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.*

Defendants.

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

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 19

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

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

STATUTES

OTHER AUTHORITIES

RULES

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

Attempting to exploit tribal sovereignty and avoid all liability for their fraudulent and predatory lending scheme, Defendants Matt Martorello and Eventide Credit Acquisitions, LLC ("Defendants") argue that Rule 19 should preclude the Court from holding them accountable for their tortious conduct. Defendants seek to use Rule 19 to compel dismissal, not to join new or former parties to this suit. At least two other courts have denied similar motions from operators of tribal lending models. *Commonwealth of Pennsylvania v. Think Fin., Inc.*, No. 14-CV-7139, 2016 WL 183289, at *4 (E.D. Pa. Jan. 14, 2016); *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163, at *20 (D. Vt. May 18, 2016).

Fundamentally, Rule 19 pertains to mandatory joinder and attempts to preserve the rights of absent parties, not parties that have settled their interests. Defendants fail to account for the fact that Big Picture Loans, LLC, Ascension Technologies, LLC, and the Lac Vieux Desert Band of Lake Superior Chippewa Indians (collectively "the Settled Parties") settled their interests in this case in anticipation of the continued litigation against the remaining Defendants. Rule 19 addresses whether joinder is required, which is obviously predicated upon the parties' absence from the case. It simply does not apply in the context of former parties' settlement of claims; the Settled Parties effectively renounced any claimed interest in the litigation and can no longer be considered "necessary." Far from an absent party, Big Picture and Ascension were active litigants that negotiated a settlement for themselves, the Tribe, and other Released Parties. (Dkt. 149 at 27, ¶ 2.22.) Under these circumstances, Rule 19 does not apply as there is no absent party or claimed interest as required by the plain language and purpose of the rule.

Additionally, the Court can accord complete relief to the existing parties. Smith seeks disgorgement of profits and other monetary damages from Defendants. To the extent that Smith

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

seeks declaratory relief, it is only to prevent Defendants from relying on the terms of the form loan agreement to avoid liability. Defendants' reliance on cases seeking to invalidate contractual interests of Native American tribes are not applicable in this context. The requested relief does not impede or impair the Settled Parties' conduct. The Court can provide meaningful and complete relief against the remaining Defendants that would not require action by the Settled Parties.

Further, the tort-based claims against Defendants are not subject to Rule 19. Defendants' egregious misconduct arises from intentional, tortious acts, which constitute statutory violations, fraud, and unjust enrichment. Where, as here, a plaintiff seeks monetary damages from a co-conspirator: "[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990).[1] Given their joint and several liability for the wrongful acts, Defendants cannot avail themselves to a Rule 19 defense in a premeditated effort to avoid liability. The Court can accord complete relief to Smith without the presence of the Settled Parties.

Finally, Defendants' Motion represents their continued gamesmanship to misuse federal procedure in an attempt to avoid liability. For at least eight years, Martorello has planned to invoke Rule 19 in conjunction with loose tribal affiliation and corporate fictions as a shield for liability. Defendants did not attempt to hold the Settled Parties in this litigation through crossclaims or third-

[1] The Central District of California addressed similar claims in holding that absent parties were not necessary under Rule 19. *State Compensation Ins. Fund v. Drobot*, No. SACV 13-0956 AG (CWx), 2015 WL 12711650, at *10 (C.D. Cal. Dec. 18, 2015). Citing the above quote from *Temple*, the court noted that it can "grant complete relief to Plaintiff without the Absent Parties because co-conspirators are jointly and severally liable for all damages caused by the conspiracy." *Id*. (citing *Ward v. Apple*, 791 F.3d 1041, 1948–49 (9th Cir. 2015) (finding an absent antitrust co-conspirator was not a required party under Rule 19(a)(1)(A) because of joint and several liability) and *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n*, 298 F.3d 768, 775 (9th Cir. 2002) (noting that "RICO conspirators jointly and severally liable for the acts of their co-conspirators.")).

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

party actions; instead, they waited until final approval of a settlement with the Settled Parties as a part of their plan to invoke Rule 19. Defendants have made no effort to hold or include them in the litigation.

II. FACTUAL BACKGROUND

The Court is already very familiar with the well-pleaded claims against Defendants. (Dkt. 146 at 2-11; *see also* Dkt. 100.) Smith hereby supplements that record in the context of this Motion. In particular, since roughly the outset of the abusive lending enterprise, Martorello has planned to use Rule 19 as an intended shield from liability. Of course, Martorello did not anticipate that Smith and other litigants nationwide would reach a settlement with the Settled Parties, effectively isolating him for liability. In June 2013, the Tribe's counsel listed off anticipated defenses based on Martorello's false narrative:

> [T]he aiding and abetting question is a bit tougher, as you no doubt know; however, I believe that colorable legal arguments exists [sic] for the vendors for the same reasons that we are able to show that the Tribe is the lender – you are not making decisions and the [Tribal lending entity] is merely purchasing services from [Sourcepoint VI] and other vendors – and the Rule 19 argument that the Tribe must be joined as an indispensable party as they are the lender and then you have a sovereign immunity issue.

(Exhibit A, email exchange (emphasis added).) In October 2013, with the pending New York Department of Financial Services litigation and with "class actions against banks and personal threats of enforcement against individuals" that have "everyone spooked," Martorello noted that he was "[d]esperately hoping that Rule 19 works." (Exhibit B, email exchange.) Therefore, it comes as no surprise that Defendants raise Rule 19 as a misguided and inapplicable defense to liability, albeit more than two years after the filing of this lawsuit.

Defendants' Rule 19 arguments also avoid another fundamental issue: if Smith were unable to proceed with his claims in this Court, he would be left with no venue for the prosecution of his

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

claims against Defendants for violations of state and federal laws. (Dkt. 146 at 34-40; *see also* Dkt. 150 at 15-17.) Defendants suggest that Smith could pursue claims through the tribal dispute procedure; however, the tribal code provides no means for a non-tribal member to prosecute claims against another non-tribal member for off-reservation conduct. The code provides "illusory" claims merely against "licensees" (*e.g.*, Big Picture). (Dkt. 146 at 36; *see also* Tribal Code § 9.2[2] (specifying that the Tribal Dispute Resolution Procedure applies to claims arising by "an action or inaction of a Licensee," *e.g.*, Big Picture[3]).)

