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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

RICHARD LEE SMITH, JR., individually and on behalf of persons similarly situated,

Plaintiff,

vs.

MATT MARTORELLO, et al.,

Defendant.

Case No. 3:18-cv-01651-AC

DEFENDANT MATT MARTORELLO'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF COMPLIANCE WITH LR 7-1 AND 7-2

Pursuant to LR 7-1, counsel for Matt Martorello certifies that they made a good faith effort to resolve these issues with Plaintiff's counsel by telephone and email, but were unable to do so.

MOTION TO DISMISS

Defendant Matt Martorello, through his undersigned counsel, respectfully moves the Court for an Order dismissing Plaintiff's Complaint under Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure. The grounds for this motion are set forth in the accompanying Memorandum in Support of Motion.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION.

The claims asserted in Plaintiff's First Amended Class Action Complaint parrot those asserted in similar baseless lawsuits pending in the United States District Court for the Eastern District of Virginia.[1] Mounting evidence in the Virginia litigations has increasingly disproven the veracity of those claims, and yet Plaintiff here regurgitates and exaggerates those allegations in the hope of manufacturing RICO allegations against Martorello and Eventide by drawing false comparisons between the tribal lending involved here and that involved in other cases involving true "rent-a-tribe" frauds. Plaintiff's claims against Martorello can be distilled to a single erroneous, conclusory, and false assertion: that by assisting the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD" or the "Tribe") to expand its already existing lending operations with common services through a company which the Tribe sought to purchase as

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1 *See Williams v. Big Picture Loans, LLC*, Case No. 3:17-cv-461 ("*Williams*"), *Galloway v. Big Picture Loans, LLC*, 3:18-cv-406-REP; *Galloway v. Justin Martorello*, Case No. 3:19-cv-314 REP.

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early as 2012 and in fact *did* ultimately purchase in 2016 (years before this case was filed), Martorello was somehow the "architect" of an illegal lending operation formed for the sole purpose of allowing Martorello to use the sovereign *immunity* of the Tribe to circumvent state usury laws for his own personal benefit. Notwithstanding that it is *sovereignty*, rather, which renders state law inapplicable.

Such false equivalencies transgress federal law and policy and threaten and degrade vital nation building efforts of tribes in need of the outside capital and expertise Congress expressly encourages be obtained through commercial dealings between Indians and non-Indians. These precise arguments and troves of evidence proffered by the plaintiffs in *Williams* (which Plaintiff plagiarizes in support of his allegations) were considered and unanimously rejected by the Fourth Circuit in *Williams v. Big Picture Loans*, 929 F.3d 170 (4th Cir. 2019), which found that the e-commerce self-determination efforts here were a "far cry" from the utter sham operations of others, LVD controlled the lending operation, Big Picture Loans was an independent tribal lending entity, and the loans were "*its* loans." *Id.* at 175, 181. The court further concluded that if LVD, in a proper exercise of its sovereign authority, chose to engage routine commercial services, at market rates, with a non-tribal entity owned by Martorello to further the Tribe's sovereign interests, that does not render the lending businesses unlawful or illegitimate, ***even if Martorello ultimately benefitted from the arrangement***. *Id.* at 179. Nor does the arrangement render Martorello liable under any of Plaintiff's various theories. For these reasons, the First Amended Complaint fails to satisfy the Federal Rules, and this Court should dismiss the claims against Martorello with prejudice.

II. BACKGROUND.

In concluding that LVD's lending businesses are a legitimate effort in tribal self-determination, the Fourth Circuit in *Williams* largely adopted the factual findings of the district

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court regarding the genesis, purpose, consummation of the loan origination and performance ***on-reservation***, structure and governance of LVD's lending businesses, and the commercial agreements with non-Indians, including Eventide Credit Acquisitions, LLC ("Eventide"), Bellicose Capital, LLC ("Bellicose"), and SourcePoint VI ("SourcePoint"). These unanimous findings, which are a matter of public record and can (and should) be considered by this Court, support the dismissal of Plaintiff's claims in this proceeding.[2] This is especially so given the First Amended Complaint's express invocation of materials from the dockets in the Eastern District of Virginia. *See, e.g.*, First Am. Compl. at ¶¶ 45, 46, 50, 55, 57, Exs. 3-4, 6-11.

A. The Tribe—not Martorello—created TED, Big Picture Loans, and Ascension to continue its lending operations and not to primarily benefit Martorello.

LVD was already in online lending before it met Bellicose. As noted by the Fourth Circuit, "the Tribe entered the business of online lending in 2011 when it organized Red Rock Lending as a tribally owned LLC." *Williams*, 929 F.3d at 174. Subsequently, "Red Rock contracted with Bellicose, a non-tribal LLC, to provide vendor management services, compliance

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[2] A court may take judicial notice of another court's proceedings that have direct relation to the matters at issue. *Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011). But judicial notice is unnecessary here, because *Williams* is a published opinion and this Court can consider the reasoning of another court's "ruling for whatever persuasive value it may have." *Diversified Capital Invs., Inc. v. Sprint Commc'ns, Inc.*, No. 15-CV-03796-HSG, 2016 WL 2988864, at *5 (N.D. Cal. May 24, 2016). Martorello asks that the Court take notice of the *Williams* opinion not necessarily for the truth of any ***disputed*** fact recited therein, but of the existence of that opinion, and asks that the Court simply consider the opinion for its thoroughly persuasive recitation of the facts underlying Plaintiffs claims, which it may do without converting this motion into one for summary judgment. *E.g.*, *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001) ("A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment…. But a court may not take judicial notice of a fact that is subject to reasonable dispute…. [Thus, when considering a] motion to dismiss, when a court takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.") (internal quotation marks and citations omitted).

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management assistance, marketing material development, and risk modeling data and analytics development." *Id.* Martorello was Bellicose's founder and chief executive officer. *Id.*

"[T]he Tribe organized Big Picture [Loans, LLC ("Big Picture")] as an ***independent tribal lending entity*** that would ultimately consolidate the activities of its other ***lending entities***, including Red Rock." *Id.* (emphasis added). "[T]he Tribe Council formed another entity, Tribal Economic Development Holdings, LLC ('TED'), to operate the Tribe's current and future lending companies." *Id.* at 175. Ascension Technologies, LLC ("Ascension") was formed "as a subsidiary of TED for the purpose of engaging in marketing, technological, and vendor services ***to support*** the Tribe's lending entities." *Id.* (emphasis added). "Big Picture and Ascension were both organized through resolutions by the Tribe Council, exercising powers delegated to it by the Tribe's Constitution, and the Entities operated pursuant to the Tribe's Business Ordinance." *Id.* at 177. "The Tribe was the sole member of TED, and TED became Big Picture's and Ascension's sole member." *Id.* at 175. "TED now oversees both Big Picture and Ascension, and all three entities have their headquarters on [LVD's] Reservation." *Id.* "Michelle Hazen and James Williams, both Tribe Council members, co-manage" TED, Big Picture, and Ascension. *Id.* at 175. Hazen and Williams "were appointed by majority vote of the Tribe Council and must be removed in the same way." *Id.* at 182.

