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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

RICHARD LEE SMITH, JR., individually and on behalf of persons similarly situated, Plaintiff, vs. MATT MARTORELLO, *et al.*, Defendants.	Case No. 3:18-cv-01651-AC **MATT MARTORELLO'S OBJECTIONS TO FINDINGS AND RECOMMENDATION** REQUEST FOR ORAL ARGUMENT

Matt Martorello, by counsel, respectfully submits the foregoing objections to the Findings and Recommendation ("F&R") (Dkt. 146) relating to his Motion to Dismiss (Dkt. 106).

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INTRODUCTION

An Indian nation's sovereignty is not the result of reparations or a specific grant of authority by Congress, but rather the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). Because a tribe retains all inherent attributes of sovereignty that have not been divested by Congress, the proper inquiry with respect to a tribe's exercise of its sovereignty is whether Congress—which exercises plenary power over Indian affairs—has limited that sovereignty in any way. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148-49 n.11 (1982); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 6.02[1] (2005). Further, "[I]n the absence of federal authorization . . . tribal sovereignty is privileged from diminution by the States." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986). "The question of whether federal law, which reflects related federal and tribal interests, pre-empts state activity is not controlled by the standards of preemption developed in other areas." *See Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989). Instead, "no specific congressional intention to pre-empt state activity is required." *Id.*

This matter arises from loan contracts issued by the sovereign Native American Tribe Lac Vieux Desert Band of Lake Superior Chippewa Indians' (the "Tribe" or "LVD") wholly owned entity arm of the Tribe, Big Picture Loans, LLC ("Big Picture"). Big Picture's loans promote the Tribe's self-governance and further important federal policies. The loan contracts provided for interest rates that are legal under Tribal and federal law. They expressly provided that Tribal law and applicable federal law would govern. Plaintiffs, however, seek to ignore the application of Tribal law to the loan agreements; render the loan agreements illegal; and convert a case arising from the Tribe's successful efforts in further its self-sufficiency into a tort case against Martorello personally. This effectively would undermine recognition of Tribal law and policy; freedom of contract (including choice of law) between the Tribe and consumers; and the federal policy of promoting assistance with tribal economic development through tribal self-governance and self-determination. This Court should reverse the F&R and reject Plaintiffs' attempt to bypass the Tribe

(and its laws) and seek damages from Martorello personally, though Martorello never issued, never collected on the Tribal loans and has no authority to direct the Tribe's council with respect to the operations of its business.[1]

SPECIFIC OBJECTIONS

I. Martorello Objects to the Court's Finding of Personal Jurisdiction in Oregon.

Martorello (a Texas resident) never *personally* and purposely conducted the alleged activity (*i.e*., Tribal loans issued by Tribally-owned entities) in Oregon to establish personal jurisdiction. Due process requires that a "defendant have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Helicopter Transp. Servs, LLC v. Sikorsky Aircraft Corp.*, 253 F. Supp. 3d 1115, 1123 (D. Or. 2017) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The focus must be on the "relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014). Due process "requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Id*. at 286 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

Personal jurisdiction must satisfy a three-part test: (1) the defendant must "purposefully direct his activities" within the forum; (2) the claim must arise out of the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). The first prong requires that the defendant have: (1) committed an intentional act; (2) expressly aimed at the forum state; and (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Id.* (stating test for purposeful direction).

[1] The LVD Tribe is a sovereign nation immune from suit in this Court. *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 804 (2014) (noting tribal sovereignty generally remains intact unless expressly waived by the tribe or abrogated by Congress). "Tribal [sovereign] immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 755-56 (1998).

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Here, Martorello never individually committed any "intentional act," expressly "aimed" at Oregon, and which caused harm in Oregon that Martorello should have known was likely. *See Dole*, 303 F.3d at 1111 (defining three part test for purposeful direction). Rather, at most, prior to the Tribe's acquisition of Sourcepoint in January of 2016, Martorello managed companies that provided services to Tribal entities that loaned money *at rates that are legal under Tribal law*.[2]

The Court's determination that Martorello violated Oregon's consumer protection laws by "creating an online lending scheme," improperly ignores the critical and paramount role of the sovereign Tribe. (*See* F&R at 21.) Alleging that the Tribal lending was "Martorello's lending enterprise" is not plausible without improperly stamping out the Tribe's governmental functions (including their legislative and regulatory actions), their ownership of the lending business, the consent to Tribal governing law and forum, and dispositive corporate formalities. It would be implausible for Big Picture to be both an arm of the Tribe, a governmental entity benefiting from all of the privileges of the sovereign, and also Martorello's alter ego.

The governance and corporate formalities were examined in *Williams v. Big Picture Loans, LLC*, and the Fourth Circuit concluded Big Picture's "general structure is to assure that Big Picture is answerable to the Tribe at every level" and that its structure is not "outweighed by Ascension's substantial role in Big Picture's operations." 929 F.3d 170, 182 (4th Cir. 2019). It was Big Picture (a wholly-owned Tribal entity whose ultimate authority is any given presiding elected Tribal council), which issued, signed, approved, and collected the loans. (*See*, *e.g.*, First Am. Compl. ¶¶ 9, 26-29, 34); *see Williams,* 929 F.3d at 182-83. Big Picture also funded the loans with its money, and then owned, managed, and collected the loans post origination. Big Picture's balance sheet

[2] The court erred in stating that Martorello claimed he *is* a consultant to Big Picture. Rather, Martorello's assertion was that his company consulted to the Tribe's predecessor lending business *prior to* the sale to the Tribe of that business in January 2016. After which, Martorello had no consulting role and no involvement in the Tribe's business other than those in his capacity as manager of its creditor, Eventide.

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owned the entirety of the loans and their economic risks and benefits.[3] Thus, this case is distinguishable from *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955, 979-80 (N.D. Cal. 2019), in which the court exercised jurisdiction over an individual, in part due the nature of the individual's conduct and personal funding and signatures on agreements to fund the loans. As the Fourth Circuit stated, "the Tribe would not have been able to finance a loan operation on its own and thus entered a loan agreement with a non-tribal entity [Eventide] in order to obtain revenue both now and in the future" and "in only a few years, not only will all revenue belong to the Tribe, but it will own outright all of the components of the commercial lending enterprise." *Williams*, 929 F.3d at 180-81. In light of that those facts, Plaintiffs' attempt to attribute those Tribal loans to Martorello, *personally*, is not plausible or appropriate. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007) (noting allegation of parallel business conduct and a bare assertion of conspiracy is insufficient); *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163, at *9 (D.Vt. May 18, 2016) (noting the tribal lending entity's "contacts with Vermont are not vicariously attributed to its officials any more than directors of a corporation are subject to suit personally in any forum where the actions of the corporation satisfy the minimum contacts test"); *Dumont v. Corr. Corp. of Am.*, No. 2:14-cv-209, 2015 WL 3791407, at *5 (D. Vt. June 17, 2015) (noting status of individuals as "high level managers" or "officers" was "not a sufficient basis for concluding that they are subject to the same personal jurisdiction as their employer").

