UNITED STATES DISTRICT COURT
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.

RENEE GALLOWAY, *et al.*,

Plaintiffs,

v. **Civil Action No. 3:18-cv-406 (REP)**

BIG PICTURE LOANS, LLC, *et al.*,

Defendants.

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM SUMMARIZING ADMITTED EVIDENCE AT JULY 21 and 22, 2020 MISREPRESENTATIONS HEARING

Plaintiffs, by and through counsel, submit this Supplemental Memorandum to provide their identification of exhibit and testimonial evidence admitted at the July 21 and July 22 Misrepresentations Hearing (the "Hearing").

Plaintiffs do not herein seek to extend or repeat the arguments previously made in their original briefing, (*e.g.,* Mem. Regarding Material Misrepresentations, *Williams v. Big Picture Loans, LLC*, No. 3:17-cv-461, ECF No. 755), or otherwise in the cases. Plaintiffs continue to rely on their written submissions in addition to the Hearing evidence. Instead, they detail herein the

specific exhibits and testimony from the Hearing that support the relevant claims made that Defendants made material misrepresentations in support of the Tribal Defendants' Motion to Dismiss. (Mot. Dismiss, *Williams*, ECF No. 22.)[1]

Consistent with the structure followed in their opening brief, Plaintiffs presented Hearing evidence tracking the creation of Red Rock, its operation, the negotiations and decision to create Big Picture Loans and the operation of the later. Those factual categories tracked the Court's own analysis and findings of fact upon which both this Court[2] and the Fourth Circuit[3] relied. This largely followed Matt Martorello's declaration ("Martorello Decl."). (Martorello Decl., *Williams* ECF No. 106-1.)

A. Creation of Red Rock Lending

The Hearing testimony and exhibits evidenced that the Court's original factual conclusions with regard to the origination and creation of Red Rock were not entirely correct. The Court earlier found: "Soon after the Code was enacted, the Tribe began operating in the online lending arena when the LVD Council organized Red Rock Tribal Lending, LLC ("Red Rock") as a tribally-owned LLC on September 14, 2011." *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 255 (E.D. Va. 2018), *rev'd and remanded,* 929 F.3d 170 (4th Cir. 2019). This was true, but incomplete, as it suggests that the LVD independently adopted its Tribal Resolution and did so independent of Martorello.

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[1] While the Hearing focused largely on the misrepresentations of Defendant Matt Martorello ("Martorello" or "Defendant"), the evidence presented in briefing and at the Hearing necessarily raises concerns regarding the legal and factual positions presented by others.

[2] *Williams v. Big Picture Loans, LLC*, 329 F.Supp. 3d 248 (E.D.Va. July 27, 2018). ("*Williams* Decision.")

[3] *Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019).

1. At the Hearing, Martorello confirmed that his attorney, Jennifer Weddle, was the person who created and submitted the Tribal Resolution and that Martorello (and/or his attorney) had to approve same:

> Q. [R]egarding the creation of Red Rock and then, I guess, later the other tribal entities, you are aware, and I think in paragraph 16 of your declaration you noted that you reviewed the tribal council resolutions relating to the lending entities Red Rock; right?
> A Yes, that's correct.
> ...
> Q. And so when it says Ms. Weddle's form was modified, she had submitted a form resolution for the execution and transaction that became Red Rock that the tribe then felt it should edit; correct?
> A That seems to be what this says here.

(July 21, 2020 Hr'g Tr. 57:6-11, 58:15-19, *Williams,* ECF No. 882; July 21, 2020 Hr'g Pls.' Ex. 10, Oct. 22, 2011 Email Correspondence re Proposed Resolution.)

2. The Court also incorrectly found that – lending operation already underway – LVD "subsequently decided to contract with an outside entity to better learn the lending industry" and thus the "Tribe had identified Martorello as a potential consultant in mid-2011[.]" *Williams*, 329 F.Supp. 3d 248 (citing Martorello Decl. ¶¶ 14, 17). These claims of the Defendant were patently false.

In fact, it was actually ***Martorello*** who sought out a tribal connection so he could get into this budding field. The declaration of Joette Pete, former Vice Chairmen of LVD, was admitted at the Hearing without objection. She also confirmed this fact:

> Tribal Council was approached by Matt Martorello with an opportunity to participate in a lending business.

(July 21, 2020 Hr'g Pls.' Ex. 129, Aug. 20, 2019 Declaration of Joette Pete and its exhibits, at ¶2.)

Scott Merritt, a long-time proponent of the Tribal lending model, was unequivocal that he was

never the Tribe's agent and that Martorello was the one who reached out seeking a Tribal connection for his lending business.

Q. Okay. So what made you -- what led you, then, to introduce him to Mr. Rosette?
A. Just his – [Martorello's] interest in working with the tribe. I knew Rob -- Rob's a very well-known attorney in that space.

Q. At the time that you introduced Mr. Martorello to Mr. Rosette, had Mr. Rosette or anyone -- or Ms. Wichtman or anyone else indicated to you that LVD was interested in finding a service provider?
A. No.
Q. Had you had any interactions with anyone specifically at the tribe or its -- any of its corporate entities?
A. LVD? No.

(July 21, 2020 Hr'g Pls.' Ex. 139, Merritt Dep. 32:7-23.) Merritt – unchallenged at the Hearing by Martorello and even offered as one of his own witnesses, unquestionably rebutted Martorello's false statement:

Q. So if Mr. Martorello said that, Scott Merritt approached me indicating that he represented the tribe, that would be inaccurate; right?
A. Inaccurate.
Q. And it would also be inaccurate if -- that, Scott Merritt told Mr. Martorello that the LVD was involved in the -- in an online lending business and was looking for a servicer?
A. Inaccurate as well.
Q. Okay. And it would also be inaccurate that you told him the LVD had a tribal code and was set
to make loans?
A. Inaccurate.

(Id. at 92:16-93:3.)

And of course, both the testimony and exhibits at the Hearing showed that Merritt and his company were *Martorello*'s advocates (not the Tribe's). (July 21, 2020 Hr'g Pls.' Ex. 15, June 16, 2012 Email from S. Merritt to M. Martorello and F. Richardson ("Matt – I'm confident

we can find you a backup partner…We're your advocate so will act on your behalf regardless"); Hr'g Tr. 90:21-91:12 (confirmed by Martorello).)

Confronted at the Hearing with his misrepresentation, Martorello had to concede that he did not actually have any personal knowledge that the *LVD* had ever "identified" *him* for any role. Instead, he tried to explain his way out of an otherwise objectively false statement:

Q And turning to paragraph 14 again, under the heading LVD approached Martorello in 2011, paragraph 14, you say, "In mid 2011, I learned that LVD had identified me as a potential consultant." Do you recall that?
A I do.
Q But at that point, your claim would have been that was Mr. Merritt?
A Mr. Merritt I viewed as LVD, as an agent of LVD who had been seeking someone to help LVD for some time.
...
Q But you have not -- you're not aware of any documentary evidence that shows that LVD was trying to reach out to you as a potential consultant.
A I wouldn't use the word me specifically, but they were seeking lending operations to start and help with it since 2009, 2010 with Scott Merritt.
Q This says me. 14 says, "I learned that LVD had identified me." So you say I wouldn't say me specifically. Does that mean that you were incorrect in drafting paragraph 14?
A No. I think we just have a difference of interpretation. LVD identified me as, you know -- Scott was working for LVD as an agent, and he was seeking someone to provide services to LVD, and when I met his partner, his partner had introduced me to the concept of Think Finance, working with tribes, and I said that was interesting.

