Steve D. Larson, OSB No. 863540
Email: slarson@stollberne.com
Steven C. Berman, OSB No. 951769
Email: sberman@stollberne.com
STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840

Michael A. Caddell (admitted pro hac vice)
Email: mac@caddellchapman.com
Cynthia B. Chapman (admitted pro hac vice)
Email: cbc@caddellchapman.com
John B. Scofield, Jr. (admitted pro hac vice)
Email: jbs@caddellchapman.com
Amy E. Tabor (to be admitted pro hac vice)
Email: aet@caddellchapman.com
CADDELL & CHAPMAN
628 East 9th Street
Houston, TX 77007
Telephone: (713) 751-0400
Facsimile: (713) 751-0906

Attorneys for Plaintiff

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

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

Plaintiff,

v.

MATT MARTORELLO, *et al*.

Defendant.

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

PLAINTIFF'S RESPONSE TO MARTORELLO'S OBJECTIONS TO FINDINGS AND RECOMMENDATION

TABLE OF CONTENTS

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

TABLE OF AUTHORITIES

CASES

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

STATUTES

OTHER AUTHORITIES

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

I. INTRODUCTION

The Court's Findings and Recommendation (Dkt. 146) correctly applied well-established law to detailed, well-pleaded facts to determine that (1) the Court has personal jurisdiction over Matt Martorello, and (2) Richard L. Smith, Jr. adequately pleaded causes of action in his First Amended Complaint (Dkt. 100) ("Amended Complaint"). In his Objection to the Findings and Recommendation (Dkt. 148), Martorello improperly asks this Court to assume, contrary to the well-pleaded facts, that Big Picture's loans were made on the Tribe's Reservation. (Dkt. 146 at 4-11.) Reviewing this 12(b)(6) motion to dismiss, however, 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 Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1042 (9th Cir. 2015) (quoting *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008)). Similarly as to Martorello's 12(b)(2) motion to dismiss for lack of personal jurisdiction, because Martorello has submitted no declarations or evidence to controvert Smith's allegations, "plaintiff's version of the facts is taken as true for the purposes of a 12(b)(2) motion[.]" *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011). Martorello's argument that this Court should accept his unsupported contention, contrary to the pleaded facts, that Big Picture originated its loans on the Reservation is particularly brazen in light of the fact that the Eastern District of Virginia has already found, following a lengthy evidentiary hearing, that Martorello misrepresented facts regarding the genesis of Big Picture and its lending process. *See Williams v. Big Picture Loans, LLC*, No. 3:17-cv-00461-REP, 2020 WL 6784352, at *12-14 (E.D. Va. Nov. 18, 2020); *see also* Dkt. 146 at 12-13. Taking as true Smith's well-pleaded allegations, including that (1) Martorello created and oversees the lending enterprise to target lending to Oregon consumers at annual interest rates exceeding 500% (Dkt. 100 ¶¶ 1-8, 18-20, 22, 24, 31, 44-102),

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

(2) Smith took out his loan in Oregon, (*id*. ¶¶ 9, 26), (3) he has never been to the Tribe's reservation, (*id.*), and (4) all significant parts of the lending scheme are conducted outside the Reservation by non-Tribal employees, (*id.* ¶¶ 52–54, 76, 89–93),[1] clearly established law supports Smith's causes of action and personal jurisdiction over Martorello.

II. TRIBAL SOVEREIGN IMMUNITY DOES NOT PROTECT MARTORELLO

In his Objection, Martorello distorts and misuses the doctrine of tribal sovereign immunity – which gives rise to a limited jurisdictional defense available only to the Tribe and entities found to be "arms of the Tribe" – in an effort to turn the doctrine into a substantive legal defense and a device for extending Tribal law and jurisdiction outside the boundaries of the Reservation. In effect, Martorello is seeking immunity from suit because he arranged for his predatory lending scheme to be in the name of the Tribe, in return for which the Tribe receives a small fraction of his enterprise's gross profits. Under Martorello's reasoning, he must be held immune from suit to sustain the Tribe's continued receipt of income from the lending operation. Such a twisted application of Tribal interests and sovereign immunity would be unprecedented. The Court correctly found that, in this context, the doctrine of tribal sovereign immunity does not support dismissal of this litigation under either Rule 12(b)(2) or 12(b)(6). (Dkt. 146.)

Fundamentally, the lending enterprise and non-Tribal member Martorello's tortious conduct occurred off the Reservation and targeted U.S. consumers through internet loans in Oregon and other states. *Infra*, section III.(B)(1). Tribal law does not apply to such off-Reservation

[1] Smith here incorporates by reference his Amended Complaint, (Dkt. 100), his Response to the Motion to Dismiss (Dkt. 120), and the Court's Findings and Recommendation, (Dkt. 146), which contain additional detailed facts and authorities supporting personal jurisdiction and Smith's causes of action.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

conduct involving non-tribal members. *Montana v. United States*, 450 U.S. 544, 565 (1981). Martorello's arrangement to pay the Tribe a small portion of his illegal profits does not justify invoking "tribal self-governance" to grant him immunity from suit or to justify application of Tribal law to off Reservation loans to non-members of the Tribe. Although the Tribe and its corporate entities may not be subject to suit in U.S. Courts, that jurisdictional immunity does not suggest that the lending operation is legal or beyond the reach of U.S. Courts as to other parties, such as Martorello. In fact, state law continues to apply and Tribal council members and other participants in the scheme remain subject to suit. *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 795-96, 134 S.Ct. 2024 (2014) (relying on *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908), for the proposition that the plaintiff could "resort to other mechanisms, including legal actions against the responsible individual" to vindicate violations of state law); *Gingras v. Think Finance, Inc*., 922 F.3d 112, 123 (2d Cir. 2019) (holding that, regardless of whether a tribal lender may be entitled to sovereign immunity, "official capacity suits are available against tribal officials" to stop unlawful conduct), *cert. denied sub nom. Sequoia Capital Operations, LLC v. Gingras*, 114 S.Ct. 856 (2020); *see also Gingras v. Rosette*, No. 15-cv-101, 2016 WL 2932163, at *4–7 (D. Vt. May 18, 2016), *aff'd sub nom. Gingras*, 922 F.3d 112 (2d Cir. 2019). The expanded application of Tribal law sought by Martorello "would eviscerate the power of states to subject 'Indians going beyond reservation boundaries . . . to any generally applicable state law' by allowing tribes operating as payday lenders to reach far beyond their sovereignty and violate state consumer protection statutes with impunity." *Hengle v. Asner*, 433 F. Supp. 3d 825, 876 (E.D. Va. 2020), *appeal filed sub nom. Hengle v. Treppa* (4th Cir. Mar. 26, 2020) (quoting *Bay Mills*, 572 U.S. at 795).

