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

LULA WILLIAMS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 3:17-cv-461 (REP)
	)	
BIG PICTURE LOANS, LLC, *et al.*,	)	
	)	
Defendants.	)	

MARTORELLO'S STATEMENT OF POSITION PURSUANT TO ECF NOS. 599 & 601

Pursuant to the Court's Orders, ECF Nos. 599 and 601, Matt Martorello ("Martorello") submits the following Statement of Position with respect to the effect of the Fourth Circuit's Decision on: (a) further proceedings in this case and (b) each pending motion.

I. EFFECT OF THE FOURTH CIRCUIT'S DECISION ON FURTHER PROCEEDINGS

The Fourth Circuit's legal and factual findings profoundly impact Plaintiffs' claims against Martorello and establish that this matter cannot go forward procedurally or substantively and should be dismissed with prejudice. As the Fourth Circuit concluded, the tribal lending businesses created by LVD and supported by Bellicose and SourcePoint were legitimate efforts in tribal economic development and self-governance which necessitate due consideration of "too important" federal law and policy underscoring the obligation of the US government to guard and preserve, and to promote outside expertise, outside capital, and commercial dealings with non-Indians. Tribal immunity derives from tribal sovereignty. The numerous federal policies and laws instructing immunity apply equally with respect to matters of tribal economic development and to "non-Indians," like Martorello, whom Congress urges to take action in support of such development. As the Fourth Circuit expressly noted, restrictions of tribal immunity are reserved for Congress. The Supreme Court has consistently acknowledged the same of broader tribal sovereignty. This deference to Congress is of particular importance here where the ability of Indian Country to use the internet in furtherance of tribal economic development and self-governance, in accordance with express directives of Congress, is at stake.

The Fourth Circuit also confirmed that the lending businesses are not, and were not, a "sham," that the Eventide Note is not improper, and that control rested with the Tribe, rejecting any significance to the financial details between the parties. Moreover, it expressly distinguished LVD's lending businesses as a "far cry" from *Miami Nation*, the case involving Scott Tucker plead in the Complaint and repeatedly cited by Plaintiffs throughout their crime-fraud and other

briefing. The Fourth Circuit also found: (1) that both Tribal Defendants serve the purposes of tribal economic development and self-governance and are legitimate arms-of-the-Tribe even though the record showed that the Tribe created the Tribal Defendants following the Second Circuit's ruling in *Otoe-Missouria* and the CFPB's enforcement action against Western Sky; (2) that the evidence does not support that the creation of the Tribal Defendants was "only or primarily intended to benefit Martorello" or that the creation of the Tribal Defendants "was solely the product of Martorello's design and urging;" (3) that Big Picture is tribally owned and operated (contrary to Plaintiffs' "de facto" owner allegations); and (4) that Big Picture—not Bellicose, not SourcePoint, and not Martorello—**is the lender**. The same reasoning applies to Red Rock. As a result of the Fourth Circuit's legal conclusions, class certification should be denied, the Court's crime-fraud opinion should be vacated, and the case should be dismissed in its entirety with prejudice. If not dismissed in its entirety, the case should be promptly set for trial.

From a procedural standpoint, Plaintiffs' claims against Martorello must be dismissed *in their entirety* because Plaintiffs cannot proceed against necessary and indispensable parties Big Picture Loans and Ascension due to the Fourth Circuit's Decision finding that both entities are arms-of-the-Tribe entitled to the protections of sovereign immunity. That threshold issue necessarily impacts the Tribe and Tribal Defendants—indeed all of Indian Country—and requires LVD's participation. Martorello intends to file a Motion to Dismiss under Fed. R. Civ. P. 19, once the Tribal Defendants are dismissed. Plaintiff's claims and remedy are with the lending entities, not Martorello as a legal strawman to get around tribal sovereignty.

From a substantive standpoint, Plaintiffs' claims against Martorello cannot survive following the Fourth Circuit's Decision. It is the Fourth Circuit's narrative that must be

considered, not the Plaintiffs. This case involves a poor, remotely-located Tribe, that through strategic relationships with non-tribal partners and creditors, entered into a new industry, pursuant to its own laws, and is now on the path to long-term economic self-sufficiency. The commonplace commercial controversy and routine commercial agreements, promoted by numerous Federal laws and policies, is not a RICO enterprise. Based on the Fourth Circuit opinion, state law is barred and *unenforceable*, thus no predicate offense exists. This is furthered by the Virginia Supreme Court's prior decision in *Settlement Funding*, the Virginia Bureau of Financial Institutions' express recognition that arm of the tribe lending is not subject to its regulation, and the Virginia Code.