III. PROCEDURAL HISTORY

Smith initiated this litigation against Big Picture, Ascension, and Martorello on September 11, 2018. (Dkt. 1.) Big Picture and Ascension filed motions to dismiss for lack of jurisdiction and for failure to state a claim. (Dkts 39-47.) Instead of litigating their defenses to jurisdiction and liability, Big Picture and Ascension, in conjunction with the Tribe and other parties, elected to settle Smith's claims as well as other litigation nationwide. The parties notified this Court of the settlement in November 2019. (Joint Status Report, Dkt. 94.)

Under the terms of the settlement, Big Picture and Ascension negotiated for Smith to dismiss them from this lawsuit after preliminary approval of the settlement was granted in the Eastern District of Virginia. (Dkt. 149 at 33, ¶ 5.1.) The settlement agreement acknowledged that Martorello and Eventide were not parties to the settlement. (Dkt. 149 at 26, ¶ 2.16; Dkt. 149 at 27, ¶ 2.22.) Despite the dismissal of the Tribe-affiliated entities, the agreement allowed Smith and other plaintiffs to continue to litigate class action claims against Martorello and Eventide,

[2] https://www.bigpictureloans.com/hubfs/2019%20DNN%20Website%20Images/20151103_Tribal_Consumer_Financial_Services_Regulatory_Code.pdf (last visited Feb. 13, 2021).

[3] Martorello and Eventide are not licensees and therefore not subject to the resolution procedure.

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

including claims for declaratory relief, injunctive relief, disgorgement of profits, and other money damages. (Dkt. 149 at 34, ¶ 5.3; Dkt. 149 at 35, ¶ 6.3; Dkt. 149 at 53, ¶ 12.1; Dkt. 149 at 55-56, ¶ 12.8.) In the agreement, the Tribe-affiliated entities did not object to, or otherwise dispute, Smith's continued prosecution of claims against Martorello and Eventide. The agreement also provides for Smith and other plaintiffs to continue using the Tribal entities' document production, as well as loan data for purposes of class certification. (Dkt. 149 at 35, ¶ 6.3; Dkt. 149 at 59, ¶ 15.4; Dkt. 149 at 63, ¶ 15.12.) Big Picture, Ascension, and other settling parties agreed to consider producing additional data and documents "to establish liability or for other important purposes in [this case as well as other litigation nationwide] other than class certification" in the continued litigation of claims against Martorello and Eventide. (Dkt. 149 at 36, ¶ 6.4.) The Tribe-affiliated entities also agreed to withdraw claims of attorney-client privilege on disputed documents in furtherance of discovery on claims against Martorello and Eventide. (Dkt. 149 at 60, ¶ 15.6.)

The Eastern District of Virginia granted preliminary approval of the settlement on December 20, 2019. (*Galloway v. Williams*, No. 3:19-CV-470, Dkt. 58 (E.D. Va.).) On December 30, 2019, Smith dismissed his claims against Big Picture and Ascension. (Dkt. 96.) On January 17, 2020, Smith filed his First Amended Class Action Complaint against Martorello and Eventide and, in the process, also removed all allegations against Big Picture and Ascension. (Dkt. 100.) The Amended Complaint does not include any request for relief from or against the Settled Parties.

On February 14, 2020, Martorello filed his Motion to Dismiss the Amended Complaint under Rule 12(b)(2) and 12(b)(6). (Dkt. 120.) The Court issued its Findings and Recommendation for denial of Martorello's motion (Dkt. 146), which is the subject of a pending objection. (Dkt. 148; Dkt. 150.) After an attempt to suspend and transfer the litigation failed in bankruptcy court

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

(Dkt. 133), Eventide filed its Answer to the Amended Complaint on July 21, 2020. (Dkt. 139.)

On December 18, 2020, the Eastern District of Virginia granted final approval of Smith's settlement of claims with the Settled Parties. *Galloway v. Williams*, No. 3:19-CV-470, 2020 WL 7482191, at *1 (E.D. Va. Dec. 18, 2020). During the 14 months before filing this Motion, Defendants never sought to maintain or include the Settled Parties in this case: not when the settlement was initially announced, not after preliminary approval, not before the dismissal, not after the filing of the amended complaint, and not before final approval of the settlement in Virginia.

IV. ARGUMENTS AND AUTHORITIES

A. The Legal Standard for Review of Defendants' Motion Favors Smith's Claims.

Defendants bear the "burden of persuasion in arguing for dismissal under Rule 19." *Accentcare Home Health of Rogue Valley, LLC v. Bliss*, No. 1:16-cv-1393-CL, 2017 WL 2464436, *2 (D. Ore. June 7, 2017) (McShane, J.). The standard for review of this Motion to Dismiss requires the Court to "accept as true the allegations in Plaintiff['s] complaint and draw all reasonable inferences in Plaintiff['s] favor." *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 851 (9th Cir. 2019) (citations omitted).

In a motion to dismiss for failure to join a party under Rule 19, there is a two-step analysis to determine whether a party should or must be joined. *USA Fund, LLLP v. Wealthbridge Mortgage Corp.*, No. 03:11-CV-510-HZ, 2011 WL 3476815, *1 (D. Ore. Aug. 9, 2011) (Hernandez, J.) (citing *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985). The Court must first determine whether the party is necessary. *Id.* If the party is necessary but cannot be joined in the litigation, then the court must consider whether "in equity and good conscience" the action should proceed without his joinder. *Id.*; *see also E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d

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

774, 779 (9th Cir.2005) (noting that whether a party is indispensable to an action involves "three successive inquiries" with the first determining whether the absent party is "required," the second determining the feasibility of joinder, and the third, if the absent party is required and cannot feasibly be joined, whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed.").