The Fourth Circuit found that "the district court accurately noted that the Tribe has a stated purpose for each Entity that relates to broader goals of tribal self-governance separate from the Entity's commercial activities, *i.e.*, tribal economic development and self-sufficiency." *Id.* at 178. While the Fourth Circuit agreed that the record supported a finding that the Tribe created TED, Big Picture Loans, and Ascension following an adverse preliminary injunction ruling in the Second Circuit in *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*,

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769 F.3d 105 (2d Cir. 2014), and a Consumer Financial Protection Bureau ("CFPB") enforcement action against another online lender (which did not involve a tribe), the Fourth Circuit expressly found that the documentary evidence presented by the plaintiffs did not support the district court's conclusion (advanced by the plaintiffs) "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." *Williams*, 929 F.3d at 178-79. Instead, the Tribe (and Martorello) was interested in avoiding a potential enforcement action and overzealous regulation by ensuring its commercial relationships and the lending business would be deemed lawful if and when challenged, so that its lending operations, as well as the vital economic benefits to tribal members, would continue. *Id.* The Tribe acting to reduce its potential exposure to liability was consistent with its goal of tribal economic development. *Id.* Accordingly, "***the Tribe here did not create Big Picture and Ascension solely, or even primarily, to protect and enrich a non-tribe member,***" *i.e.*, Martorello. *Id.* (emphasis added).

Further, the Fourth Circuit found that "[t]he district court's reasoning as to the fulfillment of the Entities' stated purposes was also in error," recognizing that LVD stands to inure a windfall when its note with Eventide matures, both in terms of dollars *and* substantial value in its equity ownership: "in only a few years, not only will ***all revenue belong to the Tribe***, but it will ***own outright*** all of the components of the commercial lending enterprise." *Id.* at 181 (emphasis added). In short, "[w]hile Martorello certainly stood to benefit from the creation of Big Picture and Ascension and the continuation of the Tribe's lending operations, so too did the Tribe. Thus, the district court's conclusion that the 'real purpose' of Big Picture and Ascension was simply to protect Martorello does not hold up…." *Id.* at 179.

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B. The Tribe—not Martorello—controls the lending.

The Fourth Circuit correctly recognized Big Picture and Red Rock as the "lending entities" and Ascension as the consultant. Reviewing the allegations, the evidence, and the legal agreements at issue here, the Fourth Circuit unanimously agreed with the district court's conclusion that the lending business's "general structure is to assure that ***Big Picture is answerable to the Tribe at every level***" and rejected the district court's erroneous conclusion that "its structure was outweighed by Ascension's substantial role in Big Picture's operations." *Id*. (emphasis added) (internal quotation omitted). And as the Fourth Circuit expressly cautioned, a tribe's decision to outsource management does not (and must not) weigh against its sovereign nature, especially "given the other evidence of Tribal control" here with respect to LVD's lending businesses. This conclusion applies equally to the servicing agreements between Bellicose and the Tribe. Indeed, Plaintiff has repeatedly characterized the Ascension Intratribal Servicing Agreement as "identical" to the servicing agreements between Bellicose and the Tribe.

The Court in *Williams* also found that in early 2015, "Martorello and the Tribe agreed on a basic framework for the sale of Bellicose: a seller-financed transaction with non-fixed payments over a seven-year term, with any outstanding amount due to be forgiven at the end of that term." *Id.* at 175. "Prior to that time, the Tribe and Martorello had engaged in multiple conversations about the potential sale of Martorello's consulting companies to the Tribe, which would allow the Tribe to engage in online lending without relying on outside vendors for support services." *Id*. According to the Court, "the evidence suggests that the Tribe would not have been able to finance a loan operation on its own and thus entered a loan agreement with a non-tribal entity in order to obtain revenue both now and *in the future*." *Id.* at 180 (emphasis added). Having reviewed the governing documents and appointment of council members Hazen and Williams, and the commercial agreements between LVD and entities associated with Martorello,

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its unanimous legal conclusions were clear. ***The Tribe owns and controls the lending business and its role is "substantial," the lender is Big Picture (not Ascension and not Martorello), and the loans were "its loans."*** *Id.* at 175, 182 (emphasis added).

Notably, the Fourth Circuit rejected the idea that the lending businesses were not an arm of the tribe because the revenue the Tribe received was somehow inadequate. The Fourth Circuit found that money generated by Big Picture a host of vital services for the community, and constituted more than 10% of the Tribe's general fund (and could contribute more than 30% of the fund in the coming years). *Id.* at 179. It also held that "policy considerations of tribal self-government and self-determination counsel against second-guessing a financial decision of the Tribe where, as here, the evidence indicates that the Tribe's general fund has in fact ***benefitted significantly*** from the revenue generated by an entity." *Id.* at 181 (emphasis added). The Fourth Circuit concluded by reversing the district court and holding that Big Picture and Ascension are arms-of-the Tribe entitled to tribal sovereign immunity. *Id.* at 185.

Consistent with *Williams*, this Court should recognize that Plaintiff's loans served these same legitimate and critical policies, which undermine Plaintiff's causes of action.

III. THERE IS NO PERSONAL JURISDICTION OVER MARTORELLO.

Dismissal is necessary under Rule 12(b)(2) because Plaintiff fails to establish personal jurisdiction of this Court over Martorello.

A. The First Amended Complaint must be dismissed for lack of personal jurisdiction.

Martorello, an individual residing in Texas with no property or connection to Oregon, is not subject to the personal jurisdiction of this Court. Oregon's long-arm statute extends personal jurisdiction to the limits allowed by the federal Constitution. *Tech Heads, Inc. v. Desktop Serv. Ctr., Inc.*, 105 F. Supp. 2d 1142, 1144 (D. Or. 2000); Or. R. Civ. P. 4. "Due process requires that

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a defendant have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Helicopter Transp. Servs, LLC v. Sikorsky Aircraft Corp.*, 253 F. Supp. 3d 1115, 1122 (D. Or. 2017) (internal quotation marks omitted) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). This analysis requires the Court to consider two specific types of contacts a defendant has with a forum: general and specific. *Bristol-Myers Squibb Co. v. Super Ct. of Cal., San Francisco Cty.*, 582 U.S. --, 137 S. Ct. 1773, 1779-80 (2017).