II. Martorello Objects to the Court's Application of Oregon Law.

The loans at issue originated on the Reservation, they are an instrumentality of the Tribe, and they come within the jurisdiction of the Tribe. As a result, the loans should be regulated by tribal law, and the Court erred in applying Oregon law to those loans.

The Indian Commerce Clause precludes the application of state laws to loans made by an Indian tribe. Indeed, it divests states "of virtually all authority over Indian commerce and Indian

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[3] This is in contrast to cases involving alternate "true lenders." *Cf. CFPB v. CashCall, Inc.*, No. CV 15-7522-JFW, 2016 WL 4820635, at *5 (S.D. Cal. 2016) (discussing when a non-tribal entity originated and then sold loans to a non-tribal third party).

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tribes." *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996). It reserves to the federal government alone the authority to regulate commerce with Indian tribes. The Clause not only prohibits any state from dictating what an Indian tribe must do on tribal land, it also prohibits any state from dictating the terms of commerce between its citizens and an Indian tribe.

Furthermore, the states cannot infringe on tribal sovereignty. "Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (internal quotation marks and citations omitted). "The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. '[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'" *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

"[A]s part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers." *Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316, 327 (2008). "A tribe may regulate, through 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." *Montana v. United States*, 450 U.S. 544, 565 (1981) (emphasis added). Thus, a state could not apply its law to prevent a tribe from making available high stakes bingo and card games to non-Indians coming from outside the reservation. The Supreme Court concluded that state regulation would impermissibly infringe on tribal government. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 222 (1987).

Here, the Court errs by concluding that Tribe's loans do not "promote tribal self-governance." (F&R at 40.) To the contrary, the Fourth Circuit's decision in *Williams* established that distributions from Big Picture's profits "constitute[] a significant percentage of the Tribe's general fund." 929 F.3d at 179. Indeed, "the Entities have increased the Tribe's general fund, expanded the Tribe's commercial dealings, and subsidized a host of services for the Tribe's

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members." *Id.* at 185. Accordingly, "Big Picture and Ascension serve the purpose of tribal economic development and self-governance." *Id.* at 182.

Likewise, the Court errs in analyzing the loan transactions only from the perspective of the borrower and concluding that those transactions do not implicate tribal sovereignty because Smith did not engage in any activity on tribal lands. "[I]n cases involving a contract formed on the reservation in which the parties agree to tribal jurisdiction, treating the nonmember's physical presence as determinative ignores the realities of our modern world that a [person], through the internet or phone, can conduct business on the reservation and can affect the Tribe and tribal members without physically entering the reservation. The proper focus is on the nonmember Borrower's '*activities*' or '*conduct,*' not solely the nonmember Borrower's *physical location*." *F.T.C. v. Payday Financial, LLC*, 935 F. Supp. 2d 926, 939-40 (D.S.D. 2013) (emphasis in original).[4] Thus, Plaintiff engaged in "conduct directed toward the Reservation [which] includes applying to a reservation-based business for a loan, agreeing with the reservation-based business to a loan, and receiving of funds from a reservation business under a loan contract." *Id.* at 938.

The Second Circuit addressed tribal loans made via the internet in *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014). It observed that "[l]oans brokered over the internet seem to exist in two places at once. Lenders extend credit from reservations; borrowers apply for and receive loans without leaving New York State." 769 F.3d at 144. The court noted that these loans involve "e-commerce that straddles borders and connects parties separated by hundreds of miles." *Id.*

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[4] "Reducing the *Montana* jurisdictional analysis from a thorough investigation of the nonmember's course of conduct and contact with the reservation, to a mere determination of the nonmember's physical location is improper and would render *Montana*'s jurisdictional inquiry inapplicable to many modern-day contracts involving a reservation-based business." *Id.* at 940; *see also Wisconsin v. E.P.A.*, 266 F.3d 741, 749 (7th Cir. 2001) (granting tribal jurisdiction over the off-reservation conduct of non-Indians stating "[t]here is no case that expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation").

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Importantly, the Second Circuit acknowledged that "[a] court might well find that the tribes' sovereign interest in raising revenue militate in favor of prohibiting a separate sovereign from interfering in their affairs." *Id.* at 112 n.4. Although part of the loan transaction occurred in the state where the borrower lived, "[a] court might ultimately conclude that, despite these circumstances, the transaction . . . could be regarded as on-reservation, based on the extent to which *one side* of the transaction is firmly rooted on the reservation." *Id.* at 115 (emphasis added).

In that case, which was at the preliminary injunction stage, "plaintiffs provided insufficient evidence to establish that they are likely to succeed in showing that the internet loans should be treated as on-reservation activity." *Id.* Specifically, the court noted that "[t]he lenders' affidavits boldly (but conclusorily) assert that 'loans are approved through processes that occur on . . . Reservation[s],' but nowhere do they state what specific portion of a lending transaction took place at any facility physically located on a reservation . . . or where the servers hosting the websites were located." *Id.* The Second Circuit concluded that "plaintiffs may amass and present evidence that paints a clearer picture of the 'who,' 'where,' and 'what' of online lending, and *may ultimately prevail in this litigation*. But at this stage, the record is still murky, and thus, the District Court reasonably held that plaintiffs had not proven that they would likely succeed on the merits." *Id.* at 115.

In contrast, here it is established that one side of the transaction is indeed "firmly rooted" on the Tribe's Reservation. First, all of the loans were made by Big Picture which, as the Fourth Circuit has concluded, is an arm of the Tribe, serving the purpose of tribal economic development and self-governance. Second, as the district court in *Williams* found, all of the loans are originated on the Reservation:

> Big Picture has its principal place of business on the Reservation, and its employees are all located there. The servers for Big Picture's websites are also stored on the Reservation. And, because all loan applications are approved by Big Picture employees on the Reservation, all consumer loans are originated there.

Williams v. Big Picture Loans, LLC, 329 F. Supp. 3d 248, 264 (E.D. Va. 2018).