(July 21, 2020 Hr'g Tr. 37:12-20, 37:21-38:13.)

3. The Court was also previously misled by Martorello's sworn claim that "he was not involved in the creation of Red Rock." *Williams,* 329 F. Supp. 3d at 255 (citing Martorello Decl. ¶ 17). Remarkably, Defendant repeated this lie throughout the Hearing:

THE COURT: What he wants to know is, were you involved in the creation of it no matter how you were involved. He can get into

the next question, he'll ask you how if the answer is yes. If the answer is no, then the answer is no. Do you understand?
THE WITNESS: I believe so.
THE COURT: Were you involved in the creation of Red Rock?
THE WITNESS: No.

(July 21, 2020 Hr'g Tr. 50:24-51:7.)

The Hearing evidence showed that he was even more than "involved" in the creation of Red Rock, regardless of what "creation" could mean. Martorello determined the name Red Rock. (July 21, 2020 Hr'g Pls.' Ex. 5, Sep. 7, 2011 Email from F. Richardson re Update on LVD Bellicose VI Transaction ("Matt has indicated that the intended Tribal LLC should be established as "Red Rock Lending, LLC" a Tribal Entity" and "my understanding from Scott is that Matt has a nearly complete set of documents.").) At the hearing, Martorello testified to the following:

Q Now, where did the name Red Rock Lending -- Red Rock come from?
A I asked the tribe what name -- what would the name of the entity be, and they said, what would you like, what do you like, and I said, I like Red Rock, and then they went with that name.

(July 21, 2020 Hr'g Tr. Pp. 41:5-43:15.)

In fact, Martorello drafted, reviewed and/or approved the Red Rock formation, creation and organizational documents. (*E.g.,* July 21, 2020 Hr'g Pls.' Ex. 2, Aug. 24, 2011 Email from R. Rosette fw Tasks for Oct 1 Launch ("I plan to have the draft documents done by end of week and then send to [Martorello attorney] Ryan Bloom."); July 21, 2020 Hr'g Pls.' Ex. 3, Aug. 24, 2011 Email from R. Rosette fw Next Steps ("I'd like to get the legal documents all completed and ready for signatures ASAP. Then on that week in Sept. we can execute the agreements with an Oct 1 launch date ... I do have additional questions to clarify some other details when I started reading docs a few days

ago. Maybe we can keep moving forward with docs to complete things ASAP and have a call Thursday morning to go over status and additional papers?"); Pl's Ex. 5 ("Karrie - thanks for providing again the email that Ryan had sent and I apologize for missing this previously which contained the following items that he has requested...TRIBAL ENTITY - PROVIDE A DRAFT OF THE RED ROCK LENDING, LLC ORGANIZATION DOCUMENT AND OPERATING AGREEMENT FOR RYAN TO REVIEW PRIOR TO HAVING IT APPROVED BY LVD AT THE NEXT SCHEDULED COUNCIL MEETING. ALSO PROVIDE THE LLC CODE THAT WAS ESTABLISHED BY THE TRIBE PREVIOUSLY.").)

B. Martorello Controlled the Red Rock Lending Business

The Court understood that, "The company was managed by two members of the Tribe, and the Tribe was Red Rock's sole member." *Williams*, 329 F. Supp. 3d at 255. And Martorello claimed in his Declaration, as cited by the Court, that he was never a manager of Red Rock. *Id.* (citing Martorello Decl., ¶¶18-21). The Court was also previously persuaded by the Tribal Defendant's assertion that "[w]hile Red Rock received advice and consulted with Bellicose about operations, all final decisions about operations were made by Red Rock's managers" and Martorello's claim that he was a mere "consultant." *Id.* at 256.

4. But the evidence admitted at the Hearing refuted the significance of these claims. The role of "manager" was a meaningless title. At initial formation of Red Rock, Martorello understood that,

YOUR ENTITY WOULD BE THE SERVICER FOR THE LENDING OPERATION. THE LLC MANAGERS ARE MANAGERS OF THE LLC ENTITY ON BEHALF OF THE TRIBE BUT ARENT INVOLVED IN THE BUSINESS.

REPRESENTATIVES FROM THE TRIBE ARE THE LLC'S "MANAGERS". THE SERVICER, BELLCIOSE OPERATES THE BUSINESS COMPLETELTY.

(July 21, 2020 Hr'g Pls.' Ex. 4, August 26, 2011 Email Correspondence between M. Martorello and F. Richardson; *see also* July 21, 2020 Hr'g Tr. 54:14-19.)

A revealing example of the actual meaningless role played by the "Managers" (and "Co-Managers") was admitted as Exhibit 56. In this August 26, 2014 e-mail exchange between Martorello and LVD's attorney, the Defendant bristled when LVD sought to learn what exactly their "Co-Managers" were being asked to approve. (July 21, 2020 Hr'g Pls.' Ex. 56, Aug. 26, 2014 Email between M. Martorello, K. Wichtman, D. Gravel and Giizhigookway.) In the LVD attorney's suggestion of future involvement by her client, the then existing lack of involvement is her obvious assumption. The exchange evidence that the ordinary process of providing "Final Approval" to documents sent by Martorello was ordinarily not a substantive exercise:

With regard to the other documents, while not needed for approval for the campaign to move forward, due to the desire to learn and the pending restructure it is my recommendation that you set up a conference call with SPVI to determine for each document (as applicable):
1. Who created the document/concept? Vendor/Individual/Both
2. Who created the models and the criteria for the models re: where the campaign should be launched? Vendor/Individual/Both
3. How will the data be tracked and compiled to measure success?
4. Who will track the data and compile it?
5. How will such data be reported to the Company and by whom?
It is never too soon to learn who is doing what, where, why, how and when it will be done with regard to every aspect of the business.

(*Id.*) In his response to this request that the "Managers" learn what they were approving, Martorello stated:

We respectfully opt to continue to keep any details of SPVI IP (including DM) explicitly for internal eyes only, both for the protection of our business and maintaining the integrity of an acquisition of the SPVI business. Should an acquisition actually transpire, obviously these would be relevant questions for the

eyes of Management and those in the acquiring company on a need to know basis as well (I.e. Certain IP, even in small doses, should at all times be aggressively protected when the result is such a massive competitive advantage, like the process of even just utilizing DM itself which SPVI owns and created.

(*Id.*) That response also foretold that Martorello was scheming even in 2014 to restrict the Tribe's post-purchase access even to the "secret sauce" that was to be conveyed to it as Ascension, limiting access to "management" – which he would still control. Revealing on paper the lack of substance in the Manager "approval" stage of decisions, LVD's lawyer replied, "I wasn't recommending that SPVI disclose its secret sauce but only that SPVI be willing to explain to the Co-Managers what exactly they are approving." (*Id.*) And she correctly understood what Martorello meant when he warned that the Ascension "secret sauce" would be restricted even post-sale to management, answering, "I guess I would like to know who Management is?" (*Id.*)

5. Amongst his many misrepresentations, Defendant has sworn, "As a consultant to Red Rock, I made suggestions and offered advice to Red Rock's co-managers. Red Rock's co-managers were ultimately responsible for all decisions regarding Red Rock's operation. I have never made a decision on behalf of Red Rock. No company I own or manage has ever made any decision on behalf of Red Rock. Any action I took on behalf of Red Rock was either authorized by my contractual relationship or delegated to me by Red Rock." (Martorello Decl. ¶ 22.) And the Court found, "Red Rock provided loans to consumers from its offices on the Reservation, and its employees, computers, and records were all located there." *Williams,* 329 F. Supp. 3d at 255. The Court also accepted several provisions of the Red Rock Service Agreement to conclude that the LVD role was greater than was later discovered and established at the Hearing.