Martorello cannot justify an unprecedented extension of tribal law beyond the boundaries

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

of the reservation, given that (1) he has no tribal affiliation whatsoever, (2) the victims of the lending scheme were not members of the Tribe and never visited the reservation; and (3) the well-pleaded facts show that he orchestrated the usurious lending operation outside the Reservation. Not surprisingly, there is no authority to exonerate Martorello from personal liability for his design, implementation, and oversight of the illegal enterprise simply by sharing a small percentage of the illegal gains with a Native American tribe.[2] Under Martorello's reasoning, any third party could develop a business outside a Tribal reservation that is illegal under state law and yet insulate it from legal challenges by sharing a small portion of the profits with the Tribe in the name of "tribal self-governance." The reliance on a tribe's interest in self-governance from ill-gotten gains is misplaced; the sharing of profits with a tribe does not cure the illegality of the business. While the Tribe itself might not be subject to suit in U.S. Courts, black-letter Supreme Court precedent establishes that "'Indians going beyond reservation boundaries' are subject to any generally applicable state law." *Bay Mills*, 572 U.S. at 795 (quoting *Wagnon v. Prairie Bound Potawatomi Nation*, 546 U.S. 95 (2005)). Even more so, non-tribal members like Martorello are clearly subject to suit for participating in such illegal enterprises. *Gingras,* 922 F.3d at 123; *Hengle*, 433 F. Supp. 3d at 876; *Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 662 (E.D. Va. 2019) (non-tribal entities cannot claim sovereign immunity); *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955, 983-86 (N.D. Cal. 2019) (appeal filed April 10, 2019). Because sharing of profits of an illegal

[2] An unprecedented extension of the doctrine of tribal sovereign immunity to protect Martorello would theoretically subject him to suit in the tribal court system. However, the Tribal regulatory authority and code do not provide non-member Smith with jurisdiction, procedures, and/or causes of action against non-member Martorello. (*Infra*, section III.(C)(2); Dkt. 100 ¶¶ 104, *et seq.*; Dkt. 146 at 31-40.) Therefore, Martorello's invoking of tribal jurisdiction seeks the equivalent of a proverbial "get out of jail free" card to shield him from liability for millions of dollars of illegal profits from usurious loans to Oregon consumers.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

operation with a Native American tribe does not cure the illegality of the business or shield its managing agents from liability, this Court should overrule Martorello's objections.

III. SPECIFIC OBJECTIONS

A. The Magistrate Judge Correctly Found that the Court Has Personal Jurisdiction over Martorello in Oregon

Smith made a prima facie showing of this Court's personal jurisdiction over Martorello, and Martorello failed to sustain his burden of proving that the Court's exercise of jurisdiction would be unreasonable. The Court's Findings include an accurate and detailed analysis of the facts supporting jurisdiction as well as a thorough analysis of the factors favoring jurisdiction in this Court. (Dkt. 146 at 4-11, 16-29.)

With no declarations or affidavits to controvert the detailed facts that Martorello designed, implemented, and controlled the nationwide lending scheme that targeted Oregon consumers, Martorello's objection is fatally flawed. (Dkt. 100 ¶¶ 9, 18-20, 22, 24, 26-37; Dkt. 148 at 2.) Instead, Martorello makes unsupported assertions that he did not personally issue, sign, approve, or collect on the subject loans or commit acts targeting Oregon. (Dkt. 148 at 3.) Such claims, however, ignore the well-pleaded facts that Martorello was the architect and supervisor of the lending model in his personal capacity (including the creation of the Big Picture lending platform and Ascension's handling of all material parts of the lending process outside of the reservation).[3]

[3] *See, e.g.*, Dkt. 120 at 9-15; Dkt. 146 at 4-11, 17-29. Martorello developed the loan servicing concept in an unlawful attempt to make loans at usurious rates. (Dkt. 100 ¶¶ 2, 18, 44-46, 58-63.) He was aware of the state lending laws, yet neither he nor any other participant in the lending scheme became licensed lenders to make loans to Oregon residents. (*Id*. ¶¶ 94-100 161.) Martorello developed the corporate lending entities in an elaborate effort to insulate himself from personal liability. (*Id.* ¶¶ 5, 58-63, 165-167; Dkt. 100-2 at 19; Dkt. 100-2 at 21.) Martorello was aware that he could be prosecuted and could be held personally liable. (Dkt. 100 ¶¶ 55-59; Dkt. 100-1 at 81; Dkt 100-1 at 84.) Martorello developed the Bellicose/Red Rock and Big Picture/Ascension lending platforms so that he would be able to maintain control of all material

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

The lending process "was operating under the instruction, direction, and/or supervision of [Martorello and Eventide]." (Dkt. 100 at ¶ 31.) The Court correctly found that there were "extensive detailed allegations in the Amended Complaint of [Martorello's] personal involvement." (Dkt. 146 at 50.) The Amended Complaint and the Court's Findings also identified and established Martorello's targeting of Oregon consumers and therefore his purposeful availment to the jurisdiction of this Court. (Dkt. 100 ¶¶ 98-100, 156-157, 161; Dkt. 146 at 18-26.) These uncontroverted facts must be taken as true even as Martorello restructured the business as a nominal debt to him, rather than an equity ownership. Additionally, Martorello failed to sustain his burdens in the challenge of jurisdiction, none of which is disputed in his Objection. (Dkt. 146 at 26-28.)

Finally, other jurisdictions have found personal jurisdiction of non-tribal defendants for their participation in predatory lending directed at states' consumers. *See, e.g.*, *Brice*, 372 F. Supp. 3d at 979-81 (finding a prima facie case for personal jurisdiction over non-tribal defendants who created and implemented the lending scheme because of their intentional acts to reap profits from the state's residents); *Shapiro v. Think Finance, Inc.*, No. 14-cv-7139, 2018 WL 637656, at *5-6 (E.D. Pa. Jan. 31, 2018); *Gingras*, 2016 WL 2932163, at *11 (finding personal jurisdiction where architect of tribal lending model "and the companies which he controls developed a nationwide,

---

aspects of the lending business. (Dkt. 100 ¶¶ 1, 24, 45, 58-62, 75, 79-82, 87, 154-155, 161, 171-173.) He created the framework for the entire usurious lending enterprise including the companies that buttress the illegal scheme. (*Id.* ¶¶ 18, 44-48, 58-66, 171-172.) He then structured the operation to have minimal tribal involvement. (*Id.* ¶¶ 45-46, 49, 58-60, 75; Dkt. 100-1 at 15-16.) Martorello oversees and controls Big Picture and Ascension. (Dkt. 100 ¶¶ 8, 24, 75-88.) He directs the lending scheme with the intention of soliciting, funding, and collecting on usurious loans. (*Id.* ¶¶ 10, 19, 22, 155-158, 161, 165-167.) Martorello performed these illegal acts in his individual capacity, (*see, e.g.*, *id.* ¶¶ 7, 8, 18, 31, 58, 165-168). Overall, but for Martorello's design, implementation, and oversight of the lending operation, the illegal loans targeting, among others, Oregon consumers never would have occurred.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

illegal lending scheme which resulted in predatory loans to Vermont residents"). In light of the detailed facts regarding Martorello's design, implementation, and oversight of the lending operation that targets Oregon consumers, the Court correctly found that it has personal jurisdiction over Martorello. (Dkt. 146 at 13-29; *see also* Dkt. 120 at 8-15.)

