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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

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

Plaintiff,

v.

MATT MARTORELLO, *et al*.

Defendant.

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

PLAINTIFF'S RESPONSE TO MARTORELLO'S MOTION TO DISMISS

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I. INTRODUCTION

This case involves Defendant Matt Martorello's efforts to circumvent Oregon usury laws through a "rent-a-tribe" lending scheme. Under this model, a tribal entity serves as the nominal lender. In return for the use of its name, the tribal entity receives a nominal percentage of the revenues (in this case, 2% to 6%) with no responsibility for the loan operations. (Dkt. 100 ¶¶ 2-3, 24, 47, 67-68.) Martorello and other non-tribal participants retain nearly all the proceeds from the illegal loans and control all aspects of the day-to-day operations.

In his First Amended Complaint, Richard L. Smith, Jr. alleges Martorello orchestrated the predatory lending operation, (Dkt. 100 ¶¶ 2-3, 24), which made loans through companies that claimed to be owned and operated by the Lac Vieux Desert Band of Lake Superior Chippewa Indians (the "Tribe"). Martorello used the Tribe's name as a front for a contrived claim of sovereign immunity. The Tribe had no actual control over the businesses' income, expenses, or day-to-day operations.

Martorello created the lending enterprise to thwart Oregon's usury laws. Annual percentage rates typically exceeded 500%—40 times Oregon's usury cap. ORS 82.010. This lawsuit seeks to recover damages against Martorello for his violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961-1968, usury laws, and unjust enrichment.

Smith filed a 63-page complaint with 37 exhibits. (Dkt. 100.) The detailed allegations demonstrate that this Court has personal jurisdiction over Martorello for his illegal lending operation targeting Oregon borrowers. Furthermore, the facts support Smith's claims for declaratory relief that the choice-of-law provisions of the loan agreement are unenforceable as well

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as supporting his causes of action for Martorello's violation of RICO and unjust enrichment to redress his violations of Oregon Law.

Other jurisdictions have rejected similar motions to dismiss. In numerous "rent-a-tribe" lending cases, district courts have uniformly held that the pleadings are plausible and that claims for violations of state usury laws, RICO, and unjust enrichment should not be dismissed.[1] As this Court is aware, the Eastern District of Virginia has a similar class action against Martorello on the same operative facts for Virginia residents. That court considered and denied Martorello's arguments for dismissal of the same claims and causes of action currently before this Court.[2] Since then, even more compelling facts have been uncovered and incorporated into Smith's First Amended Class Action Allegation Complaint. Based on the detailed allegations and the overwhelming volume of case law refuting Martorello's meritless arguments, the Court should reach the same conclusion here.

II. FACTUAL BACKGROUND

A. Smith's First Amended Complaint provides detailed allegations of Martorello's violations of RICO and Oregon law and his unjust enrichment.

Beginning in 2011, Martorello partnered with the Tribe to make loans over the internet that typically exceed 500% interest and violate state usury laws. The scheme has operated in two phases. From 2011 to 2015, Martorello and his companies partnered with Red Rock Tribal Lending, LLC. *Williams v. Big Picture Loans, LLC*, No. 17-cv-00461, 2019 WL 1983048, at *1-

[1] *Hengle v. Asner*, No. 3:19cv250, 2020 WL 113496 (E.D. Va. Jan. 9, 2020); *Gibbs v. Stinson*, No. 3:18cv676, 2019 WL 4752792 (E.D. Va. Sept. 30, 2019); *Gibbs v. Haynes Investments, LLC*, 368 F. Supp. 3d 901 (E.D. Va. 2019); *Solomon v. Amer. Web Loan*, No. 4:17cv145, 2019 WL 1320790 (E.D. Va. March 22, 2019); *Gingras v. Rosette*, No. 5:15-cv-101, 2016 WL 29332163, *37 (D. Vt. May 18, 2016), *aff'd*, 922 F.3d 112 (2d Cir. 2019).

[2] *Williams v. Big Picture Loans, LLC*, No. 17-cv-00461 (E.D. Va. March 12, 2018) ("*Williams*"), Dkt 119.

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2 (E.D. Va. May 3, 2019). Martorello operated, controlled, and funded the enterprise. *Id.* at *2. He created the business model and retained all significant decision-making authority. (Dkt. 100 ¶¶ 45-53; Dkt. 100-1 at 14-15.) Consistent with the account of the Tribe's former Vice Chairwoman, Martorello noted that "[Tribe-affiliated managers] don't really do anything." (Dkt. 100 ¶ 51; Dkt. 100-1 at 16.) The Tribe received less than 2% of the gross revenue from the loans. *Williams*, 2019 WL 1983048, *2. From January 1, 2014 through August 31, 2015, the enterprise generated $161.9 million in revenue for Martorello and his investors; the Tribe, on the other hand, received less than $3.2 million. (Dkt. 100 ¶ 47.)

Martorello knew he was exposed to legal liability for the lending enterprise. He was advised by counsel that he could be liable for "aiding and abetting felony crime[s]." (*Id*. ¶ 55; Dkt. 100-1 at 81.) He also was aware of his potential liability for class actions and "personal threats of enforcement actions against individuals by regulators." (*Id*. ¶ 57.) In 2013, the New York Department of Financial Services ("NYDFS") issued cease-and-desist letters to online lenders and other entities involved in payday lending operations. (*Id.* ¶ 56.) The Tribe and Red Rock sued the NYDFS, arguing that it could not regulate their lending activities. (*Id*.) The district court disagreed and held "to the extent the State seeks to prevent the Tribes from making loans to New York residents who are in New York, it is regulating off-reservation activity." *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 360 (S.D.N.Y. 2013). The Second Circuit affirmed, noting that "a tribe has no legitimate interest in selling an opportunity to evade state law." *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 114 (2d Cir. 2014).

Recognizing that the *Otoe-Missouria* opinion exposed him to the risk of "significant liability" and the "potential investigation and prosecution of us personally," (Dkt. 100 ¶ 58; Dkt.

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100-2 at 8), Martorello attempted to paper over his operation so that he could retain control of the usurious lending enterprise, continue to reap the profits, and only nominally surrender corporate ownership of the lending services provider to present a misleading appearance of tribal control. (Dkt. 100 ¶¶ 58-60.) Martorello approached the Tribe about changing the lending structure so that the Tribe would nominally own the lending services company but Martorello, under the guise of a "creditor," would continue to control the enterprise and receive all the net profits. *Williams*, 2019 WL 1983048, at *4; *see also* Dkt 100 ¶¶ 58-60.

In January 2016, Martorello nominally "sold" his interest in Bellicose to the Tribe, and the lending services company became Ascension Technologies, LLC. *Williams*, 2019 WL 1983048, *4-5; Dkt. 100 ¶ 65. Martorello engineered these superficial changes to the structure of the operation—characterizing his interest as a $300 million debt rather than equity—in a vain attempt to avoid accountability for his oversight of the lending operation and blatant violations of state and federal lending laws. (Dkt. 100 ¶ 70.) The intent was to maintain the "*status quo*" of Martorello's management of the illegal scheme and receipt of the business profits. (Dkt. 100 ¶ 60.) The purpose of the restructuring was to "zero in asap on minimizing [Martorello's] risk for being individually liable." (*Id*., Dkt. 100-2 at 24.)

Martorello oversees the expenses of both Big Picture and Ascension, including both companies' balance statements, profit and loss statements, and transaction details for every professional service. He approves all monthly distributions to the Tribe and Eventide. (Dkt. 100 ¶ 79.) He remains involved in operations in his individual capacity, as well as through control of his holding company, Eventide. (*Id*. ¶¶ 5-7, 60, 70, 75, 88.)