Despite earlier claims otherwise, the evidence at the Hearing showed that the only actual task performed by Red Rock was so-called "verifications" – "meaning how the call center would do their analysis for bank verifications or employment verification, how the loan and rate and term should match up to two different types of pre-qualified leads[.]" (July 21, 2020 Hr'g Tr. 63:15-18.) For such non-discretionary and rudimentary "verifications,"

> [T]he call center will go through certain processes to verify, you know, bank, are they employed, is it really their bank account, is it fraudulent, things like that.

(July 21, 2020 Hr'g Tr. 59:23-60:1.)

Vice-Chairman Pete confirmed that for the period she was on Tribal Council (2010-2016), Martorello fully operated the entire lending business:

> For Martorello to be able to claim that LVD law applied to the consumer loans, the deal required that Red Rock "originate" the loans. But this responsibility was immaterial because Red Rock would have no reason to reject a loan that satisfied Martorello's lending criteria because Martorello ran the business and bore all the risk. After the inception of the business, it was operated completely by Martorello until government regulators and litigation against competitors began. As these cases proceeded, efforts were made to create the appearance of the Tribe's involvement, but the Tribe had no substantive involvement.

(Pl's Ex. 129, at ¶ 4.)

6. Martorello also claimed that neither he nor his companies ever collected any money from any consumer. This was untrue. The Defendant's Servicing Agreement detailed otherwise:

> 4.9 Daily Deposits to Bank Account. The Servicer shall collect all gross revenues and other proceeds connected with or arising from the operation of Enterprise and all other activities of Enterprise and deposit proceeds daily into a bank account established under Section 4.4 consistent with Paragraph 3.5.1 herein, except as to any restrictions on cash deposits imposed by the local bank.

(July 21, 2020 Hr'g Pls.' Ex. 11, Oct. 25, 2011 Servicing Agreement Between Red Rock and Bellicose.) At the Hearing, it became obvious that Martorello's claim was based on his self-constructed semantics. Money paid by consumers went into the bank account over which only Martorello and his employees had access. *Supra.* That is collection in ordinary course.

And "collection" in the context of defaulted debts – debt collection was not performed by the Tribe or Red Rock, but instead by a third-party collection vendor.

Q And how were they notified, the consumer? How were they notified, hey, you're late, you didn't pay your bill?
A There would be an automated email that would recognize that it wasn't paid, and so it would trigger an email through the technology....
Q The code and everything that was shared with Red Rock?

A No, that would have been triggered from the loan management software.
Q. And with whom -- again, the Red Rock period, with whom was the contract with the loan management software vendor; Sourcepoint or Red Rock?
A I can't remember right now.

(July 21, 2020 Hr'g Tr. 78:25-79:16.) Instead, Martorello justified his sworn statement that he was never involved with collecting Red Rock loans because "What I meant was that we did not take or receive any cash from the consumer." (*Id*. at 79:23-24.) This itself was an untrue assumption – Martorello was solely in control of the bank account to which consumers sent that cash.

7. In the original briefing supporting the Tribal Defendants' Motion to Dismiss, Martorello and the Tribal Defendants relied heavily on the text they had placed within the Red Rock Servicing Agreements. The Court and the Fourth Circuit both followed that same path. However, it is now obvious that Defendants saw the document as a litigation shield rather than a fully-governing business document. At the Hearing, this came out in several places.

One example was in regard to the supposed transfer of "Intellectual Property" from Martorello and SourcePoint to Red Rock. As addressed above, none of the "IP" detailed as supposedly belonging to the LVD under the Servicing Agreement was transferred. Similarly, above Plaintiffs have detailed LVD communications as late as 2015 in which the Tribe's lawyer was asking Martorello to provide training to Red Rock managers so they could understand the "Loan Process." This reveals the Defendant's belief that the Servicing Agreement, which otherwise required such training, was not a governing document.

When confronted with the text of the Servicing Agreement on the question of whether Martorello – the "Servicer" – "collected", Martorello dismissively responded that the Servicing Agreement was wrong:

Q. And I want to push us forward a little bit to page 15 of it which is paragraph 4.9 which I've called out on our screens. Do you see that?
A I see it.
Q And what does it say that you, as the servicer, did with respect to the consumer loans revenue that was coming in?
A Well, it doesn't say what we did.
Q But it says, "The servicer shall collect all gross revenues and other proceeds connected with or arising from the operation of the enterprise"; right?
A That's what it says. We didn't do that.

(*Id.* at 94:16-95:5.)

The point here is that while there is evidence that a Servicing Agreement existed, there is no evidence – in fact there is counter-evidence from the Hearing– that the Servicing Agreement accurately described the Red Rock lending operation and relationship between the Tribal Defendants and Martorello.

8. Regardless of what the Defendants created on paper, the testimony and admitted exhibits clearly established that the LVD had no meaningful role in the business if for no other reason than that the Red Rock managers had no actual operational knowledge.

In August 2014, Martorello made clear to LVD that in any sale, "the seller will have to keep a final say so in business decisions to protect the business from being destroyed by the new owner before paid." (July 21, 2020 Hr'g Pls.' Ex. 57, Aug. 26, 2014 Email between M. Martorello, K. Wichtman, D. Gravel and Giizhigookway.) In another critical exhibit admitted at the Hearing, Martorello insisted in September 2014 that,

> After further discussions, the Bellicose Companies will be sold only "as is", with existing Management in place and the company remaining substantially the same. Of course, a purchase, merger and dissolution are required for a Tribal buyer, and so the name will/jurisdiction of the LLC will change. … It also needs to be run in the same format it is today.

(July 21, 2020 Hr'g Pls.' Ex. 60, September 15, 2014 Email between M. Martorello and K. Wichtman.) These admissions are important as they show not only what was then intended as to Big Picture, but also confirm that the then existing Red Rock business was not as defendants had represented to the Court.

Other Hearing exhibits confirm Martorello's total control. For example, in a December 2, 2014 email, Michelle Hazen, a "Co-Manager" of Red Rock, writes to Martorello and apologizes for overstepping her role in suggesting salaries, trade show attendance and the use of a compliance officer. (July 21, 2020 Hr'g Pls.' Ex. 69, Dec. 2, 2014 Email between M. Martorello and K. Wichtman.) Martorello wrote in the exchange:

> The recommended revisions to the Budget sent by DCTF were not accepted by SPVI. ... There is much concern about the inflated line items relative to market-based value in the Watersmeet area. Certain travel budgets, parties, and compensation plans are nowhere near the market universe in Watersmeet or for an operation

> DCTF's size. ... Further, SPVI will be requiring changes to DCTF's internal legal policies, which I will work with Karrie on directly, in order to ensure the Budgeted items for the legal line item are not exceeded in 2015, which in turn represents a default with Alpha.

(*Id.*)

On June 10, 2015, unbeknownst to Duck Creek's Tribal members, Martorello's lieutenants had access to the Duck Creek email account and discovered an internal discussion starting to schedule bi-monthly meetings with SourcePoint to start learning the business. (July 21, 2020 Hr'g Pls.' Ex. 83, June 9, 2015 Email between McFadden, J. Martorello, K.Wichtman and others.) The admitted exhibit is important because it shows what the Managers did not know or do as of at least that date, and it showed Martorello's express refusal to allow them to do more. When the LVD Managers suggested these Bi-Monthly meetings with Martorello, LVD's lawyer stated, "I think our first training session should be 'The Loan Process.'" (*Id.*) Brian McFadden asked Martorello how to carefully deal with this uprising, "What's the best way to interject here?", to which Martorell responded that SourcePoint would allow Manager "Training", but only "related GENERALLY to the industry and the operation of the business." (July 21, 2020 Hr'g Pls.' Ex. 84., Jun. 10, 2015 Email between J. Martorello, B. McFadden, K. Wichtman and Others.)