B. The Magistrate Judge correctly found that Oregon law applies to the predatory lending scheme.

1. The loans originated off the Reservation.

This Court correctly relied upon the well-pleaded allegations in Smith's Amended Complaint and found that the loans did not originate "on the Reservation" and should instead be governed by Oregon law. (Dkt. 146 at 40-42.) The lending enterprise did not originate on the Reservation and is not a "reservation-based business," as Martorello contends. (Dkt. 148 at 4.) There is no dispute that the loans originated from Smith's application of the loan in Oregon, his receipt of the funds in Oregon, his efforts to resolve the debt in Oregon, and his payment of the loans in Oregon. (Dkt. 100 ¶¶ 9, 18-20, 22, 24, 26-37; Dkt. 146 at 11, 40.) Additionally, the Court correctly relied on the Amended Complaint (with its supporting proof), which established that all other meaningful parts of the lending business occurred hundreds of miles from the Reservation: none of Martorello's design, implementation, and oversight of the lending operation occurred on the Reservation; the automated targeting of consumers and the lending approval process originated through Ascension off the Reservation with no tribal oversight or involvement; all customer service related to the loan application process occurred in Mexico and the Philippines; all supervision of customer service was in the Virgin Islands; and accounting, marketing, compliance, risk assessment and analytics, information technology, call center monitoring and training, vendor identification, contract negotiations, and assistance with solicitation of investors occurred off the

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

reservation and primarily in Atlanta, Georgia. (Dkt. 100 ¶¶ 76-79, 80, 83, 90-93; Dkt. 146 at 4-5, 9-11, 40.) No meaningful part of the lending process occurred on the Reservation. (Dkt. 100 ¶ 93.)

As the sole factual basis for his claim that Big Picture loans originated on the Reservation, Martorello relies on outdated findings by the Eastern District of Virginia, which are not evidence and which have now been reconsidered. (Dkt. 148 at 7 (citing *Williams v. Big Picture Loans*, LLC, 329 F. Supp. 3d 248, 264 (E.D. Va. 2018).) In November 2020, the Eastern District of Virginia revisited the facts quoted by Martorello in the context of new evidence and determined that its 2018 findings were erroneous due to Martorello's distortion of the record: "the entire section of the opinion describing Big Picture's lending process, *Williams*, 329 F. Supp. 3d at 264, was materially erroneous because of [Martorello's] misrepresentations." *Williams*, 2020 WL 6784352, at *14 (emphasis added).[4] Martorello's misrepresented facts cannot support his arguments here. (Dkt. 146 at 13, 19-20.)

The majority of courts that have considered this issue have determined that, the mere fact that Smith visited a website possibly owned and operated by the Tribe does not constitute on-

[4] Further, the Eastern District of Virginia addressed the off-reservation conduct while denying the tribal defendants' motion to dismiss for failure to exhaust tribal remedies: "there was no basis on which to conclude that a non-member of the Tribe acted on tribal land[.]" *See* Order, *Williams*, No. 3:17-cv-00461-REP-RCY, Dkt. 142 ¶ 1 (July 25, 2018).

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

Reservation activity.[5] These principles have been applied with equal force to non-tribal internet lenders as well.[6]

[5] *Gingras*, 922 F.3d at 121 (finding that the tribal defendants "engaged in conduct outside of Indian lands when they extended loans to the Plaintiffs in Vermont"); *Hengle*, 433 F. Supp. 3d at 876 (holding that authorities have repeatedly held that tribal online loans "constitute off-reservation conduct subject to nondiscriminatory state regulation"); *United States v. Hallinan*, No. 16-130, 2016 WL 7477767, at *1 (E.D. Pa. Dec. 29, 2016) ("Because the loans at issue involve activity that takes place, at least in part, off a reservation, state law still applies."); *Colo. v. Western Sky Fin., LLC*, 845 F. Supp. 2d 1178 (D. Colo. 2011) ("Plaintiffs allege, and defendants do not dispute, that defendants were operating via the Internet. The borrowers do not go to the reservation in South Dakota to apply for, negotiate or enter into loans. They apply for loans in Colorado by accessing defendants' website… this is not a case about commercial activity on Indian lands."); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782 (7th Cir. 2014) ("Here, the Plaintiffs have not engaged in *any* activities inside the reservation. They did not enter the reservation to apply for the loans, negotiate the loans, or execute documents.") (emphasis in original)); *Parnell v. W. Sky Fin., LLC*, No. 4:14-CV-0024-HLM, 2014 WL 11460814, at *9 (N.D. Ga. Apr. 28, 2014) (finding that the events at issue did not occur on the reservation, the plaintiff not engage in activity on the reservation, the parties to the suit are not tribe members: "even if Plaintiff had some consensual contacts with the [Tribe], the mere existence of those contacts would not give rise to jurisdiction in the … Tribal Court."); *see also Otoe-Missouria Tribe of Indians v. N.Y. State Dept. of Fin. Servs.*, 974 F. Supp. 2d 353, 359-61 (S.D.N.Y. 2013) (denying Indian tribes' request to enjoin tribes from extending payday loans to New York citizens over the Internet, because "the activity the State seeks to regulate is occurring off of Plaintiffs' Tribal lands"), *aff'd*, 769 F.3d 105, 115 (2d Cir. 2014) (affirming the district court's decision because the tribes "provided insufficient evidence to establish that they are likely to succeed in showing that the internet loans should be treated as on-reservation activity"); *State ex rel. Suthers v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389, 400-01 (Colo. App. 2008) (holding that a payday lending business that engaged in transactions over the Internet with consumers located off the reservation constituted off-reservation activity: evidence showed that the contracts "were entered into and negotiated in Colorado; the loans are delivered to consumers in Colorado; and performance will occur in Colorado because consumers will repay the principal and pay interest" in Colorado), *aff'd*, 242 P.3d 1099 (Colo. 2010).

[6] *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1304 (10th Cir. 2008) (finding that usury statutes regulated in-state activity where Utah-based lender made loans over the internet to residents in Kansas); *State ex rel. Swanson v. Integrity Advance, LLC*, 846 N.W.2d 435, 442 (Minn. Ct. App. 2014) (holding that "extension of payday loans to Minnesota residents did not occur wholly outside Minnesota's borders" thereby requiring online lender from Utah to comply with lending statutes).

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

2. Tribal law does not apply to a dispute between non-Tribal members that arises from off-Reservation conduct.

Tribal law simply does not apply because there is no colorable claim of Tribal jurisdiction pursuant to the *Montana* rule. In short, Tribal law does not govern Tribal dealings with non-members that occur off the Reservation, much less an off-Reservation dispute among non-members. Tribal jurisdiction derives from the fact that "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory.'" *Montana*, 450 U.S. at 563 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). For certain core tribal matters, tribes retain "inherent sovereignty" to "exercise [their] tribal power" over disputes and parties. *Id*. at 564. These matters, as the Supreme Court has explained, include "the power to punish tribal offenders" and the rights to "determine tribal membership," "regulate domestic relations among members," and "prescribe rules of inheritance for members." *Id*. at 564. But "through their original incorporation into the United States as well as through specific treaties and statutes," the tribes have "lost many of the attributes of sovereignty." *Id*. at 563. As a result, the Supreme Court has held that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id*. at 564.

