UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

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

Plaintiff,

v.

MATT MARTORELLO, and EVENTIDE CREDIT ACQUISITIONS, LLC,

Defendants.

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

FINDINGS AND RECOMMENDATION

ACOSTA, Magistrate Judge:

In this putative class action, Plaintiff Richard Lee Smith, Jr. ("Smith"), brings this action against Defendants Matt Martorello ("Martorello") and Eventide Credit Acquisitions, LLC ("Eventide") (collectively "Defendants"), alleging violations of Oregon consumer protection laws, OR. REV. STAT. §§ 82.010 and 725.045; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) & (d); and Oregon common law claims for unjust enrichment, based on the high-interest, short-term consumer loan he obtained from Defendants over the

internet. Smith, on behalf of borrowers nationwide and a subclass of Oregon borrowers, seeks an order declaring the consumer loans invalid and the lending scheme illegal, and asks the illegal proceeds be returned to the exploited borrowers. Now before the court is Martorello's Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6).[1] For the following reasons, Martorello's motion should be granted in part and denied in part.

Introduction

Smith seeks to hold Martorello liable for a predatory "rent-a-tribe" lending scheme. Smith asserts that Martorello has nominally named a Native American tribe, the Lac Vieux Desert Band of Lake Superior Chippewa Indians (the "Tribe"), as a nominal lender. According to Smith, in exchange for use of its name, the Tribe receives a small percentage of the loan revenues (between two and six percent) with no responsibility for the loan operations. Smith argues that Martorello and other non-tribal participants retain the remaining revenue and exercise control over all aspects of the lending operations. Smith asserts that Martorello, by nominally identifying the Tribe, seeks to cloak himself in the Tribe's sovereign immunity and thwart Oregon's usury laws so that he may charge borrowers exceedingly high interest rates on the short-term loans. Smith seeks to recover damages against Martorello personally for violations of RICO, Oregon consumer protection laws, and unjust enrichment.

This lawsuit is related to several other lawsuits ongoing in the Eastern District of Virginia, including a class action on behalf of Virginia residents against Martorello in which Virginia residents allege similar facts. *See Williams v. Big Picture Loans, LLC*, Case No. 3:17-cv-00461

[1] In Eventide's Answer and Affirmative Defenses, it asserts that the court lacks personal jurisdiction over it. (Def. Eventide Answer at 38, ECF No. 139.) Eventide, however, did not file a Motion to Dismiss, despite being granted an extension of time to do so. (Minutes of Proceedings, ECF No. 135.)

(E.D. Va) ("Williams"); *Galloway v. Big Picture Loans, LLC*, Case No. 3:18-cv-406 (E.D. Va.) ("*Galloway I*"); *Galloway v. Williams*, Case No 3:19-cv-470 ("*Galloway III*") (E.D. Va.).[2] There are numerous other lawsuits challenging similar "rent-a-tribe" Internet loan businesses in various jurisdictions. *See, e.g.,* *Gibbs v. Haynes Investments, LLC*, 967 F.3d 332 (4th Cir. 2020) (holding arbitration clause in online short-term loans issued by tribes were unenforceable); *Gibbs v. Sequoia Capital Operations, LLC*, 966 F.3d 286 (4th Cir. 2020) (holding arbitration clause in online short-term loans issued by tribes were unenforceable); *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 117 (2d Cir. 2019) (denying motion to compel arbitration and motion to dismiss based on tribal sovereign immunity); *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't Fin. Servs.*, 769 F.3d 105, 114 (2d Cir. 2014) (holding plaintiffs did not establish that loans occurred on Native American soil and district court did not abuse discretion in denying preliminary injunction); *Hengle v. Asner*, 433 F. Supp. 3d 825, 851-52 (E.D. Va. 2020), *appeal filed* (4th Cir. Mar. 26, 2020) (holding forum selection clause requiring arbitration in tribal payday loan agreement unenforceable); *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955 (N.D. Cal. 2019), *appeal filed* (9th Cir. Apr. 10, 2019) (rejecting defendants' motions to compel arbitration, to dismiss for lack of personal jurisdiction, and failure to state a claim).

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[2] Matt Martorello is not a defendant in *Galloway v. Martorello*, Case No. 3:19-cv-314 (E.D. Va.) ("*Galloway II*"). In *Galloway II*, the defendants are Justin Martorello; Rebecca Martorello; Jeremy Davis; Eventide Credit Acquisitions, LLC; Lion LLC; Gallant; BlueTech Irrevocable Trust; Breakwater Holdings, LLC; and Kairos Holdings LLC. The entity defendants in *Galloway II* are owned or controlled by Matt Martorello. *Williams v. Big Picture Loans, LLC*, Case No. 3:17-cv-461, 2020 WL 1879675, at *1 (E.D. Va. Apr. 15, 2020) (denying motions filed in *Williams*, *Galloway I*, and *Galloway II* to transfer to the cases to bankruptcy court).

Factual Background

Smith alleges that Martorello used the Tribe to set-up a lending scheme beyond the reach of federal and state licensing and lending laws.[3] (Am. Compl. ¶ 3, ECF No. 100.) Under this "rent-a-tribe" model, Defendants created and controlled an enterprise charging high-interest loans under the names Castle Payday ("Castle") and Big Picture Loans, LLC ("Big Picture"). (*Id.* ¶¶ 1, 3.) Martorello, through his company Bellicose Capital, LLC ("Bellicose"), originally handled all of the day-to-day operations for Castle, including marketing, screening, funding, and underwriting. (*Id.* ¶ 4.) Management then transferred from Bellicose to Ascension Technologies, LLC ("Ascension"). (*Id.* ¶ 4.) Smith alleges Big Picture and Ascension nominally operate the lending operations, and that Martorello and his company Eventide actually operate and control the entire lending enterprise, and structured it to cloak themselves with tribal sovereign immunity. (*Id.* ¶ 5.)

I. History of Martorello's Involvement

In 2011, Martorello, through his companies Bellicose and SourcePoint, began its relationship with the Tribe, which operated its lending business through Red Rock Tribal Lending, LLC. (Am. Compl. ¶ 45.) Although Martorello and the Tribe's lawyer structured their relationship as one of "co-managers," Bellicose operated the business. (*Id.* ¶ 46.) The purpose of this structure was to create the illusion of tribal control and oversight, and to give the appearance that the loan originations were those of a tribal lending entity. (*Id.* ¶ 46.) The Tribe created Red Rock and Duck Creek Tribal Financial, LLC ("Duck Creek"). (*Id.* ¶ 46.)

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[3] The facts are taken from Smith's Amended Complaint and are viewed in the light most favorable to him.

Red Rock and Duck Creek entered into servicing agreements with Bellicose, which Martorello owned and operated. (*Id.* ¶ 47.) Duck Creek entered into a servicing agreement with Bellicose VI, LLC, a Virgin Islands subsidiary of Bellicose. Bellicose VI assigned its rights under those contracts to an affiliate, SourcePoint VI, LLC, another subsidiary of Bellicose. (*Id.* ¶ 47 n.10.) Under these agreements, the Tribe-affiliated entities received two percent of the net revenue from the lending operations, and the Martorello-affiliated entities received the remaining ninety-eight percent of revenue, as well as reimbursement for advances and expenses. (*Id.* ¶ 47.) From January 1, 2014, through August 31, 2015, the lending enterprise generated a net profit of $161.9 million; of this amount, Red Rock and the Tribe received less than $3.2 million after paying brokerage fees. (*Id.*¶ 47.)

Under the servicing agreements, SourcePoint was entitled to collect all gross revenues and proceeds arising from Red Rock operations; SourcePoint retained all authority to sweep Red Rock's accounts; and SourcePoint would not share any intellectual property pertaining to vendor agreements, analytics, or other information released under Red Rock's name. (*Id.* ¶ 48.) Red Rock was nominally designated as the entity making the final determination whether to lend to a consumer; however, Red Rock's approvals were based on SourcePoint's pre-determined underwriting criteria. Thus, Red Rock's involvement was reduced to "rubber stamping" the loan agreements. (*Id.* ¶ 49.) Bellicose provided all the infrastructure and investment capital to market, fund, underwrite, and collect on the loans, including all lead generation, payment processing, and collection procedures. (*Id.* ¶ 51.) Additionally, Red Rock's activities were performed by employees and officers of Bellicose who were located in the Virgin Islands and Puerto Rico, and they contracted with a call center located in the Philippines. (*Id.* ¶ 52.)

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II. Enforcement Actions

In August 2013, Red Rock received a cease-and-desist letter from the New York Department of Financial Services ("DFS"), in which DFS contended that the Tribe's lending practices violated New York civil and criminal laws. (*Id.* ¶ 56.) Weeks later, Red Rock and the Tribe sought a preliminary injunction against DFS and the state from limiting its lending enterprise. The court rejected Red Rock and the Tribe's arguments. *Otoe-Missouria Tribe of Indians v. N.Y. Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 356 (S.D.N.Y. 2013); *see also Williams v. Big Picture Loans, LLC*, Case No. 3:17-cv-461, 2019 WL 1983048, at *2-3 (E.D. Va. May 3, 2019). State attorneys general and the Consumer Financial Protection Bureau ("CFPB") also threatened enforcement actions. (*Id.* ¶ 57.) *See In Re Cashcall, Inc.*, Case No. 12-308, 2013 WL 3465250, at *2-3 (N.H. Banking Dep't June 4, 2013) (issuing cease-and-desist order to CashCall and WS Funding based on suspected violations New Hampshire lending licensing laws).

These enforcement actions caused Martorello to recognize the risk of potential investigation and significant personal liability. (Am. Compl. ¶ 58.) He was concerned that SourcePoint would be discovered, and needed to defend against aiding and abetting and true lender claims. (*Id.* ¶ 58.) Martorello proposed to Red Rock's counsel, Robert Rossette, that the Tribe take ownership of Bellicose through a new entity, Ascension. (*Id.*) Martorello proposed that the Tribe take a controlling interest in Ascension, but he would receive 100 percent of the profits for four years. (*Id.* ¶ 59 & Ex. 14.) Rosette then circulated a memorandum on the nominal transfer, analyzing whether Martorello's proposal would pass the "arm of the tribe test" and extend tribal sovereign immunity to the proposed new company. (*Id.* ¶ 59 & Ex. 15.) Martorello was particularly interested in structuring the deal to transfer Bellicose VI and SourcePoint to the Tribe in a manner that would minimize his personal liability. (*Id.* ¶ 59 & Ex. 16) ("Let's zero in asap

on minimizing my risk for being individually liable like [Colorado] just successfully did to Butch [W]ebb."). Management of the new enterprise was to remain "status quo," however, meaning that Martorello and his team would remain in control. (*Id.* ¶ 60 & Ex. 15) ("[a]ll investors (institutional, personal, and myself) won't allow the deal to occur without being 100% certain adequate Management resources are in control").