Plaintiff only alleges specific jurisdiction over Martorello and must therefore meet a three-part test: (1) whether Martorello either purposefully directed his activities or purposefully availed himself of the benefits afforded by the forum's laws; (2) the Plaintiff's claim arises out of or relates to Martorello's forum- related activities; and (3) the exercise of jurisdiction is reasonable and comports with fair play and substantial justice. *See Helicopter Transp. Servs, LLC*, 253 F. Supp. 3d at 1123-24. A defendant's contacts with the forum state must be assessed individually. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984). The focus must be on "the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014) (quoting *Keeton*, 465 U.S. at 775). Due process is satisfied only where that relationship arises out of contacts that the "defendant *himself* creates with the forum State" without regard to the "unilateral activity of another party or a third person." *Id.* at 284 (emphasis in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984)). "Due process requires that a defendant be haled into a court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Walden*, 571 U.S. at 286 (quoting

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Burger King Corp., 471 U.S. at 475). And, as the Supreme Court's decision in *Bristol-Myers Squibb* makes clear, there must be a sufficient "activity or an occurrence that takes place in the forum State," by a defendant relating to a claim by a plaintiff such that the defendant is "subject to the State's regulation." 137 S. Ct. at 1780. Such a relationship with Oregon has not been established here.

At best, Plaintiff has alleged, in conclusory fashion, that Martorello "does business" in Oregon. First Am. Compl., at ¶ 24. Beyond the, again, conclusory allegation that Martorello's "business" was "[i]n furtherance of the illegal enterprise that defrauds Oregon borrowers," there is no allegation as to what "business" Martorello allegedly conducted in Oregon or how such "business" in any way related to Plaintiff. *Id.* To the contrary, Plaintiff's claims as to Martorello are limited to acts taken by others, specifically acts by Big Picture and Ascension, which affirmatively occurred ***on the reservation in Michigan***, and thus cannot arise out of, or relate to, forum-state activities. *See Williams*, 929 F.3d at 182 ("The district court found that the Tribe has a substantial role in the operations of Big Picture, 'as the entity employs a number of tribal members'–including Hazen as its chief executive officer–***and 'conducts all of its operations on the Reservation***.'" J.A. 214.) (emphasis added). Specifically, it was Big Picture, the sovereign Native American lender, which executed and collected on the loans to Plaintiff from tribal land. *See, e.g.*, First Am. Compl., at ¶¶ 9, 26-29, 34. And it was Ascension that was the service provider to Big Picture. *Id.* Those acts are not the acts ***of Martorello*** and cannot be ascribed to Martorello for jurisdictional purposes. *See Walden*, 571 U.S. at 283-84. In fact, the only allegations of the First Amended Complaint touching upon Oregon are the acts of other individuals and entities—not Martorello.

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Because Plaintiff has failed to satisfy his burden to provide unchallenged facts showing Martorello's direct contacts with this forum, Martorello is not subject to the Court's jurisdiction, and the First Amended Complaint should be dismissed for lack of personal jurisdiction.

B. RICO's nationwide service of process provision does not provide the Court with personal jurisdiction over Martorello.

In addition to the typical personal jurisdiction analysis, RICO's venue provisions permit a court to exercise personal jurisdiction over a defendant in certain limited circumstances. *See* 18 U.S.C. § 1965. Under well-established Ninth Circuit case law, the Court should consider its ability to exercise personal jurisdiction over Martorello pursuant to 18 U.S.C. § 1965(b) only to the extent that the "ends of justice requires." *Butcher's Union Local No. 498, United Food & Comm. Workers v. SDC Inv., Inc.*, 788 F.2d 535, 538 (9th Cir. 1986). But Plaintiff cannot make the required showings here.

Section 1965(b) "provides for nationwide service and jurisdiction over 'other parties' not residing in the district, who may be additional defendants of any kind, including co-defendants, third party defendants, or additional counter-claim defendants." *PT United Can Co. Ltd v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65, 71 (2d Cir. 1998). Jurisdiction over other defendants not subject to jurisdiction in the forum under a more traditional due process analysis is not triggered automatically and "the right to nationwide service in RICO suits is not unlimited." *Butcher's Union*, 788 F.2d at 539. Rather, Section 1965(b) "requires a showing that the 'ends of justice' so require" the assertion of the nationwide jurisdictional reach of the RICO statute. *Id.*

"Ends of justice" is not defined under the statute. But in the Ninth Circuit, the party invoking the provision has the burden to demonstrate: (1) the court has personal jurisdiction over at least one defendant; and (2) there is no other district in which a court will have personal jurisdiction over all of the other defendants. *Id.* at 538-39; *see also Estate of Carvel ex rel.*

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Carvel v. Ross, 566 F. Supp. 2d 342, 351 (D. Del. 2008) (noting same). Additionally, a plaintiff must show a single nationwide conspiracy, and allegations of participation in multiple separate conspiracies will not permit a court to exercise jurisdiction based on Section 1965(b). *Butcher's Union*, 788 F.2d at 539. "Once the defendant has challenged the exercise of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction." *Id.* at 538.

Plaintiff has failed to establish that any of these factors weigh in favor of this Court maintaining personal jurisdiction over Martorello in this District under RICO's nationwide service of process provision. First, there are at least two other districts that could exercise personal jurisdiction over Martorello and all other Defendants. The remaining Defendants, Eventide and Martorello, are both located in Dallas, Texas, and are therefore amenable to jurisdiction in the Northern District of Texas (where Eventide's related bankruptcy proceedings are pending). Alternatively, jurisdiction would be proper in the Western District of Michigan, where LVD and its Reservation are located and where the Defendants are alleged to have engaged in actions that purportedly caused Plaintiff's harms. *Williams*, 929 F.3d at 182 (noting that Big Picture conducts all of its operations on the reservation). Plaintiff cannot contest that Martorello and Eventide would also be subject to jurisdiction in those districts given their alleged involvement with the tribal lenders. Thus, it is in one of ***those*** districts—not this one—where this case must proceed. Given these alternative forums, there is no ability to exercise jurisdiction over the non-resident defendants using Section 1965.

Second, Plaintiff fails to demonstrate facts involving a single nationwide conspiracy. As the Fourth Circuit found, Eventide sold the servicing business to LVD in a seller-financed transaction in which Eventide served as the seller. *Id.* at 175. Red Rock was later dissolved and LVD began a new lending business through Big Picture. *Id.* at 174. The record also

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demonstrates the evolving nature of the relationship as the Tribe learned and grew, and Martorello became less and less involved even before the sale. These findings and the evidence indicates not an alleged single nationwide operation, but multiple. This precludes use of Section 1965, particularly where Plaintiff took out his loans through Big Picture, and other purported class members allegedly took out loans from Red Rock.

Finally, Plaintiff has failed to demonstrate that this Court can exercise personal jurisdiction over any one of the defendants in this matter.

Because Martorello has no contact with this forum, the Court should dismiss for lack of personal jurisdiction.

IV. PLAINTIFF FAILS TO STATE A CLAIM AS TO MARTORELLO.

Dismissal is also necessary under Federal Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

A. Plaintiff's allegations concerning Martorello are conclusory, speculative, directly contrary to relevant documents, and cannot be accepted.