Finally, as the Second Circuit noted, "[a] tribe's [sovereign] interest peaks when a [state] regulation threatens a venture in which the tribe has invested significant resources." *Otoe-Missouria Tribe*, 769 F.3d at 113. Here, the lending operation is a legitimate tribal enterprise in which "[t]he Tribe itself has invested over $7 million." *Williams*, 329 F. Supp. 3d at 263. Thus, the Tribe has "built the electronic equivalent of 'modern[,] . . . comfortable, clean, attractive facilities' like the ones in *Cabazon,* and . . . ha[s] 'engaged in a concerted and sustained undertaking to develop and manage' its limited capital resources." *Otoe-Missouria Tribe*, 769 F.3d at 116.

In sum, because the loans at issue here were originated on the Reservation by an instrumentality of the Tribe, they come within the jurisdiction of the Tribe, which is entitled to regulate them through tribal law. Because the lending operation is a legitimate venture in which the Tribe has invested significant resources, the application of state law to the loans would impermissibly infringe on tribal self-government. *See Cabazon*, 480 U.S. at 222[5]; *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (noting exercise of "state regulatory authority" barred where it is "pre-empted by federal law" or infringes on Indians' right "to make their own laws and be ruled by them."); *Okla. Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450 (1995) (rejecting the State's request to perform a balancing test pertaining to taxation of fuel sales made on the reservation to non-Indians, opting instead for a dispositive approach absent clear congressional authorization, the state next unsuccessfully argued that the legal incidence would ultimately fall upon the non-Indian wholesaler or the consumer). Accordingly, Tribal law rather than Oregon law governs these loans.

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[5] Tribal lenders are not only subject to tribal regulatory authorities, but also the Consumer Financial Protection Bureau (from which it does not have immunity) represents the federal interests. The CFPB has aided tribal regulatory efforts to effectively regulate their businesses: see: https://www.consumerfinance.gov/tribal/ providing resources "which Tribal Regulatory Authorities should find useful as they supervise companies that provide consumer financial products or services".

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III. Martorello Objects to the Court's Failure to Enforce the Tribal Choice of Law and Forum Clauses.

The Court erred in not enforcing the choice of law and forum clauses providing for Tribal law. The "broad federal commitment" to Tribal sovereignty includes the Tribes' ability to "undertake and regulate economic activity." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983). This policy applies to the enforcement of the governing law and forum provisions in the Tribal loans. Those provisions in the parties' agreement should be enforced because: (1) the Tribe is not trying to "regulate" matters off reservation; rather, the Tribe is trying to regulate its own lending activities and to enforce its own contracts; (2) no exceptions apply to invalidate the choice of law and forum provisions; (3) the prospective waiver doctrine should not be expanded to apply here; and (4) even if the choice of law and forum were not enforced (though they should be), Oregon's conflict of law principles point to the application of Tribal law.

A. The Tribe Has a Legitimate and Substantial Interest in Enforcing Its Contracts.

As discussed above, the Court erred by concluding that the Tribe's freedom of contracting does not "promote tribal self-governance." (*See* F&R at 40.) The Tribe has a legitimate and substantial interest in enforcing its own contracts, which provide revenue enabling self-governance in furtherance of federal policy. *See Williams,* 929 F.3d at 179-80 (recognizing LVD's substantial interest in the consumer loans; the loans' role in tribal economic development; and the important benefits the loan revenues confer on tribal government services, including health care, education, subsidized housing, law enforcement, elder care, foster care, and employment).

Here, there is no dispute that the loans are legal under Tribal law, and the Tribe has a legitimate and substantial interest in governing its own contracts. *See id.* at 178-79 (rejecting argument that the primary purpose of the tribe's lending operations was to benefit Martorello; instead, the Tribe stood to benefit meaningfully). Plaintiffs' lawsuit threatens LVD's political integrity, economic security, and welfare by challenging the integrity of LVD's economic arms and instrumentalities and its online lending operations. However, because Oregon's state

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regulatory lending laws apply the lending side of the loan transaction, the infringement on tribal conduct sought here is not permissible.

B. Tribal Exhaustion Requirements Are Not Illusory.

The Supreme Court has long recognized that when there is a "question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians" that the "examination should be conducted in the first instance in the Tribal Court itself." *Nat'l Farmers Union Ins. Cos*., 471 U.S. at 855-56. A federal court must "dismiss or abstain from deciding cases in which concurrent jurisdiction in an Indian tribal court [is] asserted. Whether proceedings are actually pending in the appropriate tribal court is irrelevant." *Crawford v. Genuine Parts Co., Inc*., 947 F.2d 1405, 1407 (9th Cir. 1991) (internal citations omitted); *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) (*per curiam*) (stating that there is no requirement under the tribal exhaustion doctrine that litigation over the same matter be pending in tribal court).

The doctrine of tribal exhaustion dictates that federal courts give a tribal adjudicative body "whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge" when the tribal court's "jurisdiction is 'colorable' or 'plausible.'" *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 897-98 (9th Cir. 2017). A claim only fails to meet that "colorable" or "plausible" standard if it is "plain" that the tribal court's jurisdiction is lacking. *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008). Consistent with this authority, this Court should consider whether it is plausible that the tribal court could have jurisdiction over the matter, not whether the tribal court *actually* has jurisdiction. *See Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x at 11, 13 (9th Cir. 2012) ("We emphasize that we are not now deciding whether the tribe actually has jurisdiction . . . . We hold only that where, as here, the tribe's assertion of jurisdiction is 'colorable' or 'plausible,' the tribal courts get the first chance to decide whether tribal jurisdiction is actually permitted."). Therefore, "[f]ailure to exhaust 'is not a jurisdictional bar, but rather a prerequisite to a federal court's exercise of its jurisdiction.'" *Watterson v. Fritcher*, No. 1:17-CV-01020-DAD-JLT, 2018 WL 5880776, at *3 (E.D. Cal. Nov.

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8, 2018). Moreover, the question to this Court is not whether the underlying allegations have merit. *See Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856 ("Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.") If the LVD court *could* have jurisdiction, exhaustion is appropriate.