Furthermore, the laws and policy obligating the Federal government to guard, protect, and promote commercial dealings between Indians and non-Indians apply here, agnostic to industry, and the Fourth Circuit repeatedly recognized the substantial interest of LVD in "*its*" loans. The same laws and policies did *not* exist in the sham arrangements of Tucker, Hallinan, or CashCall—none of which involved arm-of-the Tribe lending businesses, if a Tribe at all. And entirely unlike those comparisons Plaintiffs often feature, LVD deployed tribally-owned and tribally-controlled arm-of-the-Tribe lending entities engaged in self-determination, consummating consensual loan transactions on the reservation subject to and fully compliant with Tribal and Federal law. Plaintiffs' assertion that the routine commercial services here can support a RICO claim cannot survive this backdrop of Congressional directive and policy, particularly where there is simply no authority restricting sovereignty upon which one might believe state law preempts tribal law. It is indeed even constitutionally the opposite. The Federal law and policy at the center of nearly a dozen tribal expert non-privileged legal opinions forming the basis of Martorello's good faith has now been unanimously affirmed. This, along

with the lack of predicate offense, the affirmed substantial interest of LVD in "*its*" loans and *Settlement Funding* leave no doubt that Tribal and federal law apply to the consumer loans at issue in this case. No court has ever held otherwise; and with their "sham" fiction now eviscerated by the Fourth Circuit, neither Martorello nor any of the tribal law experts involved with LVD's lending businesses could have had any basis upon which to believe (or advise Martorello) differently. Even irrespective of the threshold issue, a "far cry" from the sham of Tucker and Hallinan, Martorello's good faith belief in these underlying federal laws and policies has prevailed.

The Fourth Circuit's findings also require dismissal of Plaintiffs' usury and unjust enrichment claims against Martorello because Big Picture is the lender and Plaintiffs' remedy at law is limited only to it. This conclusion is also independent of any choice of law analysis and applies equally to Red Rock. For these reasons and others following the Fourth Circuit's Decision, this case should be dismissed in its entirety with prejudice. If not, it must be promptly set for trial so as to bring an end to Plaintiffs' meritless claims and related suite of meritless lawsuits.

II. EFFECT OF THE FOURTH CIRCUIT'S DECISION ON PENDING MOTIONS

Absent dismissal, Martorello states as follows with respect to each pending motion. Martorello has attempted to group the pending motions and related filings by subject matter. Exhibit A contains a chart setting forth Martorello's position for each individual motion.

A. Plaintiffs' Motion For Class Certification [ECF No. 189]; Plaintiffs' Motion for Leave to File Supplemental Authority [ECF No. 475]

The Fourth Circuit's Decision requires that Plaintiffs' Motion to For Class Certification and related Motion for Leave to File Supplemental Authority be denied. Plaintiff's loan agreements are not the product of a sham. They are valid, as are their dispute resolution

procedures and class action waiver. Further, Plaintiffs cannot establish ascertainability because they have no current means of obtaining loan data that would allow identification of class members. The only documents or data that might establish the identities of the class plaintiffs are in the Tribe's possession or belong to the Tribe. The Fourth Circuit's Decision puts an end to the possibility of that ascertainability-related discovery from the Tribal entities. Even if Plaintiffs' theoretical "paths for obtaining the loan data" (Class Cert. Reply, ECF No. 236, at 14) were sufficient basis for a finding of ascertainability (which they are not), each of the "paths" hypothesized by Plaintiffs is now closed by virtue of the Fourth Circuit's Decision.

B. Martorello's Motion For Reconsideration Of Order, ECF No. 479 [ECF No. 486]

The Fourth Circuit's legal conclusions require that the Court's crime-fraud opinion be vacated.[1] The Fourth Circuit's narrative detailed above, citing the same key evidence relied on by the Plaintiffs (and mirroring the now alleged "new evidence" in *Galloway et al., v. Big Picture Loans, LLC, et al.,* 18-cv-406-REP) definitively rejected Plaintiffs' attempts to place a sinister veneer on the sale of Bellicose, as well as their attempts to improperly restrict tribal sovereignty. In reversing the Court's sovereign immunity opinion, the Fourth Circuit—considering substantially the same evidence considered by the Court in support of its crime-fraud opinion—found that it was not inappropriate to restructure in an attempt to reduce its potential liability following *Otoe-Missiouria, CashCall,* or other regulatory pressures at the time: "The

[1] The Fourth Circuit's Decision does not impact Martorello's Motion for Reconsideration directed to the Court's finding that Martorello waived the attorney-client privilege by asserting a good faith defense. Accordingly, in the event Martorello's Motion to Dismiss is denied, this portion of Martorello's Motion for Reconsideration would require resolution. Also, in the event that the Court determines that Plaintiffs' Motion for Class Certification or Martorello's Motion for Reconsideration require resolution despite the Fourth Circuit's Decision, the records related to these motions are now incomplete and require supplementation in light of the significant discovery that has occurred since the filing of the motions, including the production of a significant volume of documents by the Rosette law firm.

fact that the Tribe created Big Picture and Ascension in part to reduce exposure to liability does not necessarily invalidate or even undercut the Tribe's stated purpose, i.e., tribal economic development. Indeed, in order to reach its stated goal, the Tribe may have deemed it necessary to reduce its exposure to liability." *Id.* at 179. The Fourth Circuit also rejected the significance of the financial arrangement of the parties, another central theme in Plaintiffs' allegations. The narrative and findings of the Fourth Circuit must now be considered, which ,effectively eviscerates the rationale underlying the Court's crime-fraud ruling, which was based on the Court's errant belief that "the sale transaction was devised by Martorello to shield him and his closely-held corporations…." Mem. Opinion, ECF No. 478 at 18. The Court's crime-fraud ruling thus conflicts with the Fourth Circuit's opinion and must be set aside.