Plaintiff theorizes that Big Picture and Ascension "serve as a front to disguise Martorello's and his company [Eventide's] roles and to ostensibly shield the scheme by exploiting tribal sovereign immunity." First Am. Compl. at ¶ 5. Plaintiff seeks to buttress this theory by repeatedly contending that "Martorello was the architect of the rent-a-tribe lending scheme…" and he controlled the supposedly illegal lending operations through Eventide. *See, e.g., id.* at ¶¶ 5, 8, 18, 24, 25, 45, 75-88. Plaintiff's conclusory allegations are insufficient under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to state factual allegations demonstrating plausible entitlement to relief.

Nor do they comport with Oregon law. *See Ott v. Mortg. Inv'rs Corp. of Ohio*, 65 F. Supp. 3d 1046, 1060 (D. Or. 2014) (noting that "the personal liability of a corporate director or

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officer must be 'founded upon specific acts by the individual director or officer'") (quoting *United States v. Reis*, 366 F. App'x 781, 782 (9th Cir. 2010)); *see also Kibec v. Balog*, No. 3:12-CV- 559-ST, 2012 WL 2529202, at *2 (D. Or. May 29, 2012) ("corporate officers 'are not personally liable for the debts or other contractual obligations of the corporation'") (quoting ORS 58.185(10)); *Shlim v. CML, Inc.*, 112 Or. App. 597, 602 (1992) (affirming dismissal of claims against individual alleged to be president, director, and sole shareholder of an entity because plaintiffs failed to provide evidence that the individual "improperly controlled the corporation," in a way that caused plaintiff's harm). Further, to the extent that Plaintiff seeks to hold Martorello liable for acts of Bellicose (or any other entity), he must still show some wrongful conduct rising above a mere error of judgment by Martorello was the cause of his harm. *Amfac Foods, Inc. v. Int'l Systems & Controls Corp.*, 294 Or. 94, 111 (1982). Here, Martorello knows only Federal and Tribal law to apply to the loans, and there is nothing in the vast public record that suggests Martorello partnered with LVD for its "immunity" as opposed to tribes being free from the applicability of state law entirely (*i.e.*, to make lawful and enforceable loans). Indeed, the record is rife with legal opinions from inception through the sale of Bellicose detailing exactly that.

Plaintiff, however, failed to plead facts demonstrating Martorello's personal participation in acts causing his harm. The conclusory nature of Plaintiff's allegations is laid bare in that they are analogous to those already considered, ***and rejected***, by the Supreme Court in *Iqbal.* There, the Supreme Court was confronted with claims that the Attorney General, John Ashcroft, and FBI Director, Robert Mueller, created a scheme to deprive the plaintiff of his constitutional rights. *Iqbal*, 556 U.S. at 669. The complaint alleged that Ashcroft was the "principal architect" of the policy and that Mueller was "instrumental in its adoption, promulgation, and

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implementation." *Id.* at 664. Ashcroft and Mueller moved to dismiss the complaint for lack of personal jurisdiction and failure to state a claim on the basis that such conclusory facts could not support putting them through the expense and imposition of discovery in a foreign jurisdiction. *Cf. Iqbal v. Hasty*, 490 F.3d 143, 177 (2nd Cir. 2007) (noting Ashcroft and Mueller's motion to dismiss for lack of personal jurisdiction was intertwined with the issue of personal involvement). The Supreme Court ultimately agreed with Ashcroft and Mueller: mere allegations that a defendant is the "architect" of a policy allegedly causing plaintiff harm or is instrumental in implementing that policy, cannot, ***as a matter of law***, be the basis of forcing an individual into the expense and inconvenience of discovery. *Iqbal*, 556 U.S. at 678-79.

Plaintiff's allegations against Martorello are analogous to, and in some instances identical to, those dismissed in *Iqbal*. Plaintiff's First Amended Complaint makes vague allegations regarding Martorello's power to control the lending enterprise—both before and after the sale of the servicing entity to the tribe—just as the plaintiff in *Iqbal* labeled Director Mueller as "instrumental" in implementing the scheme alleged in that matter. But Plaintiff's First Amended Complaint does not stop at mere similarities to the allegation in *Iqbal.* Martorello is, again contrary to both available evidence and findings, considered the "architect" of the alleged lending scheme (First Amended Complaint at ¶ 24)—the precise epithet attached to Attorney General Ashcroft by the plaintiff in *Iqbal*.

Even if such allegations are indeed facts and not thinly veiled legal conclusions, Plaintiff has not alleged (and cannot allege) that Martorello made the loans at issue or that he took any actions to collect on the loans. Rather, Plaintiff's First Amended Complaint makes absolutely clear that his alleged loan was issued solely by Big Picture. First Am. Compl. at ¶ 9, ("Mr. Smith obtained a $1,500 loan from Big Picture Loans…."), ¶ 136 ("Big Pictures Loans' loan

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agreement contains…"). This is critically important because, as the Fourth Circuit found in *Williams* (and this court should as well), Big Picture is a properly established tribal entity, formed pursuant to the Tribe's status as a sovereign entity, in order to further tribal economic and self-governance interests, and answerable to the Tribe at every level. Stated otherwise, Plaintiff's allegation that Big Picture was merely a "front" for Martorello to hide behind immunity lacks facial plausibility sufficient to state a claim.

Indeed, Plaintiff's allegations regarding the alleged scheme are directly contrary to relevant documents in the public record—including the Fourth Circuit's opinion in *Williams* which examined identical allegations and accepted and relied upon many of the district court's ***factual findings.***[3] As the Fourth Circuit noted, Eventide played a critical role in furthering the Tribe's lending operations by providing financing that the Tribe could not get elsewhere. *Williams*, 929 F.3d at 180. The Fourth Circuit also rejected the assertion made by Plaintiff here that the Tribe lacked meaningful control over Big Picture and Ascension. The court instead concluded that the Tribe's council members, Michelle Hazen and James Williams, were "granted broad authority to bind Big Picture" and "'to do and perform all actions as may be necessary or appropriate to carry out the business of Big Picture including…the power to enter into contracts for services, to manage vendor relationships, and to manage personnel issues and affairs'" of the entity. *Id.* at 182. And after reviewing the legal agreements in this case concluded, "the fact that

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[3] Although the Fourth Circuit in *Williams* reversed the ultimate legal conclusions reached by the Eastern District of Virginia, it agreed with the lower court's recitation of the facts, which was based on that court's review of scores of documents and pages of deposition testimony. The Eastern District of Virginia's recitation of the facts refutes many conclusory allegations within Plaintiff's First Amended Complaint and demonstrates the conclusory—and false—nature of those allegations.

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Big Picture currently chooses to utilize [consultant's] criteria does not mean that it does not have the power to choose differently in the future." *Id.* at 183.

In short, a careful examination of all publicly available records makes clear that Plaintiff's conclusory allegations are simply insufficient to state a claim against Martorello under any of the posited theories.

