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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

RICHARD LEE SMITH, JR., individually and on behalf of persons similarly situated, Plaintiff, vs. MATT MARTORELLO, *et al.*, Defendants.	Case No. 3:18-cv-01651-AC **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 19** ORAL ARGUMENT REQUESTED

INTRODUCTION

Rule 19 mandates the dismissal of this action because Big Picture Loans, LLC ("Big Picture"), Ascension Technologies, LLC ("Ascension"), and the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Tribe") are indispensable parties and this action should not proceed in their absence. The contractual and sovereign rights of Big Picture, Ascension, and the Tribe "lie

at the heart of [this] action." *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1149 (D. Or. 2005). Plaintiff's claims revolve around consumer loans made by an arm of the tribe—Big Picture—allegedly with the assistance of Ascension—another arm of the Tribe—and remaining defendants Matt Martorello and Eventide Credit Acquisitions, LLC ("Eventide"). The initial complaint named all of these parties as defendants. But after the Fourth Circuit ruled that Big Picture and Ascension share in the Tribe's sovereign immunity, *Williams v. Big Picture, LLC*, 929 F.3d 170, 185 (4th Cir. 2019), plaintiff entered a class action settlement agreement ("Settlement Agreement") with Big Picture, Ascension, and a number of Tribal officials in *Galloway, et al. v. Williams, et al*., 3:19-cv-00470 (E.D. Va.) ("*Galloway*"), Dkt. 55-1. Per the Settlement Agreement, plaintiff dismissed Big Picture and Ascension as defendants in this case, and filed a First Amended Complaint that omits them as named parties but continues to allege that they are key participants in the events at issue (Dkt. 100). Because the Settlement Agreement does not eliminate the interests that Big Picture, Ascension, and the Tribe have in this action, they remain necessary parties pursuant to Rule 19. And because Big Picture, Ascension, and the Tribe have sovereign immunity and cannot be joined, this action must be dismissed in their absence.

BACKGROUND

I. The claims in the First Amended Complaint directly implicate the interests of Big Picture, Ascension, and the Tribe.

The First Amended Complaint alleges that all loans made by Big Picture to Oregon residents after October 30, 2014, violate Oregon's usury and lending laws and are null and void. (Dkt. 100 ¶¶ 94–97, 127.) It seeks a declaratory judgment that the governing law, forum selection, class action waiver, and dispute resolution provisions in the Big Picture loan documents are void and unenforceable as to Oregon residents because they violate Oregon law, are unconscionable, and are contrary to matters of public policy. (*Id*. ¶ 139.)

The Complaint further alleges that Big Picture and Ascension, together with Martorello and Eventide, constitute a RICO enterprise, and "have all participated in the formation and

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operation of [a] scheme to defraud borrowers while attempting to take advantage of tribal immunity through the association with the Tribe." (*Id.* ¶ 149.) It alleges they intentionally and willfully committed mail fraud and wire fraud, and have defrauded thousands of people in a financially challenged position by extending loans at illegally high and extortionate interest rates, (*id.* ¶¶ 165–66), and that they continue to operate, direct, and control the RICO enterprise by lending money at usurious rates according to Oregon law. (*Id.* ¶¶ 179, 181.) It alleges that a number of existing agreements and promissory notes between Martorello and Eventide, on one hand, and Big Picture or Ascension, on the other hand, constitute agreements to violate RICO. (*Id.* ¶ 189.)

II. The Settlement Agreement does not eliminate the interests of Big Picture, Ascension, and the Tribe.

The Settlement Agreement does not include any disclaimer by Big Picture, Ascension, or the Tribe of their interests in this suit, nor does it even begin to extinguish those interests. It contains no admission of liability and no waiver of tribal sovereign immunity. (Settlement Agreement, Dkt. 49, Ex. A §§ 1.6, 3.1–3.3.) It does not modify the governing law and forum selection provisions in Big Picture's loan agreements, nor does it modify Big Picture's operations or Eventide and Ascension's alleged participation in them. It permits the continued collection of Big Picture's loans at rates that far exceed the Oregon usury laws that plaintiff claims apply here. And it does not cover loans originated after December 20, 2019.

Furthermore, the overwhelming majority of the Settlement Class members did not resolve their individual claims against Big Picture; they simply waived their right to form a class if they pursue a claim against Big Picture or Ascension. Only class members who receive a payment from the settlement fund release all claims against Big Picture and Ascension. Members who do not receive a payment waive only their rights to bring a class action, collective action, or mass action. (*Id.* §§ 12.1–12.4.) According to the October 30, 2020 report of the Settlement Administrator, there are 491,018 class members but only 4,245 of them—less than 1%—are eligible to receive a cash payment. (*Galloway*, Dkt. 105-4.) Thus, almost all borrowers who received loans from Big Picture

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before December 20, 2019 can still sue Big Picture and Ascension over those loans. And all borrowers who received loans from Big Picture after December 20, 2019 can do so (including in a class action).