The analysis under Rule 19 is "a practical, fact-specific one, designed to avoid the harsh results of rigid application." *Golden Temple of Oregon, LLC v. Wai Lana Productions, LLC*, No. 03:09-CV-902-HZ, 2011 WL 6070385, at *2 (D. Ore. Dec. 5, 2011) (quoting *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist*., 276 F.3d 1150, 1154 (9th Cir. 2002)); *see also White v. Univ. of Cal*., 765 F.3d 1010, 1026 (9th Cir. 2014) (noting that the Rule 19(a) inquiry is "a practical one and fact specific"). The Court may review extrinsic evidence on a motion for failure to join, and "the moving party bears the burden of producing evidence in support of the motion." *Cat Coven, LLC v. Shein Fashion Group, Inc*., No. CV 19-7967 PSG, 2020 WL 3840440, at *3 (C.D. Cal. Mar. 12, 2020). Defendants have failed to sustain their burden for dismissal.

B. The Settling Parties are Not "Necessary" For the Adjudication of Claims Against Defendants.

Rule 19 addresses the mandatory joinder of non-parties under certain circumstances that are inapplicable in this case:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect

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 interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a); *see also United Specialty Ins. Co. v. Jonak*, No. 3:17-cv-0330-AC, 2017 WL 7805738, at *3 (D. Ore. Aug. 28, 2017) (Acosta, J.). "The 'appropriate focus' in determining the necessity of a party under Rule 19(a) is on the 'practical ramifications of joinder versus nonjoinder.'" *Davis Wine Imports, LLC v. Vina Y Bodega Estampa, S.A.*, No. CV-10-650-HU, 2011 WL 13250769, at *3 (D. Ore. Mar. 11, 2011) (Hubel, J.) (quoting *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1255 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984)).

1. Rule 19 Applies to Non-Joined Parties, Not Settling Parties.

Having settled their interests related to this litigation, Big Picture, Ascension, and the Tribe are not necessary or subject to joinder. These Settled Parties have participated in this nationwide litigation of RICO and state law claims, and they elected to settle their claims with Smith. *Galloway*, 2020 WL 7482191, at *1 (granting final approval of the class action settlement between Plaintiffs, Big Picture, Ascension, and the Tribe's officials). Thus, Defendants' Motion is fundamentally flawed: Rule 19 simply does not apply to parties who were parties to this action and/or have settled plaintiff's claims. *See, e.g.*, *Shropshire v. Canning*, No. 10-CV-01941-LHK, 2012 WL 13658, at *5-6 (N.D. Cal. Jan. 4, 2012) (explaining that Rule 19's concerns were no longer present because a settling party had already been joined to the action).

To begin, the express terms of Rule 19 address the "Required Joinder of Parties." FED. R. CIV. P. 19. Thus, Rule 19 involves an analysis of persons who are not parties to the action and involves a determination of whether such a person is a "Required Party." FED. R. CIV. P. 19(a). In pertinent part, the rule begins with the following condition: "A person who is subject to service of

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

process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if. . .” FED. R. CIV. P. 19. “When determining whether an absent party is a required party within the meaning of Rule 19 and, accordingly, whether the action can proceed in that party’s absence, *the court must first consider whether the nonparty should be joined* under Rule 19(a).” *Exit 282A Development Co., LLC v. Worrix*, No. 3:12–CV–939–BR, 2013 WL 6031387, at *9 (D. Ore. Nov. 13, 2013) (Brown, J.) (emphasis added) (citing *EEOC v. Peabody W. Coal Co*., 610 F.3d 1070, 1078 (9th Cir.2010)). Against this backdrop, the rule then creates two situations where an absent litigant should be joined: (1) if the court “cannot afford complete relief among the existing parties;” or (2) where a person “claims an interest relating to the subject of the action.” *Id*. at 19 (a)(1)(A)-(B).

The purpose of Rule 19 is to “preserve the rights of parties to make known their interests and legal theories” and to protect an absent “party’s right to be heard and to participate in adjudication of a claimed interest.” *Shropshire*, 2012 WL 13658, at *5 (citation and quotations omitted). These concerns are simply not present where, as here, the persons were involved in the litigation and have settled the plaintiffs’ claims. In other words, the settlement with persons no longer involved in the action does not: (1) create a threat of repeated lawsuits on the same matter; (2) prejudice the settled party; or (3) create a threat of double or inconsistent liability to the settled party. *See* FED. R. CIV. P. 19.

Because Rule 19 was enacted to protect absent—not settled—parties, courts have repeatedly rejected similar attempts. *See, e.g.*, *Shropshire*, 2012 WL 13658, at *5-6 (explaining the purpose of Rule 19 and explaining that a party that was given an opportunity but chose not to claim an interest in the litigation did not subject the defendant to a substantial risk of incurring double, multiple, or inconsistent obligations); *Hill v. Mallinckrodt LLC*, No. 1:19CV532, 2020

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

WL 956589, at *3 (M.D.N.C. Feb. 27, 2020) (explaining, in a similar context, that the absent party's "interest has already been adequately protected through their participation in the South Carolina action and the resulting settlement" between the absent party and the plaintiff) (emphasis added); *CRST Expedited, Inc. v. TransAm Trucking, Inc*., No. C16-52-LTS, 2018 WL 2016273, *9 (N.D. Iowa Mar. 30, 2018) (finding settlement of some claims could affect calculation of damages, but does not factor into an analysis of joinder); *Sec. & Exch. Comm'n v. Nodurft*, No. 8:09-CV-866-T-26TGW, 2009 WL 10671156, at *1 (M.D. Fla. June 17, 2009) (denying a Rule 19 motion, including as to "Defendants who were named in the earlier lawsuit… which was settled"); *Thompson v. United Transp. Union*, No. 99-2288-JWL, 2000 WL 382033, at *2 (D. Kan. Mar. 30, 2000) (denying Rule 19 motion for joinder of settled party, noting that "[p]resumably, [the settling defendant] would not have settled with plaintiff if it had known it could still be brought into the litigation by the nonsettling [defendant]").