B. The choice-of-law provision in the loan agreement must be enforced.

Despite acknowledging that his loan agreement contained a choice-of-law provision selecting the laws of the forum in which Plaintiff's consensual loan was negotiated, originated, and collected (First Amended Complaint ¶ 105), Plaintiff now seeks to void his obligations by applying the laws of Oregon, the state where he resides. Under LVD law, the amount of interest charged to Plaintiff is not usurious. *See* Tribal Consumer Financial Services Regulatory Code § 11.3(b) (setting forth that the maximum finance charge permissible under the Code's small loan transaction provisions is "fifty dollars ($50.00) per one hundred dollars ($100.00) of principal per installment period").[4] The loans represent a consensual commercial transaction agreeing to tribal law, and are lawful under the laws of LVD—a law that is "privileged from diminution by the states," absent Congressional action. *Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g*, 476 U.S. 877, 891 (1986). Indeed, the underlying lawfulness of these loans under LVD law should end the inquiry if the inherent sovereignty of a Native

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4 The relevant dispute provisions of the Tribal Consumer Financial Services Regulatory Code are available online at http://www.lvdtribal.com/pdf/TFSRA-Regulations.pdf (as stated in paragraph 114 of the First Amended Complaint) and the entire code can be freely accessed by consumers prior to entering into their loans with LVD at the following website: http://www.lvdtribal.com/pdf/2015%2011%2003%20Tribal%20Consumer%20Financial%20Services%20Regulatory%20Code.pdf (last visited February 9, 2020). The court may consider this document on a motion to dismiss. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

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American tribe and its ability to legislate free from interference from co-equal sovereigns are to be respected as Congress and the Supreme Court have repeatedly required. *See, e.g., Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989) ("If the state law interferes with the purpose or operation of a federal policy regarding tribal interests, it is preempted"). And as the Fourth Circuit concluded, the lending activities at issue are indeed made in furtherance of a federal policy, tribal economic development and self-sufficiency. *Williams*, 929 F.3d at 178. Accordingly, the loan to Plaintiff is lawful, and no further analysis is required.

To the extent the Court nonetheless feels compelled to undertake a conflict of law analysis, Oregon conflicts law requires application of *ex ante* laws chosen by the parties: the laws of LVD. Where a contractual choice-of-law clause is included in the agreement between the parties, that clause encompasses all causes of action arising from or related to that agreement, regardless of how they are characterized. *See, e.g., Don Rasmussen Co. v. BMW of North America, LLC*, No. 02-1504-KI, 2003 WL 26076846, at * 10 (D. Or. Nov. 20, 2003) ("The Ninth Circuit has held that choice of law provisions in contracts apply equally to contract and tort claims"); *see also* ORS 15.350 ("the contractual rights and duties of the parties are governed by the law or laws that the parties have chosen"); ORS 15.455 (providing that torts and noncontractual claims will be governed by the law of the parties' choosing, with limited exceptions). Oregon law specifically contemplates the potential use and acquiescence to the laws of sovereign Native American tribe. *See* ORS 15.300(2) (including within the statutory definition of "state," for choice of law principles, "any Indian tribe, other Native American group . . . recognized by federal law"). Where the parties have selected a set of laws governing claims, courts should look to the laws of that state or tribe, as well as the public policy of that state or tribe, to determine the proper outcome of a legal question. *See Johnson v. J.G. Wentworth*

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Originations, LLC, 284 Or. App. 47, 53 (2017) (examining California law and California public policy given choice of California law provision in assignment agreement).

Here, Plaintiff's causes of action all arise from his loan agreement containing a choice-of-law provision selecting the LVD law to govern all disputes arising out of that agreement. *See* First Am. Compl. at ¶ 105 ("This Agreement will be governed by the laws of the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Tribal Law"), including but not limited to the Code as well as applicable federal law"). Because the loan agreement contains an express choice of law provision, that should end the inquiry under ORS 15.350. Under LVD's laws and policy, the rates charged are not unlawful or usurious. Tribal Consumer Financial Services Regulatory Code § 11.3(b). As such, Plaintiff's loan is not usurious under the laws selected by the parties. This conclusion undercuts the legal theory underpinning all of Plaintiff's causes of action, and requires their dismissal.

Even if the Court were to consider the more traditional choice of law analysis from the Restatement (Second) Choice of Laws, the result would be no different. Under the Restatement, the contractual choice of law will be upheld if the selected law has a substantial relationship to the forum selected by that provision. *See* Restatement (Second) Conflict of Laws § 187(2). Here, the laws selected by the choice-of-law provision indisputably have a substantial relationship to the Plaintiff's lender, Big Picture, as well as LVD. For example, Big Picture is incorporated in LVD's jurisdiction and operates from LVD's reservation. *Williams*, 929 F.3d at 175. Big Picture's incorporation pursuant to the laws of LVD establishes both a substantial relationship to, and a reasonable basis for the selection of, LVD's laws. *See ABF Capital Corp., a Delaware Corp. v. Osley*, 414 F.3d 1061, 1065-66 (9th Cir. 2005) (finding a substantial relationship and a reasonable basis for enforcing the choice of law provisions of the state where one of the parties is domiciled

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or incorporated). Accordingly, the choice-of-law provision should be given effect unless Plaintiff can demonstrate that application of LVD's laws is both contrary to an Oregon fundamental public policy, or Oregon has a materially greater interest in resolution of this matter. Plaintiff cannot do so.

Even if the state did have a conflicting fundamental public policy, it does not have a "materially greater interest" in the loan transaction than LVD's significant benefit vital to Federal policy and self-governance. This is particularly evident when imputing Federal policy to promote these efforts of economic development, and considering the Federal interests as the third prong in such balancing test, as demonstrated by the principals established in the *Montana v. United States*, 450 U.S. 544 (1981), and *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980), progenies. The Fourth Circuit also affirmed that the place of negotiation, contracting, and performance on the contract all occur on the LVD reservation, which undoubtedly has the most significant relationship to the transaction and the parties, where (unlike routine commercial transactions) one party indeed is the Tribe itself. These significant findings as to the nexus to the transaction mandate application of tribal law and a swift end to Plaintiff's serious accusations.

C. Plaintiff's RICO claims are deficient as a matter of law.

Plaintiff's RICO claims are not only deficient as a matter of law as described below, but also constitute a gross misuse of the RICO statute in an attempt to taint the legitimate and common nation building business relationship between a third-party servicer and a tribal lending entity formed and operated by a Native American tribe pursuant to its laws and in accord with Federal policy. As the First Circuit has held, RICO "has an almost inevitable stigmatizing effect on those named as defendants," and in the interests of fairness to those labeled as racketeers, "courts should strive to flush out frivolous RICO allegations at an early stage of litigation." *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990) (dismissing RICO claim as having

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no legal basis). It is hard to conceive a more applicable circumstance. Far from the criminal organizations Congress aimed at eliminating through enacting the RICO statute, Big Picture and Ascension are legitimate businesses formed to provide jobs and further economic development of LVD providing state of the art health care, education, scholarships, housing, cultural programs, and police support on a federally recognized Native American tribe. Accordingly, this Court should dismiss the frivolous RICO allegations against Martorello, allowing him and indeed Indian country more broadly, to avoid any further stigma and diminishment against outside capital and expertise assisting struggling tribes in their efforts of self-determination.