While Martorello was restructuring Bellicose, the Tribe was rebranding Red Rock and Castle. (*Id.* ¶ 61.) Martorello suggested the Tribe form a new entity to avoid negative publicity about Red Rock and payday loans. (*Id.* ¶ 61 & Ex. 17.) Martorello developed the new brand "Big Picture," and presented it to the Tribe's counsel on August 25, 2014. (*Id.* ¶ 62.) The next day the Tribe approved a resolution and operating agreement for "Big Picture." (*Id.* ¶ 62.)

On October 1, 2014, the Second Circuit affirmed the decision of the Southern District of New York in *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014). In that decision, the Second Circuit upheld the district court's denial of a preliminary injunction, concluding that Red Rock failed to establish that it was likely to succeed on its claim that New York could prevent it from issuing loans, observing that a "tribe has no legitimate interest in selling an opportunity to evade state law." *Id.* at 112-14.

In response to the Second Circuit's decision, Martorello moved quickly to get Ascension and Big Picture operational. To do so, Ascension (the new loan servicing entity for the Tribe) vastly overpaid for Bellicose. (Am. Compl. ¶ 63.) Bellicose, the target of government regulators, was on the brink of shutdown, but Martorello engineered a transaction to value Bellicose at $300 million; its actual value likely was $11.7 million. (*Id.* ¶¶ 63-64.) Martorello nominally "sold" Bellicose and its subsidiaries (including SourcePoint) to Tribe-affiliated companies, namely Tribal Economic Development Holdings, LLC ("TED"), LVD Tribal

Acquisition Company, LLC ("TAC"), Big Picture, and Ascension. (*Id.* ¶ 65.) Martorello created a new company, Eventide, as his conduit to receive payments from the transaction. (*Id.*) Martorello owns approximately 85.1 percent of Eventide and his brother, Justin Martorello, owns 9.9 percent of Eventide. (*Id.*) The remaining five percent of Eventide is owned by officers of Ascension: Brian McFadden, Simon Liang, and James Dowd. *Williams v. Big Picture*, 2020 WL 1879675, at *2. TAC acquired Bellicose and its subsidiaries, and TED subsequently acquired TAC through a $300 million promissory note to Eventide. (Am. Compl. ¶ 65 & Exs. 19, 26.) Martorello structured the deal in this manner to provide additional layers of protection from liability for violations of state usury laws. (*Id.* ¶ 66.)

Martorello and the Tribe negotiated a seven-year term for payout on the agreement, despite that the CFPB and other regulators expected Bellicose would cease operations at the end of 2019. (*Id.* ¶¶ 72-73.) In 2016, an independent accounting firm noted that Bellicose faced imminent liquidation. (*Id.* ¶ 73.) Thus, Martorello and Tribe officials knew or should have known that their business model was not sustainable. (*Id.* ¶ 74.)

After the restructurings and reconfigurations were complete, TED and Eventide's financial arrangement essentially mirrored the financial payments involving Red Rock and SourcePoint; that is, TED would receive approximately two percent of the gross revenue and a no-interest reinvestment of an additional two percent. (*Id.* ¶ 67.) In January 2017, the parties entered an addendum to the promissory note in which Eventide agreed to distribute three percent of gross revenues to the Tribe. (*Id.* ¶ 68.) Eventually, Eventide agreed to structure the deal to provide the Tribe six percent gross revenues and eliminate the reinvestment requirement. (*Id.* ¶ 68.) After payments from gross revenues, Eventide was to receive all the net revenue of the lending operation. (*Id.* ¶ 69.) Despite agreements to improve the optics of the lending enterprise,

Eventide received over eighty-three percent of the Big Picture's revenue from February 2016 through April 2019. (*Id.* ¶ 69.) Martorello and the Tribe, by characterizing Martorello's interest as debt rather than equity, hoped the changes to their corporate structures would insulate them from liability for their ongoing evasion of state and federal lending laws. (*Id.* ¶ 70.)

Additionally, the corporate restructuring resulted in cosmetic changes to governance. (*Id.* ¶ 75.) Ascension and Big Picture were structured to create the appearance of tribal control, but the control is illusory: two Tribe members are designated as "co-managers" of Ascension, but the positions are unpaid, with no day-to-day control over the business. (*Id.* ¶¶ 76-77, 91.) And, Ascension operates in the same manner with the same individuals as Bellicose, none of whom are members of the Tribe or live on the reservation. (*Id.* ¶¶ 77, 90.) Through an "Intratribal Servicing Agreement," Big Picture relinquished the daily operations to Ascension. (*Id.* ¶¶ 77, 78.) Through the Agreement, Big Picture granted Ascension the power and authority to perform all responsibilities to carry out the business, including: all accounting, marketing, compliance, risk and analytics, information technology, call center monitoring and training, vendor identification, contract negotiations, and assistance with solicitation of investors. (*Id.* ¶¶ 77, 78 & Ex. 32.) The servicing agreement is nearly identical to that between SourcePoint and Red Rock. (*Id.* ¶ 78.) Moreover, TED cannot modify or terminate the servicing agreement until the $300 million promissory note to Eventide is satisfied. (*Id.* ¶ 78.)

Big Picture also assigned the right to control distribution of money to Brian McFadden and Simon Liang, non-tribal members who are close associates of Martorello. (*Id.* ¶ 79.) Each month, Liang performs the accounting and sends the information to Martorello for approval, and then transfers the sums to TED, Eventide, and Big Picture. (*Id.* ¶ 79.)

Martorello, through Eventide, controls operation of Ascension. None of Ascension's employees are members of the Tribe, and Martorello installed his friend and associate Brian McFadden to handle the day-to-day operations of Ascension. (*Id.* ¶¶ 80, 83, 91.) Martorello insisted that McFadden, the president of Bellicose, manage Ascension, and, under the Loan Agreement, Martorello – through Eventide – has the authority to approve or reject replacement of McFadden. (*Id.* ¶¶ 80, 81.) Martorello possesses the unilateral right to buy-out McFadden's two percent interest in Eventide, and Eventide has authority over increases to Ascension's budget. (*Id.* ¶ 81.) Big Picture and Ascension must obtain Eventide's permission to make large changes, such as lowering interest rates, to their business model. (*Id.* ¶ 85.) Martorello has remained involved in the lending operations even after creating Eventide to oversee those operations. For example, after reaching a proposed settlement in the *Williams* matter, Eventide and Martorello objected to the release of past due debts and reduced interest on pending debts. (*Id.* ¶ 88.) Eventide claims it has numerous controls and related rights to oversee Big Picture and Ascension's business operations based on the Secured Promissory Note, the Loan and Security Agreement, and the Parental Guarantee. (*Id.* ¶ 88.)

III. Operation of Big Picture and Ascension

Big Picture employs few Tribe members, and they perform only administrative tasks at or near minimum wage and are not engaged in managing Big Picture's lending operations. (*Id.* ¶¶ 92-93.) Loan applications arrive through the Internet and are evaluated by an automated process, call centers in the Philippines or Mexico respond to applicant questions, and quality control is conducted from the Virgin Islands. (*Id.* ¶ 93.) Big Picture employs seventeen Tribe members on the reservation; meanwhile there are over 200 customer service representatives employed overseas in the Philippines, Mexico, the Virgin Islands, or Puerto Rico. (*Id.* ¶ 93.)

Ascension operates in the same way, using the same individuals who ran Bellicose, none of whom are affiliated with the Tribe. (*Id.* ¶ 89.) McFadden operates and controls Ascension, which has two tribal co-managers (Michelle Hazen and James Williams) neither of whom is responsible for any day-to-day operations. (*Id.* ¶¶ 90-91.) No Ascension employee is a member of the Tribe and nearly all of Asension's activities occur off reservation. (*Id.* ¶ 90.)

IV. Smith's Loan

On December 11, 2017, while at home in Banks, Oregon, Smith applied online for a short-term installment loan from Big Picture. (Am. Compl. ¶¶ 9, 26.) After completing the online application, a Big Picture representative located in the Philippines or Mexico telephoned Smith, informed him he was eligible for a $1,500 loan, and said repayments of $337.91 every other week would be required. (*Id.* ¶¶ 9, 27.) Smith was not told that the interest on his loan would exceed 527% APR (Annual Percentage Rate); that the anticipated finance charges for the loan would total $7,285.01, plus repayment of the principal; or that his loan did not comport with Oregon law. (*Id.* ¶¶ 9, 28, 32.) During the telephone call, the Big Picture representative sent him an internet link that enabled Smith to complete the loan application, and had Smith sign the loan document before the call ended. (*Id.* ¶ 29.) On December 12, 2017, Smith received a $1,500 deposit in his bank account and, from January 8, 2018, through April 16, 2018, Big Picture deducted payments of $337.91 twice monthly from Smith's bank account. (*Id.* ¶¶ 33, 34.) Smith made repeated efforts to obtain repayment information, then in April 2018 paid $1,650.41 to repay the loan, thereby having paid a total of $4,353.69 for the $1,500 loan. (*Id.* ¶¶ 36, 37.)

V. Procedural Posture of This Case

On September 11, 2018, Smith filed a putative class action Complaint in this court alleging violations of Oregon consumer protection laws, RICO violations, and common law unjust

enrichment claims against Defendants Big Picture, Ascension, and Martorello. (Compl., ECF No. 1.) In November 2019, the parties informed the court that Smith and Defendants Big Picture and Ascension (the "Settling Defendants") reached a settlement in related litigation pending in the Eastern District of Virginia. (Joint Status Report, ECF No. 94). In December 2019, the Settling Defendants were voluntarily dismissed from this case, pursuant to Rule 41(a)(1). (Notice of Dismissal, ECF No. 94.)

On January 17, 2020, Smith filed an Amended Complaint against Martorello and Eventide. (Am. Compl., ECF No. 100.) On February 14, 2020, Martorello filed the instant Motion to Dismiss (ECF No. 106), and also filed a Motion to Change Venue to the Northern District of Texas, contending that it is related to Eventide's pending bankruptcy petition in that district. (ECF No. 107.) This court temporarily stayed this case pending a decision by the Bankruptcy Court on Smith and the consumer-plaintiffs' motion there to dismiss the petition as improperly filed. (Status Report, ECF No. 130.) On June 29, 2020, counsel for Eventide advised the court that the bankruptcy petition had been dismissed. (Status Report, ECF No. 133.) This court then denied the Motion to Transfer as moot, and permitted Eventide an opportunity to respond to the Amended Complaint. (Minutes of Proceedings, ECF No. 135.) On July 21, 2020, Eventide filed its Answer and Affirmative Defenses. (Ans., ECF No. 139.)