Meanwhile, Martorello, not the Tribe, created "Big Picture Loans" as a new brand and website. (*Id*. ¶¶ 61-62.) Under Martorello's direction, Big Picture Loans, LLC became the tribally

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owned, nominal lender. (*Id*.) Big Picture is essentially a shell with few employees and limited responsibility; most of its work is done by customer service contractors in the Philippines and Mexico. (*Id*. ¶¶ 92-93.) Ascension provides all the lending services that make Big Picture possible (mostly in Atlanta), where it is under Martorello's oversight, supervision, and day-to-day control. (*Id*. ¶¶ 76-91.)

Martorello's holding company, Eventide, receives 100% of the net profits of the lending operation. (*Id*. ¶ 70.) Martorello made approximately $43 million from February 2016 through April 2019, including hundreds of thousands of dollars from Oregon borrowers. (*Id*. ¶ 69.) For example, a table of the lending services shows that, at just one point early in the operation, there were 411 loans to Oregon borrowers with a total amount outstanding of $338,131.25. (*Id*. ¶¶ 20, 22; Dkt. 100-1 at 9.)

As well-established Supreme Court precedent holds, and the Second Circuit recently reiterated in the tribal lending context, "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state." *Gingras v. Think Finance*, 922 F.3d 112, 122 (2d Cir. 2019) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973)). That well-established precedent undermines Martorello's efforts to subject Oregon consumers to liability under unjust tribal laws.

Richard Smith's loan and repayment demonstrate the illegality of the lending operation. Smith contracted through Big Picture for a loan in the amount of $1,500. (Dkt. 100 ¶ 27.) The interest rate for the loan was 527.4%. (*Id*. ¶ 28.) Smith entered the contract in Oregon, received the funds in Oregon, and made all payments through his bank in Oregon. (*Id*. ¶¶ 26-27, 29.) Over a period of approximately four months, Smith paid a total of $4,353.69 for repayment of the $1,500 loan. (*Id*. ¶ 37.)

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B. Martorello's reliance on the Fourth Circuit analysis of an incomplete record in *Williams* is misplaced.

Martorello mistakenly relies on the Fourth Circuit's opinion in *Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019), for the proposition that Smith's claims and causes of action against him were "rejected" by the Fourth Circuit. (Dkt. 106 at 2.) To the contrary, the limited issue before that court was whether Big Picture and Ascension were entitled to share in the Tribe's sovereign immunity. Sovereign immunity is a jurisdictional defense which limits "the means available to enforce" state law against tribal entities. *Kiowa Tribe of Ok. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998). Sovereign immunity does not prevent substantive state law from applying to off-reservation conduct. *Id.*; *see Gingras*, 922 F.3d at 121 ("[t]ribes and their officers are not free to operate outside of Indian lands without conforming their conduct in these areas to federal and state law"). Sovereign immunity provides no defense of any kind to non-tribal members like Martorello. Moreover, the Fourth Circuit did not make any factual findings, but instead based its analysis on the district court's findings, which were premised on an anemic factual record. Discovery later yielded evidence disproving many of the facts upon which the sovereign immunity issue was decided. Much of the new evidence is referenced in Smith's First Amended Complaint. Because of the narrow scope of an immunity analysis, the appeals court did not address the merits of Smith's claims against Martorello, nor did it contradict the well-established rule that state substantive law applies to tribal entities and those who choose to do business with them outside of their reservations. *Gingras*, 922 F.3d at 121; *see also United States of America v. Neff*, 787 Fed. App'x 81, 92 (3d Cir. 2019) (holding that tribal sovereign immunity "does not transfigure debts that are otherwise unlawful under RICO into lawful ones."). Therefore, Martorello's attempts to rely on the *Williams* Fourth Circuit opinion are wholly misplaced. The Eastern District of

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Virginia is the only court that has considered Martorello's baseless arguments for dismissal, and that court denied Martorello's motion to dismiss. (*Williams*, Dkt. 119.)

III. PROCEDURAL HISTORY

Smith has described the relevant procedural history in his opposition to the pending motion to transfer venue and will not repeat it here. (Dkt. 116 at 4-9.) Three events deserve emphasis.

A. The *Williams* court found prima facie evidence that Martorello knew he was violating RICO and usury laws and used lawyers to help him do so.

The district court in *Williams* considered plaintiffs' motion to compel documents that Martorello had withheld on grounds of attorney-client privilege. *Williams*, 2019 WL 1983048 (E.D. Va. May 3, 2019). Among other things, the Court held there was prima facie evidence that Martorello intended to lend at usurious rates of interest and engage in conduct that violates RICO, and that he used lawyers to help him achieve those objectives. *Id.* at *12-15. Therefore, Martorello had waived attorney-client privilege under the crime-fraud exception.

B. Extensive additional discovery in *Williams* and *Galloway I* contradicts Martorello's depiction of the facts.

While the Big Picture and Ascension appeal was pending, the *Williams* and *Galloway* plaintiffs conducted extensive additional discovery, uncovering substantial additional evidence that contradicts the defendants' depiction of the lending operation, including Martorello and Eventide's control over the business. (*See Galloway I*, Dkt. 249, *passim*.) In May 2019, the *Galloway I* plaintiffs alerted the district court to various material misrepresentations made to the that court and the Fourth Circuit in connection with the sovereign immunity briefing and argument in *Williams* and in *Galloway I.* That led to briefing of the misrepresentations for an anticipated evidentiary hearing. (*Id*.)

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C. The *Williams* court denied Martorello's motion to dismiss similar claims.

Martorello moved for dismissal of the *Williams* complaint claiming, as here, that the plaintiffs had failed to state a claim. (*Williams*, Dkts. 36, 37.) The court denied Martorello's motion without the need for hearing (*Id*., Dkt. 119.) Class certification on the RICO, usury, unjust enrichment and declaratory judgment claims is now set for hearing on June 5, 2020.

IV. ARGUMENT AND AUTHORITIES

A. Martorello is subject to personal jurisdiction in this Court.

Martorello is subject to the jurisdiction of Oregon courts because he "allegedly helped design, fund, and run this 'rent-a-tribe' scheme." *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955, 980–81 (N.D. Cal. 2019) (denying personal jurisdiction motion filed by private equity firm that had allegedly masterminded an online tribal lending business). He is also subject to jurisdiction under RICO, which authorizes nationwide service of process. 18 U.S.C. § 1965. For these two independent reasons, this Court should deny Martorello's 12(b)(2) motion.

1. Specific jurisdiction exists over Martorello because he purposefully directed his conduct at Oregon and availed himself of Oregon law by running an illegal lending enterprise that targeted Oregon consumers.

Courts in the Ninth Circuit apply a three-pronged test for specific personal jurisdiction over a non-resident defendant.

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

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Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004). "The first prong may be satisfied by 'purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof." *Plain Green*, 372 F. Supp. 3d at 977 (quoting *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006)). At the motion to dismiss stage, "'the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss.'" *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011) (citing *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010)). "Where not directly controverted, plaintiff's version of the facts is taken as true for the purposes of a 12(b)(2) motion to dismiss." *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001). Here, Martorello has submitted no affidavits or other evidence with his Motion. The Court must therefore accept Smith's proffered facts regarding Martorello's Oregon contacts and his control over the Big Picture lending enterprise as true for purposes of this motion. *Id.*; *see also Plain Green*, 372 F. Supp. 3d at 977 ("The plaintiff 'need only demonstrate facts that if true would support jurisdiction over the defendant.'") (quoting *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995)).

a. Martorello purposefully directed activities toward Oregon and availed himself of the privilege of doing business in the state.