C. Plaintiffs' Motion for Sanctions [ECF No. 488]; Proposed Scheduling Order for Spoliation Discovery [ECF No. 498]; Plaintiffs' Statement of Position [ECF No. 523]; Plaintiffs' Motion for Leave to Serve Requests for Production and Third-Party Subpoenas [ECF No. 524]; Plaintiffs' Motion to Strike The Declaration Of John M. Norman [ECF No. 549]; Plaintiffs' Motion to Compel [ECF No. 552]; Plaintiffs' Cross-Motion to Compel Against Non-Party Conner & Winters, LLP [ECF No. 571]; Martorello's Motion for Protective Order [ECF No. 539]; Motion to Quash, In Part, Non-Party Subpoena, Or, In the Alternative Motion for Protective Order [ECF Nos. 542, 543]; Defendant Martorello's Motion for Leave to File a Reply [ECF No. 564]

Each of these filings spring from or relate to the Court's crime-fraud opinion and accordingly, should be denied (ECF Nos. 488, 524, 549, 552, 571), deemed moot (ECF Nos. 498, 523, 564), or granted (ECF Nos. 539, 542, 543) as indicated on Exhibit A because, as explained above, the Fourth Circuit's Decision eviscerates the rationale underlying the crime-fraud ruling, including its spoliation-related findings, and requires it to be set aside.[2]

[2] Also, Plaintiffs have waived the right to brief spoliation by not adhering to their own proposed deadlines in ECF No. 498-1 and failing to file their brief in sufficient time to allow for briefing to be completed by August 30, 2019, as required by Order, ECF No. 479, ¶ 2.

D. Matt Martorello's Opening Brief Explaining Why He Is Entitled To Proceed With a Privilege Review [ECF No. 536]

To the extent that Plaintiffs rely on the Court's crime-fraud opinion in Order ECF No. 479 as a basis for denying Martorello the right to conduct a privilege review or assert privilege, Plaintiffs' arguments should be denied because as explained above, the Fourth Circuit's Decision eviscerates the rationale underlying the Court's crime-fraud ruling and requires it to be set aside. To the extent that Plaintiffs raise other purported grounds for denying Martorello the right to proceed with a privilege review, this issue requires resolution by the Court.

E. Motions That Are Not Impacted By The Fourth Circuit's Decision.

The following motions are not impacted by the Fourth Circuit's Decision and accordingly will require resolution in the event that Martorello's Motion to Dismiss is denied as set forth in Exhibit A: ECF Nos. 499, 500, 505, 509, and 528.

Respectfully submitted,

MATT MARTORELLO
By:/s/ *John M. Erbach*
M. F. Connell Mullins, Jr. (VSB No. 47213)
Email: cmullins@spottsfain.com
Hugh McCoy Fain, III (VSB No. 26494)
Email: hfain@spottsfain.com
John Michael Erbach (VSB No. 76695)
Email: jerbach@spottsfain.com
Spotts Fain PC
411 East Franklin Street, Suite 600
Richmond, Virginia 23219
Telephone: (804) 697-2000
Facsimile: (804) 697-2100

Richard L. Scheff (admitted *pro hac vice*)
Jonathan P. Boughrum (admitted *pro hac vice*)
Michael C. Witsch (admitted *pro hac vice*)
ARMSTRONG TEASDALE, LLP
2005 Market Street
29th Floor, One Commerce Square
Philadelphia, PA 19103
Telephone: 267.780.2000

Facsimile: 215.405.9070
Email: rscheff@ armstrongteasdale.com
Email: jboughrum@ armstrongteasdale.com
Email: mwitsch@armstrongteasdale.com

Michelle Lynne Alamo (admitted *pro hac vice*)
William Ojile (admitted *pro hac vice*)
ARMSTRONG TEASDALE, LLP
4643 S. Ulster Street, Suite 800
Denver, CO 80237
Telephone: 720.722.7189
Facsimile: 720.200.0679
Email: malamo@armstrongteasdale.com
Email: bojile@armstrongteasdale.com

Counsel for Defendant Matt Martorello

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 23rd day of August, 2019, the foregoing was filed using the Court's CM/ECF system, thereby serving a copy on all counsel of record electronically.

By:/s/ *John M. Erbach*
John M. Erbach (VSB No. 76695)
Email: jerbach@spottsfain.com
Spotts Fain PC
411 East Franklin Street, Suite 600
Richmond, Virginia 23219
Telephone: (804) 697-2000
Facsimile: (804) 697-2100