VI. Procedural Posture of Related Litigation

On July 27, 2018, U.S. District Judge Robert E. Payne, issued a memorandum opinion holding that Big Picture and Ascension were not entitled to sovereign immunity. *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 283 (E.D. Va. 2018). On July 3, 2019, the Fourth Circuit Court of Appeals reversed Judge Payne's decision, holding that Big Picture and Ascension are entitled to sovereign immunity as arms of the tribe. *Williams v. Big Picture Loans, LLC*, 929

F.3d 170, 177 (4th Cir. 2019). Following additional discovery and an evidentiary hearing, on November 18, 2020, Judge Payne issue a memorandum opinion finding that Martorello made misrepresentations concerning the genesis of Big Picture and its lending process. *Williams v. Big Picture Loans, LLC*, Case Nos. 3:17-cv-461, 3:18-cv-406, 2020 WL 6784352, at *12-14 (E.D. Va. Nov. 18, 2020).[4] Judge Payne previously had denied Martorello's motion to consolidate the various lawsuits within the Eastern District of Virginia, *Williams v. Big Picture Loans, LLC*, Case Nos. 3:17-cv-461, 3:18-cv-406, 3:19-cv-314, 2020 WL 1855194 (E.D. Va. Apr. 13, 2020), and a motion to transfer venue to the Northern District of Texas. *Williams v. Big Picture Loans, LLC*, Case Nos. 3:17-cv-461, 3:18-cv-406, 3:19-cv-314, 2020 WL 1879675 (E.D. Va. Apr. 15, 2020).

Legal Standards

I. Rule 12(b)(2)

In a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), the plaintiff bears the burden to demonstrating the court's exercise of jurisdiction is proper. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). When resolving such a motion on written materials, rather than after an evidentiary hearing, the court need "only inquire into whether the plaintiff's pleadings and affidavits make a prima facie showing of personal jurisdiction." *Id.* (internal quotation and citation omitted). Martorello's personal jurisdiction challenge rests solely on his motion to dismiss and is not based on a declaration or affidavits. Thus, Smith "need only make a prima facie showing of jurisdictional facts to withstand dismissal." *AMA Mulitmedia,*

[4] In that litigation, Plaintiffs submitted the declaration of Joette Pete, who served as the Vice Chairwoman of the LVD Tribe from 2010 to 2016, in which she attested that Martorello ran Red Rock and bore all the risk, and that he purposefully destroyed evidence relating to the business's operation. *Pete v. Big Picture Loans, LLC*, Mis. No. 3:19-mc-26, 2020 WL 3979662, at *1 (E.D. Va. July 14, 2020). Additionally, Pete met with the FBI about alleged crimes involving Martorello, James Williams, and Michelle Hazen. *Id.* at *1-2.

LLC v. Wanat, 970 F.3d 1201, 1207 (9th Cir. 2020); *Schwarzenegger*, 374 F.3d at 800. Uncontroverted allegations in the Amended Complaint must be taken as true, but Smith cannot simply rest on the bare allegations in the complaint. *AMA Multimedia*, 970 F.3d at 1207; *CollegeSource, Inc. v. AcademyOne, Inc.,* 653 F.3d 1066, 1073 (9th Cir. 2011) ("Where not directly controverted, plaintiff's version of the facts is taken as true for the purposes of a 12(b)(2) motion[.]"). "[D]isputed allegations in the complaint that are not supported with evidence or affidavits cannot establish jurisdiction[.]" *AMA Multimedia*, 970 F.3d at 1207 (citing *In re Boon Glob. Ltd.*, 923 F.3d 643, 650 (9th Cir. 2019). Conflicts between facts contained in declarations or affidavits are resolved in the plaintiff's favor. *Mattel, Inc. v. Greiner & Hausser GmbH*, 354 F.3d 857, 861-62 (9th Cir. 2003).

II. Rule 12(b)(6)

A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). While a complaint need not contain detailed factual allegations to survive a Rule 12(b)(6) motion, "it must plead enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

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On a motion to dismiss under Rule 12(b)(6), the court may consider only the pleadings themselves, exhibits that are physically attached to the complaint, and matters properly subject to judicial notice. *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium); *e.g., Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1042 (9th Cir. 2015) (court may consider materials incorporated into complaint, matters of public record, or documents whose contents are alleged in the complaint and "whose authenticity no party questions"). On a motion to dismiss, the court must "'accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the non-moving party.'" *Northstar*, 779 F.3d at 1042 (quoting *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008)).

Discussion

I. Martorello Is Subject to Personal Jurisdiction and His Rule 12(b)(2) Motion Should Be Denied

A. Legal Standards

Unless a federal statute governs personal jurisdiction, a district court applies the law of the forum state. *See Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Oregon's long-arm statute is co-extensive with federal due process standards. *Gray & Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 760 (9th Cir. 1990) (citing OR. R. CIV. P. 4(L)); *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1063 (9th Cir. 2015). Thus, the court need only determine whether its exercise of personal jurisdiction over Martorello would offend constitutional due process requirements. *Gray*, 913 F.2d at 760; *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003); *Climax Portable Mach. Tools, Inc., v. Trawena GmbH*, Case No. 3:18-cv-1825-AC, 2020 WL 1304487, at *1 (D. Or. Mar. 19, 2020).

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Due process requires that the 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.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted); *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015). The court should consider the "quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Int'l Shoe*, 326 U.S. at 319.

To satisfy due process requirements, defendants in a civil action must have a requisite level of minimum contacts with a forum state. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1779 (2017) ("*BSM*"). Minimum contacts may be shown by a defendant's continuous and systematic general business contacts with a forum state (general jurisdiction), or if a defendant has sufficient contacts arising from or related to specific transactions or activities within the forum state (specific jurisdiction). *BSM*, 137 S. Ct. at 1780; *Schwarzengger*, 374 F.3d at 800-02.

Smith relies on specific jurisdiction over Martorello. "The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant 'focuses on the relationship among the defendant, the forum, and the litigation.'" *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017) (quoting *Walden v. Fiore*, 571 U.S. 277, 287 (2014)); *BSM*, 137 S. Ct. at 1780. The Ninth Circuit applies a three-part inquiry to assess whether a defendant has sufficient contacts with the forum to warrant the court's exercise of jurisdiction:

> (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.

Schwarzenegger, 374 F.3d at 802; *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*, 905 F.3d 597, 603 (9th Cir. 2018). Smith bears the burden of satisfying the first two prongs. *Climax Portable*, 2020 WL 1304487, at *2. If he does so, then Martorello bears the burden of presenting a "compelling case" that "the exercise of jurisdiction would not be reasonable." *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985)). Typically, committing an intentional tort within the forum state is a purposeful act that satisfies the first two prongs of the minimum contacts inquiry. *Freestream Aircraft*, 905 F.3d at 603; *Paccar Int'l, Inc. v. Commercial Bank of Kuwait, S.A.K.*, 757 F.2d 1058, 1064 (9th Cir. 1985) ("The commission of an intentional tort in a state is a purposeful act that will satisfy the first two requirements [of the minimum contacts test].").

The first prong requires Smith to show that Martorello either "purposefully directed his activities" toward Oregon, or "purposefully availed himself" of the privilege of conducting business in Oregon. *Axiom*, 874 F.3d at 1068. The purposeful direction test, often called the "effects" test, derives from *Calder v. Jones*, 465 U.S. 783 (1984). The purposeful availment test typically "is satisfied if the defendant has taken deliberate action within the forum state." *Freestream Aircraft*, 905 F.3d at 604 (citation and internal quotation omitted). "The exact form of our jurisdictional inquiry depends on the nature of the claim at issue." *Picot*, 780 F.3d at 1212.

While often confused, purposeful availment and direction are distinct concepts. *Schwarzenegger*, 374 F.3d at 802; *Columbia Sportswear N. Am., Inc. v. Seirus Innovative Accessories, Inc.*, 454 F. Supp. 3d 1040, 1046 (D. Or. 2020); *Climax Portable*, 2020 WL 1304487, at *2. Generally, purposeful availment analysis applies to actions "sounding in contract," and

purposeful direction applies to actions "sounding in tort." *Schwarzenegger*, 374 F.3d at 802. "The key, however, is where the allegedly wrongful conduct took place." *Climax Portable*, 2020 WL 1304487, at *2 (citing *Freestream Aircraft*, 905 F.3d at 604-05). "For tortious conduct that takes place within the forum state, the purposeful availment test under *Paccar* is appropriate, while the purposeful direction analysis is appropriate for tortious conduct that takes place outside the forum state but has an effect within the forum state." *Id.*; *see also AMA Multimedia*, 970 F.3d at 1208 (applying purposeful direction test where "allegedly tortious conduct takes place *outside* the forum and has effects inside the forum").

In the Amended Complaint, Smith asserts violations of Oregon lending and consumer protection laws by offering loans at usurious rates (Claim Two), four claims of mail and wire fraud under RICO (Claims Three through Six), and two claims for unjust enrichment (Claims Seven and Eight), and he seeks declaratory and injunctive relief based on the illegal loans (Claim One). Because the fraud claims against Martorello reasonably sound in tort with effects occurring in Oregon, the court applies purposeful direction test. *See Brice v. Plain Green*, 372 F. Supp. 3d 980-81 (holding court had personal jurisdiction over individual corporate officer and out-of-forum private equity firm that provided services to high-interest loans to in-state consumers); *Federal Trade Comm'n v. Apex Capital Group*, Case No. CV 18-9573-JFW (JPRx), 2019 WL 9077469, at *6-7 (C.D. Cal. Sept. 16, 2019) (applying the purposeful direction test to analyze defendants' contacts with California in action for credit card laundering and chargeback manipulation); *see Kelley v. Kirkman Group, Inc.*, Case No. 3:19-cv-01068-SB, 2020 WL 363389, at *2 (D. Or. Jan. 22, 2020) (applying purposeful direction test to fraud claims against individual corporate officer); *Ott v. Mortgage Investors Corp. of Ohio*, 65 F. Supp. 3d 1046, 1056-57 (D. Or. 2014) (rejecting

application of "fiduciary shield doctrine" and finding officers and directors purposefully directed actions toward Oregon and subject to personal jurisdiction for telemarketing violations).

B. Analysis

The parties first dispute whether Martorello's alleged actions on behalf of various companies are attributable to him personally and are relevant to the court's jurisdictional analysis. Martorello argues that Smith interacted solely with tribal entities Big Picture and Ascension, entities that were determined to be "arms of the Tribe" by the Fourth Circuit in *Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019). According to Martorello, he is not an owner, controller, or participant in either Big Picture or Ascension, and those entities' actions, with respect to Smith, cannot be attributed to him. Martorello contends that only his individual actions are relevant to the court's personal jurisdiction consideration because the Fourth Circuit determined that Big Picture and Ascension were entitled to sovereign immunity.