The *Plain Green* case is directly on point. *Plain Green*, 372 F. Supp. at 980–81. In addition to the tribal lender itself, the *Plain Green* plaintiffs sued a group of Texas-resident defendants who "allegedly helped design, fund, and run this 'rent-a-tribe' scheme …." *Id.* at 962. Those defendants moved to dismiss for lack of personal jurisdiction, arguing that "the only acts complained of are those by others," *i.e*, the tribal lender and the loan servicing company. *Id.* at 979. Similarly here, Martorello argues that Smith's claims against him "are limited to acts taken by others." (Dkt. 106

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at 9.) Just like in *Plain Green*, however, jurisdiction is proper here because Smith alleges that Martorello designed, arranged funding for, and ran the lending enterprise. (Dkt. 100 at ¶¶ 44-79.)

Martorello established Bellicose Capital and Red Rock in 2011, structuring the operation to "ensure Martorello's control of all material aspects of the lending business." (*Id.* at ¶ 45.) As shown by the Declaration of Joette Pete, it was Martorello who approached the LVD Tribe and "explained that his company would run the business if LVD allowed him to claim that LVD law applied to the loans." (Dkt. 100-1 at 15.) Then, when court rulings confirmed that lending to non-tribal members outside the reservation is governed by state law, Martorello restructured the enterprise to further disguise his control—which continued to be pervasive—in a vain attempt to shelter himself behind the Tribe's jurisdictional immunity from suit. (Dkt. 100 ¶¶ 58-79.) Despite the creation of various new entities and the conversion of Martorello's interest from equity to debt, Martorello "continued to control the lending operation." (*Id.* ¶¶ 8, 18, 70.) This included control over the lending enterprise's activities directed at Oregon. (*Id.* ¶ 19.)

Smith further alleges, and attaches documents to support, that Martorello controlled the enterprise's advertising and marketing, including its targeting of Oregon consumers. (Dkt. 100 ¶ 98 ("Through their supervision and control over advertising and marketing, Defendants targeted Oregon consumers for their lending practices, including the loans to Mr. Smith.").)[3] Documents attached to the First Amended Complaint also support that when Red Rock was restructured, Martorello demanded that he and Eventide retain control of the business. (Dkt. 100 ¶ 75; Dkt. 100-3 at 70-85.) Martorello insisted that "the seller [*i.e.*, the entity which would become Eventide] will

[3] *See* Dkt. 100-3 at 75 (Bellicose, the servicing entity controlled by Martorello, recommending a direct mail advertising campaign); *id*. at 73 (Martorello demanding that tribal managers should not receive details of business's intellectual property, including direct mail strategy).)

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have to keep a final say so in business decisions." (Dkt. 100-3 at 71). As Eventide's recent attempts to block the class plaintiffs' settlement with Big Picture and Ascension make clear, Martorello continues to assert that this "final say so" includes requiring Big Picture and Ascension to collect illegal, usurious rates of interest. *See Eventide Credit Acquisitions, LLC v. Big Picture Loans, LLC*, Case No. 2:19-cv-00256-JTNMV, Dkt. 14 (W.D. Mich. Dec. 19, 2019). When Martorello demanded this ongoing control, an attorney with the Rosette firm immediately understood the legal implications. (*See* Dkt. 100-3 at 83.) Cautioning against "put[ting] these things in writing," the attorney noted that Eventide's maintaining control over "which states RRTL can lend in" could subject the enterprise to "rent-a-tribe" liability. (*Id.* at 84.) The attorney specifically raised the *Gingras* litigation as an example of the kind of liability Martorello and Eventide could face. (*Id.*)

Martorello, however, categorically rejected any changes that could lessen Eventide's control, stating flatly that Eventide "won't allow those changes." (*Id.* at 82.) He explained that it was vital for Eventide to maintain control over the states in which the lending enterprise would operate. The risk of litigation in states that prioritize consumer protection was too great:

> They also won't lend if you're lending in states that get them in trouble or are too high risk of their collateral or them getting sued (I wouldn't lend to you if you're lending to PA either right? Heck, even Sequoia is now getting sued in VT).
>
> ….
>
> It's take it or leave it ….

(*Id.* at 83.) Martorello believed (Smith hopes incorrectly) that other states, including Oregon, were less committed to consumer protection than Vermont and Pennsylvania, making it safe for Big Picture and Ascension to collect usurious interest rates there. (Dkt. 100-3 at 82.) As the *Shapiro* court noted, out-of-state defendants' control over the states in which a lending enterprise will operate shows that they "targeted customers" in the forum, subjecting themselves to jurisdiction.

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Pennsylvania by *Shapiro v. Think Finance, Inc.*, No. 14-cv-7139, 2018 WL 637656, at *5 (E.D. Pa. Jan. 31, 2018); *see also Gingras*, 2016 WL 2932163, at *11 (architect of tribal lending enterprise was subject to personal jurisdiction where he "and the companies which he controls developed a nationwide, illegal lending scheme which resulted in predatory loans to Vermont residents"). By maintaining influence and control over where Big Picture operated, Martorello purposefully availed himself of the privilege of conducting activities in these jurisdictions, thereby invoking the benefits and protections of Oregon's law and making his involuntary presence before the state's courts foreseeable. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (holding that jurisdiction is consistent with due process where "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there").

Just as the *Plain Green* court did, this Court should therefore find that Martorello was "responsible for the creation and implementation of the allegedly fraudulent and illegal scheme," and such contacts are sufficient to subject him to personal jurisdiction in the states where the borrowers he targeted live. *Plain Green*, 372 F. Supp. 3d at 980; *see Unocal Corp.*, 248 F.3d at 924 (holding that jurisdiction is proper where the defendant '[has] performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state") (quoting *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) (brackets in original)).

b. Martorello's control over the Big Picture lending enterprise's daily operations made him its *alter ego* for jurisdictional purposes.

In addition to being subject to jurisdiction based on his own acts purposefully directed at Oregon residents, Martorello is subject to jurisdiction through Big Picture and Ascension's

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jurisdictional contacts, which may be attributed to him.[4] A defendant's jurisdictional contacts may be attributed to a co-defendant where two related entities are not really separate entities, such that failure to disregard their separate identities would result in an injustice. *Unocal Corp.*, 248 F.3d at 926.

Smith's First Amended Complaint and the supporting exhibits attached thereto show that Martorello exercised pervasive control over Big Picture's internal affairs and daily operations, including its business in Oregon, requiring that Big Picture's Oregon contacts be attributed to Martorello for jurisdictional purposes. *See id.* (holding that an alter ego or agency relationship is typified by control of an affiliated entity's "internal affairs or daily operations.") Specifically, Smith alleges that Martorello controls the creation of any new employment positions with Ascension. (*Id*. ¶ 85.) He also "must approve any changes to Big Picture's budget, if it seeks to make a change that would increase labor costs by more than five percent (5%)." (*Id.* ¶ 86); *see In re W. States Wholesale Natural Gas Antitrust Litig.*, No. MDL 1566, 2009 WL 455663, at *5 (Feb. 23, 2009) (explaining that alter ego test is satisfied where plaintiff shows that defendant controls an affiliated entity's "internal affairs or daily operations"). Martorello thus purposefully availed himself of Oregon law both directly through his control of lending and marketing directed at Oregon and as Big Picture and Ascension's alter ego.

[4] Contrary to Martorello's contention that Big Picture and Ascension's conduct occurred on the tribal reservation, (Dkt. 106 at 9), numerous courts have held that when a tribal lender deliberately solicits business from, advances funds to, and collects usurious rates of interest from consumers in a state, it is engaging in business in that state. (*See infra*, Sections IV.B. and IV.D.3.)

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c. Smith's claims arise out of and relate to the Big Picture lending enterprise's Oregon activities.