In addition to having been asserted for improper purposes, Plaintiff's RICO claim against Martorello suffers from numerous deficiencies as a matter of law, each of which requires dismissal of those claims in full. First, Plaintiff lacks standing because he was not proximately harmed by a violation of the statute ***by Martorello***. Second, Plaintiff fails to demonstrate that ***Martorello*** took the prohibited act of collecting any unlawful debts from Plaintiff. On this point, Plaintiff also fails to show that the debts collected by Big Picture are unlawful under RICO.[5]

While "pleadings should generally be construed liberally, a greater level of specificity has always been required in RICO cases." *Dermesropian v. Dental Experts*, 718 F. Supp. 2d 143, 153 (D. Mass 2010) (quoting *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 443 (1st Cir. 2000)). Here, Plaintiff's attempts to hold Martorello liable under RICO are deficient as a matter

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[5] Section 1961(6) defines unlawful debt as a debt that is (1) "unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury"; (2) which was incurred in the business of lending money or a thing of value; and (3) at a rate of interest at least twice the enforceable rate. 18 U.S.C. § 1961(6). Given the enforceable choice-of-law provision, the debts at issue in this case do not have a rate of interest that is twice the enforceable rate. Nor was collection of an unlawful debt intended for garden variety consensual choice of law loan disputes such as this.

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of law and improperly conflate Martorello with the entire alleged enterprise. For these reasons, dismissal of the RICO claims against Martorello is appropriate.

1. Plaintiff lacks standing under RICO to pursue claims against Martorello.

Plaintiff lacks standing to pursue RICO claims against Martorello because she has not been injured in her business or property by reason of the collection of an unlawful debt ***by Martorello***. Private plaintiffs have standing to sue under RICO only when "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). This standing requirement demands that a plaintiff demonstrate that a defendant's collection of an unlawful debt is both the but-for and legal cause of a plaintiff's injury. *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1117 (9th Cir. 1999). In determining whether proximate causation exists under RICO, courts should consider both the "directness concern" and "three functional factors" as announced in *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

"Mere 'but-for' or factual causation is insufficient. So too is 'a link that is too remote, purely contingent, or indirect.'" *Mitsui O.S.K. Lines, Ltd. v. SeaMaster Logistics, Inc.*, 691 F. App'x 416 (9th Cir. 2017) (internal citations and quotation marks omitted) (holding that proximate cause under Section 1964(c) did not exist even where false mail and wire transmissions facilitated an overall illegal arrangement because the actions of others more directly caused the plaintiff's injuries). This is because the Supreme Court has repeatedly confirmed that "the general tendency of the law" in regards to proximate cause inquiries under RICO "*is not to go beyond the first step*." *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 10 (2010) (emphasis added) (citing *Holmes*, 503 U.S. at 271-72). Indeed, as the Ninth Circuit recently recognized, the Supreme Court's decision in *Hemi*, "emphasized that a claim would not meet RICO's direct relationship requirement if it required the Court to move beyond the first

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step in the causal chain." *Fields v. Twitter, Inc.*, 881 F.3d 739, 745 (9th Cir. 2018) (citing *Hemi*, 559 U.S. at 8-12).

A plaintiff must demonstrate that each defendant—not the enterprise as a whole—meets the proximate cause requirement. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1481 (9th Cir. 1997), *overruled on other grounds by Lacey v. Maricopa Cty.*, 693 F.3d 896, 927 (9th Cir. 2012) ("[A] plaintiff must show not only *that the defendant's violation* was a 'but for' cause of his injury, but that it was the proximate cause as well") (quoting *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1311 (9th Cir. 1992)) (emphasis added). The RICO proximate cause element is "used to limit a person's responsibility for the consequences of that person's own acts." *Holmes*, 503 U.S. at 268. Where a plaintiff fails to demonstrate proximate causation as to a defendant, the plaintiff cannot recover from that defendant. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 659-60 (2006) (affirming district court's dismissal of claim as having a too attenuated causal connection between the injury and alleged injurious conduct).

Plaintiff has failed to demonstrate that Martorello, as opposed to others, or the enterprise as a whole, has proximately caused his harm. Therefore, he cannot establish the "directness concern" raised in *Holmes*. First and foremost, Eventide sold the servicing business to LVD in January 2016. *Williams*, 929 F.3d at 175. Importantly, Plaintiff's loan agreement was executed in 2017. First Am. Compl. at ¶ 26. No proximate cause could possibly exist as to Martorello for loans made for the post-sale period when Martorello has had no involvement in any tribal lending business. To the extent Plaintiff has suffered any harm, such harm would have been proximately caused by the entities that actually collected the Plaintiff's debt, not Martorello, now an officer at a company that is a mere creditor of the lending business. But the entities that actually collected on the loan from Plaintiff are sovereign arm-of-the-tribe lending companies

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formed by LVD and managed by two members of LVD, Chairman James Williams and Michelle Hazen. *Williams*, 929 F.3d at 175. There is no monetary or equitable relief available from such entities under RICO, as sovereign entities are not "Persons" under RICO from whom relief is available. *Cf. Inyo Cty. v. Paiute Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 709 (2003) (A Native American tribe, like a state, is not a "person" that could be sued under 42 U.S.C. § 1983); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 914 (3rd Cir. 1991) (plaintiffs could not maintain private civil action under RICO against municipality as the municipality could not be liable for the treble damages imposed in such an action).

Similarly, consideration of the first functional factor weighs in favor of Martorello, as any damages allegedly suffered by Plaintiff are only indirectly linked to Martorello, as an executive of a creditor wholly untied to the Tribe's lending capital. As such, it is difficult "to ascertain the amount of damages attributable to the violation, as distinct from other, independent, factors," such as the conduct of the tribal lending entities. *Holmes*, 503 U.S. at 269. As for the second functional factor, Plaintiff initially pled his RICO claims against several entities alleged to be his lender and the entity collecting those loans, and Martorello, an executive of an entity that previously provided consulting services to a predecessor to Plaintiff's lender. Plaintiff is essentially seeking identical and multiple recoveries from disparate parties with vastly different theories of liabilities. This Court should dismiss Martorello from the RICO claims, as he is too indirectly linked to the alleged harm suffered by Plaintiff.

Finally, the last factor also weighs in favor of dismissing the RICO claim, as the Tribe has a sovereign right to contract with third parties under its own laws and Federal policy expressly details outside capital and expertise as the pinnacle of a Tribe's efforts to alleviate the many burdens of self-governance. Not only is there nothing "illegal" about tribes doing so, a

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conclusion the Fourth Circuit has recognized (*Williams*, 929 F.3d at 183 (noting that a tribal lender's "decision to outsource management [of its operations] does not weigh against tribal immunity")), but there is a greater societal interest at stake, protecting the sovereignty of Native American tribes and the Congressional vision as to their survival and self-determination.