In the absence of a federal statute authorizing tribal court jurisdiction, the Supreme Court's decision in *Montana* articulated two limited exceptions to the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." *Montana*, 450 U.S. at 565; *see also Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316, 328 (2008); *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). Under the first exception, a tribe may exercise civil jurisdiction over non-Indians on their reservations through taxation,

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

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*, 450 U.S. at 565. Second, "[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 566 (emphasis added).

Here, neither of the *Montana* exceptions apply because Smith and the classes have not engaged in any activities on the Reservation. As to the first exception, the *Montana* court was clearly discussing only transactions occurring on tribal lands. *Montana* stated in relevant part:

> To be sure, 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. 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.

450 U.S. at 565 (emphasis added). In support of this statement, *Montana* cited to *Williams v. Lee*, 358 U.S. 217, 223 (1959), which concerned a transaction between a nontribal member and tribal member that took place on tribal land and several other cases concerning the regulation of transactions occurring on tribal land. *See Montana*, 450 U.S. at 565 (citing *Williams*; *Morris v. Hitchcock*, 194 U.S. 384 (1904) (considering tribal legislation on live stock owned by nonmembers on tribal land); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (noting tribe had inherent authority to govern business transacted on tribal land); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 150 (1980) (discussing tribal power to tax non-members "entering the reservation to engage in economic activity")). Accordingly, simply entering into an agreement with a tribe, tribal corporation, or tribal member is not sufficient to implicate the Tribal law. It is essential to *Montana* that the specific conduct of the non-member occur on the

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

reservation. *Montana*, 450 U.S. at 565. In 2008, the Supreme Court reiterated that *Montana* requires "nonmember conduct on tribal land." *Plains Commerce Bank*, 554 U.S. at 333. In doing so, the Court examined its prior cases and observed that they follow "the same pattern, permitting regulation of certain forms of nonmember conduct on tribal land." *Id*. These cases "always concerned nonmember conduct on the land." *Id*. (citations omitted). There is no precedent for extending the reach of Tribal law to disputes between non-Tribal members regarding conduct that occurred off the Reservation. As the Second Circuit addressed in *Otoe-Missouria Tribe of Indians v. New York State Dept. of Fin. Servs.*:

> The breadth of a state's regulatory power depends upon two criteria—the location of the targeted conduct and the citizenship of the participants in that activity. Native Americans going beyond the reservation boundaries must comply with state laws as long as those laws are nondiscriminatory [and] ... otherwise applicable to all citizens of [that] State.

769 F.3d 105, 113 (2d Cir. 2014) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)) (internal quotations omitted) (noting states' interest in regulation of "the conduct of non-Indians"); *see also Jackson*, 764 F.3d at 782 ("Because the Plaintiffs' activities do not implicate the sovereignty of the tribe over its land and its concomitant authority to regulate the activity of nonmembers on that land, the tribal courts do not have jurisdiction over the Plaintiffs' claims."); see also, *infra*, section III.(C)(1), III.(C)(2). Most significantly, "a tribe has no legitimate interest in selling an opportunity to evade state law." *Id*. at 114. In *Otoe-Missouria*, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, the Tribe at issue here, failed to make a "showing that the internet loans should be treated as on-reservation activity." *Id*. at 115. Similar to the failure to prove a likelihood of success on the merits in *Otoe-Missouria*, Martorello's arguments fall equally short and cannot justify an application of Tribal law.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

None of the other cases cited by Martorello relate to off-Reservation conduct by a non-Tribal member, as pleaded and proven in this case. *Plains Commerce Bank*, 554 U.S. at 327 (pertaining to regulation and taxation of on-reservation activities); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (finding state law does not govern on-reservation bingo and gambling); *F.T.C. v. Payday Fin., LLC*, 935 F. Supp 2d 926, 939 (D.S.D. 2013) (noting that "a nonmember defendant's lack of physical contact with the reservation, particularly in tort cases, is indicative that the nonmember's conduct did not occur within the reservation and did not have a discernable effect on the tribe," and as to a contract issue, the focus should be on "the nonmember Borrower's 'activities' or 'conduct'") (citations omitted and emphasis removed). Martorello mistakenly relies on *Wisconsin v. E.P.A.*, 266 F.3d 741, 749 (7th Cir. 2001), as somehow supporting the extension of tribal jurisdiction off the Reservation. (Dkt. 148 at 6 n.4.) *Wisconsin*, however, was a lawsuit related to the E.P.A. giving a tribe status to regulate water quality on the reservation under the federal Clean Water Act, which is not analogous to the present dispute. Not only was the body of water in question surrounded by reservation lands, but the *Wisconsin* court found that "the [tribe] has demonstrated that its water resources are essential to its survival" and narrowly limited its holding to the facts of that case. *Id.* at 750.

3. Oregon's strong interests in protection of its consumers from abusive lending practices requires the application of Oregon law.

The Court correctly found that Oregon has the most significant relationship to internet lending to Oregon consumers, because public policy interests favor the application of state usury laws for the protection of consumers from predatory lending practices. (Dkt. 146 at 41-42.) Oregon courts have addressed the importance of protecting consumers from predatory lending:

> The courts do not permit any shift or subterfuge to evade the law against usury. The form into which parties place their transaction is unimportant. Disguises are

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

> brushed aside and the law peers behind the innocent appearing cloaks in quest for the truth. . . . If the transaction was, in fact, a loan of the kind denounced by the law of usury, no form to which the parties could resort for purposes of creating false appearances of innocence would be invulnerable to attack by the truth.

Fidelity Sec. Corp. v. Brugman, 137 Or. 38, 50–51, 1 P.2d 131, 136 (1931); *see also Pacific Bldg. Co. v. Hill*, 40 Or. 280, 293, 67 P. 103, 106 (1901) ("Usury is a moral taint wherever it exists, and no subterfuge should be permitted to conceal it from the eyes of the law. . . . As a principle of international jurisprudence, no state is bound or ought to enforce or hold valid in its courts of justice any contract which is injurious to its public rights, offends its morals, contravenes its policy, or violates a public law."). Reaching similar conclusions about the paramount interests of preventing usurious lending practices, other jurisdictions have held that held that consumer protection through usury laws are more significant than the interests of applying tribal laws.[7] Because this litigation involves non-tribal member Martorello's off-Reservation conduct intentionally directed at Oregon consumers, such as Smith, state interests greatly exceed any legitimate interest the Tribe might have in applying its laws. nonmembers on that land, the tribal courts do not have jurisdiction over the Plaintiffs' claims.").