The Ninth Circuit addressed a similar issue in *U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901 (9th Cir 1994). In that case, the plaintiff filed claims against defendants Rose and Miller and sought injunctive relief against the defendants. *Id*. at 903-04. The plaintiff and Miller agreed to a stipulated dismissal of Miller, who was a party to the disputed contracts. *Id*. at 904. After the dismissal, "Rose moved to dismiss the complaint for failure to join Miller as an indispensable party." *Id*. The district court denied Rose's motion, and the Ninth Circuit affirmed:

> The purpose of FED. R. CIV. P. 19(a)(2)(i) is to protect the legitimate interests of absent parties, as well as to discourage multiplicitous litigation. Ordinarily, any party may move to join any such interested party. In this case, however, the procedural history is such that it is inappropriate for one defendant to attempt to champion an absent party's interests. Miller was originally a defendant in the action, but he and the Band stipulated to his dismissal shortly after this court's resolution of the first appeal. Therefore, Miller's voluntary dismissal indicates that

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

> Miller himself did not feel that it was necessarily in his interest to remain a party in this action. This is the best evidence that Miller's absence would not impair or impede his ability to protect his interests. Moreover, Miller filed declarations in support of his position, and Rose had every incentive to pursue the defense based on the contract[s] to which Miller was a party. "Impairment may be minimized if the absent party is adequately represented in the suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990). We believe that these facts provide a solid basis for a conclusion that Miller's interests would not be prejudiced by his absence.

Id. at 908 (emphasis added). The Ninth Circuit also noted that, as in this case, "[t]here is no indication that Rose sought to retain Miller as a party at the time of Miller's dismissal, probably because Rose is only interested in securing dismissal of the action against him, not in joining Miller." *Id*. at 908 n.6. These facts are analogous to the present case: Miller's participation in the suit and election to join in a stipulated dismissal are similar to the Settled Parties' involvement in this case and negotiation for dismissal. Also, Defendants have misused Rule 19 for purposes of seeking dismissal, with no real interest in joinder of the Settled Parties.

Thus, Defendants' argument that the Settled Parties are necessary parties because of their "contractual interests in the loan agreements" cannot satisfy Defendants' burden. Because Big Picture and Ascension were involved in the litigation and settled with Smith, they cannot be considered a person that "has not been joined" under Rule 19. The involvement of Big Picture, Ascension, and the Tribal Council Defendants in the litigation and their settlement with Smith, obviates any claim that the Settled Parties are necessary parties to Smith's remaining claims against Defendants. The Court should deny Defendants' Motion based solely on this analysis; however, there are several other compelling grounds for denial of Defendants' Motion.

2. The Court Can Accord Complete Relief Among the Existing Parties.

Rule 19 does not require joinder of absent parties where "complete relief can be afforded between the *existing parties* . . . without joining other parties who may also have an interest in 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

funds." *USA Fund, LLLP*, 2011 WL 3476815, *3 (emphasis in original) (citing *Puyallup Indian Tribe*, 717 F.2d at 1255) (complete relief is possible without joinder of State even though State may challenge title of land in future), and 4 Moore's Federal Practice—Civil § 19.03 (3d ed. 2011) ("'complete relief' clause does not contemplate other potential defendants")). "Here, complete relief – [the disgorgement of profits and other monetary recoveries] – is possible between [the existing parties]." *Id*.

Rule 19(a)(1)(A) does not apply because the Court can accord complete relief among the existing parties—Smith and Defendants. *Tinoco v. San Diego Gas & Elec. Co*., 327 F.R.D. 651, 658-59 (S.D. Cal. 2018). "Complete relief can be accorded when a court is able to fashion 'meaningful relief' between the existing parties." *Rediger v. Country Mut. Ins. Co*., 259 F. Supp. 3d 1151, 1155 (D. Or. 2017) (Aiken, J.) (citing *Disabled Rights Action Comm. v. Las Vegas Events, Inc*., 375 F.3d 861, 879 (9th Cir. 2004)). In other words, relief is not complete where it is only "partial" or "hollow" relief. *Id*.; *see also* FED. R. CIV. P. 19 cmt.; *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 315 (3d Cir. 2007). Smith is not seeking an injunction restraining the Tribe or any Tribal entity. Instead, Smith seeks exclusively monetary relief from Defendants along with declaratory relief only related to Defendants' contractual defenses. "An entity is not necessarily a required party in a breach of contract action simply because it is a party to the contract at issue." *Wheaton v. Diversified Energy, LLC*, 215 F.R.D. 487, 490 (E.D. Pa. 2003). "Such a hard and fast rule would violate Rule 19(a)." *Id.*

Here, the Court may grant complete relief to Smith in the absence of the Settled Parties. Smith seeks monetary damages available under RICO and state laws for Defendants' conduct. In rejecting defendants' arguments in a similar case, the United States District Court for the Eastern District of Pennsylvania explained:

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

> [H]ere the relief sought by the Plaintiffs does not require the non-party tribes to do or refrain from doing anything. For example, the Plaintiff seeks disgorgement of the money earned by the Defendants only, not the money the tribes have earned, through the alleged scheme. The Plaintiff is not seeking a declaration that the contracts themselves are illegal, but rather a declaration that the Defendants' conduct violates a number of state and federal laws. The Chippewa Cree were engaged in consumer lending prior to their partnership with Think Finance and, since the tribes are not bound by the outcome of this case, they would be permitted to continue that business. The tribes continuing their business (without the services of the Defendants) would in no way limit the relief the Plaintiffs seek. The tribes are not required under Rule 19(a)(1)(a).

