Nos. 20-1062 (L), 20-1063, 20-1358, 20-1359

In the United States Court of Appeals for the Fourth Circuit

George Hengle, *et al.*,
on behalf of themselves and all individuals similarly situated,
Plaintiffs-Appellees,

v.

Sherry Treppa, *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND
Case No. 3:19-cv-00250-DJN, David J. Novak, U.S. District Court Judge

BRIEF OF *AMICUS CURIAE* HABEMATOLEL POMO OF UPPER LAKE CONSUMER FINANCIAL SERVICES REGULATORY COMMISSION IN SUPPORT OF APPELLANTS SUPORTING REVERSAL

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I. BACKGROUND AND STATEMENT OF INTEREST

Amicus Curiae, the Habematolel Pomo of Upper Lake Consumer Financial Services Regulatory Commission (the "Commission") is a governmental arm of the Habematolel Pomo of Upper Lake Tribe (the "Tribe"). The Commission operates independently of the Tribe to enforce Tribal and applicable federal consumer financial protection laws.

About the Commission

The Tribe created the Commission to implement its Tribal Consumer Financial Services Regulatory Ordinance (the "Ordinance"). The Commission is an independent regulatory authority that exercises jurisdiction over all entities licensed by the Tribe to provide financial services subject to Tribal law (collectively, the "Licensees"). The Ordinance charges the Commission to "[e]nsure that Consumer Financial Services are conducted appropriately . . . and remain free from corrupt, incompetent, unconscionable and dishonest practices." (Ordinance at § 1.2(e), JA250.)

As part of the exercise of its duties, the Commission regularly examines the operations, books, and records of all Licensees. It also issues regulations and written guidance as needed. Although consumer

complaints relating to Licensees are rare, the Commission investigates and responds to all consumer complaints it receives.

The Commission consists of a commissioner appointed by the Tribe's Executive Council to a three-year renewable term. Once appointed, the commissioner is subject to removal only for cause. (Ordinance, § 4.8(a), JA258.) The current commissioner is Mr. David Tomas. Mr. Tomas is a Tribal member with significant experience in both Tribal governance and business operations. As commissioner, Mr. Tomas is advised by, among others, attorneys Brendan Johnson (a former United States Attorney nominated by President Obama and unanimously confirmed by the United States Senate) and Sarah Auchterlonie (a former acting deputy director of enforcement at the Consumer Financial Protection Bureau).

Interest in this Matter

The Commission has an interest in defending its regulatory power and its jurisdiction over Tribal financial services. It also has an interest in promoting a correct understanding of Tribal law and its application, and in ensuring that tribal governments receive the same respect afforded to state governments. Finally, the Commission has an interest in preserving the

rights of tribal governments to regulate their own economic entities, and ensuring that treaties and federal legislative policies promoting tribal economic development are promoted.

Rule 29(4)(E) Statement

Pursuant to Rule 29(4)(E) of the Federal Rules of Appellate Procedure and Local Rules of the Fourth Circuit, Amicus states as follows: The foregoing brief was authored in its entirety by the Commission's counsel; no party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person (other than the amicus curiae, its members, or its counsel) contributed money that was intended to fund preparing or submitting the foregoing brief.

II. ISSUE PRESENTED

This brief addresses the following issue: Did the District Court err when it determined that a choice-of-law clause requiring application of Tribal law was unenforceable as a matter of public policy?

III. ARGUMENT

The District Court, exercising supplemental jurisdiction over the Plaintiffs' state-law usury claims, applied Virginia's choice of law rules. Under Virginia law, a contractual choice-of-law provision should be enforced unless it results in "something immoral, shocking one's sense of right." *Hengle v. Asner*, No. 3:19cv250 (DJN), 2020 WL 113496, at *24 (E.D. Va. Jan. 9, 2020) (quoting *Tate v. Hain*, 25 S.E.2d 321, 325 (Va. 1943), at JA1749. In the lending context, the Virginia Supreme Court has expressly held that choice-of-law clauses designating the application of another sovereign's law should be enforced even if that law does not contain an interest rate cap. *See Settlement Funding, LLC v. Van Neumann-Lillie*, 645 S.E.2d 436 (Va. 2007). Nonetheless, the District Court then found that the Tribal choice-of-law provision violated Virginia's public policy because Tribal law does not set a specific interest rate cap. *Hengle*, 2020 WL 113496, at *24-25, JA1751-57.

