to throw into confusion the complex system of modern interstate banking. . . . We do not choose to invite these difficulties by rendering so elastic the term "located."

Id. at 312.

The Plaintiffs' theory here would conjure up precisely the confusion the Supreme Court feared in *Marquette National Bank*. For example, Utah law contains no usury limit. If a consumer entered into a loan agreement in Utah governed by Utah law for a loan at 35 percent annual interest, and then moved to Virginia, any continued collection of the loan would violate Virginia's law. Thus, the enforceability of a loan would change depending on the location of the consumer at any moment in time. In addition, a lender who had complied with every state or tribal law at the time it issued a loan could suddenly become subject to liability simply because a consumer moved to a different state. That result is absurd and impractical.

1. Consumers freely agree to get products that are not compliant with Virginia usury laws

The Commission ensures that Lending Business customers know, understand, and agree that Tribal Law applies to their loans. Indeed, American consumers are accustomed to

contracting for financial services with terms that do not comply with their state of residences' laws. The best example is credit cards.

Many federally-insured banks and thrifts market, originate, and collect on loans that exceed certain states' usury rates, particularly when issuing credit cards.[9] Consumers in states with usury limits routinely apply for and use these products, knowing that the interest rates exceed what is offered from local lenders. Like federally-chartered banks, tribally-licensed lenders rely on their locus to determine usury limits and make this choice of law an explicit contract term. And like federally-chartered banks, tribally-owned lenders rely on contractual choice-of-law provisions to establish the law governing the parties' lending agreement.

2. The Commission enforces applicable federal law.

Just as any other sovereign regulator, the Commission has a strong interest in ensuring that it is recognized as the proper regulatory authority governing the Tribal Businesses. If this Court applies Virginia law to loans governed by the Ordinance, such application would impair the ability of the Commission to carry out its regulatory functions, and would jeopardize the very existence of the Tribal Businesses. By extension, such a decision would also allow the laws of Virginia to extend to lending operations regulated by other sovereigns—such as the state of Utah or any other state without a usury limit—and would deprive those sovereigns of the ability to make and implement their own policy choices.

The Plaintiffs have no defensible or coherent reason to impose shifting, extra-jurisdictional state usury limits on consumer loans. Nor can they justify displacing the parties' autonomy to select the choice of law merely because they later prefer the laws of other jurisdictions. Indeed,

[9] The Plaintiffs have not plead any facts showing that consumers understand online loan contracts any less than credit card contracts.

because the Ordinance, in some cases, provides greater consumer protections than federal law, the Tribe has a greater interest than any state in imposing its lending laws on contracts originated by its government-owned enterprises.

The confusion created by the Plaintiffs' position would upend consumer and business expectations. Both consumers and businesses depend on the ability to choose the law that governs their agreements free from undue interference. When consumers enter into a loan agreement with the Tribal Lenders, both the Tribal Lenders and the consumers can rely on the application of tribal law and regulation by the Commission. If the Plaintiffs can displace the concept of contractual choice-of-law, consumers and lenders will no longer enjoy the freedom to contract that is available in virtually every other lending relationship.

CONCLUSION

The Plaintiffs appear to be under the impression that the Tribal Businesses are not regulated. That is incorrect. The Commission thoroughly regulates the Tribal Businesses, and the loans issued by the Tribal Lenders comply with the stringent requirements imposed by the Tribe's Ordinance. Replacing the Commission and the Tribe's Ordinance with Virginia law flies in the face of tribal sovereignty, independence, and development. It also threatens to upset the common lending practice whereby lenders are governed by the laws of their home state, thereby throwing into question the governing law and regulatory authority of all state and tribal regulators. Accordingly, the Commission respectfully requests that this Court dismiss the claims against the current set of Defendants.

Dated: August 30, 2019

Respectfully submitted,

ATTORNEYS FOR HABEMATOLEL POMO OF UPPER LAKE CONSUMER FINANCIAL SERVICES REGULATORY COMMISSION

By: */s/ Christine A.Samsel* _____

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CERTIFICATE OF SERVICE

I, Christine A. Samsel, hereby certify that on this 30th day of August, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing (NEF) to all counsel of record.

*/s/ Christine A. Samsel*_____
Christine A. Samsel, Attorney