Even as late as February 4, 2015, the Tribe was still having to negotiate – as a change to the way Red Rock lending had operated through that point – to get Martorello to share any information as to how the business was actually operated:

> [Martorello] What did you mean by training program and employee loyalty built in? [Wichtman]Modified language. If the TSE is going to survive after the sale sunsets or is complete – it cannot operate in a vacuum – it's a tribal business and the Tribe needs to know what is happening and be learning about the operation of the TSE through building relationships with TSE employees. Upper level management and tribal leadership should become aware of all aspects of operation of the TSE.

(July 21, 2020 Hr'g Pls.' Ex. 99, Jan. 14, 2016 Email between K. Wichtman, J. Martorello and M. Martorello.)

C. The LVD Received Less than 1% of the Red Rock Profits

As in so many other regards, the Defendants misrepresented the economic stake that LVD had in Red Rock. In its Decision, the Court found that Red Rock "received 2% of all gross revenues 'plus bad debt recoveries minus the sum of charge backs and bad debt ''charge-offs.'" *Williams,* 329 F. Supp. 3d at 255–56.

9. In reality, Red Rock received much less – just 1%. In fact, this was in the initial Servicing Agreement. (*See* Pl's Ex. 15, at §6.4.1.) As the LVD attorney detailed to Martorello:

> Should we be calling the 2% TNP? 1/2 of it goes to TLM which is not an arm of the Tribe. I'd pick on that point if I were a regulator and might claim the Tribe owns only 50% then and TLM owns 50%. It'd seem to make sense if TLM were a "Professional Fee" included under the Servicing Expense, and the calculation were the same definition. But it were termed what it truly is, a broker fee. Section 6.4.1 further reads like it is 50% owned by LVD and 50% by TLM.

(*See* July 21, 2020 Hr'g Pls.' Ex. 17, Jun. 19, 2012 Email Correspondence re Amendment to Servicing Agreements (Karrie Wichtman and Martorello discussing revised Servicing Agreement).)

D. Martorello actually Suggested the 2% Pay Structure

10. In its Decision, the Court noted Martorello's claim "that the Tribe itself suggested this revenue split because it guaranteed monthly income for the Tribe's general fund[.]" *Williams,* 329 F. Supp. 3d at 256 (citing Martorello Decl. ¶ 36). This was in fact proven untrue at the Hearing, with even Martorello admitting that he really had meant in his Declaration a guaranteed payment, rather than the actual revenue split:

> Q It was their idea. LVD said we want to pay two percent.

A No, I'm talking about the structure of the arrangement.
Q Well, you heard Mr. Merritt, so you suggested and asked that he and then Mr. Rosette approach LVD and see if they would accept two percent; correct?
A Two percent was my counteroffer to their offer.

(July 21, 2020 Hr'g Tr. 83:20-25.) And Martorello conceded that there were no documents or collaborating testimony to support his claim that it was the Tribe's idea. (July 21, 2020 Hr'g Tr. 84:1-3 ("Q Okay. Is there – have you seen a document that says that? A It was a verbal conversation.").)

Merritt testified that it was Martorello's idea and the documents backed that up. (Pls.' Ex. 139, Merritt Dep. 48:2-5 ("the two percent was Matt's proposed revenue retention for LVD. So I took that ask to Rosette to see if it would fly, and that was what I remember happening.").) And Joette Pete, who was actually there on the Tribal Counsel testified in her admitted declaration that:

In the fall of 2011, Martorello visited our reservation to meet with Tribal Council to present the deal. During this presentation, Martorello explained that his company would run the business if LVD allowed him to claim that LVD law applied to the loans. Under the deal, LVD would receive 2% of the gross revenue from the loans.

(Pls.' Ex. 129, Aug. 20, 2019 Declaration of Joette Pete and its exhibits ¶ 2.)

E. Other than Some Cash Payments, LVD Never Received Economic Benefit from Red Rock As Martorello Never Shared his Intellectual Property

The Court noted, based again on Martorello's Declaration, that "aside from these distributions, Red Rock received and retained ownership of all intellectual property developed under the Servicing Agreement by SourcePoint." *Williams,* 329 F. Supp. 3d at 256 (*citing* Martorello Decl. ¶ 35). In his declaration, Martorello had testified, "In addition to the distributions, under the Servicing Agreement, LVD received and retained the significant additional economic

value of ownership of all intellectual property developed under the agreement by SourcePoint." (Martorello Decl. ¶ 35.)

11. At the Hearing, it was clear that LVD had not received such economic value. Martorello had never (and never intended) to transfer the "Intellectual Property" necessary to operate a lending business. Going back to Red Rock's creation, Martorello never intended to provide a meaningful transfer of such assets. (July 21, 2020 Hr'g Pls.' Ex. 13, Nov. 13, 2011 Email Correspondence re Our Call this Morning- Follow-Up Items ("Intangible asset ownership - talk to Jennifer about the language that they have related to you obtaining ownership of the intangibles (specifically domain names) if you are no longer the servicer.").)

When first questioned about the claim in his declaration of having provided economic value to the Tribe, Martorello again relied on his semantic gamesmanship:

Q So your statement under oath is that Sourcepoint gave LVD all intellectual property developed under the agreement with Sourcepoint. That's how I read it. Am I wrong?
A Anything that was theirs developed through the agreement would be their intellectual property, yes.

(July 21, 2020 Hr'g Tr. 58:5-9.) However, after examination, we all learned that Martorello did not convey any actual "IP" to LVD because in his claimed view, none of it was "developed through the [Servicing] "Agreement." He testified that the only "economic value" to which he referred and that was ever given to the LVD was the customer list – the "pre-qualified leads" that ultimately made loans and became consumer borrowers. All that the LVD received was the list of consumers who were paying money into a bank account controlled by Martorello:

Q So you gave all that computer code and all those formulas to a tribal member to own, possess, and keep?

A I didn't give them our pre-qualified stuff, but I gave them their statements and procedures, verification procedures, and the underwriting box.
THE COURT: What's this pre-qualified stuff that you are talking about?
THE WITNESS: Pre-qualified leads, kind of like when you get pre-qualified for a mortgage, will run a bunch of data to determine if you would be eligible, and then we'd solicit, you know, a direct mail campaign or something, and then you might apply if you're interested. So we would generate leads like marketing through analytics and such.
THE COURT: And so the algorithms you developed for pre-qualified leads, were they developed under the agreement by Sourcepoint?
THE WITNESS: No. That was how we provided that service to them. Our agreement required us to provide --
THE COURT: That wasn't what I asked you. I asked you a different question. Were those algorithms that you are talking about respecting the pre-qualified leads developed under the agreement by Sourcepoint? Read your affidavit, paragraph 35.
THE WITNESS: Okay. I've read it again.
THE COURT: Were the algorithms that you spoke of for the pre-qualified leads developed under the agreement by Sourcepoint?
Q So what you are referring to when you discuss the pre-qualified leads is the leads themselves.
A Correct.
THE WITNESS: No.
THE COURT: And they were not given to the tribe.
THE WITNESS: Correct. ... Maybe I'm not explaining this well, but the pre-qualified leads, the way we generate those is our intellectual property. Then we provide the leads themselves which is, I think, what you're saying. So that becomes the customer for them which is their intellectual property, is the customer list, so it becomes theirs at that point.
...
THE COURT: Q So the algorithms, the analytics, the machine from which business was generated, that was not given to the tribe?
A Correct.
Q The actual output, that is, here's the leads, and not all leads but the leads that ultimately become their customers, that intellectual property is the intellectual property that you are referring to?
A. I think that sounds correct.
...
Q Everything else, all of the analytics, the ... You retained and never gave that to the tribe?