Plaintiff's alleged harm was plainly caused by others. But the actions of others cannot create standing to pursue such claims against Martorello. Big Picture, not Martorello, collected Plaintiff's loan—as the loan agreements expressly provide. Martorello was a mere executive with a company who, for a time prior to when Plaintiff entered into his loan agreement, provided assistance and consulting services through an NIGC-like contract to the Tribe, which was offering loans to consumers from its reservation. Those facts cannot show Martorello's actions were the proximate cause of Plaintiff's harm. Accordingly, Plaintiff's theory of liability against Martorello is based on a causal link too attenuated to warrant recovery from Martorello.[6]

2. Plaintiff fails to demonstrate a violation of § 1962(c) by Martorello.

Beyond the lack of standing, perhaps a more fundamental flaw in Plaintiff's First Amended Complaint is that it fails to allege that Martorello engaged in unlawful conduct in violation of Section 1962. Specifically, Plaintiff's First Amended Complaint fails to allege facts demonstrating that Martorello—as opposed to any other defendant—participated in the operation or management of the alleged enterprise, or that he did so ***through*** the collection of unlawful debts. *See* 18 U.S.C. § 1962(c). The absence of such key and necessary factual allegations requires dismissal of the RICO claim against Martorello.

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[6] By dismissing the Tribal defendants, Plaintiff has made it impossible for Martorello to litigate this matter without the presence of necessary and indispensable parties including Big Picture, which issued Plaintiff's loan and is a party to the loan agreement.

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First, Plaintiff's First Amended Complaint fails to even allege that Martorello engaged in any acts prohibited under the statute, namely the collection of any unlawful debt. To face liability under substantive RICO, each individual defendant must be shown to have engaged in either a pattern of racketeering activity or the collection of unlawful debt. 18 U.S.C. § 1962; *see also Phillips v. Lithia Motors, Inc.*, No. 03-3109-HO, 2006 WL 1113608, at *10 (D. Or. Apr. 27, 2006) (requiring the plaintiff in a RICO action to allege "that each individual defendant engaged in a pattern of racketeering activity"). In other words, under Section 1962(c), a plaintiff must prove that each defendant "participated in (1) the conduct of (2) an enterprise that affected interstate commerce (3) through a pattern (4) of racketeering activity or collection of unlawful debt, and the conduct must have been (5) the proximate cause of harm to the victim." *De Los Angeles Gomez v. Bank of America, N.A.*, 642 F. App'x 670, 676 (9th Cir. 2016) (citing *Eclectic Prop. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014)).[7]

Beyond the mere elements of a RICO claim, courts must be wary where, as here, a plaintiff seeks to turn general contract disputes into federal causes of action. *See, e.g., Flip Mortg. Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988). This is particularly true where, again as here, the underlying predicate is the collection of unlawful debts because "'RICO is concerned with evils far more significant than the simple practice of usury.'" *Sundance Land*

[7] This requirement has been rigorously enforced by each and every circuit. *See, e.g., United States v. Bergrin*, 650 F.3d 257, 267 (3d Cir. 2011) ("It is the 'person' charged with the racketeering offense—not the entire enterprise—who must engage in the 'pattern of racketeering activity.'"); *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) ("Regardless of subsection, RICO claims under § 1962 have three common elements: '(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise'") (citation omitted); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1110 (D.C. Cir. 2009) ("in a section 1962(c) suit, the defendants are the 'persons' who conduct the 'enterprise's' affairs through racketeering activity"). Additional citations can be provided.

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Corp. v. Cmty. First Fed. Sav. and Loan Ass'n, 840 F.2d 653, 666 (9th Cir. 1988) (quoting *Durante Bros. and Sons, Inc. v. Flushing Nat. Bank*, 755 F.2d 239, 248 (2d Cir. 1985)).

The unlawful conduct Plaintiff alleges is the collection of unlawful debt. First Am. Compl. at ¶ 11. As other courts have found, that conduct only occurs where a defendant takes an action that "would tend to induce another to repay an unlawful debt." *United States v. Eufrasio*, 935 F.2d 553, 576 (3d Cir. 1991). Nowhere in the First Amended Complaint is Martorello, as opposed to the enterprise as a whole, alleged to have collected any debts from Plaintiff or taken any action which would have induced Plaintiff to repay a debt. Indeed, the only "unlawful" conduct alleged by Plaintiff is on the part of the purported enterprise as a whole. As set forth above, it is Big Picture that makes and collects all loans from individuals, not Martorello. Accordingly, Martorello cannot be liable under Section 1962(c).

Plaintiff's failure to allege that Martorello took a prohibited action is not the First Amended Complaint's only shortcoming—it also fails to allege Martorello's participation in the "enterprise" was undertaken ***through*** acts of racketeering. RICO requires more than just the collection of an unlawful debt by a defendant. "RICO does not criminalize engaging in a pattern of racketeering or collecting unlawful debt, but rather criminalizes participation in the affairs of an enterprise through those means." *United States v. Pepe*, 747 F.2d 632, 661 n.48 (11th Cir. 1984); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 372 (3d Cir. 2010) (holding that a defendant must conduct or participate in the enterprise's affairs "through—that is, by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of—a pattern of racketeering activity"). In other words, Section 1962(c) is violated only when the collection of an unlawful debt is "the means by which a defendant 'participate[s], directly or indirectly, in the conduct of [the] enterprise's affairs.'" *Ins. Brokerage*, 618 F.3d at 371 (quoting

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18 U.S.C. § 1962(c)) (alterations in original). Given the First Amended Complaint's failure to allege Martorello engaged in the collection of an unlawful debt, it is no surprise that it similarly fails to allege Martorello's participation in the purported enterprise through such means.

Finally, the First Amended Complaint fails to plausibly allege that Martorello has operated or managed the enterprise, rather than simply conducting the affairs of a terminable-at-will servicing consultant in a commercial relationship with a lender that—like Big Picture vis-à-vis its commercial relationship with Ascension—held the "power to choose differently" and was solely "answerable to the tribe at every level." The Supreme Court has held that mere participation in the activity of an enterprise is insufficient to impose liability under Section 1962(c). *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993); *see also Int'l Bus. Machines Corp. v. Brown*, 134 F.3d 377 (9th Cir. 1998) (unpublished) ("Evidence that the defendant knew of the scheme or even benefitted from the scheme is not enough to impose RICO liability"). In this context, Congress did not intend for liability to arise under Section 1962(c) for those that aid or abet an enterprise, but rather only those who take part "in directing the enterprise's affairs." *See Reves*, 507 U.S. at 178-79.