Here, however, the Court concluded that the Tribal Dispute Resolution Procedure ("TDRP") was illusory because Smith "has no viable way to challenge the usurious interest rate charged on his loan" since the Tribal court has no discretion to charge less than the 527.5 percent interest rate charged by Big Picture because that rate is within the 699 percent cap provided in the Tribal code. (F&R at 38.) But neither do state courts have discretion to lower the interest rates on challenged loans that are within the lawful limits of state law. This limitation on the Tribal court's authority does not establish that it is an illusory form of relief. The Tribal court is not precluded from considering other challenges to the validity of the loan apart from the interest rate. And, if Smith (or another borrower) is dissatisfied with the result after exhausting the Tribal remedy, he may then proceed to federal court. Similarly, even though a complaint sent to the lenders is considered "without waiver of sovereign immunity and exclusive jurisdiction and does not create any binding procedural or substantive rights for a petitioner," that does not demonstrate that the TDRP cannot or will not grant any relief. Like in federal court, if a faulty complaint is submitted because a party does not have standing, or the issue is not ripe, the complaint is dismissed because the party does not have any binding procedural rights to prevail. Once a court decides it has an actual case or controversy, federal courts may protect rights to speech, religion, and property rights, but there is likewise no guarantee a party will prevail.

C. No Exceptions Apply to Invalidate the Choice of Law and Forum Provisions.

The choice-of-law and forum provisions in the loan agreements are enforceable, and no exceptions apply to invalidate them. *See* ORS 15.350 ("[T]he contractual rights and duties of the parties are governed by the law or laws that the parties have chosen"); ORS 15.455 (providing that

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torts and non-contractual claims will be governed by the law of the parties' choosing, with limited exceptions). Oregon evaluates choice of law provisions according to the Restatement (Second) of Conflict of Laws Section 187 (2) (1971), whereby the "law of the state chosen by the parties to govern their contractual rights and duties will be applied," unless the chosen state has no substantial relationship or "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a *materially greater interest.*" *See Young v. Mobil Oil Corp*., 85 Or. App. 64, 68 (1987) (adopting Restatement Section 187 (2) regarding choice of law); *CACV of Colorado, LLC v. Stevens*, 248 Or. App. 624, 647 (2012) (enforcing choice of law provision); *In re Kellas*, 113 B.R. 673, 679 (D. Or. 1990) (applying Restatement and enforcing choice of law provision).

Here, Tribal law has a substantial relationship with the loans and Oregon has no "overpowering" public policy greater than the Tribal and federal interests in Big Picture's loans. *See, e.g.*, *Finch v. Andrews*, 124 Or. App. 558, 561 n.1 (1993) (noting that a "public policy must be 'overpowering' before a court will interfere with the parties' freedom to contract); *see also Cabazon*, 480 U.S. at 221-22 (concluding that the "State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them"). The Court, however, found that the three *Bremen* exceptions invalidate the choice of forum clause and independent choice of law clause here. (F&R at 34.) Those exceptions do not apply here because they require a "strong showing" that: (1) the clause is invalid due to "fraud" or overreaching; (2) enforcement would contravene "strong public policy" of the forum; or (3) enforcement would be "gravely difficult and inconvenient," so as to deprive the litigant of his day in court—which Plaintiffs have not shown. *See M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 18 (1972).

First, "simply alleging that one was duped into signing the contract is not enough" to establish fraud. *Richards v. Lloyd's of London*, 135 F.3d 1289, 1297 (9th Cir. 1998) (holding that the fraud exception "does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud . . . the clause is unenforceable."). Smith cannot make a strong showing

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simply by asserting his call with Big Picture omitted important information and he did not read the documents. Moreover, Smith's loan agreement provides several days for which he could rescind his loan free of charge, and Smith had to access Big Picture's website to apply, which makes clear that it is an arm of LVD and operates from the Reservation where state laws would not apply. Similarly, selection of tribal law and forum is not necessarily indicative of "fraud or overreaching." *See*, *e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) (enforcing forum selection clause applying to cruise participants); *Delhomme Indus., Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049, 1058 (5th Cir. 1982) ("A choice of law provision in a contract is presumed valid until it is proved invalid").

Second, differences between the states' or sovereigns' substantive laws do not create a sufficient basis to strike down a choice of law and forum provisions. *See, e.g., Bremen*, 407 U.S. at 15-19 (enforcing choice of English forum and law, even though it would limit the litigant's maximum recovery); *Aetna Life Ins. Co. v. Great Nat. Corp.*, 818 F.2d 19, 21 (8th Cir. 1987) (holding Texas law applied to loan agreement secured by property located in Arkansas, which was undisputedly usurious under Arkansas law); *Richards*, 135 F.3d at 1295-96 (requiring enforcement of choice of law and forum provisions selecting United Kingdom law although enforcement of those clauses would "deprive [plaintiffs] of important remedies provided by our securities laws" as well as a wholesale inability to assert their RICO claims); *Simula Inc. v. Autoliv, Inc.* 175 F.3d 716, 723 (9th Cir. 1999) (enforcing forum-selection clause because the plaintiffs would have some "reasonable recourse" in the foreign forum, even if they could not bring claims under U.S. antitrust laws); *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1090 (9th Cir. 2018) (concluding that "strong federal policy in favor of enforcing forum-selection clauses would supersede antiwaiver provisions in state statutes as well as federal statutes"); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1297 (11th Cir. 1998) ("We will not invalidate choice clauses, however, simply because the remedies available in the contractually chosen forum are less favorable than those available in the courts of the United States"); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1360–61 (2d Cir. 1993) ("In the absence of other considerations, the

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agreement to submit to arbitration or the jurisdiction of the English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum.").

Third, Oregon public policy favors forum selection clauses that were freely negotiated. *Harry & David v. J & P Acquisition,* No. CIV. 09-3056-CL, 2009 WL 4892296, at *8 (D. Or. Dec. 17, 2009). Although Oregon may have a general policy disfavoring what it defines as usury within the state, this policy should not be so overpowering that it stamps out the choice of Tribal law and the Tribal forum. *See, e.g., Aetna*, 818 F.2d at 21 (holding Arkansas law did not override Texas choice of law where Texas had a "substantial connection" with the contract); *E. & J. Gallo Winery v. Andina Licores S.A.*, 440 F. Supp. 2d 1115, 1126 (E.D. Cal. 2006) (noting that the "Supreme Court and Ninth Circuit cases clearly establish that strong public policy supports the enforcement of forum selection clauses"). Indeed, Oregon's Division of Financial Regulation has acknowledged potential exceptions for tribes, stating that tribal lenders "can make loans with higher fees and interest rates than those allowed by state laws." *See* "Payday loans," Oregon Division of Financial Regulation, Nov. 5, 2016, available at https://dfr.oregon.gov/financial/loans/personal/payday/Pages/index.aspx. Such exceptions are particularly appropriate to protect Tribal law from improper diminution by states. *See*, *e.g.*, *Three Affiliated Tribes*, 476 U.S. at 891 (noting tribal law is "privileged from diminution by the states" absent Congressional action); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989) ("If the state law interferes with the purpose or operation of a federal policy regarding tribal interests, it is preempted").

