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.	)	
	)	

PLAINTIFFS' RESPONSE TO MATT MARTORELLO'S STATEMENT OF POSITION

Pursuant to the Court's orders (ECF Nos. 599, 601), Plaintiffs, by counsel, submit this response to Matt Martorello's Statement of Position (ECF No. 613).

Based on the record before it, the Fourth Circuit held that Big Picture Loans, LLC and Ascension Technologies, LLC (the "Corporate Defendants") were sufficiently "arms-of-the-tribe" such that the Corporate Defendants could share in the LVD Tribe's sovereign immunity from suit. However, critically, the Fourth Circuit ***did not*** bless any portion of the lending enterprise as legal. The Fourth Circuit said nothing about whether RICO or state usury laws apply to the loans. The Fourth Circuit ***did not*** in any fashion exonerate Matt Martorello from liability. The opinion merely held that the Corporate Defendants could not be sued. As the Corporate Defendants stated in their reply brief on appeal, "this appeal is not a policy debate about consumer finance, or whether state or tribal law governs Plaintiffs' consumer loan agreements." *Williams v. Big Picture Loans, LLC*, No. 18-1827, ECF No. 90 at 1 (4th Cir. Feb. 15, 2019).

Predictably, Martorello argues that the Fourth Circuit's limited opinion means that Martorello is somehow off the hook for his conduct in the lending enterprise. Plaintiffs have previously addressed the effect of the Fourth Circuit's ruling as to Martorello. (ECF No. 597 at 2-

6.) To briefly summarize, the Fourth Circuit's ruling has no effect on the merits of the claims against Martorello. As stated by the Supreme Court, "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998). Although the questions often arise together, "whether an Indian tribe is subject to a statute and whether the tribe may be sued for violating the statute are **two entirely different questions**." *Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1130 (11th Cir. 1999) (emphasis added). Tribal sovereign immunity only addresses whether a tribe may be sued for violating the law. It does not mean that the illegal activities conducted by a tribe are necessarily legal. In other words, tribal sovereign immunity "does not transfigure debts that are otherwise unlawful under RICO into lawful ones." *United States v. Neff*, No. 18-2282, 2019 WL 4235218, at *7 (3d Cir. Sept. 6, 2019). Nor does it render criminal behavior non-criminal. *Id.* ("A debt can be 'unlawful' for RICO purposes even if tribal sovereign immunity might stymie a state civil enforcement action or consumer suit (or even a state usury prosecution, although tribal sovereign immunity does not impede a state from resort[ing] to its criminal law and prosecuting offenders . . . .") (internal citation and quotation omitted). Sovereign immunity merely blocks certain lawsuits directly against arms-of-the-tribe. State lending laws and RICO apply regardless of whether the Corporate Defendants can be sued for violations of those laws.

Nevertheless, Martorello argues that Plaintiffs' claims must be dismissed because the Corporate Defendants are necessary and indispensable parties, and that Plaintiffs' state law and RICO claims necessarily fail because of the Fourth Circuit's decision. There are no motions pending regarding any of these issues, and to fully address those positions would far exceed the page limits allowed for this response. Plaintiffs do note that similar Rule 19 efforts involving tribal

lending enterprises have failed. *See Commonwealth of Pennsylvania v. Think Finance, Inc.*, No. 14-cv-7139, 2016 WL 183289 (E.D. Pa. Jan. 14, 2016) (holding that "[b]ecause the lenders are at most joint tortfeasors or co-conspirators, they are not necessary parties under Rule 19") (internal quotations omitted); *Dillon v. BMO Harris Bank, N.A.*, 16 F. Supp. 3d 605, 613 (M.D.N.C. 2014) (holding that tribal lenders were not necessary parties because "[t]he lenders are at most joint tortfeasors or co-conspirators. Neither are necessary parties under Rule 19."). And for the reasons stated above, the Fourth Circuit's ruling does not mean that RICO and state law do not apply to the loans at issue. It simply means that Plaintiffs cannot maintain a lawsuit for money damages against arms-of-the-tribe. Nor does the Fourth Circuit's opinion have any bearing on whether Plaintiffs' usury and unjust enrichment claims can proceed against Martorello.