Think Fin., 2016 WL 183289, at *4 (E.D. Pa. Jan. 14, 2016) (internal citations omitted) (citing *Dillon v. BMO Harris Bank, N.A.*, 16 F. Supp. 3d 605, 615 (M.D.N.C. 2014) ("[J]udgment . . . will not prohibit the lenders from lending money or from relying on other mechanisms to collect on their loans.").

Simply put, Smith seeks monetary damages for Defendants' violations of state and federal law. Such relief would "accord complete relief among existing parties." FED. R. CIV. P. 19(a). Put differently, the present case involves nothing more than a party seeking monetary damages from a joint tortfeasor.[4] It is well settled that Rule 19 is inapplicable in such situations. *Dillon*, 16 F. Supp. 3d at 615 ("However, this is not an action to set aside a contract or for breach of contract; Mr. Dillon's RICO and UDTPA claims arise under statutory schemes analogous to tort law. The lenders are at most joint tortfeasors or co-conspirators. Neither are necessary parties under Rule 19."); *Think Fin.*, 2016 WL 183289, at *7 ("We find the Commonwealth's argument that the tribes are akin to joint tortfeasors, and therefore not necessary to be joined, persuasive.").[5] Additionally,

[4] Where, as here, there are pending tort claims, including unjust enrichment, the preceding settlement, at worst, creates issues related to potential settlement credits for the remaining parties. *Chao v. Pinder*, No. 2:03-0653-18, 2014 WL 7333421, at *5 (D.S.C. Mar. 15, 2004). For example, "the request that defendant turn over any money by which he has been unjustly enriched does not raise any Rule 19 problems on its face." *Id*.

[5] As explained in the comments to Rule 19, subdivision (a) "is not at variance with the settled

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

to the extent Smith may be able to seek other relief from other nonparties for different claims, it is irrelevant as the inquiry under Rule 19(a)(1) looks only to the Court's ability to provide "complete relief among ***existing*** parties." FED. R. CIV. P. 19(a) (emphasis added). Here, the joinder of the Settled Parties would add nothing to Smith's claims for Defendants' violations of federal and state law. Accordingly, the Court can accord complete relief among the existing parties.

3. The Settled Parties Do Not Claim an Interest Relating to the Subject of the Action.

The second consideration under Rule 19(a)(1) is whether the absent non-party clams an interest in the action. *USA Fund, LLLP*, 2011 WL 3476815, *3; see also *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 49 (2d Cir. 1996) ("It is the absent party that must claim an interest.") (internal quotations omitted); *CRST Expedited, Inc.*, No. C16-52-LTS, 2018 WL 2016273, at *8 (holding "the absent party must affirmatively claim an interest in the pending litigation."). Defendants bear the burden to show that a third party claims this interest, not that Defendants claim such interest on its behalf. *Scottsdale Ins. Co. v. B&G Fitness Center, Inc*., No. 4:14-CV-187-F, 2015 WL 4641530, at *3 (E.D.N.C. Aug. 4, 2015) (citing *Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir.2005)). Here, the Settled Parties have "never asserted a formal interest in this action." *Tinoco*, 327 F.R.D. at 659. "Where a party is aware of an action and chooses not to claim an interest, the district court does not err by holding that joinder was 'unnecessary.'" *USA Fund,*

---

authority holding that a tortfeasor with the usual 'joint and several liability is merely a permissive party to an action against another with like liability." FED. R. CIV. P. 19 at cmt. "Joinder of these tortfeasors continues to be regulated by Rule 20 . . . ." *Id.*; *see also supra*, section I (page 2, n.1). "The Advisory Committee Notes to Rule 19(a) explicitly state that a tortfeasor with the usual joint-and-several liability is merely a permissive party to an action against another with like liability." *Cat Coven, LLC*, 2020 WL 3840440, at *5.

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

LLLP, 2011 WL 3476815, at *3 (quoting *Altmann v. Republic of Austria*, 317 F.3d 954, 971 (9th Cir.2002)); *see also Universal Cas. Co. v. Godinez*, No. 2:11-cv-00934-MCE-GGH, 2011 WL 6293641, at *4 (E.D. Cal. Dec. 15, 2011) (finding Rule 19(a)(2) unmet where "the third party claimed to be necessary to this case has not petitioned to be joined and does not claim to have an interest in the subject matter being contested").

Neither the Settled Parties nor its Tribal council have made any attempt to claim an interest in Smith's litigation of claims against Martorello and Eventide; therefore, the Settled Parties are not "necessary parties." *USA Fund, LLLP*, 2011 WL 3476815, at *3. In fact, the opposite is true. Big Picture and Ascension were actual participants in the case, not "absent" parties. The Settled Parties could have remained in the suit to urge dismissal of the claims, but instead they took a step wholly inconsistent with claiming an interest: they settled all claims with Smith (and other plaintiffs nationwide) and now cooperate in the continued prosecution of claims against Defendants. In other words, the Settled Parties expressly opted out of participating in the litigation through a settlement of their interests. No terms of the Tribal settlement preclude the continued litigation against Martorello and Eventide; instead, the settlement agreement with the Settled Parties explicitly anticipates the continued litigation. *Supra*, section III. In light of the settlement, which includes the Settled Parties' cooperation with the continued prosecution of claims against Defendants, the Settled Parties are not necessary parties under Rule 19(a)(1)(B). *See USA Fund, LLLP*, 2011 WL 3476815, at *3 (holding a non-party was not a necessary party because it was aware of the action and declared it would not pursue a claim related to the disputed funds).

In addition to the Settled Parties' claiming an interest in the litigation, the Tribal council could have appeared and urged protection of Tribal interests that Defendants now assert. Alternatively, Defendants could have requested joinder of the Tribal council as third-party

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

defendants. As the Ninth Circuit noted in *Dine Citizens*, the *Ex parte Young* doctrine "permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or tribe." 932 F.3d at 856 n.7 (quoting *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012) and citing, in part, *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). In other words, tribal sovereign immunity does not impede litigation by or against the Tribal council to address matters about which the Tribe may claim an interest. The Tribal council claims no interest in the litigation, and Defendants have not attempted to join them in the case.