Here, the Tribal and federal interests in Big Picture's consumer loans prevail over Oregon policy because the Tribe has significant interests at stake, and has invested over $7 million in its lending business, and it relies on the loan revenue to provide a large percentage of its budget for government services. *See*, *e.g.*, *Williams*, 329 F. Supp. 3d at 263 ("The Tribe itself has invested over $7 million" and the revenue supports necessary government services).

Surprisingly, here, the Court notes that "it is the inclusion of the forum selection and choice of law clauses that constitute the alleged fraud." (F&R at 34.) That conclusion is wrong. The choice of a different sovereign's law is not necessarily fraudulent—even if it results in fewer remedies. *See, e.g.*, *Sun,* 901 F.3d at 1092 (noting forum selection clause "remains enforceable even when the contractually selected forum may afford the plaintiffs less effective remedies than they could receive in the forum where they filed suit"). Thus, Plaintiffs failed to meet their burden to override the choice of law and choice of forum provisions.

D. The Prospective Waiver Exception Does Not Invalidate the Choice of Tribal Law.

The choice of law and forum provisions are not invalidated by the court-created "prospective waiver" exception to the general rule of enforceability. The prospective waiver exception is not, as Plaintiffs argue, a generalized contract defense that can invalidate choice of law globally. Rather, the prospective waiver exception is a judicial exception applicable only to whether choice-of-law and choice of forum clauses *in an arbitration agreement* prevent a litigant from *pursuing* his or her federal claims. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235-36 (2013) (noting prospective waiver is a "judge-made exception" to the Federal Arbitration Act). It does not apply where a litigant effectively may vindicate his claims in arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."). The doctrine generally is not applied outside the narrow context of arbitration clauses. *See*, *e.g.*, *Cvoro v. Carnival Corp*., 941 F.3d 487, 502 (11th Cir. 2019) (noting that the U.S. Supreme Court limited the import of the "prospective waiver" language in *Mitsubishi Motors* to dicta). In addition, courts should be wary of expanding preemptive waiver to avoid unnecessarily overriding tribal contracts and choice-of-law agreements therein. *See, e.g.*, *Hengle v. Asner*, 433 F. Supp. 3d 825, 865 (E.D. Va. 2020) (holding although loan agreements indicated they "shall be governed by applicable tribal

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law," this did not expressly disavow the application of federal law, and *the prospective waiver doctrine did not apply*).

Here, the preemptive waiver exception does not apply because *there is no elimination of the right to pursue a remedy* in a Tribal Forum. *See Italian Colors*, 570 U.S. at 236 (noting prospective waiver exception finds its "origin in the desire to prevent 'prospective waiver of a party's right to pursue statutory remedies"). The Tribe's law expressly includes federal consumer protection laws, without prospectively renouncing, waiving, or eliminating the ability to *pursue* federal claims. *See, e.g.*, LVD Code, *Williams v. Big Picture Loans, LLC*, E.D. Va. Civil Action No. 3:17-cv-00461-REP, Dkt. 958-1 ¶ 1.1(f) ("It is essential that the Tribal Council regulate consumer financial services in a manner commensurate with Tribal law and policy and applicable federal law."); ¶ 6.2 ("A Licensee shall conduct business in a manner consistent with principles of federal consumer protection law, *including, without limitation* . . ."); ¶ 7.2 (expressly incorporating numerous federal consumer protection laws).[6] The consumer protection laws identified in the Tribe's law provide a floor, not a ceiling, for federal protections.

The Tribal loan agreements specifically include "applicable federal law," suggesting that Tribal loan agreements anticipate and provide for, instead of foreclosing, federal law claims. *See, e.g.*, *Gibbs v. Stinson*, 421 F. Supp. 3d 267 (E.D. Va. 2019) (holding that "the phrase 'applicable federal law' renders the Mobiloans Contract subject to federal law, seemingly without qualification" *and the prospective waiver doctrine did not apply*). The choice-of-law provisions here provide:

> 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**

[6] The expressly included federal consumer protection laws include *but are not limited to* the Dodd-Frank Wall Street Reform and Consumer Protection Act; Truth in Lending Act; Consumer Lending Act; Fair Credit Billing Act; Equal Credit Opportunity Act; Electric Fund Transfer Act; Fair Credit Reporting Act; privacy provisions of Gramm-Leach-Bliley Act; and the Fair Debt Collection Practices Act. Not all federal laws apply to tribes. The absence of a specific reference to RICO is no more relevant than the absence of a specific reference to the Endangered Species Act.

> **<u>but not limited to the Code as well as applicable federal law.</u>** 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.
>
> * * *
>
> IMPORTANT NOTICE: This Loan Agreement (hereinafter, the "Agreement") is governed by the laws of the Lac Vieux Desert Band of Lake Superior Chippwa Indians.

(Dkt. 461-1 (Emphasis added).)

These loan agreements are different from those precluding federal law. *Cf. Hayes v. Delbert Serv. Corp*., 811 F.3d 666 (4th Cir. 2016) (holding arbitration agreement that purported to renounce any application of federal law to borrowers' claims was unenforceable); *Dillon v. BMO Harris, N.A.* 856 F.3d 330 (4th Cir. 2017) (holding loan agreement precluded application of federal law).

LVD's jurisdiction also anticipates federal claims. LVD's Constitution Art. V § 2(a) extends the LVD Court's jurisdiction to "all cases, matters or controversies arising under this Constitution and the laws, ordinances, regulations, customs, and judicial decisions of the Lac View Desert Band . . . ." Such jurisdiction does not exclude jurisdiction over federal claims.

The Tribal forum is far from illusory. For example, Plaintiff could have challenged in a Tribal forum whether there ever was a "meeting of the minds" regarding application of Tribal interest rates, including whether Smith was tricked into agreeing to (other otherwise never understood) the applicable interest rate. (*See* F&R at 11; Am. Compl. ¶¶ 9, 28, 32 (alleging Smith "was not told" the interest rate and did not understand its implications). In a Tribal Forum, Smith would have a meaningful opportunity to claim he was misled and never agreed to the loan. Smith never even tried.