Smith responds that Martorello wrongly relies on the Fourth Circuit's decision. He argues that the Fourth Circuit's decision concerned only whether Big Picture and Ascension enjoyed sovereign immunity, that it was premised on an inadequate factual record, and that it did not evaluate Smith's allegations against Martorello. Smith's analysis is correct. In a recent opinion, Judge Payne found that Martorello made misrepresentations that affected that court's analysis of sovereign immunity and casts doubt on the Fourth Circuit's decision, which similarly relied on those misrepresentations. *Williams v. Big Picture*, 2020 WL 6784352, at *12-14.

Smith additionally asserts that he filed the Amended Complaint in this case on January 17, 2020, and it includes evidence that was not before the Fourth Circuit. He contends this evidence shows that Martorello exercised control over all aspects of the lending scheme and he alleges that Martorello acted as the mastermind behind the entire lending enterprise from inception, providing

the Tribe the entire Big Picture lending platform. Smith alleges that Martorello arranged a corporate restructuring and sale of Bellicose to the Tribe to use the cloak of sovereign immunity to insulate himself from state usury laws. He further asserts that Martorello purposefully designed the lending operation to give the appearance of tribal control while maintaining pervasive control over Big Picture's internal affairs and daily operations, all to avoid federal and state licensing and lending laws. The court finds that Smith has provided the court sufficient basis to disregard the corporate form. *Ott,* 65 F. Supp. 3d at 1056-57; *D. Brutke's Victory Hill's, LLC v. Tutera*, Case No. 3:12-cv-01951-SI, 2013 WL 3818146, at *4 (D. Or. July 22, 2013) (discussing that corporate shield doctrine does not protect corporate officers where the "corporate form could be disregarded for liability purposes") (citing *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 520 (9th Cir. 1989); *Transgo, Inc., v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1021 (9th Cir. 1985) ("A corporate officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf.") (internal quotation omitted). Therefore, the court will consider the totality of the Defendants' actions, including those of the Settled Parties, in assessing the court's personal jurisdiction over Martorello.

1. purposeful direction

To determine whether a defendant purposefully directed its tortious activity toward the forum state, the court applies the "effects test" from *Calder*. *Schwarzenegger*, 374 F.3d at 803. Under this test, a defendant must have: "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002).

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a. intentional act

The "intentional act" required under the first prong refers to actions taken by the defendant that demonstrate the "intent to perform an actual, physical act in the real world." *Picot*, 780 F.3d at 1214; *Schwarzenegger*, 374 F.3d at 806. This prong does not require showing the defendant intended the action to accomplish a result or consequence in the forum. *Schwarzenegger*, 374 F.3d at 806 (placing advertisement in newspaper an intentional act); *Rio Props, Inc., v. Rio Int'l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2002) (operating passive website an intentional act); *Dish Network, LLC v. Jadoo TV, Inc.*, Case No. CV 18-9768 FMO (KSx), 2020 WL 6536659, at *5 (C.D. Cal Mar. 16, 2020) (operating servers and domain name and uploading content intentional acts).

Smith alleges that Martorello violated Oregon's consumer protection laws by creating an online lending scheme that would intentionally charge consumers usurious interest rates. He alleges that Martorello then offered loans at usurious rates. Martorello committed intentional acts by operating a lending scheme that included sending emails to Smith, calling Smith, and depositing and withdrawing money from Smith's Oregon bank account. (Am. Compl. ¶ 26.) *Ott*, 65 F. Supp. at 1057 (finding individual officers knew or should have known that telemarketing scheme would cause harm in Oregon).

b. expressly aimed

The second prong examines whether the defendant engaged in conduct "expressly aimed at the forum state." *Schwarzenegger*, 374 F.3d at 805. The court analyzes the nature of the wrongful conduct and whether the defendant expressly aimed the conduct at residents in the forum state. *Climax Portable*, 2020 WL 1304487, at *2.

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Martorello again contends that Smith has failed to demonstrate that he expressly aimed any conduct at Oregon, because the acts at issue were those of the Tribe's lending businesses performed on the reservation by a Tribal legislative government. Martorello's arguments are not supported by any declarations, only his allegation that others, Big Picture and Ascension, committed the challenged actions. The court disagrees.

Smith has made a prima facie showing of jurisdictional facts. He alleges that Martorello knowingly and intentionally created Bellicose and Red Rock in 2011, and structured the lending operation to ensure his control of all aspects of the lending business. (Am. Compl. ¶ 45.) The Declaration of Joette Pete shows that Martorello approached the Tribe and explained that his company would run the entire business if it allowed him to contend that LVD tribal law applied to the loans. (Am. Compl. Ex. 15.) After other court rulings held that state law, not tribal law, applied to the loans similar to those Smith alleges here, Martorello restructured the lending enterprise to conceal his role, to evade regulators, and to attempt to shelter behind the Tribe's immunity. (Am. Compl. ¶¶ 58-79.) Smith alleges that without Martorello and Eventide continuing to operate as the servicer for the loans, the entire enterprise would cease to exist. (*Id.* at Ex. 31, ECF. No. 100-3 at 82) ("[I]f the Borrower was to cut [SourcePoint Virgin Islands] out of the picture, then you simply cannot perform as a business.")

Smith also alleges that Martorello continued to control the lending enterprise's advertising and marketing after the restructuring, including by specifically targeting Oregon consumers. (Am. Compl. ¶ 98) ("Through their supervision and control over advertising and marketing, Defendants targeted Oregon consumers for their lending practices, including the loans to Mr. Smith"). Indeed, Smith has shown that Martorello maintained control over the states in which he continued to lend. (*Id.* at Ex. 31, ECF. No. 100-3 at 82) ("They also won't lend if you're lending

in states that get them in trouble or you are too high risk of their collateral or them getting sued." And, [i]n this term sheet, RRTL . . . is required to use a certain servicer, and the lender gets to determine which states RRTL can lend in.") An email between lawyers for the Tribe and Martorello acknowledged that if Eventide maintained control over "which states RRTL can lend in," that could expose them to "rent-a-tribe" liability, as had been found in the *Gingras* litigation. (*Id.*, ECF No. 100-3 at 83.) Moreover, the lawyer questioned the wisdom of putting the arrangement in writing. (*Id.*) (observing that "it is highly unlikely any potential plaintiff could get their hands on this document, but I am wondering whether that is a risk we are willing to take given the recent case in Vermont.") Martorello insisted that if SourcePoint VI, which would eventually become Ascension, was cut out of the picture, the business would fail, and he threatened – "take it or leave it" – that he would not lend if he and Eventide did not have control over the states in which the lending occurred. (*Id.*)

Contrary to Martorello's contentions, Smith has made a prima facie showing that he actively and expressly aimed his conduct at Oregon. Smith has pleaded that Martorello personally participated in structuring the scheme to retain control over where and how the lending operation did business. *See Brice v. Plain Green*, 372 F. Supp. 3d at 980 (finding individual officer personally directed his conduct at California by helping to design the financial and operational structure of the rent-a-tribe lending scheme, played a critical role in finding a banking partner, and personally acted as the liaison between the Tribe and the servicer).

In the Amended Complaint, Smith alleges that after filling out information online, a Big Picture representative contacted him and provided information, and the loan monies were immediately deposited in his Oregon bank account, thus sufficiently showing that defendants knew they were loaning money to an Oregon resident. And, Smith alleges that at one point defendants

had made approximately 411 loans to Oregon borrowers totaling $338,131.25. (Am. Compl. ¶ Ex 2).

Smith has demonstrated Martorello's intimate involvement in creating a turnkey lending operation that he then pitched to the Tribe, and which ensured his continued personal control and profit. (Am. Compl. Ex. 18.) The purpose of the scheme and its result shows that Martorello targeted Oregon residents, including Smith. *Pennsylvania ex rel. Shapiro v. Think Finance, Inc.*, Case No. 14-cv-7139, 2018 WL 637656, at *5-6 (E.D. Pa. Jan. 31, 2018) (holding court had personal jurisdiction over individual defendants who structured the rent-a-tribe scheme, and controlled where payday loans were made, including Pennsylvania); *Gingras v. Rosette*, Case No. 5:15-cv-101, 2016 WL 2932163, at *11 (D. Vt. May 18, 2016) (finding personal jurisdiction over individual defendants who "provided leadership, underwriting, marketing, and servicing" of tribal loan operation), *aff'd sub nom Gingras v. Think Fin. Inc.*, 922 F.3d 112 (2d Cir. 2019). Smith has sufficiently alleged Martorello restructured the entire lending enterprise to ensure his control and that he rejected the suggestion to loosen his grip on where the scheme could operate. Thus, Smith has alleged Martorello was an active participant in the lending scheme that expressly aimed its conduct at Oregon.[5]

c. foreseeable harm

The final prong of the *Calder* effects test is whether defendant's actions "cause harm that it knew was likely to be suffered in the forum." *Yahoo*, 433 F.3d at 1206. "The touchstone is

[5] That Martorello performed these acts outside of Oregon is of no moment, because his actions connect him to Oregon in a meaningful way. *See, e.g., Ott*, 65 F. Supp. 3d at 1057 (finding plaintiffs pleaded sufficient facts to show that conduct was expressly aimed at Oregon, and facts showing personal participation by individual defendants to state claim for telemarketing violations); *Shapiro v. Think Finance*, 2018 WL 637656, at *6 (citing *Walden*, 134 S. Ct. at 1125).

not the magnitude of the harm, but its foreseeability." *Id.* at 1207. Foreseeable harm exists when a jurisdictionally sufficient amount of harm is suffered in the forum state. *Id.*; *Dole Food*, 303 F.3d at 1113 (noting the Ninth Circuit has "not decide[d] whether the effects test requires that the brunt of the harm have occurred within the forum state, or merely that some significant amount of harm have occurred there.") Under either showing, Smith has sufficiently alleged that Martorello knew his conduct was likely to cause harm in Oregon.

Smith alleges that Martorello engaged in consumer protection violations intentionally to avoid Oregon's usury laws, thereby allowing him to make more money through loans such as the one offered to Smith. Smith has presented evidence, which Martorello does not challenge, that at one point 411 such loans, totaling a value of nearly $340,000 in principal, interest, and fees were outstanding in Oregon. (Am. Compl. Ex. 2.) It is entirely foreseeable that consumers in Oregon would be harmed by Martorello's actions, and the court finds Smith has demonstrated that Martorello purposefully directed his actions Oregon.

Alternatively, the court finds that Smith has made a prima facie showing that Martorello purposefully availed himself of the privilege of conducting activities in Oregon. Smith alleges that Martorello controlled the states in which Big Picture marketed loans, that a Big Picture lending representative contacted him via telephone to discuss the loan, and that Big Picture deposited the loan into his Oregon bank account. Big Picture, under Martorello's direction, then withdrew money and usurious amounts of interest from Smith's Oregon bank account twice monthly between January and April 2018. Smith alleges that Martorello, through Big Picture and the lending scheme, processed at least 411 other loans in the same way. And, Smith alleges that Martorello engaged in this conduct for the express purpose of evading Oregon's usury, lending, and consumer protection laws. These bi-monthly withdrawals from Smith's bank account, and

scores of others, are not simply routine contacts but instead are specific actions undertaken by Martorello and the companies he is alleged to control. Thus, the court finds Smith has made a prima facie showing that Martorello purposefully availed himself of conducting activities within Oregon. *See Climax Portable*, 2020 WL 1304487, at *3-6 (holding individual defendants purposefully availed themselves of conducting activities in Oregon); *see also Walden v. Fiore*, 571 U.S. 277, 285 (2014) ("the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over [them].").