[7] *Consumer Financial Protection Bureau v. CashCall, Inc.*, CV-157522-JFWRAOX, 2016 WL 4820635, at *7 (C.D. Cal. Aug. 31, 2016) ("Application of [tribal] law would be contrary to a fundamental public policy of sixteen states, and those states have a materially greater interest than [the tribe] in the application of their laws."); *see also MacDonald v. CashCall, Inc.*, CV 16-2781, 2017 WL 1536427, at *8 (D.N.J. Apr. 28, 2017), *aff'd*, 883 F.3d 220 (3d. Cir. 2018) ("application of [tribal] law would be contrary to New Jersey's fundamental public policy of protecting its citizens from usurious loans and unlicensed lenders."); *Brice*, 372 F. Supp. 3d at 981 (finding that "the interests of California in protecting low income consumers (as plaintiffs assert they are) and in applying its usury laws far outweigh the interests of Texas as the residence of the defendants").

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

C. The Magistrate Judge Correctly Found that the Choice of Law and Forum Selection Clauses in the Loan Agreement Should Not Be Enforced.

1. The Tribe does not have a well-grounded interest or the legal authority to enforce the choice of law and forum selection clauses of the form loan agreement.

For the reasons previously stated, Martorello cannot rely on Tribal interests and laws to protect him from suit for his off-Reservation conduct. *Supra*, sections III.(B)(1), III.(B)(2). The well-pleaded facts support application of the *Montana* rule and not enforcing the boilerplate terms of the loan agreement. As the Eighth Circuit recently held, the limited jurisdiction of tribal law cannot be expanded by consent: "Even where there is a consensual relationship with the tribe or its members, the tribe may regulate non-member activities only where the regulation 'stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.'" *Kodiak Oil & Gas (USA), Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019) (quoting *Plains Commerce Bank*, 554 U.S. at 336); *see also Jackson*, 764 F.3d at 783 (finding that "a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court"). Where, as here, the litigation is between non-Tribal members arising from off-Reservation activities, the boilerplate loan agreement should not control the terms of this dispute.

2. Tribal law does not provide a forum for Smith's causes of action against Martorello.

Tribal law and its court system do not have jurisdiction over Smith's claims against Defendants. *Hicks*, 533 U.S. at 369; *see also* Dkt. 100 ¶¶ 105-118. The Magistrate Judge provided a detailed and accurate assessment of the choice of law and forum selection clauses and correctly found that provisions of the loan agreement should not permit Tribal laws to be extended beyond the boundaries of the Reservation. (Dkt. 146 at 33-39.) The terms of the loan agreement, in conjunction with Tribal law and the limited jurisdiction of the Tribal courts, "effectively foreclose

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

Smith's rights if the court enforced the forum selection clause," and the adhesion contract merely creates an "illusory promise" of a basis to dispute the loan. (Dkt. 146 at 36, 38.)[8] Accordingly, even if *Montana* did not forbid the application of Tribal law, the forum selection clause would be unenforceable under the rule of *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). (*See* Dkt. 146 at 35-36.) .

[8] The Tribal code and regulations expressly prevent resolution of the core issue in this case, *i.e.*, that the loan is illegal and violates state usury laws and RICO's prohibition against the collection of "unlawful debt," which RICO defines as debt "which is unenforceable under State or Federal law" and where "the usurious rate is at least twice the enforceable rate." 18 U.S.C. § 1961(6). In particular, the Tribe's Regulations provide that consumers will not be granted the opportunity to be heard "if the only allegation contained in the consumer complaint is an allegation that the consumer finance services provided is illegal in a jurisdiction outside the jurisdiction of the Tribe." Tribal Financial Services Authority Comm. Regs. 1.1 § 4(b), http://www.lvdtribal.com/pdf/TFSRA-Regulations.pdf. Additionally, the Tribe's Code makes clear that "any claims or defenses whatsoever asserted by or on behalf of a consumer shall be subject to the sole and exclusive jurisdiction of the Tribal Dispute Resolution Procedure under this Code." Tribal Consumer Fin. Services Regulatory Code at 1.1 § 4(b), http://www.lvdtribal.com/pdf/TFSRA-Regulations.pdf, Regulation 7.2(g). But the TFSRA may only "resolve the dispute in favor of the consumer upon a finding that the [tribal entity] violated a law or regulation ***of the Tribe***," *i.e.*, not a federal law or regulation. Tribal Financial Services Authority Comm. Regs., Reg. 1.1 § 4(c) (emphasis added). Only after this process, could a consumer "appeal" to the tribal court, who similarly lacks authority to consider claims arising under state or federal law. And once again, the Code allows the tribal court to reverse the decision of the TFSRA where "the Authority's conclusions of law conflict with Tribal law or the Tribal Constitution," and nothing else. Code at § 9.4(f)(iv). Also, the Tribe's Constitution limits the jurisdiction of its Tribal courts to cases, matters, or controversies arising under Tribal law:

> Tribal Court. The judicial power shall extend to all cases, matters or controversies arising under this Constitution and the laws, ordinances, regulations, customs, and judicial decisions of the Lac Vieux Desert and shall be exercised to the fullest extent consistent with self-determination.

Constitution of the Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan, art. V, § 2(a) (1997), http://www.lvdtribal.com/pdf/constitution.pdf; *compare with* Constitution of the United States, Art. III, § 2. Because the Tribe's Constitution limits its powers to cases arising under the Tribe's Constitution and laws, it does not have subject matter jurisdiction over Smith's claims alleging violations of state and federal law.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

3. There are no grounds or foundation for an "exhaustion of tribal remedies" as to Smith's claims against Martorello.

Martorello's new arguments for enforcement of the forum selection clause or to require exhaustion of Tribal remedies are meritless and should be rejected.[9] The "exhaustion of tribal remedies" doctrine does not apply in this case. First, as previously addressed, there is no basis for tribal jurisdiction, which is an obvious prerequisite to applying the doctrine. (*Supra*, sections III.(B), III.(C)(1), (III.(C)(2).) Second, there is no pending Tribal litigation for which this Court should stay proceedings. The concept of exhausting Tribal remedies is based on principles of comity and was developed by the Supreme Court to determine "the relationship between tribal courts and state and federal courts." *Hicks*, 533 U.S. at 398 (O'Connnor, J. concurring). In other words, the doctrine of tribal exhaustion "is not . . . a jurisdictional prerequisite, but rather is a matter of comity" between the courts. *Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 195 (7th Cir. 2015) (internal quotations omitted) (quoting *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 813 (7th Cir. 1993) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n. 8 (1987))). The doctrine of tribal exhaustion generally applies in cases where a plaintiff attempts to litigate a "previously-filed, ongoing tribal court action" and asks the federal court "to interfere with those tribal proceedings. *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 80 (2d Cir. 2001); *see also Brendale v. Confederated Tribes & Bands*

[9] This Court has discretion to disregard Martorello's belated arguments raised for the first time in his objection. *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review de novo magistrate judge's findings and recommendations if objection is made, "but not otherwise"); *Vahora v. Valley Diagnostic Lab. Inc.*, 119CV00912DADSKO, 2020 WL 1061470, at *1 n.1 (E.D. Cal. Mar 5, 2020), *appeal dism'd sub nom. Vahora v. Valley Diagnostics Lab., Inc.*, 20-15512, 2020 WL 3441040 (9th Cir June 3, 2020) ("Where, as here, the party presenting new arguments for the first time in objections to findings and recommendations is represented by counsel, the court has the discretion to decline to consider the belated arguments.") (citing *United States v. Howell*, 231 F.3d 615, 621–22 (9th Cir. 2000)).