"To determine whether a claim arises out of forum-related activities, courts apply a "but for" test. *Unocal Corp.*, 248 F.3d at 924. Martorello does not dispute here that, but for Big Picture and Ascension's lending to Smith and other Oregon consumers, these claims would not have arisen. As explained above, these loans were deliberately marketed to Oregon consumers, funded through deposits into Oregon bank accounts, and collected from Oregon residents. (Dkt. 100 ¶ 22.) The second prong of *Unocal's* specific jurisdiction test is therefore satisfied. *Unocal Corp.*, 248 F.3d at 924.

d. The exercise of personal jurisdiction over Martorello is reasonable and comports with fair play and substantial justice.

On the third prong of *Unocal*'s test, the burden shifts to the defendant contesting jurisdiction. *Schwarzenegger*, 374 F.3d at 802. It is Martorello's burden to "'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Plain Green*, 372 F. Supp. 3d at 978; *see also Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9th Cir. 2003) (holding that defendant had failed to meet this burden where "[t]he balance is essentially a wash"). Far from meeting this heavy burden, Martorello has not made any argument that the reasonableness factors do not favor jurisdiction here. (Dkt. 106 at 7–10.) Furthermore, as the *Plain Green* court held, it is reasonable to hold those responsible for running illegal lending enterprises accountable in the jurisdictions whose laws they deliberately violated and whose consumers they intentionally harmed:

> [T]he interests of California in protecting low income consumers (as plaintiffs assert they are) and in applying its usury laws far outweigh the interest of Texas as the residence of the defendants. It is not unreasonable to require defendants to litigate this case here.

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Plain Green, 372 F. Supp. 3d at 981; *see also Moore v. Gulf Atl. Packaging Corp.*, No. 3:16-cv-0886, 2016 WL 8321142, at *10 (D. Or. Nov. 11, 2016) (holding that exercise of specific jurisdiction over out-of-state defendant was reasonable where balance of factors favored exercising jurisdiction). Because Martorello has submitted no evidence to controvert Smith's allegations that he purposefully aimed his conduct at Oregon and controlled Big Picture's business in the state, nor has he met his burden to present a "compelling case" that jurisdiction would be unreasonable, this Court should deny Martorello's jurisdictional motion.

2. Personal jurisdiction is also appropriate over Martorello under RICO's nationwide service of process provision.

In addition to Martorello's purposeful forum contacts, RICO provides a separate and independent basis for personal jurisdiction here. RICO authorizes personal jurisdiction over all defendants in any district court with jurisdiction over at least one co-conspirator where it is shown "that the ends of justice require that other parties residing in any other district be brought before the court." 18 U.S.C. § 1965(b); *Butcher's Union Local No. 498 v. Utd. Food & Commercial Workers*, 788 F.2d 535, 537 (9th Cir. 1986). Here, the ends of justice require jurisdiction because Smith has alleged a nationwide conspiracy, it is uncontested that Big Picture and Ascension are subject to personal jurisdiction in this district,[5] and this Court provides the only forum in which all co-conspirators are subject to suit. *Id.* at 538. Martorello contests RICO jurisdiction on two bases: (1) he argues that Michigan or Texas could exercise jurisdiction over all defendants; and (2) he argues that Smith has not alleged a single nationwide conspiracy. Both arguments fail.

[5] Because of class plaintiffs' pending settlement with theTribe, Smith is no longer pursuing his claims against Big Picture and Ascension. For purposes of the jurisdictional analysis, however, the court evaluates the parties at the time the suit was commenced. *See Biosyntec, Inc. v. Baxter Healthcare Corp.*, 746 F. Supp. 5, 9 (D. Or. 1990) (holding that defendant "was subject to personal jurisdiction in this district at the time this suit was commenced"); *accord* 4 WRIGHT & MILLER, FED. PRAC. & PROC. § 1051 (4th ed.).

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First, the Northern District of Texas, which Martorello suggests as an alternative jurisdiction, (Dkt. 106 at 11), offers no general jurisdiction over Big Picture and Ascension, which are not "at home" in that district. *See Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014). Similarly, neither Martorello nor Eventide is "at home" in the Western District of Michigan. Nor would specific jurisdiction over all the defendants be proper in either proposed alternative forum, because Smith's claims arise out of loans made to him in Oregon, not out of any Texas or Michigan contacts. Second, Smith clearly does allege a single, nationwide conspiracy. (Dkt. 100 ¶ 19.) The restructuring of the lending enterprise that took place in 2016 did not begin a new conspiracy, but simply continued the same conspiracy by means of a re-branded lender, with additional layers of corporate complexity and a re-characterization of Martorello's interest from equity to debt. (Dkt. 100 ¶ 70.) The ends of justice therefore require jurisdiction in this court, and Martorello's jurisdictional motion should be denied on that independent basis. 18 U.S.C. § 1965(b); *Butcher's*, 788 F.2d at 537.

B. Smith's identification of specific facts strongly supports causes of action that are more than sufficient to meet the "plausible" threshold.

Martorello challenges the plausibility of Smith's depiction of the facts. To do so, Martorello ignores the facts and evidentiary support detailed in Smith's First Amended Complaint and instead asserts that Smith's factual recitations are mere "conclusory allegations" that "are simply insufficient to state a claim." (ECF 125 at 15.) The depth and detail of the First Amended Complaint, with its 199 paragraphs and 37 exhibits, speak for themselves and are more than adequate to meet the "plausible" threshold.[6]

[6] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

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Accepting Smith's allegations as true and weighing all reasonable inferences in his favor, the Court should find that his pleadings comply with *Iqbal* and *Twombly*. Unlike in *Ashcroft*, 556 U.S. at 680-81, Smith does not simply make "bare assertions" or a "formulaic recitation" that Martorello was the architect of this illegal lending scheme, but alleges detailed facts and even attaches documents showing that he personally designed and controlled the enterprise at every stage. Martorello developed the loan servicing concept in an unlawful attempt to make loans at usurious rates and generate many millions in profit. (Dkt. 100 ¶¶ 2, 18, 44-46, 58-63.) Martorello was aware of the state lending laws, yet neither he nor any other participant in the lending scheme became licensed lenders to make loans to Oregon residents. (*Id*. ¶¶ 94-100 161.) Martorello partnered with the Tribe for its immunity and developed the corporate lending entities in an elaborate effort to insulate himself from personal liability. (*Id*. ¶¶ 5, 58-63, 165-167; Dkt. 100-2 at 19; Dkt. 100-2 at 21.) Nevertheless, he recognized that he could be held personally liable. (ECF 100 ¶¶ 55-59; Dkt. 100-1 at 81; Dkt 100-1 at 84.) Martorello developed the Bellicose/Red Rock and Big Picture/Ascension lending platforms so that he would be able to maintain control of all material aspects of the lending business. (Dkt. 100 ¶¶ 1, 24, 45, 58-62, 75, 79-82, 87, 154-155, 161, 171-173.) He created the framework for the entire usurious lending enterprise including the companies that buttress the illegal scheme. (*Id*. ¶¶ 18, 44-48, 58-66, 171-172.) He then structured the operation to have minimal tribal involvement. (*Id*. ¶¶ 45-46, 49, 58-60, 75; Dkt. 100-1 at 15-16.) Martorello oversees and controls Big Picture and Ascension. (Dkt. 100 ¶¶ 8, 24, 75-88.) He directs the lending scheme with the intention of soliciting, funding, and collecting on usurious loans. (*Id*. ¶¶ 10, 19, 22, 155-158, 161, 165-167.) As a part of his supervision and control of the operation, Martorello targets Oregon consumers for the lending practices. (*Id*. ¶¶ 98-100, 156-157, 161.) Martorello performed these illegal acts in his individual capacity, (*see, e.g., id*. ¶¶ 7, 8, 18,

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58, 165-168), and they clearly were not a "mere error of judgment."[7] Overall, but for Martorello's egregious conduct, there simply would be no Red Rock, no Big Picture, no Bellicose, no Ascension, and no illegal loans at usurious rates to Smith or the classes. Martorello is liable regardless of the fact that he did not directly make the loans to borrowers or collect their payments. (*See infra*, Sections IV.E. and IV.G.).) From his lending operation, Martorello has received untold millions of dollars from thousands of usurious loans, including the one from Smith. (Dkt. 100 ¶¶ 1, 10, 19, 24, 47, 59, 65, 70, 173.) These facts should leave no doubt that Smith's detailed First Amended Complaint provides plausible allegations that should not be dismissed.