Underpinning the District Court's conclusion was a sense that the application of Tribal law really meant the application of no law at all, or the application of law that was somehow grossly deficient when compared to

Virginia law. The misconception that Tribal law is simply a means of evading the application of state and federal law fundamentally misunderstands the role and extent of Tribal law, and it disregards the role the Commission plays in ensuring that Licensees conduct their business in a transparent, professional, and honest manner. If allowed to stand, the District Court's conclusion would invalidate the laws of many other sovereign states, would upend the credit industry, and would frustrate longstanding federal policy regarding tribal sovereignty and tribal economic development.

A. The District Court Erred When It Determined that Tribal Law Resulted In Unregulated Lending that Shocks a Sense of Right.

Tribal law provides a robust regulatory framework that the Commission actively enforces. This is true even though the Tribe—as a sovereign—has chosen not to legislate a specific interest rate cap. An interest rate cap is just one tool sovereigns can use to regulate short-term consumer lending. In fact, although it sounds consumer-friendly, a rate cap is not a particularly good tool for regulating short-term loans. Given the short repayment schedules, flexibility in payment dates, and the lack of

prepayment penalties, a loan's actual annual percentage rate may vary considerably from its predicted APR at consummation. Further, specific rate caps invite creative uses of other fees—which are often harder for consumers to predict, avoid, and understand than a straightforward interest calculation.[1]

Rather than simply set forth an enumerated rate cap, the Commission uses many other tools to prevent, investigate, and remediate consumer harm and illegal practices. The Tribe's strict system of disclosure concerning the costs and terms of the product is economically rational; ensures consumers' freedom to make informed choices; allows consumers to reduce overall loan costs by paying off loans quickly; and avoids the unintended market disruptions that often coincide with government price

[1] Virginia law excludes nine categories of loans from its 12% interest rate limit. *See* Va. Code § 6.2-303. In addition, these limits often do not cover other amounts charged by lenders, such as fees or insurance. For example, Virginia law allows a lender to charge a loan fee of not more than 20 percent of the loan amount advanced. *See* Va. Code § 6.2-1817(B). Over a short repayment period, such a fee can amount to a huge number when expressed as an annualized rate. In other words, even though the Commonwealth imposes a lower interest rate cap, lenders can still charge consumers higher amounts in fees and other costs.

controls. Other sovereigns — including the federal government—have made similar choices.

1. Tribal law offers robust consumer protection.

The Ordinance offers substantial protection for consumers. At the outset, the Ordinance incorporates numerous federal consumer protection laws, including (in relevant part) the following:

- Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5491-5493;
- Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and related regulations at 12 C.F.R. Part 226;
- Consumer Leasing Act, 15 U.S.C. § 1667 *et seq.*, and related regulations at 12 C.F.R. Part 213;
- Fair Credit Billing Act, 15 U.S.C. § 1666a;
- Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, and related regulations at 15 C.F.R. Part 202;
- Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*, and related regulations at 12 C.F.R. Part 205;
- Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and related regulations at 12 C.F.R. Part 222;
- Privacy provisions of Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 *et seq.*, and related regulations at 16 C.F.R. Part 313 and 16 C.F.R. Part 314; and
- Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, and related regulations at 16 C.F.R. Part 901.

(Ordinance, § 7.2, JA267-68.) The Ordinance expressly includes these—and other—federal laws, without any prospective renunciation or waiver of federal law. In addition, the Ordinance requires that Licensees "conduct business in a manner consistent with the principles of federal consumer protection law[.]" (*Id.*, JA267.) Thus, the Ordinance also gives the Commission authority to review for compliance with forthcoming federal law. In short, federal consumer protection law provides a floor on which the Ordinance builds.

Importantly, Tribal law offers protection that, in some instances, exceeds the consumer protection standards established by other sovereigns. For example, the Ordinance prohibits all misrepresentation, which sets a more stringent standard than the Federal Trade Commission Act or Consumer Financial Protection Act's authority to prevent "deception" that is material (*Compare* Ordinance § 7.3(c)(3), JA268 ("[A Licensee shall not] use or cause to be published or disseminated any advertisement that contains false, misleading or deceptive statements or representations.") *with* 12 U.S.C. § 5531 and 15 U.S.C. § 45(a)(1) (a deception claim exists only if the misrepresentation is material)). In

addition, the Ordinance imposes data security standards that exceed federal law and most states' laws. (*See* Ordinance §§ 9.1-9.6, JA274-76.) The Ordinance also requires specific loan disclosures (Ordinance § 8.2(h)(2), JA272), and it expressly limits certain lending practices such as repeated rollovers (Ordinance § 8.2(h)(1)(A), JA271). It also specifies the computation of interest rate refunds in the event of prepayment. (Ordinance § 8.2(m)(2), JA273-74.)