As for the pending motions, Martorello argues that Plaintiffs' motion for class certification must be denied, Martorello's motion for reconsideration of the Court's crime-fraud ruling must be granted, and that all of the motions springing from the crime-fraud rulings are moot or should be granted in Martorello's favor. Martorello is wrong on all fronts. None of the pending motions are meaningfully affected by the Fourth Circuit's ruling. The Court should grant Plaintiffs' motion for class certification, and rule on the other pending motions so that trial against Martorello may proceed. Plaintiffs will address these motions in turn.

I. Plaintiffs' Motion for Class Certification Should Be Granted.

Martorello argues Plaintiffs' motion for class certification should be denied because the Fourth Circuit's opinion renders the dispute-resolution procedures and class-action waiver in Plaintiffs' contracts enforceable. The Fourth Circuit's ruling did no such thing and the Court expressed no opinion regarding whether any aspect of the underlying contracts were enforceable. Moreover, the Fourth Circuit, other Courts of Appeal, and this Court have repeatedly invalidated

dispute-resolution mechanisms contained in tribal lending contracts even when the tribal defendants are not part of the case. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 676 (4th Cir. 2016); *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 336 (4th Cir. 2017); *MacDonald v. CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018); *Parnell v. Western Sky Fin. LLC*, 664 Fed. App'x 841 (11th Cir. 2016); *Parm v. Nat'l Bank of Cal.*, 835 F.3d 1331 (11th Cir. 2016); *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1354 (11th Cir. 2014); *Gingras v. Think Finance Inc.*, 922 F.3d 112, 126-27 (2d Cir. 2019); *see also Gibbs v. Haynes Investments, LLC*, 368 F. Supp. 3d 901 (E.D. Va. 2019); *Solomon v. American Web Loan*, 2019 WL 1324490, __ F. Supp. 3d __ (E.D. Va. Mar. 22, 2019).

Martorello also argues that Plaintiffs "cannot establish ascertainability because they have no current means of obtaining loan data that would allow identification of class members." (ECF No. 613 at 5.) This is false. As the Court is aware, non-tribal entities TranDotCom and DataX are in possession of information related to the loans. (ECF Nos. 415 and 440.) Tribal sovereign immunity does not protect documents that are possessed by non-tribal parties because subpoenas to those entities they are not "suits" against the tribe that implicate sovereign immunity. *Miccosukee Tribe of Indians of Florida v. United States*, 698 F.3d 1326, 1330 (11th Cir. 2012). This Court has already noted in granting Plaintiffs' motion regarding TranDotCom that it "agrees with the Eleventh Circuit's reasoning" in *Miccosukee*. (ECF No. 415 at 8 n.3.) There is no reason to revisit the Court's prior rulings on those issues. And if anything, Plaintiffs' case for class certification is stronger than it was when originally filed because it is now known for certain that the relevant data can be obtained.

II. Martorello's Motion for Reconsideration.

Martorello argues that the Fourth Circuit's ruling affects this Court's determination that

there was prima facie evidence that Martorello engaged in criminal activity. Martorello claims that the Fourth Circuit's ruling and its statement regarding the restructure of the lending enterprise "effectively eviscerates the rational underlying the Court's crime fraud ruling." (ECF No. 613 at 6.) Not so.

> As this Court explained, the crime-fraud exception applied because:
>
> > The plaintiffs have made a prima facie case that: (1) Martorello and the Corporate Defendants intended to lend at usurious rates of interest in violation of Virginia and other states' laws and that they intended to engage in conduct (collecting unlawful debt) in violation of RICO; and (2) Martorello and the Corporate Defendants engaged the lawyers to help in achieving their objectives. Virginia Code § 6.2-1540 makes clear that it is a crime to participate in the violation of Virginia's usury statute, which limits a business to contracting for a loan interest rate of greater than 12%. See Va. Code 6.2-1501. The plaintiffs have made a compelling case that Martorello participated in such an endeavor on his own and with the Corporate Defendants.