C. A live controversy exists regarding Smith's Declaratory Judgment and Injunctive Relief claims.

In Count I of the First Amended Complaint, Smith pleads for declaratory and injunctive relief, asking the Court to find that the choice of law, forum selection, class action waiver, and dispute resolution provisions in the form loan agreement are invalid and do not govern any claims against Eventide or Martorello.[8] (Dkt. 100 ¶¶ 103-126, 135-139.) Martorello disputes Smith's right to pursue such a cause of action, claiming that any dispute about the terms of the loan agreement involves only the Tribe-affiliated entities, not Martorello. (Dkt. 106 at 31.) In the same motion, however, Martorello requests that the Court enforce the choice-of-law provision to terminate Smith's rights under state and federal law. (*Id*. at 15-18.) Martorello's attempted use of these

[7] After discovery, Smith will evaluate amending the complaint to pierce the corporate veils and hold Martorello responsible for the acts of Bellicose, Eventide, and other entities as well.

[8] The declaratory judgment claim, although statutory, ORS 28.010, is equitable in nature because the relief sought is a declaration of equitable rights and the principles invoked are equitable in nature. See *Ken Leahy Construction, Inc. v. Cascade General, Inc*., 329 Or. 566, 571, 994 P.2d 112 (1999) (explaining when declaratory judgment proceedings lie in equity); *Moon v. Moon*, 140 Or. App. 402, 408, 914 P.2d 1133, rev. den., 323 Or. 484, 918 P.2d 848 (1996) (quiet title action equitable in nature).

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provisions is exactly why the Court should grant declaratory and/or injunctive relief, holding that the terms of the form loan agreement are against public policy interests, unconscionable, and thus, unenforceable.

D. The tribal choice-of-law provisions in the loan agreements are unenforceable.

The boilerplate choice of tribal law provision in Big Picture's standard form loan agreement, which Martorello contends should control, (*see* Dkt. 106 at 16–19), is unenforceable. First, because Native American tribes are not full sovereigns but "domestic dependent nations," *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014), limits on tribal sovereignty prevent the "exercise of tribal power" to matters involving non-members of the tribe and business dealings off the reservation. *Montana v. United States*, 450 U.S. 544, 564–65 (1981). Second, Smith has pleaded facts showing that, even if tribal law had the power to regulate consumer transactions in Oregon, the attempted choice-of-law provision is unconscionable. *Bagley v. Mt. Bachelor, Inc.*, 340 P.3d 27, 37 (Or. 2014). Oregon law should therefore be applied instead as the law with the "most significant relationship" to the transactions. *Spirit Partners, LP v. Stoel Rives LLP*, 157 P.3d 1194, 1200 (Or. Ct. App. 2007).

1. Tribal law cannot regulate matters involving non-tribal members outside the reservation.

Under black-letter Supreme Court precedent, the legislative jurisdiction of Native American tribes is strictly limited. *Montana*, 450 U.S. at 564–65. Generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008). Thus, "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" *Id.* (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). As the Eighth Circuit recently held, this limitation is not waivable by consent: "Even where there is a consensual

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relationship with the tribe or its members, the tribe may regulate non-member activities only where the regulation 'stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.'" *Kodiak Oil & Gas (USA), Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019) (quoting *Plains Commerce Bank*, 554 U.S. at 336).

Similarly here, the fact that Smith's loan agreement contained a boilerplate choice-of-law provision purporting to apply tribal law cannot expand the Tribe's legislative jurisdiction beyond the strict boundaries set in *Montana*. Contrary to Martorello's outrageous argument that usurious tribal loans somehow further a "federal policy," (Dkt. 106 at 17), long-standing Supreme Court precedent holds that "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe*, 411 U.S. at 149.[9] Indeed, both the Seventh Circuit and a Massachusetts court have rejected tribal court subject matter jurisdiction, which is co-extensive with the tribe's legislative jurisdiction,[10] specifically in the tribal lending context. *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 786 (7th Cir. 2014) (holding that "there is simply no colorable claim" of tribal jurisdiction over payday loan dispute); *CashCall, Inc. v. Mass. Div. of Banks*, No. 13-CV-1616-B, 2015 WL 5173531, at *3 (Mass. Sup. Ct. Sept. 1, 2015) (holding that "[t]he tribal courts utterly lack jurisdiction, which cannot be granted through a contract"). Smith's dispute, like the payday loan disputes in *Jackson* and *CashCall*, "does not arise from the

[9] Martorello misrepresents *Williams* as concluding that "the lending activities at issue are indeed made in furtherance of a federal policy." (Dkt. 106 at 17.) Far from it, *Williams*, explained that the lending furthered *the Tribe's* policies in favor of "tribal economic development and self-sufficiency." *Williams*, 929 F.3d at 178. These are tribe's policies, not the federal government's, and no tribal policy can abrogate state or federal law governing business with non-tribal members outside the tribal reservation. *Montana*, 450 U.S. at 564–65; *Gingras*, 922 F. 3d at 121.

[10] *Nevada v. Hicks*, 533 U.S. 353, 367 (2001).

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actions of nonmembers on reservation land and does not otherwise raise issues of tribal integrity, sovereignty, self-government, or allocation of resources." *Jackson*, 764 F.3d at 786; *see CashCall*, 2015 WL 5173531, at *3 (holding that tribal payday loans to Massachusetts consumers "are not related to 'on-reservation' activity' and are not necessary to protect tribal self-government or internal relations"). Big Picture's attempted choice-of-law provision is therefore invalid. *Montana*, 450 U.S. at 564–65; *see Gingras*, 922 F.3d at 127 ("[t]ribal law is generally unavailable outside the reservation").

2. Plaintiff's well-pleaded facts show that the choice-of-law provision is an unenforceable "prospective waiver" and unconscionable under Oregon law.

Courts around the country have overwhelmingly held that choice-of-law provisions attempting to waive all application of federal and state law to usurious tribal loans, like the one Martorello asks this Court to enforce here, are unconscionable and unenforceable as illegal "prospective waivers" of a party's right to pursue statutory remedies. *See Dillon v. BMO Harris, N.A.*, 856 F.3d 330, 336 (4th Cir. 2017) (holding that provision in tribal loan agreement attempting to "apply tribal law to the exclusion of federal and state law" was unenforceable as a matter of law); *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 675 (4th Cir. 2016) (holding that "a party may not underhandedly convert a choice-of-law clause into a choice of no law clause—it may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject"); *Plain Green*, 372 F. Supp. 3d at 968 (holding that "the choice-of-law provisions regarding the lenders and the loan agreements, in conjunction with arbitration agreement provisions restricting the law the arbitrator may apply, create an unambiguous waiver of rights and the agreements and are therefore unenforceable"); *Titus v. ZestFinance, Inc.*, No. 18-cv-5373, 2018 WL 5084844, at *5 (W.D. Wash. Oct. 18, 2018) (holding arbitration agreement invalid which contained "a choice of law provision, which, when construed with the other provisions in the Loan

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Agreement, prospectively waives most federal statutory remedies"). Boilerplate language in Big Picture's standard form contract similarly attempts to waive all rights and remedies under state and federal law. (Dkt. 100 ¶¶ 105, 108-110, 114.) This Court should therefore reach the same conclusion.