The consumer protections established under the Ordinance also exceed the protections offered by some states. Utah law, for example, is decidedly sparse. Utah imposes no interest rate cap. It does not set a maximum loan amount. It does not cap finance charges. It does not impose data security requirements. It does not limit rollovers so long as the new loan does not result in more than ten consecutive weeks of payments. *See* Utah Code Ann. § 7-23-401(4)(c). It only expressly incorporates two federal consumer protection statutes: the Truth in Lending Act and the Equal Credit Opportunity Act. *See* Utah Code Ann. § 7-23-401(1)(f). Instead, Utah law contains a general prohibition on unconscionable consumer credit agreements. *See* Utah Code Ann. § 70C-7-106.

The Commission does not intend to criticize Utah's policy choices. Rather, the Commission offers the example of Utah law to demonstrate the range of policy choices that different sovereigns may make concerning short-term lending.[2] Some states, like Virginia, enact specific interest rate caps. Others, like Utah, regulate short-term loans using an approach based on broad principles rather than specific rules. Some, like the Tribe, fall in between. Far from being a shocking outlier as perceived by the District Court, Tribal law offers greater consumer protections than some states and is well within a range of permissible choices.

2. *The Commission actively enforces Tribal laws.*

The Tribe also gave teeth to the Ordinance by establishing a Commission with enforcement authority and on-site supervision powers. Among other powers, the Commission has the authority to: (1) inspect and investigate any Licensee as the Commission deems necessary; (2) examine under oath any Licensee or employee of a Licensee; (3) issue fines or

[2] Notably, in *Settlement Funding, LLC v. Von Neumann-Lillie*, 645 S.E.2d 436 (Va. 2007), the Virginia Supreme Court upheld the application of a choice-of-law clause that applied Utah law even though Utah does not impose an interest rate cap.

sanctions; (4) suspend or revoke a Licensee's license; (5) make any other finding or order necessary to carry out its duties; (6) file civil complaints in the name of the Tribe in any court of competent jurisdiction; (7) seize property; and (8) remedy all consumer complaints, up to and including cancellation of the consumer's debt and reimbursement of all monies paid by the consumer. (*See generally* Ordinance §§ 4.9, 4.13, 10, 11, JA258-59, JA260-61, JA276-82.)

The Commission also regularly audits Licensees and issues reports, including required corrective actions to address areas of weakness and recommendations to improve or strengthen otherwise satisfactory practices. Because the Ordinance gives the Commission broad regulatory authority, the Commission examines Licensees for compliance with laws outside the Consumer Financial Protection Bureau's authority, 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). The Commission also issues regulations and written guidance as needed and investigates and responds to all consumer complaints it receives.

Not only would application of Virginia law over another sovereign offend treaties, the Constitution, and federal statutes, but the Commonwealth's relevant agency has admitted it lacks authority to oversee or regulate Tribal lenders. In 2018, Virginia's Bureau of Financial Institutions explained to a consumer that Tribal licensees were not required to be licensed under Virginia law and referred the consumer's complaint to the Commission. JA171.

In short, the Commission actively and attentively regulates all Licensees, enforces Tribal law, and addresses consumer complaints. The District Court's conclusion that "the apparent absence of any comparable protection for aggrieved consumers under the Tribe's laws rises to the level of 'shocking one's sense of right' " (*see Hengle*, 2020 WL 113496, at *25, JA1756) ignores the active role the Commission plays in enforcing the Tribe's laws and addressing consumer complaints.

3. The Tribe's policy choices do not shock one's sense of right.

It should not come as a shock to anyone's sense of right that different sovereigns have different approaches to consumer protection. Indeed, some states—such as Idaho, Indiana, Nevada, and Utah—have chosen not

to enact a specific interest rate cap when loans are contracted in writing. Among states that have interest rate caps, the rates can vary and are often expressed in inconsistent or incomprehensible terms.[3]

Different sovereigns are free to take different regulatory approaches to consumer lending. Utah's policy decision to prohibit unconscionable contracts was no less important to Utah than Virginia's interest rate limit was to Virginia. Similarly, Virginia's interest rate limit is no more important than the Tribe's decision to regulate lending in ways other than imposing an interest rate limit. And just as Utah and Virginia have an interest in enforcing their laws and protecting their citizens, so too do tribes. The fact that Virginia has taken a different approach than the Tribe