A. Our systems and how we did our analytics and things, sort of how we make the sausage, that's our IP.

(July 21, 2020 Hr'g Tr. 60:9-63:17.)

12. The Hearing exhibits detailed above confirm the historical reality that SourcePoint did not share its "secret sauce" with the LVD and Red Rock. But even more remarkably, Martorello's communications admitted at the Hearing evidenced that he was not intending to provide the economic value IP even in a sale, so long as he was owed money. In one communication, he even threatened to walk from the negotiations if LVD continued to insist on him sharing the business substance and details:

Remember when we started, that all of these vendors and systems Jennifer is white boarding out were tied internally within SPVI systems behind the scenes, just like services do in the banking and credit card space. The vendor contracts and formulas used were are very closely guarded internal IP and entirely unattainable by the clients.
...
If there is a fundamental disagreement on IP ownership though, I'd Imagine the elements I mentioned required in a deal are far from obtainable. In fact, I think if that were the case, LVD would essentially make the claim that they already own us today.

(Pls.' Ex. 56, August 26, 2014 Email between M. Martorello, K. Wichtman, D. Gravel and Giizhigookway.) He continued:

[M]any extreme protections will be necessary to make sure the sale price occurs, and that IP is not misused (I.e. Escrow for example is common). These sorts of things are mandatory in such a deal format, and I don't have any certainty that they're going to be agreed to or not right now. My goal is to keep the business alive through Note repayment.

(Pls.' Ex. 57, August 26, 2014 Email between M. Martorello, K. Wichtman, D. Gravel and Giizhigookway.) As Martorello put it clearly, the actual business IP and loan process was to remain his and his alone:

The Servicer is a Servicer, so the IP it builds is its own. ... We later evolved to recommendations and sharing a bit to be helpful, but certain items and code will never even be shared with most of my current employees, because nobody else in the subprime industry does it, and it is too valuable to put at risk as one leak would destroy the business.

(*Id.*)

F. Martorello Did Not Have Mere "Limited" Access to the Bank Accounts

The Court previously found:

> Bellicose's and SourcePoint's access to Red Rock's bank accounts was limited by deposit access control agreements provided by Red Rock, which Red Rock or the Tribe could terminate at any time. Furthermore, although Martorello was a signatory on certain Red Rock accounts, he claims that he was listed that way only "to facilitate accounts payable, and never without express contractual or delegated authority." Martorello Decl. ¶¶ 22-28.

Williams, 329 F. Supp. 3d at 257.

13. It became clear at the Hearing that Martorello's access to the Red Rock operation account was absolute and not limited. Martorello testified that he had total control:

Q Well, it went into the Red Rock account, the operating account automatically; correct?
A Yeah.
Q That's the operating account that unless you were taken off, only you and your company had control over; correct?
A Correct. But what I'm saying is someone had to take the action to make the collection happen, and that happens through the batch renewal process.

(July 21, 2020 Hr'g Tr. 81:6-13.)

Q And so the limited access to bank accounts, you actually had complete access, your employees, your companies, Bellicose and Sourcepoint, had complete access to the operating account for Red Rock; correct?
A Within the scope of the deposit account control agreement, yes.

(*Id.* at 72:24-73:5.)

And of course, this is what the Servicing Agreements required: "Unless otherwise mutually agreed in writing by the Enterprise and Servicer, the Servicer shall have sole signatory and transfer authority over such bank accounts." (Pl's Ex. 11, Oct. 25, 2011 Servicing Agreement Between Red Rock and Bellicose § 4.4.)

This same control remained under Big Picture, as only Martorello's selected President and Vice President at Ascension had authority over the bank account. (July 21, 2020 Hr'g Pls.' Ex. 119, April 5, 2017 Chippewa Valley Bank Account Agreement; July 21, 2020 Hr'g Tr. 77:17-21.)

G. The decision to place Bellicose in LVD was motivated by threats of prosecution and litigation

Martorello claimed in his declaration that "the decision to sell Bellicose to LVD was not motivated by impending threats of litigation or enforcement actions by government agencies." (Martorello Decl. ¶ 69.) At the Hearing, he asserted that what he meant was that the early negotiations may have been so motivated, the ultimate sale transaction formalized in 2016 was somehow separate and not part of those earlier sale attempts. This was an objectively false statement.

14. At the Hearing, Martorello conceded that anyone reading his Declaration would have understood that he had made one continuing effort from 2012 to sell his business to the Tribe:

Q And, in fact, you would agree with me that any person reading this, without the benefit of your new position today, would conclude that this was a seamless process starting in 2012, ending in February of 2015?

A I'm sorry. By seamless you mean there were no stops and starts?

Q That it was one process, negotiation that culminated in what we see in 2015.

A I guess someone could read it that way. Yeah, it's possible someone could read it that way.

(July 22, 2020 Hr'g Tr. 192:22-193:6, *Williams*, ECF No. 883.)

Martorello and the Tribal Defendants took completely contradictory positions in attempting to describe the 2016 transaction as a long-negotiated and seamless effort beginning in 2012 almost immediately after Red Rock was started. Martorello himself claimed as much in his Declaration, stating, "To that end, since at least 2012 LVD and I have engaged in multiple conversations relating to the potential sale of my consulting businesses to LVD to accelerate LVD's ability to maintain a profitable online consumer lending business with no outsourced consulting services." (Martorello Decl. ¶ 49.) The Hearing exhibits also confirmed this ongoing effort by Martorello to make the LVD buy his business without any such contrived demarcation in sale attempt periods.

Martorello's witness, Wichtman explained that, "Discussions with regard to restructure started … around September 2012" and that "this was a long, long, long negotiated transaction with many moving parts and many changes over a four-year period." (July 21, 2020 Hr'g Def.'s Ex. 327, Wichtman Dep. 30:7-9, 31:9-12.)

15. The Hearing evidence conclusively demonstrated that even through 2016, Martorello was heavily (if not exclusively) motivated to make the LVD buy his business for the ownership "optics" necessary to hide him from regulatory and litigation actions.

The tribe's own attorney – Martorello's trial witness – confirmed that Martorello was concerned about the threat of litigation and enforcement actions throughout the entire time period:

[Q:] Did you have discussions with Mr. Martorello about Operation Choke Point?
A. Yes.
Q. And over what period of time?
A. Probably centralized in 2013, maybe 2015, '16.

Q. Okay. And what were (sic) Mr. Martorello expressing concerns about Operation Choke Point?
A. He was concerned.
Q. And what were the concerns, if you know?
A. …, and then I think there were some more, you know, personal concerns with regard to liability of his companies.
Q. Liability meaning that -- what do you mean by that; what did he say about that?
A. I think -- I mean at the time, you have – you have these lawsuits going on with regard to other -- other actors in the business and, you know, Matt was very concerned about that, and so there were -- you know, there lots of email exchanges and discussions, I'm sure, not with just me, but others with regard to outcomes, things that on behalf of the tribe we were monitoring very closely in order to make sure that that sovereign model that we described was adhered to.