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

of Yakima Indian Nation, 492 U.S. 408, 427 (1989) (noting it is "an exhaustion rule" that prevents federal courts from intervening in ongoing tribal litigation, "allowing the tribal courts initially to determine whether they have jurisdiction"); *Granberry v. Greer*, 481 U.S. 129, 131 & n.4 (1987) (indicating that the Supreme Court's tribal exhaustion doctrine applies when there has been a "failure to exhaust" a parallel and preexisting tribal court claim). Indeed, this was the case in each instance the Supreme Court required abstention under the tribal exhaustion rule.[10] Further, every other case in which the Supreme Court considered the issue of tribal exhaustion involved a previously filed tribal claim.[11]

Here, there is no pending tribal litigation justifying this Court's abstention. Instead, Smith is asserting for the first time his claims for Defendants' violations of state and federal law. Thus, as the Second Circuit explained, the doctrine is inapplicable to this case because "the comity and deference owed to a tribal court that is adjudicating an intra-tribal dispute under tribal law does not compel abstention by a federal court where a non-member asserts state and federal claims and nothing is pending in the tribal court." *Garcia*, 268 F.3d at 80.

Martorello conflates tribal sovereignty, tribal jurisdiction, and the Supreme Court's exhaustion policy in arguing that federal courts should abstain from hearing claims whenever a

[10] *See LaPlante*, 480 U.S. at 16 (holding that a party could not attempt to re-litigate a dispute that was pending in the tribal court system because "proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors); *Nat'l Farmers Union Ins. Co v. Crow Tribe of Indians.*, 471 U.S. 845, 857 (1985) (holding that exhaustion of tribal remedies was required before a party could seek a preliminary injunction preventing enforcement of a judgment entered by the tribal court on jurisdictional grounds); *Sanders v. Robinson*, 472 U.S. 1014 (1985) (involving a federal action challenging a tribal court's divorce decree).

[11] *See Hicks*, 533 U.S. at 356-57; *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 476 (1999); *Strate v. A-1 Contractors*, 520 U.S. 438, 444 (1997).

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

plaintiff might have filed his claim in tribal court rather than federal court. Accordingly, Martorello advocates for a rule that would give tribal courts exclusive jurisdiction whenever a tribal court might possibly have concurrent jurisdiction with federal courts. *See Garcia*, 268 F.3d at 82. That is simply not the purpose of the tribal exhaustion doctrine. As the Supreme Court explained in *National Farmers*, Congress' policy of favoring tribal self-determination is served by abstention during the pendency of an ongoing tribal suit. *Nat'l Farmers Union*, 471 U.S. at 856-57. The federal court should not rule on the question of the tribal court's jurisdiction in the collateral proceeding because the policy supporting tribal self-government "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 856. "The risks of the kind of 'procedural nightmare' that . . . allegedly developed in [*National Farmers*] will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made." *Id.* at 856-57.

4. Even if tribal jurisdiction existed under *Montana*, the terms of the adhesion contract are unenforceable.

The loan terms were not freely negotiated, as Martorello suggests. (Dkt. 120 at 21-23; Dkt. 146 at 34-39; *cf.* Dkt. 148 at 114.) Smith pleaded detailed facts, supported by documents attached to the Complaint, that the forum selection and choice of law provisions of the loan agreement were not freely negotiated and, to the contrary, were the result of procedural and substantive unconscionability. (Dkt. 120 at 21-23; *see also Colonial Leasing Co. of New Engl., Inc. v. Pugh Bros. Garage*, 735 F.2d 380, 382 (9th Cir. 1984) (citing *Reeves v. Chem. Indus. Co.*, 262 Or 95, 101, 495 P.2d 729, 732 (1972)) (finding that where there was "no bargaining on the clause in question" and that it was actually a "take-it-or-leave-it" clause, such a clause should be

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

disregarded).) Forum selection clauses should not be enforced where, as here, they were not freely negotiated and instead were the result of "fraud, undue influence, or overweening bargaining power." *Bremen*, 407 U.S. 1 at 92, (forum selection clause deemed "freely negotiated" would be unenforced where there was evidence that "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching").

5. The Magistrate Judge correctly found that the prospective waiver exception invalidates the application of choice of law and forum clauses.

In regard to the "prospective waiver" created by the loan agreement, Martorello overlooks the fact that the loan agreement and Tribal Law do not provide Smith and the Class with a forum for litigation of the subject causes of action between two non-tribal members for tortious conduct that did not occur on the Tribal Reservation. (*Supra*, section III.(B)(1).) Enforcement of the terms of the loan agreement, application of Tribal law, and/or compulsory litigation in Tribal courts would all result in the same thing: no forum or legal foundation to address his claims and causes of action.

Martorello cites *Cvoro v. Carnival Corp.*, 941 F.3d 487, 502 (11th Cir. 2019), for the proposition that the prospective waiver exception does not apply. (Dkt. 148 at 15.) *Cvoro*, in turn, relies on *Sky Reefer* to decline applying the "prospective waiver" doctrine. In *Sky Reefer*, the Supreme Court found that there was no waiver because "the district court would have the opportunity at the award-enforcement stage to address public policy concerns." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540, 115 S. Ct. 2322, 2330 (1995). Additionally, "[w]ere there no subsequent opportunity for review and were we persuaded that the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's rights to pursue statutory remedies," that would support a finding that the provisions at issue are "void as

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

against public policy." *Cvoro*, 941 F.3d at 502 (quoting *Sky Reefer*, 515 U.S. at 540, 115 S. Ct. at 2330) (internal quotations omitted). Here, the waiver at issue is complete. Under the terms of the loan agreement, Smith and the Class have no opportunity under the choice of law and forum selection clauses to revisit the public policy issues. The Magistrate Judge correctly found that the loan agreement acting in combination with Tribal regulations would result in a prospective waiver of Smith's claims.

D. The Magistrate Judge Correctly Found that Oregon Has the Most Significant Relationship to Smith's Dispute and the Greater Interest in Application of Its Laws.