Smith has also pleaded facts showing that Big Picture's attempted choice-of-law provision is substantively and procedurally unconscionable and unenforceable under Oregon law. (Dkt. 100 ¶¶ 103–26); *see Bagley*, 340 P.3d at 37 (holding that contractual provision purporting to disclaim liability in consumer contract was substantively and procedurally unconscionable). Oregon has a strong, long-standing public policy against enforcing usurious contracts. *Pacific Bldg. Co. v. Hill*, 67 P. 103, 106 (Or. 1901) ("Usury is a moral taint wherever it exists, and no subterfuge should be permitted to conceal it from the eyes of the law …. As a principle of international jurisprudence, no state is bound or ought to enforce or hold valid in its courts of justice any contract which is injurious to its public rights, offends its morals, contravenes its policy, or violates a public law."); *Fidelity Sec. Corp. v. Brugman*, 1 P.2d 131, 136 (Or. 1931) ("The courts do not permit any shift or subterfuge to evade the law against usury.").

Big Picture's attempted choice-of-law provision, if enforced, would threaten harm to the Oregon public by contravening the enforcement of usury laws designed to protect the public welfare from oppressively high interest rates. *See Bagley*, 340 P.3d at 37 (holding that court may conclude that contractual term is substantively unconscionable "on the basis of a public policy derived either from its own perception of the need to protect some aspect of the public welfare or from legislation that is relevant to the policy although it says nothing explicitly about enforceability") (citing RESTATEMENT (SECOND) OF CONTRACTS § 178, cmt. b)); *see also Hengle*,

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2020 WL 113496, at *25 (holding that choice-of-law provision in tribal loan agreement was unconscionable because it violated Virginia public policy).[11]

Plaintiff has also pleaded facts showing that the choice-of-law provision is procedurally unconscionable because a Big Picture Loans representative pressured him to digitally sign his loan documents during a short telephone call in which the representative did not explain the terms of the loan agreement and knew that Smith could not possibly have had time to read them. (Dkt. 100 ¶¶ 29–32); *see Bagley*, 340 P.3d at 35 (listing factors relevant to procedural unconscionability, including "inequality of bargaining power," "no real opportunity to negotiate the terms of the contract," "whether terms were hidden or obscure from the vantage of the party seeking to avoid them," and "the fact that a contract involves a consumer transaction").

The Court need not resolve these factual disputes here. *See Hinman v. Silver Star Group, LLC*, 380 P.3d 994, 998 (Or. Ct. App. 2016) (holding that if "the facts bearing on unconscionability are disputed, then the court must allow the parties to present evidence on those facts and must decide the factual questions presented to it"). At the very least, Plaintiff has stated a plausible claim that these loans violate Oregon law. *Id.*; *see Hengle*, 2020 WL 113496, at *25 (holding that

[11] Other jurisdictions have noted similar public policy interests in preventing usury. *See, e.g.*, *MacDonald v. CashCall, Inc.*, No. 16-2781, 2017 WL 1536427, *3 (D.N.J. April 28, 2017) (noting its "strong public policy against usury and licensing," "New Jersey has a specific interest in protecting its residents from out-of-state lenders who seek to lend money to New Jersey residents on terms which are usurious under New Jersey law."); *Madden v. Midland Funding, LLC*, No. 11–8149, 2017 WL 758518, at *11 (S.D.N.Y. Feb. 27, 2017) (noting "usury prohibition is a fundamental public policy"); *State of N.M. v. B&B Invest. Group, Inc.*, 329 P.3d 658 (N.M. 2014) ("It is contrary to our public policy, and therefore unconscionable as a matter of law, for these historically anomalous interest rates to be charged in our state."); *Begelfer v. Najarian*, 381 Mass. 177, 189, 409 N.E. 2d 167, 175 (1980) (finding that "[t]he public policy against usury is clearly a matter for grave legislative concern"); *Olwine v. Torrens*, 236 Pa. Super. 51, 56, 344 A.2d 665 (1975) ("[t]he statute against usury forms a part of the public policy of the state and cannot be evaded by any circumvention or waived by the debtor").

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"Plaintiffs have stated a plausible claim that the loans at issue violate Virginia's usury statute" and accordingly denying motions to dismiss "to the extent that they argue that Plaintiffs' loans are not usurious or unlawful under RICO").

3. Under Oregon choice-of-law principles, Oregon's strong interest in protecting consumers from usurious interest rates requires the application of Oregon law.

This Court should also reject Martorello's argument that tribal law should be applied under the Restatement's "most significant relationship" test. (Dkt. 106 at 26.) As the *Gingras* court held, when tribal lenders deliberately reach out beyond their reservations to make loans to state-resident consumers, they are doing business in the state where the consumers reside. *Gingras*, 922 F.3d at 128 (holding that "[t]he Tribal Defendants here engaged in conduct outside of Indian lands when they extended loans to the Plaintiffs in Vermont"); see also *Quick Payday, Inc. v. Stork*, 549 F.3d 1302, 1304 (10th Cir. 2008) (holding that Utah payday lender was subject to Kansas usury laws when it made loans to Kansas borrowers); *Hengle*, 2020 WL 113496, at *31 (holding that tribal online loans "constitute off-reservation conduct subject to nondiscriminatory state regulation"); *Otoe-Missouria Tribe*, 974 F. Supp. 2d at 356 (denying Red Rock's request for a preliminary injunction, finding that the "undisputed facts demonstrate[d]" that the illegal activity was "taking place in New York, off of the Tribes' lands").

As the state where Smith entered into the loan agreement, where the agreement was performed, and where Smith was injured, Oregon has the most significant relationship to this dispute and therefore a greater interest in having its law applied. *See Spirit Partner*, 157 P.3d at 1200 (applying Oregon law to dispute over warrants containing California choice-of-law provision, finding that "Oregon's contacts with the parties and the transaction are more significant than California's"); *MacDonald*, No. 16-cv-2781, 2017 WL 1536427, at *10, *aff'd*, 883 F.3d 220 (3d Cir. 2018) (holding that that New Jersey had a "materially greater interest" than the Cheyenne

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River Sioux Tribe in having its law applied to tribal payday loan dispute). This Court should therefore reject Martorello's attempt to apply tribal law.

E. Smith's RICO claims are well-grounded and adequate.

Smith has compelling claims under RICO, 18 U.S.C. § 1962(c). A "civil RICO action is not simply an action to recover excessive interest or to enforce a penalty for the overcharge. RICO is concerned with evils far more significant than the simple practice of usury." *Sundance Land Corp. v. Community First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 666 (9th Cir. 1988). That is exactly what we have in this case. Martorello set up the lending platform and created the corporate structure as a modern-day loan-sharking operation that he attempted to cloak with tribal sovereign immunity.[12] (*See supra*, Sections II.A. and IV.B.) He has overseen the operation and worked in partnership with others to collect on thousands of illegal loans. (Dkt. 100 ¶¶ 19-20, 22, 26.) Martorello deliberately attempted to stay below the radar of state attorneys general and regulators; he has acknowledged his risk of felony charges as well as personal liability for his egregious acts. (*Id*. ¶¶ 55-59.) This lending enterprise is exactly what RICO was designed to redress. Courts, including the Eastern District of Virginia in *Williams*, have held that the same or similar RICO claims should survive motions to dismiss. *Hengle*, 2020 WL 113496, *50; *Gibbs v. Stinson*, 2019 WL 4752792, *31-33; *Gibbs v. Haynes Investments, LLC*, 368 F. Supp. 3d at 929; *Solomon*, 2019 WL 1320790, *5; *Gingras*, 2016 WL 29332163, *37.