(*Id.* at 55:14-56:20.) Rob Rossette also confirmed,

Q You agree in this email Mr. Martorello was talking about a structure for the potential sale of the business?

A Yes.
Q And in the last sentence, he expresses urgency because he's concerned that he might end up in a CashCall type attack. Do you see that?

A Yes, I do. He appears to be a very motivated seller.

(July 21, 2020 Hr'g Pls.' Ex. 142, Rosette Dep. 198:13-21.)

Although Martorello denied this reality, his paper trail showed that ¶ 69 of his Declaration and his Hearing testimony were untruthful. Martorello began demanding the change in structure, his "Sale" once the regulators started cracking down on this predatory tribal lending and even his own Red Rock business model.

The Defendants received a large number of cease and desist notices from State Attorneys General and regulators and these continued unabated through Martorello's attempts to restructure the business and put Sourcepoint into LVD's ownership. (July 21, 2020 Hr'g Pls.' Ex. 19, Jul. 25, 2012 Kentucky Attorney General Cease and Desist Letter; July 21, 2020 Hr'g Pls.' Ex. 23, Aug.

21, 2012 North Carolina Attorney General Letter; July 21, 2020 Hr'g Pls.' Ex. 24, Sep. 14, 2012 Arkansas Attorney General Letter; July 21, 2020 Hr'g Pls.' Ex. 27, Jul. 15, 2013 Email from M. Matorello to K. Wichtman; July 21, 2020 Hr'g Pls.' Ex. 67, Nov. 24, 2014 Letter from Colorado Attorney General to Red Rock.) In fact, Defendant's own correspondence showed that these governmental challenges were at the forefront of Martorello's mind, noting that there were at least 18 different AG letters "received in the last year" - 13 in 2014, 5 in 2013. (July 21, 2020 Hr'g Pls.' Ex. 63, October 9, 2014 Email between M. Martorello, K. Wichtman and B. McFadden.) And yet, somehow, when confronted with all of these exhibits at the Hearing, Martorello still untruthfully tried to assert that these motivated his decision to put the business in the name of the Tribe. (*See in passim* July 21, 2020 Hr'g Tr. 115:22-132:6, 135:22-138:13.)

This claim – under oath – directly contradicted Martorello's own words made in writing to multiple third-parties. In an August 8, 2013 e-mail in which Martorello was trying to argue for a lowered valuation of his business, he stated, (in the relevant parts below):

What would you value a business that's competitors are being sought out by several state governments and the federal government challenging the legality?

What would you value a drug cartel at? (i.e. a business that is illegal, yet very profitable)?

The FTC right now is suing a competitor (FTC vs. AMG Services and Scott Tucker, which you can Google) and are alleging 3 or 4 violations of consumer lending laws.

Our client arguably employs similar practices and the FTC has begun investigations of several Tribal lenders like our client, and their service providers.

Class action lawsuits follow and are already following Tucker's case with the FTC. Also see Martin Butch Webb/Western Sky and look that up.

Several states make it a FELONY crime to make loans over a certain rate or without a license. I had a 20 Page document done for me to

understand the risk that I have as an equity owner for aiding and abetting felony crime in states like GA and you will see the conclusion. It says something like ... "yes it is possible the state will come after you for helping the tribe lend against their laws and charge YOU for aiding and abetting as a felony crime in their state (in some instances penalty could be jail time), but we don't think it's going to happen."

(July 21, 2020 Hr'g Pls.' Ex. 25, Email from M. Martorello.) And Martorello pointed out as his motive for a new structure that, "We have received dozens of letters from State AGs saying we need to be licensed and sending Cease and Desist orders. Those battles will go to court." (*Id.*)

Defendant repeated these same motivations and concerns on August 26, 2015:

SPVI let's assume is going to be 5 years, but it's all based on a few things:
1) the client's business which is 100% funded by Debt and 0% equity. So if the debt goes away, they are over and SPVI is over. Some of the debt certainly will not renew and getting more debt from new parties we definitely cannot assume in the models.
2) Operation Choke Point may result in losing bank/ACH
3) Lawsuits by AGs and regulators against SPVI, myself, or the client (as the reports and cases filed to date against competitors supports) may end the business or seriously shrink the business
4) The business loses states every few months, meaning there will not be growth even if it were a going concern, but rather it'd be shrinking (i.e. PA, CT, CO were all major losses in 2014)
5) CFPB rule was proposed which if implemented ends the business.

(July 21, 2020 Hr'g Pls.' Ex. 87, Aug. 26, 2015 Email between M. Martorello and S. Liang.)

And Martorell again made the same arguments explaining his real motive for restricting the business into LVD-owned companies to his in-house CPA on October 2, 2015:

Some thoughts to share on FMV vs FV. Everyone knows the CFPB rule shuts down the business and there is a court decision that shows the CFPB does control Tribes. We will provide all the support in the world for this, so we can support FMV. If nobody can argue with us about FMV that we did it right, then it doesn't matter what FV is later on. But if someone asks:
1) the Tribe is buying it b/c our contract gets terminated and they want this to continue.
2) Operation choke Point is a risk for SPVI owners but not for the Tribe.

3) All the lawsuits against Servicers is removed from the equation for the Tribe to lose us.
4) They feel they have a shot at suing the CFPB and keeping this thing going for years.
5) They pay $0 cash so they have no risk
6) If they get another vendor, even at a way better pricing, they risk that they mess it up.
7) They risk that they lose their debt investors if we go away, this deal keeps debt investors comfortable to remain, whereas they'd leave if a new vendor replaced us.

(July 21, 2020 Hr'g Pls.' Ex. 93, Email from M. Martorello to Z. Emanuelli.) Martorello made the same point to his valuation company Aranca on December 8, 2015.

Martorello was even shown to have taken business action October 15, 2013, because of "the various challenges and legal uncertainty in the lending industry." (July 21, 2020 Hr'g Pls.' Ex. 39, Oct. 15, 2013 Letter from D. Gravel to Phenomenon Marketing.)

Martorello himself detailed his concerns and motivations on November 8, 2013:

[W]here this puts us (i.e. SPVI is about to be discovered and will need extreme resources to defend itself against all kinds of aiding and abetting and "true lender" claims to come in Q1), b) and the very significant possibility that should we even survive long enough to get there, I will have to defend myself even personally (in more than civil matters)[.]

(July 21, 2020 Hr'g Pls.' Ex. 42, Nov. 8, 2013 Email from M. Martorello.)

And on December 31, 2013, Martorello stated his continuing concern that, the "Clock is ticking before I end up in a Cash Call type attack". (July 21, 2020 Hr'g Pls.' Ex. 43, Dec. 31, 2013 Email between M. Martorello and St. Germain.) His stated motivations for the sale and restructure were exactly as he denied in his Declaration to create a defense if challenged in court:

What I think you'd tell a court that would challenge the immunity is that if the deal were not done, well then: A) the tribe didn't know: A) if SPVI would be around in 10 days given the industry, B) Execute its termination provision in accordance with the SA, or C)

hike rates as risk has gone through the roof with detractors now seeking out SPVI's of the world for major attacks.