4. The Settled Parties' Opting Out of the Litigation Does Not Hurt Their Interests, Nor Does It Expose the Parties to Multiple or Inconsistent Obligations.

Assuming for the sake of argument that the Settled Parties claim a continued interest in the relief sought, the Settled Parties still would not be "necessary." The Settled Parties' interests are not impaired or impeded, and continued litigation would not expose the Defendants or the Settled Parties to substantial risk of multiple or inconsistent obligations.[6] FED. R. CIV. P. 19(a)(1)(B). "If a legally protected interest exists, the court must further determine whether that interest will be *impaired* or *impeded* by the suit." *Dine Citizens*, 932 F.3d at 852 (quoting *Makah*, 910 F.2d at 558) (emphasis in original). "As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by

[6] "An inconsistent obligation must not be confused with an inconsistent adjudication." *USA Fund, LLLP*, 2011 WL 3476815, at *4 (citing *Altmann*, 142 F. Supp. 2d at 1212–13). "Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident." *Id*. (quoting *NRDC v. Kempthorne*, 539 F. Supp. 2d 1155, 1190 (E.D. Cal. 2008)); see also *Malbco Holdings, LLC v. Patel*, No. 3:14-cv-00947-PK, 2016 WL 5898629, at *4 (D. Or. Oct. 7, 2016) (Papak, J.) (citing *Cachil Behe Band of Wintun Indians v. Cal.*, 547 F.3d 962, 976 (9th Cir. 2008)).

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

existing parties to the suit." *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013) (quoting *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999)). "Impairment may be minimized if the absent party is adequately represented in the suit." *USA Fund, LLLP*, 2011 WL 3476815, at *4 (quoting *Makah*, 910 F.2d at 558). There are three factors to determine whether a party is adequately represented: (1) "the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments"; (2) whether the party is "capable of and willing to make such arguments"; and (3) whether the absent party would "offer any necessary element to the proceedings" that the present parties would neglect. *Id*. (quoting *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir.1992)). Even if the Court were to assume that the Settled Parties claim a continuing interest in the case, Defendants would share those same interests and be equally capable of making the arguments. *See, e.g., B&G Fitness Center*, 2015 WL 4641530, at *5 (holding that where absent party would raise the same defenses, "the third party claimants are in no way prejudiced by not being part of the action").

5. The Settled Parties Have No Meaningful Interest in Smith's Claims Against Defendants.

Setting aside their settlement and bargained-for dismissal from this lawsuit, the Tribe and other Settled Parties have no meaningful interest in Smith's claims against the Defendants. First, there is no Tribal interest in an application of Tribal law (or an unprecedented expansion of the tribal sovereign immunity doctrine) because the dispute involves claims among non-members of the Tribe for conduct that occurred off the Reservation. This issue has been extensively briefed, and Smith incorporates his prior arguments as well as the Court's Findings on this issue. (Dkt. 100 ¶¶ 14, 19, 117; Dkt. 120 at 19-21; Dkt. 146 at 39-41; Dkt 150 at 2-4, 10-13.) Second, Tribal law does not provide a legal structure and regulatory code for resolution of the dispute. *Supra*, section

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

II. Third, the ongoing litigation does not seek adjudication of contractual remedies vis-à-vis the Settled Parties. For example, Smith seeks declaratory relief about the application of the class action waiver, forum selection, and choice of law provisions only in regard to their relevance and impact on this dispute with Defendants, who are not Tribe members, not named in the contract, and not third-party beneficiaries to the terms of the form loan agreement. (Dkt. 100 ¶¶ 14, 19 n.7, 94-96.) As Defendants acknowledge in their Motion, the litigation does not prohibit Big Picture from continuing to make loans or seek to invalidate their lending. (Dkt. 149 at 5.) Fourth, having omitted the Tribe from the definition of a "Settled Party" in his Complaint (even though it is a released party in the agreement), Smith did not explicitly label the Tribe as a participant in the illegal lending enterprise. (Dkt. 100 ¶¶ 19 n.7.)

C. In Equity and Good Conscience, the Lawsuit Should Proceed with the Existing Parties; the Settled Parties Are Not Indispensable Parties.

In the unlikely event that the Court were to find that Rule 19 applies to Settled Parties and that such parties are "necessary" litigants that cannot be joined, the Court should conclude that the lawsuit may proceed "in equity and good conscience" without the Settled Parties. FED. R. CIV. P. 19(b). The necessary parties issue is not a close one, particularly given that (1) Smith is only seeking monetary damages against Defendants along with discretionary relief solely targeting Defendants, and (2) existence of the Settlement Agreement. Accordingly, because only necessary persons can be indispensable, the Court need not consider whether the Settled Parties are indispensable, absent parties. *See e.g.*, *Schlumberger Indus., Inc. v. Nat'l Sur. Corp.*, 36 F.3d 1274, 1285–86 (4th Cir. 1994) ("Only necessary persons can be indispensable, but not all necessary persons are indispensable."); *Think Fin.*, 2016 WL 183289 at *8, n.7 ("Having not found the tribes necessary under Rule 19(a), we are not required to analyze whether they are indispensable under

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

Rule 19(b).”). Nonetheless, an analysis of the Rule 19(b) factors leads to the inescapable conclusion that the Settled Parties are also not indispensable. In accordance with the rule, the Court should consider the following nonexclusive factors:

> (1) the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

FED. R. CIV. P. 19(b); *see also Jonak*, 2017 WL 7805738, * 3. The action should be dismissed if the nonparty “not only [has] an interest in the controversy, but [has] an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.” *Peabody*, 610 F.3d at 1078 (quoting *Shields v. Barrow*, 58 U.S. 130, 139 (1855)). “Federal courts are extremely reluctant to grant motions to dismiss based on nonjoinder and, in general, dismissal will be ordered only when the defect cannot be cured and serious prejudice or inefficiency will result.” *Am. Trucking Ass'n, Inc. v. N.Y. State Thruway Auth.*, 795 F.3d 351, 357 (2d Cir. 2015) (quoting 7 Charles Alan Wright & Arthur R. Miller, *Fed. Practice & Procedure* § 1609 (3d ed. 2015)).