2. forum-related activities

The second prong of the specific jurisdiction test requires a plaintiff's claims arise out of or relate to the defendant's forum-related activities. *Schwarzenegger*, 374 F.3d at 802. Here, Smith's claims for consumer protection law violations, RICO, and unjust enrichment are related to Martorello's forum-related activities. Smith alleges that he applied for the loan in Oregon by accessing Big Picture's website. In response, Defendants' representative called Smith in Oregon and the deposited money in Smith's Oregon bank account; Smith later repaid the loan with the allegedly excessive interest and fees from his Oregon bank account. Thus, Smith has adequately alleged that his claims arise from Martorello's forum-related activities.

3. exercise of jurisdiction is reasonable

Having satisfied the other requirements for specific jurisdiction, the court addresses whether exercising jurisdiction over Martorello is reasonable. *Schwarzenegger*, 374 F.3d at 802. Ultimately, personal jurisdiction must "comport with fair play and substantial justice." *Burger King*, 471 U.S. at 476. To avoid personal jurisdiction, Martorello "must present a *compelling* case

that the presence of some other considerations would render jurisdiction unreasonable." *Id.* at 477 (emphasis added); *Schwarzenegger*, 374 F.3d at 802.

The court balances seven factors: (1) the extent of the defendants' purposeful injection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Freestream Aircraft*, 905 F.3d at 607. Martorello fails to satisfy this heavy burden.

Purposeful injection. Although Martorello's lending enterprise is located outside of the state, the lending scheme's effects were felt inside Oregon. The lending enterprise reached into Smith's Oregon bank account to deprive Smith and others of hundreds of thousands of dollars in principal, interest, and fees. This factor favors Smith.

Burden on defendant. Martorello offers no argument that litigating in Oregon presents an unreasonable burden. The court finds that the burden of traveling to Oregon is minimal in the context of governing precedent on this point. *See, e.g., Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988) ("[M]odern advances in communications and transportation have significantly reduced the burden of litigating in another country"). This factor favors Smith.

Conflict with sovereignty. Martorello argues that the court's exercise of personal jurisdiction is unreasonable because of the "legitimate tribal and federal interests at stake," and because of the "federal policy in support of commercial dealings with non-Indians[.]" (Martorello Reply at 16, ECF No. 123.) This argument is unconvincing. As other courts have observed, there is no legitimate tribal interest in offering usurious loans to individuals off-reservation. *Otoe-*

Missouria, 769 F.3d at 114 ("a tribe has no legitimate interest selling an opportunity to evade state law"); *see also Gingras v. Think Finance*, 933 F.3d at 124 (holding that sovereign immunity cannot be used to shield tribal officials to "violate state laws with impunity"). Martorello cites no sovereignty interest held by Texas. Thus, this factor favors Smith.

Oregon's interest. Oregon's interest in protecting its residents and enforcing its usury laws far outweighs any inconvenience to Martorello in defending this action. *See Brice v. Plain Green*, 372 F. Supp. 3d at 981 (holding California has significant interest in protecting its low-income consumers from high interest loans); *Shapiro v. Think Finance*, 2018 WL 637656, at *5-6 (denying motion to dismiss for lack of personal jurisdiction). This case deals with alleged fraudulent lending activity occurring within Oregon, and specifically orchestrated to avoid Oregon's laws prohibiting such conduct. This factor weighs heavily in favor of Smith.

Efficient resolution. The court is aware of multiple other similar cases pending in the Eastern District of Virginia. There has been no difficulty in coordinating discovery and motions practice with those other cases and, notably, Martorello does not suggest consolidating this case with the Virginia cases. Further, much of the evidence relevant to this case is in Oregon, making inefficient the resolving of this cases in another state.

Convenience to Plaintiff. Smith filed his case in Oregon, which provides a more convenient forum in which to obtain relief, and his actions in the disputed events occurred in Oregon. This factor favors Smith.

Alternative forum. Martorello offers no argument to explain how an alternative forum is more convenient.

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4. conclusion

Martorello has failed to present a compelling case that exercising personal jurisdiction is unreasonable. Specific jurisdiction is appropriate and his motion to dismiss for lack of personal jurisdiction should be denied.

C. RICO Jurisdiction

Smith argues that § 1965(b) provides a separate and independent basis for personal jurisdiction over Martorello. Under 18 U.S.C. § 1965(b), a district court may exercise personal jurisdiction over non-resident participants in an alleged RICO conspiracy, even if those parties otherwise would not be subject to the court's jurisdiction, if "the ends of justice" so require. The "ends of justice" provision permits a court, consistent with the purpose of the RICO statute, to "enable plaintiffs to bring all members of a nationwide RICO conspiracy before a court in a single trial." *Butcher's Union Local No. 498, United Food & Comm. Workers v. SDC Inv., Inc.*, 788 F.2d 535, 538 (9th Cir. 1986). A court may exercise personal jurisdiction through the "ends of justice" provision if a plaintiff shows: (1) the court has personal jurisdiction over at least one of the participants in the alleged multi-district conspiracy; (2) there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators; and (3) the facts show a single nationwide RICO conspiracy exists. *Id.* at 539; *Doe v. Walmart Inc.*, Case No. 18-cv-02125-LHK, 2019 WL 499754, at *6 (N.D. Cal. Feb. 8, 2019).

Martorello challenges this court's personal jurisdiction under § 1965(b) by citing two other districts wherein the Defendants would all be subject to personal jurisdiction — the Northern District of Texas or the Western District of Michigan. (Martorello Reply at 18-19.) Martorello also argues that Smith fails to adequately allege a single nationwide conspiracy.

The court already has determined that Smith has adequately asserted specific jurisdiction over Martorello and, as explained below, the court finds that Smith has adequately alleged a nationwide RICO conspiracy. Thus, the "ends of justice" RICO jurisdiction turns on whether Smith can demonstrate that there is no other district in which a court will have personal jurisdiction.

The court concludes that Smith has not satisfied his burden to demonstrate no other district presently would have personal jurisdiction over the alleged co-conspirators. As noted, the Eastern District of Virginia has several pending lawsuits against Martorello and Eventide alleging similar consumer protection and RICO violations arising out of the lending enterprise, and all defendants here appear to be subject to the Eastern District of Virginia's jurisdiction. Although Martorello has renewed his Motion to Dismiss for Lack of Personal Jurisdiction in *Galloway I*, (Martorello Renewed Mot. Dismiss Pursuant to Rule 12(b)(2), Case No. 3:18-cv-406-REP, ECF Nos. 410 & 411), the court finds jurisdiction pursuant to § 1965(b) is not appropriate at this juncture. Therefore, on that limited basis only, Martorello's motion should be granted, and Martorello's Rule 12(b)(2) motion should be denied on all other grounds.[6]

II. Failure to State a Claim

Martorello moves to dismiss Smith's claims, contending LVD law governs them, by as set forth in the Loan Agreement. Martorello asserts that Smith's claims fail because the interest rate charged on Smith's loan is lawful under LVD law. Martorello further argues that Or. Rev. Stat. § 82.010 fails to provide a private right of action, that no RICO conspiracy exists, that LVD law precludes Smith's unjust enrichment claim, and that Smith's requests for declaratory and

[6] If the Eastern District of Virginia determines it lacks personal jurisdiction over Martorello, this court may reconsider this jurisdictional basis.

injunctive relief are not viable because Martorello has no ownership interest in Big Picture. Smith responds that the choice of law and forum selection clauses are unenforceable, and that he has adequately pleaded claims for relief.

A. The Choice of Law and Forum Selection Clause is Unenforceable

Martorello argues that the choice of law provision in the Loan Agreement governs all disputes arising out of the agreement and, because it and LVD law, not Oregon or federal law, applies here, the case should be dismissed. Martorello insists that LVD has a substantial interest in the consumer loan because Smith entered the loan transaction via tribal servers located on the reservation. Martorello argues that Big Picture is the true lender and that LVD has a substantial interest in the consumer loans at issue in this action, and that interest prevails over Oregon's potential interest. Martorello further argues that the choice of law provision is not an impermissible prospective waiver.

In his first claim, Smith seeks declaratory and injunctive relief, asking the court to invalidate the choice of law, forum selection, class action waiver, and dispute resolution provisions in the Loan Agreement. Smith argues that the boilerplate choice-of-law provisions purporting to apply Tribal law are unenforceable for three reasons: (1) tribal law cannot regulate matters involving non-tribal matters off reservation; (2) the choice of law provision is a prospective waiver and thus unconscionable; and (3) application of Oregon law is required under Oregon's choice of law principles. Smith is correct.

"A motion to enforce a forum selection clause is treated as a motion to dismiss pursuant to Rule 12(b)(3)." *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (per curium); *Mil-Ray v. EVP Int'l LLC*, Case No. 3:19-cv-00944-YY, 2020 WL 3317931, at *11 (D. Or. Mar. 17, 2020). In resolving Rule 12(b)(3) motions based on forum selection clauses, the "'trial court must draw

all reasonable inferences in favor of the nonmoving party and resolve all factual conflicts in favor of the nonmoving party.'" *Mil-Ray*, 2020 WL 3317931 at *11 (quoting *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004)).

Forum selection clauses are presumptively valid in disputes arising out of a contract. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972); *Gemini Techs, Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 914 (9th Cir. 2019); *accord Atlantic Marine Constr. Co. v. U.S.D.C. for W. D. of Texas*, 571 U.S. 49, 63 (2013) (providing that forum selection clauses should be given controlling weight "in all but the most exceptional cases"). Courts apply federal contract law "to interpret the scope of a forum-selection clause." *Doe 1 v. AOL*, 552 F.3d at 1081; *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). "In interpreting a forum-selection clause under federal law, we look for guidance to general principles for interpreting contracts." *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir. 2018) (internal citations and quotations omitted); *see also IntelliCAD Tech. Consortium v. Suzhou Gstarsoft Co. Ltd.*, 465 F. Supp. 3d 1130, 1137 (D. Or. 2020) (noting that federal contract law applies to enforcement of forum selection clause in diversity and federal question cases).

Smith's Amended Complaint falls within the forum selection clause's scope, and Smith does not contend otherwise. The Loan Agreement's choice of law provisions state:

> **GOVERNING LAW AND FORUM SELECTION:** 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 Code as well as applicable federal law. *All disputes shall be solely and exclusively resolved pursuant to the Tribal Dispute Resolution Procedure set forth in Section 9* of the code and summarized below for Your convenience.
>
> **SOVEREIGN IMMUNITY:** This Agreement and all related documents are being submitted by You to Big Picture Loans, LLC at its office on Tribal land. The Lender is an economic development arm, instrumentality, and limited liability company wholly owned and operated by the Tribe. . . . .