(*Id.*)

The Hearing exhibits showed that Martorello was heavily focused on finding a business structure that would circumvent the developing legal hurdles presented by regulators and courts. After the Colorado Supreme Court ruled against industry competitor Butch Webb in the Cashcall/Western Sky case, Martorello told his lawyer, "Let's zero in asap on minimizing my risk for being individually liable like CO just successfully did to Butch Webb." (July 21, 2020 Hr'g Pls.' Ex. 26, April 16, 2013 Email between M. Martorello, R. Rosette and J. Weddle.) In discussions with Rossette on January 6, 2014, Martorello discussed how to change their model to avoid challenge by the CFPB and North Carolina. (July 21, 2020 Hr'g Pls.' Ex. 44, Jan. 6, 2014 Email between M. Martorello and R. Rosette.) Martorello even stated that he wanted Big Picture Loans "to be born from the learnings" of the 2nd circuit panel commentary in the New York appeal. (July 21, 2020 Hr'g Pls.' Ex. 65, November 11, 2014 Email between M. Martorello and K. Wichtman.)

H. When it Benefited Him, Martorello Described Himself as the "Lender"

16. When pitching himself to potential investors, Martorello described himself differently than when he was constructing a litigation defense. For example, in 2014 Martorello's Investment agent counseled,

We should also discuss how much we want to expose on the Tribal lending experience. I hear you that we don't want to overload them, but it is important to show your history as a lender to establish credibility.

(July 21, 2020 Hr'g Pls.' Ex. 47, Feb. 7, 2014 Email from D. Papademetriou to M. Martorello.) In that effort – Martorello establishing his credibility "as a lender", Martorello and Middlemarch offered:

> Sourcepoint began lending in 2011 through its relationship with the Lac Vieux Desert Band of Lake Superior Chippewa in Upper Peninsula Michigan.
>
> ...
>
> Sourcepoint Virgin Islands ("Sourcepoint VI" or the "Company") is an online consumer lending organization that provides, since 2011, underbanked consumers rapid and convenient access to needed funds through online payday and installment loans.

(*Id.*) And Martorello unapologetically testified that he presented this very description to Wells Fargo and other potential investors:

> Q But this document was a draft pitch book made by your marketing company for your review to then submit to Wells Fargo?
> A We did submit this to Wells Fargo, but it was made for a bunch of reasons.
> Q So this is the pitch book that went to Wells Fargo.
> A I believe so.

(July 21, 2020 Hr'g Tr. 105:22-106:3.)

I. As with Red Rock, Martorello Created Big Picture Loans and Ascension Technology

In his Declaration, Martorello falsely claimed that "Neither I nor any company I own or manage, directed or controlled the creation of Big Picture" and "Neither I nor any company I own or manage directed or controlled the creation of Ascension." (Martorello Decl. ¶¶ 67, 68.)

17. Big Picture was an idea Martorello had in 2013. He registered the website on September 18, 2013. (July 21, 2020 Hr'g Pls.' Ex. 33, Sep. 18, 2013 Big Picture Loans Domain Name Registration.) On September 30, 2013, Martorello's vendor created a full design and

operational materials for Big Picture Loans, which he. Intended to use to add a second unrelated Indian Tribe as a business partner. (July 21, 2020 Hr'g Pls.' Ex. 35, Sep. 30, 2013 Email between M. Icardo, M. Ho and A. Amin ("Bellicose has procured additional tribal business with entities not related to LVD or Middletown - i.e. Fort Belknap (Big Picture Loans) and (Chorus Loans)").)

18. In fact, while the story now is that the Tribe was eager to change the Red Rock structure and purchase Martorello's "business," the tone of his emails suggests instead that Martorello was threatening LVD to force that restructure. In one such e-mail exchange, Martorello wrote to Rossette,

So here is what I'm thinking (for now). If we can't reach terms with LVD to buy SPVI, then SPVI will be sold to another Tribe (likely Middletown).

(July 21, 2020 Hr'g Pls.' Ex. 53, August 25, 2014 Email between M. Martorello and R. Rosette.)

The exhibits admitted at the Hearing also demonstrate Martorello was at least as instrumental in the creation of Big Picture Loans and Ascension Technologies as he was in the creation of Red Rock. (*See e.g.* July 21, 2020 Hr'g Pls.' Ex. 71, January 9, 2015 E-mail with Martorello laying out the structural creation of Big Picture Loans; July 21, 2020 Hr'g Pls.' Ex. 94, Nov. 18, 2015 Email from J Martorello to J Williams; July 21, 2020 Hr'g Pls.' Ex. 95, Nov. 18, 2015 Email from J Martorello to J Williams (emails between Martorello and his attorney discussing creation of Big Picture Loans).)

J. Martorello Continued Management-Level Control over Big Picture Loans and Ascension

19. Martorello's position has been consistent as to any "sale." He would always have ultimate control over the lending business until and unless he was eventually paid in full. In 2013, he insisted,

Management – If this issue isn't worked out in some very particular way, the deal just won't get done. Hoping you have some ideas around this. All the investors (institutional, personal, and myself) won't allow the deal to occur without being 100% certain adequate Management resources are in control. This seems the 1st major hurdle to accomplish.

(Pls.' Ex. 43, Dec. 31, 2013 Email between M. Martorello and St. Germain.) And when confronted his words from this 2014 e-mail, Martorello acknowledged they were his:

Q So, here, in this email, you write, **"The seller will have to keep a final say-so in business decisions."** That means whatever deal you're going to agree to with the new Big Picture structure, one thing that you were going to insist on was that the seller -- that's you; right?
A Yes.
Q The seller will keep a final say-so in business decisions; right?
A Correct.

(July 21, 2020 Hr'g Tr. 70:16-24 (Emphasis added); *see also* July 21, 2020 Hr'g Pls.' Ex. 38, Oct. 14, 2013 Email from M. Martorello re SPVI Equity Transfer to LVD ("Current Manager (myself) will be locked in as the decision maker for 48 months, at which point they will hire a new Manager to replace me").)

As an alternative to Matt Martorello's continued direct involvement in running red Rock, Defendant proposed using a connected third-party to run the business, "O2." To that suggestion, Wichtman responded:

[H]ow does putting a company in charge of things Matt used to do help the Tribe learn the business? At the end of the day, especially if you guys are out in 2 years, with the Tribe holding all the cards they need to be playing with a full deck. Sounds to me like we will be short some aces.

(July 21, 2020 Hr'g Pls.' Ex. 80, February 23, 2015 Email between M. Martorello, K.Wichtman and J. Martorello.) To the suggestion that the Tribe instead learn the business so it could actually run it, Martorello (patronizingly) responded, ***describing the existing business – Red Rock – as a "passive investment" for the LVD:***

I guess one question I have is who are you expecting to learn it? There isn't much to "do" for the Buyer since it's built and designed to be sold to be self-sustaining as a passive investment opportunity. I think I need clarity on exactly who you are expecting to learn and what it is you want them to learn. I can't learn science because the words frustrate me too much. Just the same, if you're hoping to jam a square peg through a round hole, something will get broke

...

I think that's exactly the role of the President's and his interchangeable cronies. I wouldn't buy Pfizer and then ask to be CEO, or everyone will be out of a job at Pfizer in 12 months when I destroy it. The optics are important due to the bastards out there against us, but the practicality and sustainability of business is the basic necessary foundation over optics.

(*Id.*)

20. Even at the point where the Big Picture/Eventide transaction was closing in 2016, Martorello was still refusing to cede control of what was to be Big Picture and Ascension:

The Lenders care about the person who runs the business of AT. If the Transaction Docs are clear that the position in question and under scrutiny to the lenders is President and CEO (Brian), then I think we're OK. As far as I know, the Manager's don't really do anything... I defer to John on what the TD's say if that jives, and what the authority is of BMF vs the Managers, but if Managers are really only involved per the OA to get feedback from the CEO/President then seems OK. If they do more than that, or if the TD's say the position of concern are the Managers then we'd have some cleaning up to do.