1. Rule 19(b) Factors Do Not Support Dismissal of this Case.

All four factors would weigh in favor of the case proceeding in the absence of the Tribe, Big Picture, and Ascension if they were in fact absent and necessary parties.

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

First, there is no chance of prejudice to the Settled Parties, especially in light of the Settlement Agreement. The first factor involves "a consideration of what a judgment in the action would mean to the absentee." FED. R. CIV. P. 19 cmt. The Court should consider whether the Settled Parties would be "adversely affected in a practical sense" and, if so, whether the prejudice would be "immediate and serious, or remote and minor." *Id.* Smith does not seek a judicial determination about whether the form loan agreement is enforceable or void as to the Settled Parties. Here, Smith seeks only monetary damages against Defendants for their violations of state and federal law along with a finding that exculpatory provisions of the loan agreement do not apply to Defendants.

This action does not in any way challenge the sovereignty of the Tribe. This action does not challenge the operations of the Tribe, nor does it challenge Defendants' relationship with the Tribe. In light of the remaining parties in the case and Settlement Agreement, Smith is only seeking monetary damages from Defendants for their violations of state and federal law. Accordingly, there is no chance of prejudice to the Settled Parties.

Second, the Court may fashion any relief awarded to Smith in a manner that will eliminate any prejudice to the Settled Parties. Smith's lawsuit seeks monetary damages from Defendants, and the Court may award damages for Defendants' statutory violations without prejudicing the Settling Parties. *See* Fed. R. Civ. P. 19 cmt. (explaining that the awarding of monetary damages where specific relief would damage an absentee would be appropriate).

Third, the absence of the Settled Parties would not render any judgment inadequate. This action challenges Defendants', not the Settled Parties', violations of federal and state consumer protection statutes. Defendants conceded that the settlement does not prevent the Settled Parties from continuing to make and/or collect on loans. (Dkt. 149 at 4.) Further, this case is one in which

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 absent parties already settled their claims, so this is not a situation involving "the public interest in settling disputes by wholes." *Rediger*, 259 F. Supp. 3d at 1157 (internal quotation omitted) (quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 870 (2008)). The Court has the discretion and authority to render an adequate judgment to address Smith's claims for Defendants' violations of these remedial statutes.

Fourth, Smith would be left with no remedy for Defendants' violations of federal and state law if this action were dismissed for nonjoinder of the Settled Parties. Martorello and others created the rent-a-tribe scheme in an effort to avoid liability for their practices that violate state and federal consumer protection laws. Martorello and others crafted the lending agreements in a manner that prospectively waived the application of all federal and state law from the lending agreements and sets forth a sham dispute resolution system that insulates any decision from judicial review by state or federal courts. Defendants argument that Smith "can pursue relief under the Tribal Dispute Resolution Procedure set forth in their loan agreements" is misleading. (*See* Dkt. 149 at 16.) The Tribal Dispute Resolution Procedure provides a process and regulatory code only for Smith to pursue "illusory" claims against Big Picture. (Dkt. 146 at 34-40; *see also* Dkt. 150 at 15-17; *supra*, section II.) Smith settled any claims against Big Picture, and thus he would be unable to seek any relief through the dispute resolution procedure. More importantly, Smith would be left without a forum to pursue any relief from non-licensee Defendants. (*Id*.) Accordingly, this fourth factor weighs heavily in favor of the Court continuing the matter in the absence of the Tribe, Big Picture, and Ascension. Accordingly, Defendants have not—and cannot—establish that the Tribe, Big Picture, and Ascension are indispensable parties.

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. The Authorities Cited by Defendants Do Not Support Application of Rule 19 for Dismissal of this Case.

Defendants mistakenly rely on authorities that do not support an application of Rule 19 for dismissal of Smith's claims against the remaining Defendants.

First, Defendants argue that because the Settled Parties benefit from tribal immunity, they must be indispensable, citing several cases noting that sovereign immunity of an absent necessary party is a compelling interest. However, none of the cases involves purely monetary claims against a joint tortfeasor.[7] *See* Dkt. 149 at 3, 12-13 (citing *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542 (2d Cir. 1991) (concluding a tribe was necessary and indispensable to claims seeking to set aside a lease agreement of tribal land); *Dine Citizens Against Ruining Our Env't*, 932 F.3d 843 at 847 (concluding a tribal corporation was a necessary and indispensable party in lawsuit challenging a variety of government agency decisions reauthorizing mining activity on tribal land by a tribal company), *cert. denied*, 141 S. Ct. 161 (2020); *White*, 765 F.3d 1010 at 1027 (declaratory judgment action by scientists seeking to establish that human remains found at archaeological site at UCSD were not Native American); *Pimentel*, 553 U.S. at 854 (an interpleader action seeking to establish the ownership of property stolen by the President of the Philippines could not proceed without Republic of the Philippines and Philippine Commission on Good Governance).

Second, Defendants cite to cases seeking to void or rescind contracts in support of their argument that the Tribe, Big Picture, and Ascension are indispensable parties. *See* Dkt. 149 at 14-15 (citing *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476 (7th Cir. 1996) (the plaintiffs sought to void contracts between the defendants and the Tribe); *Hardy v. IGT, Inc.*, No.

[7] Not to mention, the court also found that the absent party was necessary in each case.

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

2:10-CV-901-WKW, 2011 WL 3583745, at *6 (M.D. Ala. Aug. 15, 2011) (reasoning that the tribe were not merely joint tortfeasors because the plaintiffs' sought "rescission of a contract, where all the parties to the contract must be joined"); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1018 (9th Cir. 2002) (concluding tribes were necessary and indispensable in case challenging Arizona's gaming compacts with the tribes). These cases are not applicable here because Plaintiffs only seek monetary damages from Defendants for their violations of state and federal law (along with declaratory findings that the form loan agreement does not afford them a defense for their wrongdoing) and do not seek recission of the contracts with the Settled Parties.