> **PRESERVATION OF SOVEREIGN IMMUNITY:** It is the express intention of the Tribe and Lender, operating as an economic arm-of-the-tribe, to fully preserve, and not waive either in whole or in part, exclusive jurisdiction, ... including the sovereign immunity of the Tribe and Lender. . . . .
>
> * * * *
>
> **TRIBAL DISPUTE RESOLUTION PROCEDURE:** The Tribe has established a Tribal Dispute Resolution Procedure (the "Procedure") to review and consider any and all types of complaints made by You or on your behalf *relating to or arising from this Agreement*. . . . .

(Am. Compl. Ex. 1, ECF No. 100-1 at 5) (italics added). The Loan Agreement also includes jury trial and a class action waivers. (*Id.*)

The forum selection clause and dispute resolution procedure provision explicitly provide that "[a]ll disputes shall be solely and exclusively resolved pursuant to the Tribal Dispute Resolution Procedure set forth in Section 9" and that the Tribe's dispute resolution procedure is to consider "any and all type of complaints . . . relating to or arising from this Agreement." (*Id.*) Thus, the forum selection clause is designed to do apply to all claims that are logically or causally related to the Loan Agreement. *See Advanced China Healthcare*, 901 F.3d at 1086-87 (finding phrase "related to" encompassed fraud claims based on share purchase agreements); *IntelliCAD*, 465 F. Supp. 3d at 1141 (holding phrase "arising out of" and "relating to" the agreement were covered by forum selection clause). Because Smith's RICO, unjust enrichment, and consumer protection claims are logically related to his Loan Agreement with Big Picture, the court finds they are subject to the forum selection clause. *Advanced China Healthcare*, 901 F.3d at 1086-87; *IntelliCAD*, 465 F. Supp. 3d at 1141.

Smith makes no direct challenge to the forum selection clause and choice of law provision, instead arguing it is unenforceable. Generally, forum-selection clauses are enforceable unless the

plaintiff makes "a strong showing that: (1) the clause is invalid due to 'fraud or overreaching,' (2) 'enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision,' or (3) 'trial in the contractual forum will be so gravely difficult and inconvenient that [the litigant] will for all practical purposes be deprived of his day in court.'" *Advanced China Healthcare*, 901 F.3d at 1088 (citing *Bremen*, 407 U.S. at 18) (alterations in *Advanced China Healthcare*); *Gemini*, 931 F.3d at 915. Smith readily makes this showing on each *Bremen* exception, any one of which renders the forum selection clause unenforceable. *Salesforce.com, Inc. v. GEA, Inc.*, No. 19-CV-01710-JST, 2019 WL 3804704, at *6 (N.D. Cal. Aug. 13, 2019) (noting satisfying any single *Bremen* factor is sufficient to render forum-selection clause unenforceable).

Turning to the first *Bremen* exception, Smith has made a strong showing that the Loan Agreement was entered through fraud and overreaching. "To establish the invalidity of a forum selection clause on the basis of fraud or overreaching, the party resisting enforcement must show that 'the inclusion of that clause in the contract was the product of fraud or coercion." *Petersen v. Boeing Co.*, 715 F.3d 276, 282 (9th Cir. 2013) (internal quotation and citation omitted). Smith alleges he applied for the loan online and was pressured to digitally sign the loan during a telephone call before he had an opportunity to review the documents. (Am. Compl. ¶¶ 29-32.) Smith also alleges that the person on the phone did not explain the documents, did not mention the 527.5 percent interest rate, and did not disclose that he would be giving up his rights under Oregon law. (*Id.*) These facts imply that Smith also was not informed during the phone call that if he did not agree to the forum selection and choice of law clauses, his loan application would be denied.

Indeed, it is the inclusion of the forum selection and choice of law clauses that constitute the alleged fraud. In the Amended Complaint, Smith alleges the entire purpose of the forum

selection clause is to ensure that LVD law with its attendant 699 percent interest rate cap applies to the Loan Agreement instead of Oregon's twelve percent cap. These allegations are sufficiently specific to survive Martorello's motion to dismiss at this juncture, and if there are evidentiary questions whether Smith was induced or unfairly pressured to agree to the forum selection clause, those fact questions are not appropriate for resolution on a motion to dismiss. *See Petersen*, 715 F.3d at 283 (stating it is abuse of discretion to dismiss on basis of forum selection clause without holding an evidentiary hearing to assess whether fraud or overreaching occurred). Smith satisfies the first *Bremen* exception.

Under the second *Bremen* exception, Smith makes a strong showing that Oregon public policy prohibits enforcement of the forum selection clause. *Gemini*, 931 F.3d at 916 ("[S]atisfaction of *Bremen's* public policy factor continues to suffice to render a forum-selection clause unenforceable."). Smith identifies statutory authority and case law that clearly state Oregon's public policy against usury. *See* OR. REV. STAT. § 82.010 (providing that persons who charge interest in excess of twelve percent "forfeit the right to collect or receive any interest" and are limited to collection of the principal amount borrowed); *Fidelity Sec. Corp v. Brugman*, 137 Or. 38, 50 (1931) ("The courts do not permit any shift or subterfuge to evade the law against usury."); *Pacific Bldg. Co. v. Hill*, 40 Or. 280, 294 (1901) (holding that contract entered for the purpose of evading Oregon usury laws was "contrary to the declared policy of the state" and "cannot receive the sanction of this court."). Smith thus demonstrates that enforcement of the LVD forum selection clause here would contravene Oregon's public policy.

Smith also satisfies the third *Bremen* exception. The Ninth Circuit has explained that "courts must enforce a forum-selection clause unless the contractually selected forum affords the plaintiffs no remedies whatsoever." *Advanced China Healthcare*, 901 F.3d at 1092. The court

explained that "'the fact that *certain types of remedies* are unavailable in the foreign forum does not change the calculus if there exists a basically fair court system in that forum that would allow the plaintiff to seek some relief." *Id.* (italics in original) (citing *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 774 (5th Cir. 2016)). Martorello contends that Smith's remedies under the Tribal Dispute Resolution ("TDR") process are not entirely foreclosed, and therefore, forum selection clause is valid. The Loan Agreement and the LVD law and processes to which it refers combine to effectively foreclose Smith's rights if the court enforced the forum selection clause.

Although the "governing law" section in the Loan Agreement provides that both LVD law and "applicable federal law" will govern disputes arising out of the Loan Agreement, the "waiver of jury trial" section provides that any claims against Big Picture and related third parties "shall be resolved" by the TDR procedures set out in the LVD code. (Am. Comp. Ex. 1 at 5) (providing that borrower is giving up right to jury trial for any dispute against "US OR RELATED THIRD PARTIES" and that "NO LITIGATION OR ARBITRATION IS AVAILABLE AND NO JUDGE OR ARBITRATOR SHALL CONDUCT CLASS PROCEEDINGS".) Indeed, Smith's Loan Agreement specifically provides "all disputes arising out" of the Loan Agreement will be determined by the TDR procedure, and that Smith is bound "solely by the [TDR] procedure" found in the LVD Tribal Financial Services Regulatory Code ("TFSRC"). (Am. Compl. Ex. 1 at 5 (providing that TFSRC is available at www.lvdtribal.com.) Thus, to the extent there is any relief at all, it lies within the TDR process, and relief under the TDR procedures is illusory.

Section 9 of the TFSRC sets out the consumer dispute resolution procedures. It provides that the Licensee (Big Picture here, defined as those licensed by the Authority, § 2.3) will gather information and facts about the dispute and respond to the borrower within thirty days. TFSRC § 9.2. Borrowers unhappy with the proposed resolution can request review by the Authority

(defined as an independent governmental tribal subdivision with sovereign immunity, § 4.1) within ninety days of the Licensee's determination. TFSRC § 9.3. The Authority will investigate the dispute "in any manner it chooses" and "may" request a response from the Licensee:

> Authority may also request additional documentation or information from the consumer or Licensee, conduct interviews as needed, require sworn statements, or take other action necessary or advisable to make its determination. A failure to respond to a request by the Authority may result in a default pursuant to Section 9.3(j).

TFSRC § 9.3(c). Further, the Authority "may" grant a borrower's request for an administrative review hearing, TFSRC § 9.3(e), and if so, the Authority will conduct the hearing and issue a written decision in which it "may grant or deny any relief to the Consumer as the Authority determines appropriate." TFSRC §§ 9.3(f)-(h).

The TDR's language gives no guarantee to an aggrieved borrower of a set process or procedure. To the contrary, the permissive language that permeates the TDR gives the Authority broad and virtually unlimited discretion to decide how it will investigate a claim. Notably, the TDR contains no standard that governs how an investigation is conducted or guides determination whether relief shall be granted or denied.

Appeals from the Authority's decision are taken to the Tribal Court, the procedures of which fare little better when examined. TFSRC § 9.4. On appeal, if the Tribal Court determines that the Authority's conclusions of law "conflict with Tribal law or the Tribal Constitution, the Tribal Court shall reverse and remand the Authority's decision," TFSRC § 9.4(f)(4), but the Tribal Court's opinion and order is not appealable. TFSRC § 9.4(g). Furthermore, LVD law provides that personal loan transactions issued pursuant to the TFSRC may carry an annual percentage rate of up to 699 percent. TFSRC § 11.1(b). Thus, even if the Authority or the Tribal Court were to agree with Smith that the 527.5 percent interest rate charged by Big Picture is too high, the Tribal

Court has no discretion to charge less because that rate is within the 699 percent cap provided in its code, an unappealable determination. *See Gibbs v. Sequoia Capital*, 966 F.3d at 293 (holding the forum selection clause an unenforceable prospective waiver because it "prevent[s] claimants from vindicating a RICO claim for treble damages against entities and individuals like the Sequoia Defendants"). Smith, therefore, has no viable way to challenge the usurious interest rate charged on his loan.

The Loan Agreement also specifically waives any federal rights Smith may possess. Although Licensees are to comply with certain federal statutes, RICO is not among the applicable laws mentioned. TFSRC § 6.1. And, the summary of the TDR procedures provided in the Loan Agreement, states that a complaint sent to the lenders is considered but "without waiver of sovereign immunity and exclusive jurisdiction and does not create any binding procedural or substantive rights for a petitioner." (Am. Compl. Ex. 1 at 5.) This language is the very definition of an illusory promise.