(July 21, 2020 Hr'g Pls.' Ex. 100, January 14, 2016 Email between M. Martorello, K. Wichtman, Williams, J. Martorello, T. Gibbs, and B. McFadden.)

K. Defendant Failed to Truthfully Defend Against Plaintiffs' Claim of Misrepresentation

21. During two full days of testimony and presentation of evidence, Martorello did not present the Court with any of their experts, introduced only a limited number of depositions, and failed to submit any of their document exhibits. In the face of Plaintiffs' allegation that Martorello lied about his involvement in the creation of Red Rock and the control he exerted over its

operations, Defendant offered very little by way of a defense. What he did offer was regarded by the Court as so conclusory and self-serving that it would not be considered in the Court's determination:

> [MR. Rosette's] answer is exemplary of Mr. Rosette's utter disregard for answering the question and for serving as a lobbyist on behalf of the tribe, and that's exactly how I'm going to view all his testimony. He didn't answer the question. He just spewed out something he thought was okay, and wherever that appears in this testimony, that's how I'm going to regard it, because he's just being a lawyer there. He's not being a witness at all. He didn't answer the question, and the question before that he didn't do and many others like that. Just so you know, don't cite him to me in any subsequent papers for anything, because it's his -- at best, his opinion, and he's not qualified to give it, and it's not relevant. It wasn't responsive to the question, and I'm kind of worn thin with a lot of this stuff. Ms. Weddle was the same way, and Ms. Wichtman was worse.

(July 22, 2020 Hr'g Tr. 242:10-25.)

In addition to the Court's proper disregard of the deposition testimony offered by Defendants, the Court was troubled, to say the least, by Martorello's answers to simple questions. Early in the hearing, the Court commented that if Martorello "continues to ramble" the Court would give Plaintiffs additional time to present its case. (July 21, 2020 Hr'g Tr. 49:15-16.) Further along in Martorello's testimony, the Court asked Martorello "What are you talking about?" and after Martorello rambled a bit more, the Court announced, "I'm utterly baffled by what you are saying." (July 21, 2020 Hr'g Tr. 56:9-25.) The Court's frustration with Martorello's evasiveness continued throughout the hearing:

> THE COURT: Was that an answer yes or no?
>
> THE WITNESS: I don't remember the exact question.
>
> THE COURT: From now on, answer yes or no, and if you then want to say something, okay, but any other answers that aren't yes or no

I'm not going to pay much attention to because I can't follow what you are saying.

You have – your practice seems to be to try to restate the question or to say something that's not even remotely implicated by the question, and, therefore, it's confusing to the record and to me, and it's not helpful to me to understand things in that fashion.

Ask the question again. Answer it yes or no. If there needs to be an explanation, your lawyer can call for it. Go on.

(July 21, 2020 Hr'g Tr. 68:14-25, 69:1-2.)

THE COURT: Mr. Martorello, I'm sorry, but you did say that the purpose of this was to make a pitch on behalf of your tribal clients. Every time you try to backtrack, every time you evade, you create the impression that you're not credible, and I have to decide your credibility. ... Can you understand how a person trying to determine whether someone else is telling the truth is confused by conflicting answers of that sort? If you want to go back and say you're changing your testimony, you can do that, but you can't expect me to hear two different versions of the same thing and come to the conclusion that I can rely on your testimony.

(July 21, 2020 Hr'g Tr. 112:17-113:12.)

Despite admonishment by the Court, Martorello continued to evade answering the questions posed to him by Plaintiffs' counsel. The reason for the evasiveness and refusal to answer the questions is clear -- Martorello cannot deny the content of the numerous emails shown to him that support Plaintiffs' allegation of misrepresentation. After Plaintiffs' extensive questioning of Martorello over two days, defense counsel asked Martorello only a handful of questions on cross-examination and sat down. Defendants offered no documents to disprove Plaintiffs' allegations and Martorello never denied the content of the emails introduced by Plaintiffs showing his clear control of and involvement in the creation of Red Rock.

After numerous depositions taken and thousands of pages of discovery (over 400,000 documents) produced in the case, the best evidence Defendants could produce consisted of

deposition testimony the Court found utterly unhelpful and evasive and untruthful testimony by Martorello. Such "testimony" merely offered the general "party-line" message without any detail or any documentary support. Five of the "witnesses" were the actual lawyers who were paid by Martorello and the Tribe to manufacture the very façade they now are offered to defend. They are the very characters presenting a far-different story in the contemporaneous e-mail discussions sand other documents discovered after the Court's *Williams* Decision – documents Martorello sought to ignore at the Hearing.

22. It also bears noting that Martorello appears to have made a habit of situational truth outside of this litigation. For him apparently there is no objective fact. Reality can be bent to fit his circumstances. Some of his business lies were small. For example, telling the LVD attorney that the Tribe would have to accept "Big Picture Loans" instead of the previously intended "Chorus Credit", because (supposedly), the later had been sold. (July 21, 2020 Hr'g Pls.' Ex. 54, August 25, 2014 Email between M. Martorello and K. Wichtman ("Chorus has been sold. Assuming LVD buys SPVI, BigPictureLoans.com would be an excellent domain.").) Martorello never sold Chorus and instead used it for one of his own new lender companies. *Braviant Holdings Announces $50 Million Credit Facility with Keystone National Group*, PR Newswire (June 13, 2018, 08:30 ET), https://www.prnewswire.com/news-releases/braviant-holdings-announces-50-million-credit-facility-with-keystone-national-group-300665300.html.

But even greater examples were exposed at the Hearing. On December 7, 2016, (again) in seeking a different valuation of his Big Picture transaction, Martorello explained that he had previously lied to the Tribe about his Intellectual property:

> About IP: The client/Tribe often argued with me that they view all of the IP and data as their property. They strongly believed that SPVI was paid to create the IP for them, and to facilitate them in using it. **Early on, I agreed with their position, but in 2014 I**

argued opposite to that (as I wanted to sell the business, it felt pretty pertinent). Now, reading the contracts, nothing is stated about IP, but it is very clear in Section 4.2 that SPVI is hired for the service of creating all of these business methods for the Tribe. It appears pretty clear that the Tribe was correct, in that the IP created to service their business, was always their property. As such, I am of the opinion that the only IP of any relevance was the contracts with the clients. With that, I'm not sure there could have been any GW.

(July 21, 2020 Hr'g Pls.' Ex. 115, December 7, 2016 Email between M. Goyal to M. Martorello (Emphasis added).)

When confronted with his written words at the Hearing, Martorello tried to come up with a new explanation – claiming that he was really just referring to "pre-qualified leads," to which explanation the Court noted:

THE COURT: Is there any part of the paragraph that you all are talking about on page 445 of Exhibit 115 that talks about pre-qualified leads? I just don't see it, and if it's there, I want to know.

THE WITNESS: It's not in there. Just with all of the IP and data includes -- their view of all IP included my IP, and that was the disconnect that I had with the tribe.

(July 21, 2020 Hr'g Tr. 103:4-10.)

Conclusion

The Court was misled. As LVD's appellate lawyer offered to the Fourth Circuit, Defendant Martorello's Declaration was the foundation for most of the record upon which Tribal Defendant's motion was based. Now, particularly with the benefit of discovery from dis-interested third-parties, it is clear that Martorello's understanding of "the truth, the whole truth and nothing but the truth" is different that it should be.

Date: July 31, 2020

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2020, 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: July 31, 2020 /s/

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