In short, the Tribal forum permits pursuit of remedies (including federal ones), but Smith never availed himself of any. Accordingly, the prospective waiver doctrine does not apply. *See, e.g.*, *Hengle*, 433 F. Supp. 3d at 865 (though loan agreements indicated they "shall be governed by applicable tribal law," this did not expressly disavow the application of federal law, and the

prospective waiver doctrine did not apply); *Vimar Seguros y Reaseguros, S.A. v. M/V/ Sky Reefer*, 515 U.S. 528, 540-41 (1995) (holding no prospective waiver, even though Japanese law provided defenses to liability that were unavailable under U.S. law).

IV. Martorello Objects to the Court's Finding that "Oregon has the Most Significant Relationship to the Dispute Concerning Smith's Loan Agreement and Thus Has a Greater Interest in Having its Law Applied."

Even if the Court ignores the choice-of-law provision in the loan agreements, the conflict of law analysis still selects Tribal law. To resolve the conflict of laws here, the Court applies the "most significant relationship" test, considering "which state ha[s] the most significant relationship to the parties and the transaction, *and* whether the interests of Oregon are so important that [courts] should not apply [outside] law, despite [the] significant connection with the transaction." *Stricklin v. Suoed*, 147 Or. App. 399, 404 (1997).

Here, the Tribe has the most significant relationship because its wholly-owned lender, Big Picture, is incorporated in LVD's jurisdiction; operates from LVD's jurisdiction; owns the loans on its balance sheet; the reservation bears the burden of risk in the consumer defaults; Big Picture initiates, signs, and collects the loans from LVD's jurisdiction in furtherance of important tribal and federal interests in self-governance. *Williams*, 929 F.3d at 175; *ABF Capital Corp. v. Osley*, 414 F.3d 1061, 1065-66 (9th Cir. 2005) (finding a substantial relationship and a reasonable basis for enforcing the choice of law provisions of the state where one of the parties is domiciled or incorporated). In addition, the "last act" for contract formation occurred on Tribal lands when the lender verified creditworthiness; and the "place of performance," the place "where the contract requires that repayment be made" is on Tribal land where checks are mailed or money is sent.

In addition, the Loan Agreements' terms were negotiated on Tribal land, the place where the terms of the contract are set and agreed upon, and the location of the tribal server through which the consumer engaged. *See Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 51 (Tex. 1991). The place of negotiation is "of less importance when there is no single place of negotiation." Restatement (Second) of Conflict of Laws § 188, cmt. e; *see also Maxus*, 817 S.W.2d

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at 51 (applying Kansas law despite Texas being the place of negotiation). Finally, "the subject matter of the contract" governs Big Picture's asset, the loan receivable, and the impact of a breach is felt on the reservation and not in Oregon. *See In re Brock*, 214 B.R. 877, 881 (Bankr. E.D. Ark. 1997) (enforcing Texas choice of law in loan agreement where the "entire transaction, including sale, would not be finally consummated until the contract documents–and primarily the loan agreement, was finally reviewed, approved, and accepted in Texas"); *see also* Restatement of Conflict of Laws Section 188 (2) (factoring in place of contracting, place of negotiation, place of performance, location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties); *cf. F.T.C. v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 936 (D.S.D. 2013) (noting that "the impact of any default by the Borrower is felt on the reservation"; that "the contract apparently forms on the reservation" and tribal lenders made "make their lending decisions on the Reservation, the loan contract forms on the Reservation, money is transferred from a bank on the Reservation, and the contract specified tribal jurisdiction"); *Dish Network Serv. LLC v. Laducer*, No. 4:12-CV-058, 2012 WL 2782585, at *5 (D.N.D. July 9, 2012) (consensual relationship exception may give a tribal court jurisdiction over a non-Indian, off-reservation company when the claim requires an examination of a contract the company entered into with a tribal member).

Regarding the second consideration, Oregon has no interest materially greater than the substantial tribal and federal interests in LVD's self-governance. Oregon's concern over high-interest rates should not preempt those interests in the Tribe's online lending business, in which the Tribe invested heavily and relies upon for revenues supporting government services. *See Cabazon*, 480 U.S. at 219 ("Self determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members"); *Mescalero Apache Tribe*, 462 U.S. at 335 (noting the "broad federal commitment" to Tribal sovereignty includes the Tribes' ability to "undertake and regulate economic activity"). Here, the Tribe's economic interest in the loans is substantial, and [its] interest in "build[ing] . . . vigorous economies" by enter[ing]

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into contracts" and trad[ing] freely" is recognized in federal law. 25 U.S.C. § 4301 (a)(4), (7).[7] Oregon has no similarly significant interest in the loans.

V. Martorello objects to the Court's findings that: (1) Smith sustained injury from "excessive interest and fees"; (2) Smith established proximate causation; and (3) the loans represent "unlawful debt" substantiating a RICO predicate offense.

A. Plaintiffs Are Not Injured By Virtue of Contracting with the Tribe.

Plaintiffs have received the "benefit of their bargain," and cannot now claim injury. *See, e.g., Consumer Fin Prot. Bureau v. CashCall, Inc.*, No. V1507522JFWRAOX, 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018). Many Plaintiffs surely did not repay the full amount of the principal back, and many more in the purported class likely received a net economic benefit from the supply of immediate cash by resolving the emergency need that brought them to apply for the loan, even at the expense of a high interest rate (in addition, some likely would not have qualified for lower rates). *Cf. Brock*, 214 B.R. at 881 (noting where debtor was "considered a bad credit risk," Texas was important in enabling the "ultimate decision" to permit the loan, which would have been usurious under Arkansas law). That the Plaintiffs have already received the immediate cash and now want to avoid payment is not sufficient to allege injury.

B. There is No Proximate Causation Between Martorello and the Alleged Injury.

RICO's proximate cause standard also presents policy considerations, and takes into consideration such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection. *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), *overruled on other grounds*, 517 U.S. 706 (1996). RICO cases leave an "inevitable stigmatizing effect on those named as defendants." *Figueroa Ruiz v. Algeria*, 896 F.2d 645, 650 (1st Cir. 1990); *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996) ("Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device"). The Fourth Circuit has cautioned that RICO penalties are "drastic" and

[7] Big Picture's profits, after its loan payments, fund a very significant portion of LVD's general fund, used for government services, including housing, court, policy, a health clinic, pharmacy, family and social services, infrastructure, education, and elder-care.

that courts must ensure that "RICO's extraordinary remedy does not threaten the ordinary run of commercial transactions." *US Airline Pilots Ass'n v. Awappa, LLC*, 615 F.3d 312, 317 (4th Cir. 2010). At least one court has questioned whether "Congress intend[ed] to impose RICO liability on a lender or debt collector based on the usury laws of the borrower's domicile[.]" *Gregoria v. Total Asset Recovery, Inc.*, No. 12–4315, 2015 WL 115501, at *5 n.8 (E.D. Pa. 2015).