Williams v. Big Picture Loans, LLC, No. 17-cv-461, 2019 WL 1983048, at *13 (E.D. Va. May 3, 2019). In other words, this Court did not apply the crime-fraud exception because of the restructure; it applied the crime-fraud exception because Plaintiffs sufficiently made a prima facie showing that Martorello committed crimes and engaged lawyers to assist him with those efforts. In addition to this, the Court found that "the documents about the corporate restructure and the Tribe's lending operation" go to the "core of the alleged crimes and fraud by outlining how the restructuring and the lending operation are to be accomplished." *Id*. at *14. Put differently, the restructure is not *the* crime—it is the continued and ongoing violation of state usury laws and RICO.

Additionally, it is important to note that the Fourth Circuit made its decision regarding the restructure based on a limited record, *i.e.*, the e-mail from Martorello to Rosette in January 2014 regarding the Consumer Financial Protection Bureau and the August 2014 e-mail to Chairman Williams. *Williams v. Big Picture Loans, LLC*, No. 18-1827, 2019 WL 2864341, at *5 (4th Cir.

July 3, 2019) (citing J.A. 1321–22 (Martorello emailing Tribal Council members and the Tribe's counsel regarding his concerns about the CFPB and New York enforcement actions); J.A. 1329 (e-mails after the enforcement actions between Martorello and the head of the Tribal Council scheduling a time to discuss "a potential bigger deal for [the Tribe] learning the Servicing business")). Based on these two e-mails, the Fourth Circuit found that "the evidence does not support the district court's conclusion that the creation of the Entities was only or primarily intended to benefit Martorello or that the creation of Big Picture and Ascension was solely the product of Martorello's design and urging." *Id*. The record, of course, is now completely different and the additional evidence submitted by Plaintiffs shows: (1) that the creation of the Entities was primarily intended to benefit Martorello; and (2) they were the product of Martorello's design and urging. To ensure the record is complete, Plaintiffs submitted this additional evidence. *See generally* ECF Nos. 572-10 through 572-26.

Since the time of those submissions, Plaintiffs have additional compelling evidence supporting the Court's waiver decision. This evidence is the Declaration of Joette Pete, attached hereto as Exhibit 1. Ms. Pete is the former Vice Chairwoman of the LVD from 2010 until 2016, *i.e.*, from the inception of the business through the restructure. (Ex. 1 at ¶ 1.) Most notably, Pete explained that she "did not participate in the destruction of Martorello's e-mails," and, to her knowledge, "it was not presented to Tribal Council for approval." (*Id*. at ¶ 11.) However, Pete was not surprised "that the e-mails were destroyed because a shredding company was also hired to destroy paper records related to the business." (*Id*. at ¶ 11.) This step "had never been done in the past and was performed specifically to conceal the truth about the business." (*Id*. at ¶ 11 (emphasis added).) In light of this Declaration—as well as the significant new evidence submitted by Plaintiffs—the Court should deny the Motion for Reconsideration and expedite the spoliation-

related discovery ordered by the Court, which has been flouted by Martorello and the Corporate Defendants.

In sum, the primary basis for the application of the crime-fraud exception is Martorello's criminal activities (which occurred both before and after the restructure) —not whether the Tribe was entitled to sovereign immunity.

III. The Other Motions Are Unaffected by the Fourth Circuit's Ruling.

The other motions cited by Martorello as "spring[ing] from or relat[ing] to" the Court's crime-fraud ruling are likewise unaffected by the Fourth Circuit's ruling with the following exception: Plaintiffs are no longer seeking to take the depositions of Ascension or Big Picture as parties to the case, and Plaintiffs are no longer seeking to depose Joette Pete. (*See* ECF Nos. 524, 523.)

Plaintiffs have not waived the right to file a motion regarding spoliation, contrary to Martorello's suggestion. (ECF No. 613 at n.6.) All of the Defendants repeatedly obstructed the process and the proposed schedule was never entered by the Court. Lastly, because the Court's crime-fraud ruling is unaffected, Plaintiffs' arguments opposing Martorello's entitlement to a privilege review still stand.

CONCLUSION

Nothing in the Fourth Circuit's ruling meaningfully affects the claims against Martorello. The Court should grant Plaintiffs' motion for class certification and the case should proceed to trial.

Date: September 16, 2019

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record.

Date: September 16, 2019

/s/

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