As explained by the United States District Court for the Middle District of North Carolina, this type of analysis, specifically the reasoning in *Hardy*, was premised on plaintiff's seeking rescission of a contract as the sole remedy:

> *Hardy*, however, was an "action seeking rescission of a contract." The plaintiff sued the manufacturers of electronic bingo machines used in Tribal gaming facilities under an Alabama statute that voids gambling contracts. The plaintiff did not sue the Tribe. The court found that the Tribe was a required party because the action threatened the Tribe's contractual interests with gamblers and the manufacturers—the remedy for the only claim in the case was rescission. The *Hardy* court explicitly distinguished the case from lawsuits involving tort claims. Therefore, *Hardy* supports Mr. Dillon's argument that the lenders here are not required parties to the RICO and UDTPA claims.

Dillon, 16 F. Supp. 3d at 613 (emphasis added). The same reasoning applies here where Smith does not seek rescission of any agreement. And, to the extent the Court's judgment may affect Defendants' willingness to "provide services" to the Tribe, "it will not prohibit the lenders from lending money or from relying on other mechanisms to collect on their loans." *Id.* at 615.

Third, Defendants make the stunning claim that "Plaintiff and the putative class of borrowers have an adequate remedy if this action is dismissed" because "[t]hey can pursue relief under the Tribal Dispute Resolution Procedure set forth in their loan agreements." Dkt. 149 at 16.

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

Defendants fail to clarify what relief and against whom Smith could pursue a recovery through Tribal courts. The ambiguity is likely intentional because the argument cannot withstand scrutiny. For starters, Smith has settled with Big Picture; accordingly, there is no one to pursue claims against using this mechanism. *Supra* at section II (noting prior consideration of the illusory relief and also citing Tribal Code § 9.2(a), which specifies that Tribal Dispute Resolution Procedure applies to claims arising by "an action or inaction of a Licensee," e.g., Big Picture). Further, Smith would have no forum in which to obtain relief against Defendants, who are not subject to the Tribal Dispute Resolution Procedure.

D. Defendants Raise Rule 19 as a Shield from Liability, Not for Joinder of Necessary Parties.

Defendants request that the Court dismiss Smith's claims for monetary damages against them, pointing to the "sovereign interests" of the Tribe even though the Tribe claims no interest in the litigation. "Thus, [Defendants] attempt to manipulate a doctrine designed to preserve tribal self-governance and independence into one that can be used as a legalistic loophole to assist non-Indians in the avoidance of civil liability . . . ." *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1143 (N.D. Okla. 2001). Such an abuse of Rule 19 "cannot stand." *Id.*; *see also Dillon*, 16 F. Supp. 3d at 615 n.48 (citing *Multimedia Games* with approval as an additional reason to distinguish tribal lending cases from *Yashenko*). Allowing Defendants to use Rule 19 to escape liability would create a legal loophole from accountability for illegal activity and accordingly incentivize widespread misconduct and abuse of the sovereign immunity doctrine. *See Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 385 (2d Cir. 2000) (holding, in a case for copyright infringement, that tribe was not indispensable party where "dismissal would

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

completely deprive [the plaintiff] of the opportunity to prevent further infringement"). In equity and good conscience, this Court should not allow Rule 19 to be misused in this fashion.

By extension, "the district court has discretion to consider the timeliness of [the] motion if it appears that the defendant is interposing that motion for its own defensive purposes, rather than to protect the absent party's interests." *Fireman's Fund Ins. Co. v. Nat'l Bank of Cooperatives*, 103 F.3d 888, 896 (9th Cir. 1996); *Shropshire*, 2012 WL 13658, at *6; *see also* FED. R. CIV. P. 19, cmt. ("However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion."). Here, prior to the confirmation of the Settlement Agreement, Defendants had the opportunity yet failed to raise concerns regarding any impact the absence of the Settled Parties would have on the Court's ability to afford complete relief amongst Smith and Defendants in their absence. *See Shropshire*, 2012 WL 13658, at *6 ("Here, prior to Plaintiff's dismissal of Trigg with prejudice, Defendant had the opportunity yet failed to raise potential concerns regarding any impact Trigg's dismissal might have on the Court's ability to accord complete relief among the remaining parties."). Further, Defendants were not only on notice of the settlement, but Martorello participated in multiple mediations sessions and was fully aware of the class settlement agreement. "To the extent [Defendants were] concerned that [the absence of the Tribe, Big Picture, and Ascension] would impair [their] interests and expose [them] to multiple or inconsistent obligations, [they] should have raised this issue earlier." *Id*. Accordingly, Defendants should be equitably estopped from now "using Rule 19 to engage in gamesmanship." *Id.*

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

E. If Necessary, Smith Requests Leave of Court to Amend His Complaint to Clarify that He Seeks No Relief from the Settled Parties.

As noted throughout his Response, the Amended Complaint does not seek an adjudication of claims against the Settled Parties, including declaratory relief that only addresses the Defendants' remedies and defenses. In accordance with that intent, the Court can limit any declaratory relief to address only the parties to this Lawsuit. Further, for purposes of this motion to dismiss, the Court should draw all inferences in the Complaint in Smith's favor. If, however, the Court should find that there is an ambiguity in the pleadings that it cannot reconcile in Smith's favor at this motion-to-dismiss phase of the litigation, Smith respectfully requests leave of Court to amend his complaint and address any question about claims asserted or relief sought pertaining to the Settled Parties.

V. CONCLUSION

For the reasons previously stated, the Court should deny Defendants' Motion to Dismiss Under Federal Rule of Civil Procedure 19 (Dkt. 149).

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

Dated: February 16, 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 16, 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