Indeed, as numerous courts have found, the proper defendant under Section 1962(c) must do more than simply provide, through its regular course of business, goods and services that ultimately benefit the enterprise. *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1251 (10th Cir. 2016); *Dahlgren v. First Nat. Bank of Holdrege*, 533 F.3d 681, 690 (8th Cir. 2008) ("A bank's financial assistance and professional services may assist a customer engaging in racketeering activities, but that alone does not satisfy the stringent 'operation and management' test of *Reves*"); *Farmers Ins. Exch. v. First Choice Chiropractic & Rehab.*, No. 3:13-CV-01883-PK, 2016 WL 10827072, at *22 (D. Or. Feb. 25, 2016) ("'Although a RICO defendant need not

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have significant control over or within [the] enterprise,…simply performing services for the enterprise does not rise to the level of direction'") (quoting *Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008)).

At best, that is all Plaintiff has alleged as to Martorello. Nothing alleges that Martorello himself participated in the affairs of the purported enterprise through the collection of Plaintiff's loan or by taking acts that would tend to induce Plaintiff to repay his debt. Receipt of income (particularly in the form of loan repayments) is plainly not enough to sustain liability under Section 1962(c)—at least as to Martorello. *See Reves*, 507 U.S. at 178-79.

3. Plaintiff fails to demonstrate a RICO conspiracy.

As a matter of course, in the absence of any underlying RICO violation, Plaintiff's RICO conspiracy claim must also fail. *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) (A plaintiff cannot properly allege that "a conspiracy to violate RICO existed if they do not adequately plead a substantive violation of RICO"). Here, as set forth above, there is no RICO violation, so there can be no conspiracy to violate RICO.

However, even if this Court were to look beyond this defect, Plaintiff's RICO conspiracy claims are legally deficient for the simple reason that Plaintiff has failed to allege an illegal agreement to violate RICO. To successfully state a claim under Section 1962(d), a plaintiff must show (1) the existence of a RICO enterprise affecting interstate commerce; (2) the participation of the conspirators in the affairs of the enterprise; and (3) "either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses." *Id.* Here, beyond mere conclusory allegations, all Martorello is alleged to have done is to have sold a business to the Tribe and previously been an executive of a company providing typical consulting services to a Tribe operating on its reservation and under its sovereign laws.

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Further, Plaintiff's RICO conspiracy claim ignores the fact that if the alleged RICO conspiracy exists—and it does not—Martorello effectively withdrew from such a conspiracy, ***at the latest***, in January 2016, when LVD closed on its purchase of Bellicose. First Am. Compl. at ¶ 7. This sale occurred almost two years prior to Plaintiff applying for or paying off her loans. *Id.* at ¶ 26. In essence, the sale of Bellicose to LVD removed Martorello from the purported enterprise and precludes a finding of liability—at least for the period after sale. Under these facts, liability under Section 1962(d) is inappropriate.

D. Plaintiff cannot state a claim for a violation of Oregon's lending laws against Martorello.

Plaintiff makes clear that his state-law claims against Martorello are, essentially, attempts to pierce numerous corporate veils and impose liability on a corporate executive for acts ***of a tribal government***. But Plaintiff makes no effort to appropriately pierce those veils, and instead, hopes the Court will ignore the text of the Oregon lending statutes he claims Martorello violated.

Oregon law does not provide a private cause of action to plaintiffs for violations of the statutes at issue. Oregon's usury statute is comprehensive, and requires that any person who makes a loan that violates the usury laws forfeit the right to collect or receive any interest upon any such loan charged, contracted for, or received. ORS 82.010(4). Under Oregon law, to show that a loan was usurious a plaintiff must establish: "'(1) a loan, express or implied; (2) an understanding between the parties that the money lent shall or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid, or agreed to be paid, as the case may be; and (4) a corrupt intent to take more than the legal rate for the use of the sum loaned.'" *Hazen v. Cook*, 55 Or. App. 66, 70 (1981) (quoting *Balfour v. Davis*, 14 Or. 47, 52 (1886)).

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Notwithstanding these elements, the statutory definition under Section 82.010 is exhaustive and does not, as Plaintiff here alleges, provide a standalone cause of action to recover principal and interest under Section 82.010. Rather, Section 82.010(4) provides a statutory defense, which can serve as a potential remedy in actions brought to collect on a usurious loan. Further, the text of that statute makes clear that it applies only to a "person" that "make[s] a loan," and not to other related third parties or their executives, such as Martorello. *See Hodges v. Oak Tree Realtors, Inc.*, 363 Or. 601, 608 (2018) ("To discern the underlying statutory intent, we examine the text of the statute in context and consider legislative history as pertinent"). Similarly, to the extent Plaintiff invokes the licensing requirements of ORS 725.045—requirements that do not apply to Martorello given his status as creditor—there is similarly no private cause of action available for consumers. *See* ORS 725.910.

E. Plaintiff's unjust enrichment claims are similarly without merit.

Finally, application of the choice-of-law provision in the loan agreements requires dismissal of Plaintiff's unjust enrichment claims. Under Oregon law, "the mere fact that a benefit is conferred is not sufficient to establish unjust enrichment." *Wilson v. Gutierrez*, 261 Or. App. 410, 415 (2014) (quoting *Tum–A–Lum Lumber v. Patrick*, 95 Or. App. 719 (1989)). For an injustice to be found, one of three things must be true: (1) the plaintiff had a reasonable expectation of payment; (2) the defendant should reasonably have expected to pay; or (3) society's reasonable expectations of security of person and property would be defeated by non-payment. *Id.* But payments made by Plaintiff under his loan agreement in 2017 had an adequate basis at law—the enforceable choice-of-law provision—and there can be no reasonable expectation that Martorello should return any funds he received as a creditor. To the contrary, Plaintiff had no interactions with Martorello and could not have formed a reasonable expectation of repayment from Martorello. Such facts are not the basis for an unjust enrichment claim under

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Oregon law—at least not against Martorello. Accordingly, the Court should dismiss Plaintiff's unjust enrichment claim.

F. No Declaratory or Injunctive Relief as to Martorello is available.

Finally, Plaintiff fails to state a claim for declaratory and injunctive relief. "In order for a court to entertain an action for declaratory relief, the complaint must present a justiciable controversy." *Brown v. Oregon State Bar*, 293 Or. 446, 449 (1982). "A controversy is justiciable, as opposed to abstract, where there is an actual and substantial controversy between parties having adverse legal interests." *Id.*

Here, Eventide sold Bellicose to the Tribe nearly two years before the loan agreement executed by Plaintiff. *Williams*, 929 F.3d at 175; First Am. Compl. at ¶ 26. As such, any controversy Plaintiff has is with the tribe and its entities and any rights that would be impacted would be with his loan agreement with those defendants, not Martorello. Martorello does not have an ownership interest in any loans made by Big Picture or the Tribe, and Plaintiff has no actual controversy with Martorello that this Court may resolve by declaratory judgment. Only the lender (i.e., Big Picture Loans)—and not Martorello, whose role as officer of a mere consultant to the tribe's lending business ended more than four years ago—is capable of stopping or modifying its lending activities. As such, no injunctive relief or declaratory judgment against Martorello is possible or appropriate.

V. CONCLUSION.

For the above reasons, Martorello respectfully requests that the Court dismiss the claims against him with prejudice.

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Respectfully Submitted,

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