[3] *See, e.g.*, Fla. Stat. § 55.03 (averaging the discount rate of the Federal Reserve Bank of New York for the preceding 12 months, then adding 400 basis points to the averaged federal discount rate); Iowa Code § 535.1 *et seq.* (The maximum rate in a written contract is 2% points above the monthly average 10-year constant maturity interest rate of United States government bonds and notes.); KRS § 360.010 *et seq.* (parties may agree in writing to a yearly rate not to exceed 4% above the discount rate on 90-day commercial paper, or 19% if it is less, on money due in an amount of $15,000 or less. If the obligation is $ 15,000 or more, the parties may agree to any interest rate); N.D. Cent. Code § 47-14-01 *et seq.* (The maximum contract rate is 5.5% per year higher than the current cost of money but may not be less than 7%).

or the state of Utah does not compel the conclusion that any one approach is more valid than others. Indeed, as recently as 2010, Congress eschewed enacting any specific interest rate limit, and has expressly prohibited its primary federal consumer protection regulator from establishing a national usury rate. 12 U.S.C. § 5517(o) ("No provision of this title shall be construed as conferring authority on the bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.").

The District Court's rationale creates a slippery slope. Should Tribal courts refuse to enforce Virginia choice-of-law clauses in consumer credit agreements because Virginia's policy is different than the Tribe's? Should Utah courts do the same? If courts are free to apply the laws of a forum state in derogation of a choice-of-law provision simply because the laws of two states reflect different public policy choices, then choice-of-law provisions will become toothless. The District Court's decision would, in effect, nationalize Virginia's consumer protection laws at the expense of every other sovereign.

There is no principled basis for distinguishing the Utah laws at issue in *Settlement Funding* from the tribal laws at issue in the present case. Like Utah, the Tribe enacted provisions aimed at preventing unconscionable conduct within its lending enterprises. The Ordinance encompasses all aspects of a consumer transaction, which necessarily captures any interest and fees charged or other conditions of the loan products offered. Thus, the Tribe exercised its policy discretion as a sovereign to prohibit unconscionable conduct through provisions requiring fairness and transparency rather than an enumerated interest rate limit.

In disregarding the choice-of-law clause, the District Court read the Virginia Supreme Court's decision in *Settlement Funding* too narrowly. *See Hengle*, 2020 WL 113496, at *23, JA1752-53 (discussing *Settlement Funding, LLC v. Von Neumann-Lillie*, 645 S.E.2d 436 (Va. 2007)). The District Court determined that the *Settlement Funding* decision turned on an absence of evidence regarding Utah law, and did not reach the question of whether the circuit court erred in applying Virginia law. But the Virginia Supreme Court's decision went further, holding that "the circuit court erred in refusing to apply Utah law in the construction of the loan agreement."

Settlement Funding, 645 S.E.2d at 439. Had the Virginia Supreme Court believed that Virginia law nonetheless displaced Utah law as a matter of public policy, it would have ruled on the second assignment of error. By enforcing the choice-of-law provision, the Virginia Supreme Court unmistakably held that choice-of-law provisions that apply a law without an interest rate cap should nonetheless be given full effect by Virginia courts. *See id.* at 438 ("If a contract specifies that the substantive law of another jurisdiction governs its interpretation or application, the parties' choice of substantive law should be applied.").

It is unsurprising that Virginia consumers—particularly under-banked consumers—may choose to obtain credit from lenders governed under laws other than the Commonwealth of Virginia. By selecting Tribal loan products over loan products offered in Virginia, certain consumers—including the Plaintiffs here—have expressed their preference for Tribal policy over Virginia policy. The District Court should have deferred to the parties' choice of law rather than substituting its judgment for the judgment of the Tribe and the consumer.

B. The District Court's Ruling Is Contrary to Public Policy on Tribal Economic Development, Home State Lending, and Freedom of Contract.

Tribal lending—regulated by tribal law—is consistent with other federal policies such as the tribal economic development, home state lending, and freedom of contract. The District Court's decision, if allowed to stand, would upset those well-established policies.

1. *Tribal lending furthers longstanding federal policy promoting tribal economic development.*

Tribal sovereignty predates the existence of the United States and all state governments, which the Supreme Court has repeatedly reaffirmed over the past three centuries. Congress has endorsed the "twin goals of economic self-sufficiency and political self-determination for Native Americans." 25 U.S.C. § 4301(a). "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." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J. concurring). An inherent aspect of sovereignty is the right of tribes to make and enforce their own laws as they see fit through tribal agencies, law enforcement, and courts. As online lending has become more widespread,

tribes have begun enacting detailed codes to regulate their lending operations, and have created tribal commissions and agencies to enforce such codes. Tribal businesses, such as the lenders involved in this case, can contribute substantially to tribal self-sufficiency.