[12] Defendants' current lending scheme with loans exceeding 500% is significantly worse than historic rates of mafia-related loan-sharks, who only charged about half as much *State of N.M.*, 329 P.3d at 674 (noting "mafia loan sharks" charged 250% at the height of their power); *U.S. v. Lombardozzi*, 491 F.3d 61, 66 (2d Cir. 2007) (noting 250% rate charged); Comment, Syndicate Loan-Shark Activities & New York's Usury Statute, 66 Colum. L. Rev. 167 (1966) (reporting extortionate mafia loan-shark interest rates averaged 250%).

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1. Smith has standing under RICO to pursue claims against Martorello.

Smith has sufficiently alleged facts to support that Martorello was the proximate and direct cause of his injuries. "In order to have RICO standing, a plaintiff must have suffered an injury that was proximately caused by the alleged RICO violation. *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 266 (1992). Proximate cause under RICO "requires some direct relation between the injury asserted and the injurious conduct alleged"; links that are "too remote," "purely contingent," or "indirec[t]" are insufficient. *Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1, 2 (2010); *Hellenic Petroleum LLC v. Mansfield Oil Co. of Gainesville, Inc.*, ___ F. Supp. 3d ___, 2020 WL 433084, *5 (E.D. Ca. Jan. 28, 2020) (noting "reliance 'on an attenuated chain of conjecture' is insufficient to support proximate causation under § 1964(c)") (quoting *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1228 (9th Cir. 2008). "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006).

Smith's and other borrowers' financial losses directly resulted from Martorello's efforts to generate massive windfalls from usurious loans. In the context of tribal payday lending, there is well-established precedent upholding claims against persons and entities who made the lending possible, such as private equity firms that financed the usurious lending. *Plain Green*, 372 F. Supp. 3d at 983; *Gibbs v. Stinson*, 2019 WL 4752792, *32; *Gibbs v. Haynes*, 368 F. Supp. 3d at 932-33; *Solomon*, 2019 WL 1320790, at *7-11. The wrongful acts of the named lender or others in the lending enterprise do not destroy proximate cause as new and intervening cause. *Plain Green*, 372 F. Supp. 3d at 983 n.24 (noting that consumers' claims against other participants in the enterprise, like ACH providers, "does not mean plaintiffs injuries were not also proximately caused by the

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[defendants'] role in the scheme) (citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658 (2008)); *Solomon*, 2019 WL 1320790, at *1.

The Ninth Circuit has clarified three factors that are relevant in evaluating whether the defendant proximately caused the alleged injury: (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries. *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1055 (9th Cir. 2008) (citation omitted). In this case, Smith was, generally speaking, the intended target of the lending business; there were no others who were injured more directly than he was. Smith's damages are easily attributable to Martorello's wrongful conduct, and the entire enterprise should be held jointly and severally liable.[13] Finally, there will be no challenge to the apportionment of the damages.

Here, Martorello is the central hub of the lending enterprise. Martorello created the lending scheme to prey on desperate, unsophisticated consumers. He supervises and controls the enterprise, presiding over decisions to loan at usurious rates of interest. (*See supra*, Sections II.A and IV.B.) Martorello claims to have had "no involvement in any tribal lending business" since he nominally transferred ownership of Bellicose in January 2016. (Dkt. 106 at 22.) Smith, on the other hand, has alleged that Martorello's role in the oversight and direction of the company is pervasive and

[13] *Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1562 (1st Cir. 1994); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1301 (6th Cir. 1989) ("the nature of the RICO offense mandates joint and several liability"); *U.S. v. Lyons*, 870 F. Supp. 2d 281, 296 (D. Mass. 2012) (holding that "[w]hile any monies collected from co-defendants can be used to offset the forfeiture amount, defendants are jointly and severally liable").

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ongoing. (*See supra*, Sections II.A and IV.B.).) Such a factual dispute cannot be resolved in a Rule 12(b)(6) motion.

Finally, Martorello baselessly contends that Federal policy supports the Tribe's rights to make usurious loans to Oregon residents. (Dkt. 106 at 17-18, 22, 23.) The only authority Martorello cites is *Williams*, which says no such thing.[14] Rejecting the same argument, the *Hengle v. Asner* court explained that if the courts were to allow "tribes operating as payday lenders to reach far beyond their sovereignty and violate state consumer protection statutes with impunity," the result would be to "eviscerate the power of states to subject 'Indians going beyond reservation boundaries … to any generally applicable state law.'"[15] Also, there are compelling public policy interests in protecting consumers from usurious lending and prospective waivers. (*See supra*, Sections IV.D.2.) Overall, applying what the court said in *Plain Green*, "at the motion to dismiss stage, [Smith has] sufficiently alleged how the [defendants] helped create, fund, and run the loan scheme that directly caused plaintiff's injuries." 372 F. Supp. 3d at 983.

2. Smith has demonstrated that Martorello violated 18 U.S.C. § 1962(c).

Smith's First Amended Complaint addresses all the factors to hold Martorello liable under 18 U.S.C. § 1962(c). Nevertheless, turning a blind eye to the First Amended Complaint, Martorello inexplicably claims that Smith did not address issues at the core of the complaint. (Dkt.106 at 24.) The supposed "failure to allege facts" is a complete falsehood. Smith alleges that Martorello

[14] *Williams*, 929 F.3d at 178 (addressing the purposes of the tribal entities for a *Breakthrough*/sovereign immunity analysis, the court merely held "the Tribe has stated a 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"). Contrary to Martorello's misrepresentation, the Fourth Circuit did not find that Big Picture and Ascension's financial success was a federal policy interest.

[15] No. 3:19cv250, 2020 WL 113496, at *33.

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engaged in unlawful conduct, and he also provides detailed factual support. (*Compare* Dkt. 106 at 24 *to* Dkt. 100 ¶¶ 148-149, 153, 159-162, 164-168.) As further support for the allegations addressed in this paragraph, Smith refers the Court to the factual support addressed *supra*, Sections II.A. and IV.B. For example, the complaint contains allegations and supporting facts that Martorello "engaged in any acts prohibited under the statute." (Dkt. 100 ¶¶ 164-68.) Although he only needed to allege his "collection of an unlawful debt" or participation "in a pattern of racketeering," Smith addressed both with extensive factual support. (Dkt. 100 ¶¶ 148, 159-162, 164-168.) Smith pleaded that Martorello participated in the purported enterprise through a pattern of racketeering. (*Compare* Dkt. 106 at 26 *to* Dkt. 100 ¶ 167.)

To make out a claim that what was collected was an "unlawful debt" within the meaning of RICO, Smith must allege facts sufficient to prove, *inter alia*, that [1] the debt was unenforceable in whole or in part because of state or federal laws relating to usury, [2] the debt was incurred in connection with the "business of lending money ... at a [usurious] rate," ... [3] the usurious rate was at least twice the enforceable rate ... [4] as a result of the above confluence of factors, it was injured in its business or property. *Sundance*, 840 F.2d at 666. In accordance with ORS 82.010, which sets the legal interest rate in Oregon at 12%, "the debt was unenforceable . . . because of state . . . laws relating to usury." *Id*. Contrary to Martorello's contention, "[a] plaintiff suing under RICO need not argue that each defendant individually collected the debt." *Gibbs v. Haynes*, 368 F. Supp. 3d at 930 n.53; *Gibbs v. Stinson*, 2019 WL 4752792, *30 n.67.