Here, we have substantial federal law policy interests at stake in furtherance of tribal economic development characterized as "rent-a-tribe" based the economic terms and delegation of services decided by Tribal council(s) in the furtherance of self-governance. In the context of "rent-a-bank" arrangements, the OCC sought to provide clarity regarding "legal uncertainty" that "chill[ed] the innovation that results from these partnerships" in its recent final "true lender" rule.[8] To stigmatize tribal support as "rent-a-tribe" would starkly contrast the federal policy and likewise chill efforts and innovations in furthering tribal self-determination.

For RICO liability, a plaintiff must demonstrate that each defendant, not the enterprise as a whole, meets the proximate cause requirement. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1481 (9th Cir. 1997), *overruled on other grounds by Lacey v. Maricopa Cty.*, 693 F.3d 896, 927 (9th Cir. 2012) ("[P]laintiff must show not only that the defendant's violation was a 'but for' cause of his injury but that it was the proximate cause as well"). The proximate cause requirement is not satisfied "if it required the Court to move beyond the first step in the causal chain." *Fields v. Twitter, Inc.*, 881 F.3d 739, 745 (9th Cir. 2018).

Where a plaintiff fails to demonstrate proximate cause as to a defendant, the plaintiff cannot recover from that defendant. *See Anza v. Idael Steel Supply Corp.*, 547 U.S. 451, 659-60 (2006) (affirming district court's dismissal of claim as having a too attenuated causal connection between

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[8] See https://occ.gov/news-issuances/news-releases/2020/nr-occ-2020-139.html. The OCC has adopted a final rule to resolve "rent-a-bank" uncertainty. The rule specifies that a bank makes a loan and is the true lender if, as of the date of origination, it (1) is named as the lender in the loan agreement or (2) funds the loan. The rule also specifies that if, as of the date of origination, one bank is named as the lender in the loan agreement for a loan and another bank funds that loan, the bank that is named as the lender in the loan agreement makes the loan.

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the injury and the alleged injurious conduct); *see also Dahlgren v. First Nat. Bank of Holdrege*, 533 F.3d 681, 690 (8th Cir. 2008) ("A bank's financial assistance and professional services may assist a customer engaging in racketeering activities, but that alone does not satisfy the stringent 'operation and management' test"); *Int'l Bus. Machines Corp. v. Brown*, 134 F.3d 377, at *1 (9th Cir. 1988) ("Evidence that the defendant knew of the scheme or even benefitted from the scheme is not enough to impose RICO liability.").

Plaintiff fails to allege plausibly that Martorello, as opposed to the Tribal lender, proximately caused the alleged harm. Any damages allegedly suffered by Plaintiff are at best indirectly linked to Martorello. As such, it would be difficult "to ascertain the amount of damages attributable" to Martorello, "as distinct from other, independent, factors," such as the conduct of the tribal lending entities. *Holmes v. Sec. Inv'r Prot. Corp*., 503 U.S. 258, 269 (1992). In addition to the difficulty in apportioning causation between the Tribe, tribal entities, and various managers, the injury is too removed with respect to Martorello. *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th Cir. 2002) (identifying factors where injury is too remote, including where it is difficult to attribute causation to a particular defendant and where courts would need complicated apportioning rules to obviate risk of multiple recoveries).

As a matter of law, it is incorrect to conclude that Martorello personally could have "participated in the practice of issuing usurious loans." (F&R at 47.) Such would ignore corporate structure and reality (notably, the necessity of any given presiding elected Tribal council); Tribal sovereignty; and tribes' ability to secure outside business assistance. *See, e.g., Ott v. Mortg. Inv'rs Corp. of Ohio*, 65 F. Supp. 3d 1046, 1060 (D. Or. 2014) (noting that "the personal liability of a corporate director or officer must be 'founded upon specific acts by the individual director or officer'"); *Kibec v. Balog*, No. 3:12-CV-559-ST, 2012 WL 2529202, at *2 (D. Or. 2012) ("[C]orporate officers 'are not personally liable for the debts or other contractual obligations of the corporation'") (quoting ORS 58.185 (10); *Amfac Foods, Inc. v. Int'l Systems & Controls Corp.*, 294 Or. 94, 107 (1982) (requiring "improper conduct" prior to disregarding corporate formality);

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see also Williams, 929 F.3d at 182 (noting an entity's decision to outsource management in and of itself does not weigh against tribal immunity).

Moreover, it is not plausible for Martorello to know the loans are unenforceable, or foresee any consumer injury or harm in the state of Oregon. In addition to the federal law and policy in support of helping tribal efforts in their economic development, the loans are lawful under all federal consumer lending and tribal laws. Congress has provided no restriction to tribal sovereignty in the form of e-commerce, consumer lending, or freedom to contract for outside services. Moreover, no Court has determined that state usury law is applicable to the loans including by measure of conducting a balancing test.[9] This is especially notable given the Court-sanctioned settlement agreement with the Tribe, described below, which continues Big Picture's supposedly illegal activity to fund prior borrower's settlement arrangement from the collections of future borrowers.

C. Plaintiff Fails to Demonstrate a Predicate RICO Act or a RICO Conspiracy.

As a preliminary matter, there should be no RICO predicate offense, where the alleged infraction is legal under Tribal law, even if it conflicts with some state law. The "essential nature"

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[9] For example, in *Denan v Transunion*, the credit bureau was sued for allowing online tribal lenders to query consumer credit reports. *Denan v. Trans Union LLC*, 959 F.3d 290 (7th Cir. 2020). The Seventh Circuit stated in part, "[o]ne might speculate that a loan is illegal, as plaintiffs do, *but it would be just speculation*. Only a court can fully and finally resolve the legal question of a loan's validity." *Id.* at 295. Indeed, even the Second Circuit in *Otoe-Missouria* found "[w]ith the benefit of discovery, plaintiffs may amass and present evidence that paints a clearer picture of the 'who', 'where', and 'what' of online lending, and may ultimately prevail in this litigation." 769 F.3d at 114. And in *Williams*, the court could not opine that they know this Tribe's loans are facially unlawful as a result of the physical location of Big Picture's borrower. *Williams*, 929 F.3d at 175 ("Big Picture charges interest rates on its loans that are substantially-50 times-higher than would be allowed *if* Virginia law were applicable."). And as mentioned prior, Oregon's Division of Financial Regulation has acknowledged potential exceptions for tribes, stating that tribal lenders "can make loans with higher fees and interest rates than those allowed by state laws." *See* "Payday loans," Oregon Division of Financial Regulation, Nov. 5, 2016, available at https://dfr.oregon.gov/financial/loans/personal/payday/Pages/index.aspx

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of the alleged "enterprise" was for the Tribe to issue loans that were legal by Tribal law—this should not be a substantive RICO violation because the loans were legal under Tribal law.