Refusing to recognize a tribal choice-of-law clause erodes the concept of tribal sovereignty. Tribal sovereignty has little meaning if private plaintiffs can override clear choice-of-law clauses in agreements regulated by tribal lending codes, overseen by tribal regulators, and entered into by tribally-owned businesses. Discounting tribal law simply because tribes make certain policy decisions effectively displaces tribes as sovereigns. In addition, tribes have an existential interest in the enforcement of choice-of-law clauses. The refusal to apply or enforce tribal choice-of-law clauses undermines myriad businesses operated by tribal entities, and undermines the tribes themselves. This, in turn, would undercut efforts to build infrastructure and economic growth on reservations and create opportunities to keep young, talented tribal members from leaving their communities.

2. The District Court's ruling jeopardizes the home-state lending rule.

For over 150 years, federal law has recognized the importance of allowing lenders to operate on a national basis, free from the vagaries of simultaneous—and possibly contradictory—regulation by multiple sovereigns. Indeed, Congress embraced streamlined national lending when it enacted the National Bank Act in 1864. *See 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 certain 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.

Applying the laws of Virginia to loans issued by tribes under tribal law would create the sort of impractical regime that the Supreme Court warned against in *Marquette National Bank*, and which the Virginia Supreme Court sought to avoid in *Settlement Funding*. Indeed, the Virginia Bureau of Financial Institutions recognized the flaws in subjecting a lender to multiple different rules simultaneously when it asserted that it did not "have any regulatory authority" over a Tribal licensee. JA171.

Without a home-state lending rule, if a consumer takes out a loan in Utah, and then moves from Utah to Virginia, the enforceability of the loan could change depending on the location of the consumer at any moment in time. Additionally, a lender who has complied with every state and federal law could suddenly become subject to liability simply because a consumer moved to a different state. This result is detrimental to orderly economic development, and is contrary to the federal policy expressed in *Marquette National Bank* and the National Bank Act of 1864.

Like federally-chartered banks, tribally-licensed lenders rely on their locus to determine interest rate caps 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. Courts should uphold the use of tribal law. *See, e.g.*, *Albemarle Corp v. AstraZeneca UK Ltd.*, 628 F.3d 643, 654 (4th Cir. 2010) (noting that contractual choice-of-law provisions are "an almost indispensable precondition to achievement of the orderliness and predictability essential to" economic growth) (quoting *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 518 (1974)).

3. The District Court's ruling undermines the public policy regarding freedom of contract.

The *Settlement Funding* decision's premise was direct and short: "If a contract specifies that the substantive law of another jurisdiction governs its interpretation or application, the parties' choice of substantive law should be applied." 645 S.E.2d at 438. Tellingly, the *Settlement Funding* Court did not qualify that statement of law, nor did it balance—or even inquire into—the purported interests of Utah and Virginia. *See generally id.*

Furthermore, the *Settlement Funding* decision expressed Virginia's public policy that contractual choice-of-law provisions should be honored by courts. This approach promotes predictability and consistency, as parties to a contract can eliminate uncertainty by specifying a choice of law in a contract.

IV. CONCLUSION

Tribal law is not the absence of law. To the contrary, the Tribe has enacted—and the Commission actively enforces—comprehensive consumer protection legislation. The Tribe's choice to take a different regulatory approach than the Commonwealth of Virginia does not shock any reasonable conscience, particularly when considered against the broad

spectrum of regulatory approaches used by states, tribes, and the federal government in the short-term lending context. The Commission respectfully urges this Court to reverse the District Court's decision and instruct the District Court to apply Tribal law as required by the choice-of-law clause.

Dated: June 9, 2020

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This memorandum complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) in that—according to the word-count feature of the word-processing program with which it was prepared (Microsoft Word)—the memorandum contains 4,136 words, excluding the portions exempted by Rule 32(f).

/s/ Bruce A. Finzen

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On this 9th day of June, 2020, I electronically filed the foregoing using the Court's appellate CM/ECF system. Counsel for all parties to the case who are registered CM/ECF users are served by that system.

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Timothy W. Billion Name (printed or typed)	605-355-1300 Voice Phone
Robins Kaplan LLP Firm Name (if applicable)	605-740-7199 Fax Number
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1/28/2020 SCC