Under section 1962(c), the culpable parties "must have some part in directing [the enterprise's] affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). While "[s]imply performing services for the enterprise does not rise to the level of direction," a defendant can be a part of an enterprise "without having a role in its management and operation." *Id.* Smith must also

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show that Martorello was "aware of the essential nature and scope of the enterprise and intended to participate in it." *Howard v. Am. Online, Inc*., 208 F.3d 741, 751 (9th Cir. 2000). Although the agreement to violate RICO need not be express, the factual allegations of the complaint, including the words, actions, and relationship between the parties, must raise an inference that an agreement exists. *Oki Semiconductor Co. v. Wells Fargo Bank*, 98 F.3d 768, 773, 774–75 (9th Cir.2002). Once an agreement is demonstrated, all conspirators, whether or not they individually violated RICO, are jointly and severally liable for the acts of their co-conspirators. *Id*. at 775. To support that element of his case, Smith provided a detailed account of "facts demonstrating that Martorello . . . participated in the operation or management of the enterprise." (*Compare* Dkt. 106 at 24, 26 *to* Dkt. 100 ¶¶ 149-151, 153-157, 161, 166-168.) Here, Smith has "alleged that each of the defendants, as distinct entities, associated with each other and nonparties for the common purpose of exploiting the sovereignty of the Tribe to engage in the practice of issuing usurious loans." *Solomon*, 2019 WL 1320790, at *7.

3. Smith has demonstrated a RICO conspiracy.

Smith has properly pleaded that Martorello conspired to violate § 1962(c). As noted in *Gibbs v. Stinson*, "the Amended Complaint describes the formation of the so-called enterprise, detailed negotiations between co-conspirators, and the development and growth of the Tribal lending businesses over time, including efforts to launder the unlawful proceeds." 2019 WL 4752792, at *33. Though Martorello disagrees, Smith has addressed in detail each of the elements for conspiracy, not "mere conclusory allegations." (Dkt. 106 at 28.) Martorello mischaracterizes Smith's pleading when he represents that "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." (*Id*.) Martorello also falsely claims that he withdrew from any illegal agreement by

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January 2016, when the Tribe acquired Ascension. (*Id.* at 29.) The First Amended Complaint provides an extensive recitation of facts, not conclusions, outlining Martorello's pivotal role in controlling and supervising lending operations in furtherance of their conspiracy to violate RICO. (Dkt. 100 ¶¶ 171-173; see also Dkt. 100 ¶¶ 148-150, 153-162,164-168.) As further support regarding the conspiracy, Smith refers the Court to the factual support addressed *supra*, Sections II.A. and IV.B. Given the compelling factual record related to Martorello's illegal conduct and his conspiracy with others in the enterprise, the Court should deny the requested dismissal of Smith's RICO claims.[16]

F. Smith may recover the proceeds of Martorello's violation of 82.010 in unjust enrichment.

Oregon courts have not directly addressed whether the usury statute, ORS 82.010, provides Smith with an independent right of action for Martorello's collection of usurious interest. The Oregon court of appeals considered the statute in *Htaike v. Sein*, 269 Or. App. 284, 291, 344 P.3d 527, 532 (2015). Leaving unresolved whether ORS 82.010 may be used as private right of action, the court instead affirmed that the borrower may bring a claim in equity for unjust enrichment to recover payments of usurious interest. *Id.*, 269 Or. App. at 293, 344 P.3d at 533. In addition, the statute serves as a compelling foundation for Smith's RICO claims. As previously addressed, with ORS 82.010, Smith may pursue recovery under RICO for Martorello's collection on the unlawful debt. (See *supra*, Section IV.E.2.) RICO does not require that ORS 82.010 provide a private right of action. *Sundance*, 840 F.2d at 666 (requiring that "the debt was unenforceable . . . because of

[16] In the alternative, if the Court deems that Richard Smith has not created a sufficient factual record to support his claims against Martorello, Smith requests leave of Court to conduct discovery and to amend his pleading. *Phillips Soil Prods., Inc. v. Heintz*, No. 3:18-cv-00263-BR, 2018 WL 2187442, *6-7 (D. Or. May 11, 2018).

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state . . . laws relating to usury") (emphasis added). Further, as noted below, Smith's unjust enrichment is premised, in part, on the societal interests in equitable recovery. (See *supra*, Section IV.G.) The decision in *Htaike* reinforces that the interests of equity require that Martorello be held accountable for his collection of illegal interest.

G. Smith's unjust enrichment claim is well-grounded and meritorious.

Smith alleges facts sufficient to state a claim for unjust enrichment. Courts presiding over litigation about "rent-a-tribe" operations have routinely denied similar motions to dismiss unjust enrichment claims. *Hengle*, 2020 WL 113496, *49; *Gibbs v. Haynes*, 368 F. Supp. 3d at 933-34; *Gibbs v. Stinson*, 2019 WL 4752792, *33; *Solomon*, 2019 WL 1320790, *16-17; *Gingras*, 2016 WL 29332163, *26-27.

To prevail on an unjust enrichment claim, a plaintiff must establish that (1) the plaintiff conferred a benefit on the defendant; (2) the defendant was aware that it had received a benefit; and (3) under the circumstances, it would be unjust for the defendant to retain the benefit without paying for it." *Cumming v. Nipping*, 285 Or. App. 233, 238-39, 395 P.3d 928, 931-32 (2017) (internal quotation and citation omitted). First, Martorello received income from the enterprise based on borrowers entering into loan agreements with Big Picture. Second, no dispute exists that that Martorello knew of the benefit. Indeed, he closely oversees every expenditure of the enterprise, including monthly receipt of financial statements for his approval. Third, circumstances render it inequitable for Martorello to retain the millions he received from the predatory lending business. In a similar case, the *Gingras* court found that the retention of allegedly illegal wealth by a company involved in a scheme similar to the one at issue here, was a sufficient "benefit" to one of its substantial investors for unjust enrichment purposes. 2016 WL 2932163, * 26.

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Martorello disputes Smith's right to an equitable recovery on unjust enrichment. Instead, he urges that Smith should pursue a breach of contract action. First, the subject choice of law provision, indeed the contract, should be held void and unenforceable. (*See supra*, Sections IV.D.) Second, there is no breach of the loan agreement upon which to base a claim. Third, recovery on an unjust enrichment claim need not be premised on an underlying contract.[17]

Society's expectations and public policy interests support Smith's right to equitable relief and return of the usurious interest payments that Martorello received. (See *supra*, Section IV.D.2.) The court of appeals, in *Htaike v. Sein*, affirmed that the interests of equity favor the return of usurious interest. 269 Or. App. at 293, 344 P.3d at 533. As detailed in the First Amended Complaint, Martorello is not merely a creditor to the tribal companies, but exercises pervasive control over their business. (Dkt. 100 ¶¶ 1-2, 5, 7-8, 10, 18-19, 22, 44-49, 55-66, 75-88, 98-100, 154-58, 161, 165-68, 171-73.) The interests of justice warrant a cause of action for unjust enrichment.

Martorello had a reasonable expectation of repayment. As previously addressed, there are numerous examples of Martorello's awareness that his receipt of the usurious loan payments was illegal. (Dkt. 100 ¶ 55, 58.) For example, Martorello was aware that he could be prosecuted for a felony for his participation in the lending scheme. (Dkt. 100 ¶ 55.) Smith has amply and plausibly shown that the underlying facts render it inequitable for Martorello to retain the untold millions he

[17] The prosecution of a claim "does not depend on privity of contract, but on the obligation to restore that which the law implies should be returned, where one is unjustly enriched at another's expense." *Jelmoli Holding, Inc. v. Raymond James Fin. Servs., Inc.*, 470 F.3d 14, 21 (1st Cir. 2006); see also *Hartford Cas. Ins. Co. v. J.R. Marketing, LLC*, 61 Cal.4th 988, 353 P.3d 319 (2015).

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received from his collections on the illegal loans. The Court should deny the motion to dismiss the unjust enrichment claims.

V. CONCLUSION

For the reasons previously stated, the Court should deny Defendant Matt Martorello's Motion to Dismiss Plaintiff's First Amended Complaint (Dkt. 106).

Dated: March 13, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2020, this document was filed electronically via the Court's ECF system and thereby served on all counsel of record.

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