At most, there is a conflict of law problem—not per se usury. *See, e.g.*, *Aetna*, 818 F.2d at 21 (noting loan would have been usurious under Arkansas law, but the loan was enforceable because Texas law governed); *FDIC v. Lattimore Land. Corp.*, 656 F.2d 139 (5th Cir. 1981) (transfer of debt did not cause National Bank Act to mandate application of usury law where national bank was located, despite conflict of laws; the "non-usurious character of a note should not change when the note changes hands."); *Krispin v. May Dep't Stores Co.*, 218 F.3d 919 (8th Cir. 2000) (for purposes of usury claims, "it makes sense to look to the originating entity …, and not the ongoing assignee"); *cf. Gingras,* 2016 WL 2932163, at *20 (noting that "[f]or many years, banks operating in the United States have avoided state usury laws by establishing themselves in states such as South Dakota and Delaware which do not have usury restrictions").

RICO should not be so broad that it encompasses run-of-the mill conflict of law problems. *E.g. Sundance Land Corp. v. Comm. First Fed. Sav. Loan*, 840 F.2d at 666 (9th Cir. 1988) ("RICO is concerned with evils far more significant than the simple practice of usury"). And if Congress wanted to avoid interest-rate-related conflicts of laws, it could set federal interest rates, but it has rejected doing so. *See S. Amdt*. 3746 to S.3217, 111th Cong. (introduced May 13, 2010; rejected May 19, 2010) (proposing capping interest rate at which loans could be offered).

Because interest rates legal under Tribal law should not justify a predicate offense, there could be no "conspiracy" with regard to choice of sovereign Tribal law. *See 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."); *Jackson v. BellSouth Telecomm'ns,* 372 F.3d 1250, 1269 (11th Cir. 2004) ("parties cannot be found guilty of conspiring to commit an act that is itself not against the law").

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VI. Martorello Objects to the Court's Finding of Potential Unjust Enrichment.

Though named Plaintiffs and the Court may dislike the Tribal lending model, the allegations in the complaint do not permit a finding that the lending model is "unjust" on that basis alone. *See*, *e.g.*, *Cumming v. Nipping*, 285 Or. App. 233, 239 (2017) (noting unjust enrichment theory requires an injustice "rooted in recognized legal principles and not in abstract notions of morality"); *Wilson v. Gutierre*, 261 Or. App. 410, 415 (2014) ("[T]he mere fact that a benefit is conferred is not sufficient to establish unjust enrichment"). These are claims based on an express contract. Martorello was not a party to that contract and no benefit was ever incurred by the Plaintiff's on Martorello. Matrorello sometimes receives distributions from Eventide, which sold a valuable asset to the Tribe, and Eventide has not yet been fully paid for the sale. Martorello could not have known of benefit and expected repayment just because Plaintiff made presumptively voluntary loan payments to Big Picture.[10]

Even if a theory of unjust enrichment (like the usury claim) could succeed against the Tribe (disregarding Tribal sovereignty, policies, and freedom of contract), the loan interest could not directly be connected to Martorello. Rather, the Tribal entities issued and collected the loans, and Martorello personally did neither.

VII. Martorello Objects to the Court's Willingness to Proceed Without the Settling Tribal Lenders.

As the Court notes, 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." (F&R at 12; Dkt. 94.) In "December 2019, the Settling Defendants were voluntarily dismissed from this case, pursuant to Rule 41 (a)(1)."

[10] To clarify Plaintiff's misinterpretation of the terms "revenue" and "net profit" for the Court, Big Picture generates 100% of its revenue, from which the Tribe takes a percentage of revenue minus bad debt ("net revenue" thus merely a contractual definition) out as a monthly distribution to support the government. Big Picture then pays it substantial expenses to numerous third-parties, and if anything remains, a note payment to Eventide is made until the Note sunsets and the remaining balance is forgiven. The Tribe additionally owns 100% of the substantial equity value of both Big Picture loans and Ascension Technologies, LLC.

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(*Id.*) By settling with the Tribal lender, Big Picture, Plaintiff is entitled to period cash payments stemming from the very lending enterprise that Plaintiff challenges here. *See Galloway, et al. v. Williams, et al.*, E.D. Va. Civil Action No. 3:19-cf-00470-REP, Dkt. 18-1, at 8 ("Under the Settlement Agreement, the consumer loans made by Big Picture will continue to be serviced by Ascension and the proceeds therefore will be collected."). The settlement does not materially modify Big Picture's ongoing operations, contemplates that Tribal lending will continue to collect from Oregon consumers at rates that far exceed the state usury laws the Plaintiff's claim apply here, and make millions of dollars in payments to Plaintiffs *over the next two years*. The settlement also requires certain defendants to transfer to the settlement fund their membership interests in Eventide, including their interests in future distributions received under the Loan Agreement and Promissory Note between Eventide and Tribal Economic Development Holdings, LLC. (*See* Settlement Agreement § 10.2.) If Plaintiff can be creditors to the Tribe, so too can Eventide. If Plaintiff can benefit from Eventide's note payments, so too can Martorello. As such, no injunctive relief against Martorello is possible or appropriate and because the Plaintiff's positions cannot be reconciled with necessary allegations of knowing and foreseeing harm or injury Big Picture's ongoing activities with Oregon consumers, all claims against Martorello should be dismissed.[11]

CONCLUSION

At heart, this matter is a conflict of law issue between Tribal law and Oregon's law; there is no basis to pierce a tribal government entity and several corporate veils and target an entrepreneur supporting tribal development. Martorello has done exactly what federal policy supports, *i.e.*, helping tribal governments develop and run businesses that ultimately can fund tribal government programs. For all of the above reasons, Martorello respectfully requests that the motion to dismiss be granted.

[11] Big Picture, Ascension, and the Tribe are necessary parties under Rule 19(a) because of their contractual interests in the loans agreements that Plaintiffs seek to invalidate. This case should be dismissed under Rule 19, as will be more thoroughly argued by separate motion.

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