The Magistrate Judge correctly found that Oregon's compelling public policies warrant the application of Oregon law, rather than Tribal laws that were crafted for the explicit purposes of reaping profits from desperate and unsophisticated borrowers. As previously addressed, Smith has pleaded detailed facts showing that the loans originated in Oregon and off the Reservation. (*Supra*, section III.(B)(1).) There is well-established authority in Oregon, as well as in the other jurisdictions, for the public policy to protect consumers from predatory lending practices at usurious interest rates.[12] (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*, 137 Or. at 50. ("The courts do

[12] *See, infra*, at 14, n.7. In contrast, Martorello cites to a web page from the Oregon Division of Financial Regulation for the premise that Oregon is aware of and, as he suggests, perhaps approves of Tribal predatory lending practices. (Dkt 148 at 14.) The Division of Financial Regulation has no applicable regulation or adjudicated finding. Also, Martorello quotes the page out of context. The Division does not accept the legality of lending through Tribal entities at usurious rates but instead notes that borrowers should make sure that the lenders are licensed to make loans in Oregon; there are no Oregon tribes that make such loans. https://dfr.oregon.gov/financial/loans/personal/payday/Pages/tribal-lenders.aspx (last viewed Jan. 25, 2021).

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

not permit any shift or subterfuge to evade the law against usury."); *Pacific Bldg. Co.*, 40 Or. at 294 (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."); *see also* Dkt. 100 at ¶¶ 42-43; Dkt. 146 at 28, 35.) Additionally, Tribal interest in application of its laws does not extend to an application of its laws for protection of non-member Martorello, particularly for the off-Reservation conduct alleged here. (*Supra*, section III.(B)(1).)

E. The Magistrate Judge Correctly Found that Smith Adequately Pleaded Claims for Martorello's Violations of RICO.

1. The abusive lending at usurious rates caused injury to Smith and the Class.

The Magistrate Judge accurately applied the law to the well-pleaded facts to find that Smith stated a plausible claim against Martorello for RICO liability. Remarkably, Martorello claims that Smith was not injured by the lending enterprise that charged him a 527% annual percentage rate on his $1,500 loan. (Dkt. 100 at ¶¶ 9, 28, 32; Dkt. 146 at 11, 42-43.) Over the course of four months, Smith paid $4,353.69 on the $1,500 loan. (Dkt. 100 at ¶¶ 36, 37; Dkt. 146 at 11.) Such charges exceed the historic rates charged by loan sharking operations, which is exactly the type of misconduct that RICO is intended to address and prevent. (Dkt. 120 at 25 n.12.) Martorello claims that Smith and the Class received the "benefit of the bargain," but such reasoning fails to appreciate that usury statutes exist to redress these wrongs even where the consumer received the disputed loan.[13] (Dkt. 100 at ¶¶ 38-42; Dkt. 146 at 42-43, 49; *cf.* Dkt. 148 at 20.) Similarly, Martorello's argument that perhaps some borrowers did not fully repay the loan overlooks the operative fact

[13] Martorello's reliance on *Consumer Financial Protection Bureau v. CashCall, Inc.*, No. V1507522JFWRAOX, 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018) is misplaced. (Dkt. 148 at 20.) That case involved findings that the CFPB had failed to prove loans and losses that were the subject of the litigation; there was no suggestion that consumers had no claim for usury because they had agreed to the loan.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

that he set up the enterprise to charge consumers astronomical rates of interest. (*Id.*) Usury statutes when combined with RICO exist were drafted to protect consumers from such abusive lending practices. Thus, the Magistrate Judge correctly found that "the excess interest and fees Smith incurred readily qualify as an 'injury' under § 1965(c)." (Dkt. 146 at 44.)

2. Martorello's orchestration and oversight of the lending enterprise was the proximate cause of Smith's injuries.

The compelling factual record supports a finding of proximate cause. (Dkt. 146 at 44-46.) As detailed above and more specifically in Smith's Amended Complaint and his Response to the Motion to Dismiss, Martorello's orchestration and supervision of the lending enterprise led directly to Smith's injuries. (*Supra*, section III.(A); *see also* Dkt. 100 ¶¶ 1-8, 18-20, 22, 24, 31, 44-102; Dkt. 120 at 25-31.) Although the loans were issued and collected by his co-conspirators, Martorello has such a pervasive role in the predatory lending enterprise that he is a direct and proximate cause of Smith's injuries. There was no intervening cause, and Smith was directly injured by Martorello's illegal implementation of the lending scheme. As the Northern District of California found in *Brice v. Plain Green*, "[t]his is not a case where the injury alleged was caused by intervening acts of third parties or where the injuries were unexpected or speculative. Instead, the injury here was expressly contemplated, and allegedly designed and specifically intended by the Haynes defendants. These allegations suffice for proximate cause." 372 F. Supp. 3d at 983 (citations omitted).

3. The detailed allegations about Martorello's misconduct are more than adequate to establish a predicate RICO act and a RICO conspiracy.

The Magistrate Judge accurately evaluated Martorello's design, implementation, and oversight of the abusive lending enterprise to find that plaintiff had stated a plausible claim for RICO liability. (Dkt. 146 at 42-48.) Martorello is the central hub of the lending enterprise.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

Martorello created the lending scheme to prey on desperate, unsophisticated consumers. He supervises and controls the enterprise, presiding over decisions to loan at usurious rates of interest. (*See supra*, sections III.(A).) The Magistrate Judge correctly found that Smith has alleged that Martorello's role in the oversight and direction of the company is pervasive and ongoing. (Dkt. 146 at 46-48; *see also* Dkt. 100 ¶¶ 1-5, 7-8, 11, 18-20, 22, 24, 31, 44-102; Dkt. 120 at 28-31.) Although Martorello generally disputes the allegations underlying his RICO liability, such factual disputes cannot be resolved in a Rule 12(b)(6) motion.

Martorello challenges the Magistrate Judge's Findings of a RICO act and a RICO conspiracy by trying to minimize the egregious lending practice and re-cast it as a conflict of law problem. (Dkt. 148 at 24.) To support his argument, Martorello mistakenly relies on *Sundance Land Corp. v. Community First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 666 (9th Cir. 1988). (Dkt. 148 at 24.) In *Sundance*, the plaintiff had no foundation for a RICO claim related to the collection of unlawful debt; the plaintiff alleged little more than an overcharge or perhaps excessive interest, not violation of state usury laws. 840 F.2d at 666. In that context, the Ninth Circuit noted that "RICO is concerned with evils far more significant than the simple practice of usury." *Id*. On the other hand, this case, with interest rates consistently charged in excess of 500%, involves the exact type of "evil" that RICO was intended to remedy.

The Magistrate Judge's Findings are consistent with other jurisdictions, which have consistently denied motions to dismiss RICO claims arising from similar tribal lending models. *Solomon v. Am. Web Loan*, No. 4:17-cv-145, 2019 WL 1320790, at *7 (E.D. Va. Mar. 20, 2019); *Gibbs v. Stinson*, 421 F. Supp. 3d 267, 312-13 (E.D. Va. 2019); *Brice*, 372 F. Supp. 3d at 984-85; *Gibbs v. Haynes Investments, LLC*, 368 F. Supp. 3d 901, 933 (E.D. Va. 2019); *Gingras v. Rosette*, 2016 WL 2932163, at *29.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

F. The Magistrate Judge Correctly Found that Smith's Cause of Action for Unjust Enrichment is Well-Grounded in Facts and Law.