When examining the TDR procedures in Section 9, their interplay with the TFSRC, and the governing law and forum selection provisions in the Loan Agreement, it becomes clear that Smith is effectively left without any remedies whatsoever. Because the TDR procedures and the TFSRC operate to eliminate any forum that would allow Smith some relief, the court finds that the third *Bremen* exception is satisfied and, thus, that the forum selection clause is unenforceable.[7]

[7] This finding is supported by numerous other courts' rejection as unenforceable prospective waivers similar tribal choice of law provisions in online payday loans agreements. *See, e.g., Gibbs v. Haynes Investments*, 967 F.3d at 341-42 (choice of law provision in online payday loan providing tribal law controls unenforceable prospective waiver); *Williams v. Medley Opportunity Fund II, LP,* 965 F.3d 229, 240-41 (3d Cir. 2020) (arbitration agreement and delegation clause in online payday loan providing tribal law applied and requiring arbitration unenforceable under prospective waiver doctrine); *Jackson v. Payday Fin. LLC*, 764 F.3d 765, 778, 783 (7th Cir. 2014) (choice of law provision applying tribal law and requiring arbitration to online payday loan

Smith also contends the court should disregard the forum selection clause and governing law provisions in the Loan Agreement for public policy reasons. Tribal court jurisdiction is limited, he argues, and tribal law does not govern non-Tribe members who enter commercial loans off-reservation. The court has concluded that Smith has satisfied all three *Bremen* exceptions, thus making unenforceable the forum selection clause and choice of law provision. Smith's public policy argument, however, is supported by recent case law from other jurisdictions that have addressed similar tribal payday loans, and provides additional persuasive authority to support the court's conclusion here.

Generally, tribes do not have authority over non-Indians who come within their borders. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008); *Montana v. U.S.*, 450 U.S. 544, 565 (1981) ("[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."). However, "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565. In *Montana*, the Supreme Court recognized two circumstances in which tribal civil jurisdiction extends to non-members: (1) "A tribe may regulate, through

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procedurally and substantively unconscionable and unenforceable); *Dillon v. BMO Harris Bank, N.A*, 856 F.3d 330, 335 (4th Cir. 2017) (choice of law provision requiring application of Oto-Missouria tribal law and requiring arbitration under tribal law to online payday loan unenforceable); *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 674-75 (4th Cir. 2016) (arbitration provision and forum selection clauses applying tribal law in online payday loan agreement unenforceable); *Hengle v. Asner*, 433 F. Supp. 3d at 857 (prospective waiver of federal and state statutory remedies in favor of tribal law in forum selection clause rendered online payday loan unenforceable); *Brice v. Plain Green*, 372 F. Supp. 3d at 982 (choice of law provisions requiring tribal law in online payday loan contract unenforceable prospective waivers of statutory rights); *Titus v. ZestFinance, Inc.*, 2018 WL 5084844, at *5 (W.D. Wash. Oct. 18, 2018) (forum selection clause and choice of law clauses requiring tribal law application unenforceable prospective waivers in online payday loan agreements), *appeal dismissed as district court decision vacated as moot by Titus v. Blue Chip Fin.*, 786 F. App'x 694 (9th Cir. 2019).

taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," and (2) "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66. These apply when necessary to protect tribal self-government. *Id.* at 564.

Smith correctly points out that the loan at issue here was not issued to promote tribal self-governance. Rather, he alleges it is part of an illegal lending enterprise Martorello designed to avoid having to comply with federal and state usury laws and licensing requirements. Moreover, Smith did not engage in any activity on tribal lands: he did not apply for, negotiate, or execute the loan documents on the reservation; he accessed them from a website and then made payments on the loan from Oregon, through twice-monthly automatic debits from his Oregon bank account. Smith's "activities do not implicate the sovereignty of the tribe over its land and its concomitant authority to regulate the activity of nonmenbers on that land," and, therefore "the tribal courts do not have jurisdiction" over Smith's claims. *Jackson v. Payday Financial*, 764 F.3d at 782-84 (forum selection clause in payday loan designating tribal resolution unenforceable because tribe did not have colorable jurisdiction over nonmembers where loans executed off-reservation); *Hengle v. Asner*, 433 F. Supp. 3d 825, 861-62 (tribe had no colorable claim of jurisdiction over plaintiffs' claims in payday lending scheme where plaintiffs "obtained, negotiated and executed their loans from their residences in Virginia through websites maintained by companies in Kansas," far from California reservation). Thus, Smith's Loan Agreement identifying LVD law as governing the agreement is insufficient "to establish the jurisdiction of a tribal court." *Jackson v. Payday Financial*, 764 F.3d at 783.

Smith's RICO claim against Martorello individually is based on his role as the architect of the lending enterprise. Smith alleges that Martorello's actions were pursued to benefit him personally and not for the Tribe's benefit. *See Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 661-62 (E.D. Va. 2019) (finding individual not entitled to tribal sovereign immunity in payday lending scheme); *Pennachietti v. Mansfield*, No. CV 17-02582, 2017 WL 6311646, at *2-4 (E.D. Pa. Dec. 11, 2017) (finding manager of tribal lending organization accused of RICO violations and sued in his individual capacity not entitled to sovereign immunity), *appeal dismissed*, 2018 WL 3475602 (3d Cir. Jan. 31, 2018). Thus, the forum selection clause in the Loan Agreement is unenforceable.

3. Oregon law should govern Smith's contract

Martorello argues that the tribal law should be applied to Smith's claims. Smith argues Oregon law governs any disputes about his Loan Agreement. Smith is correct.

Under Oregon law, the court must first determine whether an actual conflict exists and then apply the "most significant relationship" test. *In re Premera Blue Cross Customer Data Security Breach Litig.*, Case No. 3:15-md-2633-SI, 2019 WL 3410382, at *13 (D. Or. July 29, 2019); *Machado–Miller v. Mersereau & Shannon, LLP*, 180 Or. App. 586, 591 (2002) (citing *Lilienthal v. Kaufman*, 239 Or. 1 (1964)). The party advocating application of the law of another forum has the burden to identify material differences between the applicable Oregon law and the law of the other forum. *Waller v. Auto-Owners Ins. Co.*, 174 Or. App. 471, 475 (2001). Martorello fails to meet this burden.

The threshold question, whether an actual conflict exists is answered in the affirmative: Oregon's usury laws cap the chargeable interest rate at twelve percent but, under LVD law, the maximum APR is 699 percent. Next, where an actual conflict exists, the court then must apply

the "most significant relationship" approach set forth in the Restatement (Second) of Conflict of Laws to tort claims. *Spirit Partners, LP v. Stoel Rives LLP*, 212 Or. App. 295, 304 (2007). Applying this test to choice of law disputes in tort cases, the court assesses "which state has the most significant relationship to the parties and the transaction, and [determines] whether the interests of Oregon are so important that we should not apply [another state's] law, despite its significant connection with the transaction." *Stricklin v. Soued*, 147 Or. App. 399, 404 (1997).

Here, Smith negotiated and executed the Loan Agreement from his home in Oregon. Smith performed his obligations under the loan while in Oregon, and his Oregon bank account was debited twice monthly. Thus, Oregon has the most significant relationship to the dispute concerning Smith's Loan Agreement and thus has the greater interest in having its law applied. With respect to Smith's claims and to the extent that Smith seeks to pursue an Oregon subclass, then, the court should apply Oregon law.

In summary, Martorello's motion to dismiss based on the forum selection clause in Smith's Loan Agreement should be denied.

B. RICO Claims

Martorello argues that Smith's RICO claims are deficient as a matter of law on three grounds: (1) Smith lacks standing because his alleged injury is too remote; (2) Smith fails to adequately allege Martorello violated § 1962(c); and (3) Smith fails to allege a RICO conspiracy.

1. Smith has standing to allege a RICO violation

The civil RICO statutes authorize private lawsuits and the award of treble damages against individuals or entities who, through a "pattern of racketeering activity," acquire an interest in, or conduct the business of, an enterprise engaged in interstate or foreign commerce. 18 U.S.C. §§ 1962(b), 1962(c), 1964(d). "Under § 1962(c), it is illegal for any person 'to conduct or participate,

directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity,' where that enterprise affects interstate commerce. It also is illegal for any person to conspire to do so. 18 U.S.C. § 1962(d)." *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 972 (9th Cir. 2008). A pattern of racketeering activity requires two predicate acts of racketeering within a ten-year period. *Id.*

a. injury

Under RICO's civil enforcement mechanism, persons injured "by reason of" a § 1962 violation may sue to recover treble damages and attorney fees. 18 US.C. § 1964(c). To establish standing under § 1964(c), a plaintiff must show: (1) that his alleged harm qualifies as injury to his business or property; and (2) that his harm was "by reason of" the RICO violation, which requires the plaintiff to establish proximate causation. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). The alleged specific injury must be proprietary, as opposed to "personal" or "emotional," and is typically determined by reference to state law. *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc).

Smith adequately alleges an injury by asserting a concrete financial loss: excessive interest and fees paid on his loan. *See Canyon Cty.*, 519 F.3d at 976 ("In the ordinary context of a commercial transaction, a consumer who has been overcharged can claim an injury to her property, based on a wrongful deprivation of her money."); *Ellis v. J.P. Morgan Chase & Co.*, 950 F. Supp. 2d 1062, 1086-87 (N.D. Cal. 2013) (providing deprivation of money is injury to property, satisfies RICO standing); *United States ex rel. Smith v. Peters*, Case No. 2:14-cv-01982-SU, 2018 WL 4441520, at *14 (D. Or. May 3, 2018) (providing inmates stated concrete financial loss by alleging they lost unrestrained use of money). Martorello does not dispute that Smith has suffered an injury to his business or property. Thus, the court finds that the excess interest and fees Smith

incurred readily qualify as an "injury" under § 1965(c). *See, e.g., Gingras v. Rosette*, 2016 WL 2932163, at *29 (finding excessive interest charged on online tribal payday loan constituted injury under RICO).

b. proximate cause

To establish RICO standing, plaintiffs also must plausibly allege that their injury was proximately caused by the defendant's racketeering activity. *Ainsworth v. Owenby*, 326 F. Supp. 3d 1111, 1126-27 (D. Or. 2018); 18 U.S.C. § 1964(c). This means both proximate and but-for causation. *Holmes v. Secs. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992); *Harmoni Int'l Spice, Inc., v. Hume*, 914 F.3d 648, 651 (9th Cir. 2019). "Proximate cause requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Harmoni*, 914 F.3d at 651 (quoting *Holmes*, 503 U.S. at 268.) "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). A plaintiff injured only "indirectly" by a defendant's conduct, such as through harms passed on by a third party, is "generally said to stand at too remote a distance to recover." *Holmes*, 503 U.S. at 268-69. However, a plaintiff need not plead that they are "a victim of the defendant's underlying crime." *Ainsworth*, 326 F. Supp. 3d at 1127 (citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 649-50 (2008)).

The Ninth Circuit applies three factors to determine whether an injury is "too remote:"

> (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.

Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1168-69 (9th Cir.2002) (quotations and citation omitted). These factors are not exhaustive and none are dispositive. *Ainsworth*, 326 F. Supp. 3d at 1127. Rather, the controlling inquiry is "whether the alleged violation led directly to the plaintiff's injuries." *Canyon Cty.*, 519 F.3d at 982.

Martorello argues that Smith cannot establish proximate cause because the Tribe – through Big Picture and Ascension – provided Smith's loan. Martorello contends that based on the Fourth Circuit's analysis in *Williams*, the Tribe operates, controls, and manages the lending companies. *Williams*, 929 F.3d at 175, 185. Martorello also submits that because he sold his interest in Bellicose to Ascension in January 2016, Smith cannot establish that he had any continued involvement in the allegedly illegal lending enterprise at the time he executed the Loan in December 2017. The court disagrees.

As discussed above, Martorello's reliance on the Fourth Circuit's opinion is misplaced. First, additional discovery has occurred, and Smith's Amended Complaint alleges Martorello's personal involvement in the lending enterprise, based on facts not before the Fourth Circuit at the time of its decision. *See generally Williams v. Big Picture*, 2020 WL 6784352 (discussing misrepresentations made by Martorello regarding creating and controlling Red Rock, selling Bellicose to LVD, and creating Big Picture Loans). Second, Smith has sufficiently pleaded that Martorello was intimately involved in creating Big Picture and structuring the sale of Bellicose to Ascension to avoid personal liability, as well as state and federal licensing requirements and usury laws. Third, Smith has pleaded that Martorello designed, operated, and managed the lending scheme, including maintaining at least some control over Big Picture and Ascension. *See Brice v. Plain Green*, 372 F. Supp. 3d at 983 (finding plaintiffs sufficiently alleged individual defendants responsible for creating, funding, and running tribal lending scheme to establish proximate

causation); *Gingras v. Rosette*, 2016 WL 2932163, at 29 (providing plaintiffs sufficiently alleged proximate cause for RICO violation by individual defendants who managed and operated tribal payday lending scheme).

Fourth and finally, Smith adequately alleges that Martorello maintained control over the lending operation as late as 2017, despite converting his debt to equity in the form a Note. Smith alleges that Martorello continued to profit from the scheme for at least three years after the sale of Bellicose. (Am. Compl. ¶¶ 65-75.) The court concludes that Smith has plausibly alleged that Martorello's involvement led directly to his injuries and sufficiently establishes proximate causation for RICO standing.

2. § 1962(c)

To state a § 1962(c) claim, a plaintiff must allege: (i) conduct (ii) of an enterprise (iii) through a pattern (iv) of racketeering activity, and (v) injury in the plaintiffs' business or property by the conduct constituting the violation. *Hellenic Petroleum LLC v. Mansfield Oil Co.*, Case No. 1:19-cv-01071-DAD-SKO, 2020 WL 433084, at *3 (E.D. Cal. Jan. 28, 2020) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)). "The touchstone of [§ 1962(c)] is that each individual defendant must be shown to have personally participated in a pattern of racketeering activity." *Zazzali v. Ellison*, 973 F. Supp. 2d 1187, 1200 (D. Idaho 2013). Here, Smith alleges that Martorello engaged in collecting unlawful debt through the mail and through wire fraud in interstate commerce.

The court readily concludes that Smith has plausibly alleged that Martorello conducted the affairs of an unlawful lending enterprise that engaged in interstate commerce under § 1962(c). Smith alleges that Martorello personally designed and implemented LVD's Tribal lending operation through Big Picture and Ascension. (Am. Compl. ¶¶ 58-59.) Smith alleges that

Martorello was at the heart of lending enterprise, and that it was Martorello who provided Big Picture as a re-branding of Red Rock when Red Rock came under regulatory scrutiny. (*Id.* ¶ 62.) Smith alleges that Martorello nominally put Tribal leaders in control of Big Picture, while he continued to exercise control over the lending enterprise. (*Id.* ¶¶ 77-78.) Smith further alleges Martorello maintained a veneer of Tribal control by agreeing to provide the Tribe with a larger share – two percent to six percent – of the profits. (*Id.* ¶ 68.) All the while, Smith alleges, Martorello insisted upon maintaining control over underwriting, origination, marketing, and servicing the loans. (*Id.* ¶ 60.) These allegations are more than sufficient to plausibly plead that Martorello conducted the enterprise's affairs. (Am. Compl. ¶¶ 149-151, 153-57, 161, 166-68.)

Additionally, Smith plausibly alleges that Martorello personally participated in and directed an enterprise whose sole purpose was to collect illegal debts, thereby personally causing those acts and reaping their benefits. *Brice v. Plain Green*, 372 F. Supp. 3d at 985 (providing plaintiffs plausibly alleged § 1962(c) violation by individual defendants in online tribal lending scheme); *Gibbs v. Haynes Investments*, 368 F. Supp. 3d at 933 (same). Any contention that Martorello simply had a "passive interest" is unavailing, as Smith clearly alleges Martorello was an active personal participant in the alleged illegal scheme. Therefore, Smith plausibly alleges that Martorello participated in the practice of issuing usurious loans, and adequately alleges a § 1962(c) claim. *Gibbs v. Stinson*, 421 F. Supp. 3d 267, 312-13 (E.D. Va. 2019); *Solomon v. Am. Web Loan*, Case No. 4:17-cv-145, 2019 WL 1320790, at *7 (E.D. Va. Mar. 20, 2019) (finding plaintiffs plausibly alleged violations of § 1962(c)). Therefore, Martorello's motion to dismiss on this basis should be denied.

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3. § 1962(d) conspiracy

Section 1962(d) makes it unlawful to conspire to violate any of the other three subsections of § 1962. 18 U.S.C. § 1962(d). To state such a claim, a plaintiff must allege that an individual was "aware of the essential nature and scope of the enterprise and intended to participate in it." *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir.1993) (internal quotation marks and citation omitted). Smith has adequately alleged that Martorello violated § 1962(c), that he actively negotiated with others to continue the illegal scheme, including where illegal loans could continue to be made, and that he benefited from the proceeds. Thus, he has adequately pleaded a conspiracy violation and Martorello's motion to dismiss as to this claim should be denied. *See Brice v. Plain Green*, 372 F. Supp. 3d at 985 (finding plaintiffs adequately pleaded substantive RICO violations in tribal payday lending scheme, therefore conspiracy allegations also survived motion to dismiss); *Gibbs v. Stinson*, 421 F. Supp. 3d at 313 (providing plaintiffs adequately stated RICO conspiracy claim under § 1962(d)). *See also Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) ("Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not adequately plead a substantive violation of RICO.").

C. Unjust Enrichment

To state a claim for unjust enrichment, a plaintiff must show 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. Niping*, 285 Or. App. 233, 238-39 (2017). "Concerning the third element, the plaintiff must assert facts showing that the alleged injustice is 'rooted in recognized legal principles and not in abstract notions of morality.'" *Gallagher v. Capella Educ. Co.*, Case No. 3:19-cv-01342-JR, 2019 WL 8333532, at *6 (D. Or. Dec. 23, 2019), *adopted* 2020 WL

1550729 (Apr. 1, 2020) (quoting *Cumming*, 285 Or. App at 239). The plaintiff must "show more than abstract unfairness from defendants' retention of the proceeds and instead must identify, with specificity, the source of their right to the proceeds." *Id.* (internal citation and quotation omitted).

Here, Smith clearly states an unjust enrichment claim. He has alleged that Martorello benefitted from Smith paying the loan with the excessive interest, as he received payments from the loans Big Picture made; and that Martorello knew of the benefit generated from the loans offered by Big Picture. Martorello, by contrast, does not contest that he generated income from the excessive interest charged; he simply insists that the income was lawful. Finally, Smith plausibly asserts that retention of the excessive interest is inequitable, and he identifies the source of his right to the proceeds: Oregon law, which caps the annual interest on loans to Oregon consumers at twelve percent; Smith alleges the interest rate on his short-term loan was 527.5 percent. *Htaike v. Sein,* 269 Or. App. 284, 291 (2015) (recognizing that borrower may bring action in equity for unjust enrichment to recover payments of usurious interest); *see also Gibbs v. Stinson*, 421 F. Supp. 3d at 313-14 (denying motion to dismiss unjust enrichment claim based on online tribal payday loan); *Hengle v. Asner*, 433 F. Supp. 3d at 896 (denying motion to dismiss unjust enrichment claim against individuals in online tribal payday loan scheme); *Gibbs v. Haynes*, 368 F. Supp. 3d at 933-34 (same). Accordingly, the court recommends that Martorello's motion to dismiss Smith's unjust enrichment claim be denied.

D. Declaratory and Injunctive Relief

Martorello contends that Smith fails to state a claim for declaratory and injunctive relief against him. Martorello argues that Smith's loan was with Big Picture and that Martorello's relationship with Big Picture ended years ago. According to Martorello, because he no longer has any interest in Big Picture's business and serves merely a consultant to the Tribe's lending entities,

he is not capable of stopping or modifying any lending activities at issue in this case. (Def. Martorello Reply at 30, ECF No. 123.)

The court has determined that Smith has stated viable claims for relief and pursues this case in a representative capacity. Smith seeks to have the forum selection and choice of law provisions in the Loan Agreement declared invalid as against public policy. Smith's claim of unjust enrichment seeks recovery of the excessive interest he paid on the loan and, if successful, the RICO violations would provide for treble damages and attorney fees. And, Smith alleges that Martorello continues to exercise personal control over the lending enterprise, including removal of officers and controlling the budget. Martorello's contention that he is simply a consultant and lacks any authority to modify lending activities is countered by extensive detailed allegations in the Amended Complaint of his personal involvement.

At this stage of the proceedings, the court must view these allegations in the light most favorable to Smith. Doing so, the court finds Smith has plausibly pleaded grounds for injunctive and declaratory relief against Martorello personally. *See Htaike*, 269 Or. App. at 289, 293 (discussing that claims for unjust enrichment and declaratory relief proceeded to trial for violation of usury statute, OR. REV. STAT. § 82.010). Accordingly, the court recommends that Martorello's motion to dismiss Smith's claims for declaratory and injunctive relief be denied.

Conclusion

As explained above, Defendant Matt Martorello's Motion to Dismiss (ECF No. 106) should be GRANTED IN PART and DENIED IN PART.

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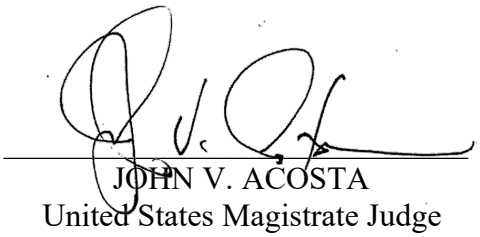
Scheduling Order

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due within fourteen (14) days. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

DATED this 5th day of January, 2021.



JOHN V. ACOSTA
United States Magistrate Judge