Smith's unjust enrichment cause of action is not premised on whether, as Martorello claims, "the Court may dislike the Tribal lending model." (Dkt. 148 at 25.) Actually, the findings are based on well-pleaded facts that "Smith clearly states an unjust enrichment claim." (Dkt. 146 at 49.) The Magistrate Judge correctly identified the elements for proof of unjust enrichment (Dkt. 146 at 48-49), and Smith has pled detailed and compelling facts to support each of those elements. (Dkt. 100 ¶¶ 1-2, 5, 7-8, 10, 12, 18-19, 22, 44-49, 55-66, 75-88, 98-100, 154-58, 161, 165-68, 171-73.) As the Magistrate Judge correctly notes, Martorello never denied that he received payments as a result of the illegal loans. (Dkt. 106 at 30 (referencing "any funds he received"), Dkt. 146 at 49.) Instead, he mistakenly disputes his liability, relying on whether the payments were made pursuant to a contract, albeit illegal and unconscionable, with a third party. Martorello's contention is irrelevant to Smith's adequate pleading of a well-grounded unjust enrichment cause of action. (Dkt. 146 at 49 (identifying authorities that upheld unjust enrichment claims under analogous facts).) Aware that he was attempting to circumvent state usury laws, Martorello structured the lending operation so that he would make roughly $200 million; it would be inequitable for Martorello to retain the fortune he received from his collections on the illegal loans. (Dkt. 100 ¶¶ 12, 55, 58; *see also Htaike v. Sein*, 269 Or. App. 284, 293, 344 P.3d 528, 533 (2015) (finding it equitable that usurious interest be returned.[14]

[14] Other jurisdictions have routinely held that the unjust enrichment cause of action should be sustained in the context of litigation against participants in illegal tribal lending schemes. *Hengle*, 433 F. Supp. 3d at 896; *Gibbs v. Haynes*, 368 F. Supp. 3d at 933-34; *Gibbs v. Stinson*, 421 F. Supp. 3d at 313-14; *Solomon v. Am. Web Loan*, No. 4:17cv145, 2019 WL 1320790, at *16-17 (E.D. Va. Mar. 22, 2019); *Gingras*, 2016 WL 29332163, *26-27.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

G. The Magistrate Judge Correctly Found that Smith Has Properly Pleaded Claims for Declaratory Relief.

1. The Court should disregard and/or overrule Martorello's objection to proceeding without the settling Tribal entities.

The Court should affirm that Smith may proceed with his claims for declaratory and relief that the choice of law and choice of forum clauses are unenforceable as to the claims against Martorello and Eventide. (Dkt. 100 ¶¶ 14, 138.) Smith has addressed the grounds to overrule enforcement of such provisions. *Supra*, section III.(C); *see also* Dkt. 146 at 31-41. Martorello's new argument that the Tribe-affiliated entities are necessary parties has no bearing on Smith's claims for declaratory relief and/or monetary damages. (Dkt. 148 at 25, 26 n.11). Fundamentally, it is well-established that plaintiffs may sue tribal officials or other wrongdoers to redress violations of state law in U.S. Courts without the related tribes as co-defendants to the action. *Bay Mills*, 572 U.S. at 796; *Gingras*, 922 F.3d at 123.

Further, given the joint and several liability under RICO, the absence of the Tribe-affiliated entities as parties to this suit does not preclude Smith from prosecuting his claims against Martorello. *Dillon v. BMO Harris Bank, N.A.*, 16 F. Supp. 3d 605, 613 (M.D.N.C. 2014) (holding that tribal lenders were not necessary parties because "[t]he lenders are at most joint tortfeasors or co-conspirators. Neither are necessary parties under Rule 19."); *see also Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1562 (1st Cir. 1994); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1301 (6th Cir. 1989) ("the nature of the RICO offense mandates joint and several liability"). It is a well-settled "tort law maxim" that joint and several defendants may be joined at a plaintiff's discretion. *Solomon*, 2019 WL 1320790, at *21 (holding that court could accord complete relief among the existing parties in tribal lending case without joining Native American tribe which owned lending business); *see also Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 225 (3d Cir. 2005)

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

(holding that proposed intervenors were not necessary parties where their interest in declaratory judgment action against another party was "collateral" and "speculative"); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000) ("Since joint tortfeasors are jointly and severally liable, the victim … may sue … as few of the alleged wrongdoers as he chooses; those left out of the lawsuit … are not indispensable parties.").

2. The terms of the Virginia settlement do not preclude Smith from seeking injunctive relief and monetary damages from Martorello.

The Virginia settlement terms do not affect Smith's prosecution of claims against Martorello. The settlement and dismissal of claims against the Tribe-affiliated entities was addressed in *Galloway v. Williams*, No. 19-cv-00470 (E.D. Va.). Martorello and Eventide are not parties in that case, because they elected not to join in the settlement. The *Galloway* case is a nationwide settlement against Big Picture, Ascension, and numerous other participants in the lending operation that provides (1) debt forgiveness on overdue loans, (2) a reduction of the maximum collection from loans that were entered before December 2019, and (3) a fund for borrowers to receive reimbursement of excessive interest charged. The *Galloway* case is a settlement for a subset of the Class's damages allowing litigants to focus on Martorello, the ringleader of the operation. The *Galloway* settlement is consistent with Smith's efforts to recover the usurious debts incurred by the settlement class, and it is therefore irrelevant to Smith's request for declaratory relief here. Any issues related to the settlement can be properly addressed through an apportionment of damages. Further, the Magistrate Judge correctly found that there were "extensive detailed allegations in the Amended Complaint of [Martorello's] personal involvement" in the lending operation and that Smith "has plausibly pleaded grounds for injunctive

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

and declaratory relief against Martorello personally." (Dkt. 146 at 50.) The Court should adopt and/or affirm these findings.

IV. CONCLUSION

For the reasons previously stated, the Court should adopt and affirm the Findings and Recommendation (Dkt. 146) pertaining to Defendant Matt Martorello's Motion to Dismiss (Dkt. 106) Plaintiff's First Amended Complaint (Dkt. 100).

Dated: February 2, 2021

Respectfully submitted,

/s/ Michael A. Caddell

Michael A. Caddell
mac@caddellchapman.com
Cynthia B. Chapman
cbc@caddellchapman.com
Amy E. Tabor
aet@caddellchapman.com
John B. Scofield
jbs@caddellchapman.com
CADDELL & CHAPMAN
628 East 9th Street
Houston TX 77007-1722
Telephone: 713-751-0400
Facsimile: 713-751-0906

Steve D. Larson, OSB No. 863540
Email: slarson@stollberne.com
Steven C. Berman, OSB No. 951769
Email: sberman@stollberne.com
STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2021, this document was filed electronically via the Court's ECF system and thereby served on all counsel of record.

/s/ John B. Scofield, Jr.
John B. Scofield, Jr.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840