ARGUMENT

I. Rule 19 Applies to Big Picture, Ascension, and the Tribe.

Plaintiff makes two preliminary arguments in an effort to avoid the application of Rule 19 to this case: (1) that Rule 19 does not apply to settled parties, like Big Picture and Ascension; and (2) that the parties to the *Galloway* settlement have no meaningful interest in this litigation. Neither argument is persuasive.

A. Rule 19 applies to dismissed parties.

First, plaintiff contends that Rule 19 applies only to non-joined parties, not to settling parties. This argument is spurious. Rule 19 applies to parties who are dismissed from an action, including settling parties, as well as to entities who have not been joined as parties. (And the Tribe, in any event, has never been joined as a party.)

In this case, as part of the settlement, plaintiff dismissed Big Picture and Ascension pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), without approval by the Court. (Dkt. 96.) Had court approval been required, the Court would have considered whether Big Picture and Ascension are indispensable parties under Rule 19 in determining whether to permit their dismissal or, instead, whether the entire suit must be dismissed. *See Edwards v. General Electric Co.*, No. C 10-02431-SI, 2011 WL 479991, at *4 (N.D. Cal. Feb. 7, 2011) (denying plaintiffs' motion for voluntary dismissal under Rule 41(a)(2) based on finding that party to be dismissed was "necessary" under Rule 19); *Mayes v. Fujimoto*, 181 F.R.D. 453, 454 (D. Haw. 1998) (denying plaintiff's motion for voluntary dismissal under Rule 41(a)(2) because party to be dismissed was "indispensable" under Rule 19), *aff'd*, 173 F.3d 861 (9th Cir. 1999) (Table).

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Likewise, Rule 21 permits a court to add or drop a party on a motion, or on its own, at any time on just terms. The Ninth Circuit has held that this rule "grants a federal district or appellate court the discretionary power to perfect its diversity jurisdiction by dropping a nondiverse party *provided the nondiverse party is not indispensable* to the action under Rule 19." *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir. 1980) (emphasis added); *accord H.D. Corp. of Puerto Rico v. Ford Motor Co.*, 791 F.2d 987, 992–93 (1st Cir. 1986) (noting because non-diverse party-defendant was indispensable, action should be dismissed in its entirety).

A plaintiff cannot evade judicial review under Rule 19 by the expedient of naming indispensable parties as defendants and then dismissing them without approval by the Court. Federal courts do not permit this sort of "end run" maneuver. Indeed, "[w]hen fewer than all defendants are dismissed voluntarily, . . . the court retains plenary power to reinstate those defendants until the claim has been adjudicated as to the remaining defendants." 9 Wright & Miller, *Fed. Prac. & Proc. Civ.* § 2367 (4th ed.).

B. The Settlement Agreement does not extinguish the interests of Big Picture, Ascension, and the Tribe in this suit.

Second, plaintiff contends that the Settlement Agreement extinguished the interests of Big Picture, Ascension, and the Tribe in this action. But this argument fails upon an examination of the Settlement Agreement.

The terms of a settlement agreement may be relevant to a Rule 19 inquiry, which is "a practical one and fact specific." *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014). Where a settlement releases a defendant from *all* potential claims, that defendant is no longer a necessary party under Rule 19 because it cannot be prejudiced by any ruling by the court. *See Intel Corp. v. Am. Guarantee & Liab. Ins. Co.*, No. C 09-299 JF, 2009 WL 1653014, at *8 (N.D. Cal. June 11, 2009); *accord SCI CA. Funeral Services, Inc. v. Westchester Fire Ins. Co.*, 288 F.R.D. 450, 456–57 (C.D. Cal. 2013) (holding party not necessary where agreement absolved it of any risk from

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litigation).[1] But where a settlement agreement does not eliminate all of a party's interests in litigation, that party may remain indispensable under Rule 19. *See Burns v. Scottsdale Ins. Co.*, No. C08-1136-RSL, 2009 WL 86549 (W.D. Wash. Jan. 7, 2009) (holding where three plaintiffs had assigned some but not all of their claims to a fourth plaintiff under a settlement agreement, they remained required parties under Rule 19 and so would not be dismissed); *Beavertail, Inc. v. United States*, No. 4:12-cv-610-BLW, 2017 WL 3749446, at *12 (D. Idaho Aug. 29, 2017) (holding that where state did not abandon its claimed ownership of a lakebed in a settlement agreement, it remained a required party under Rule 19).

Big Picture, Ascension, and the Tribe have not disclaimed any interest in the outcome of this action. And the Settlement Agreement eliminates only a tiny fraction of the interests they have in the resolution of this suit. Plainly, they would be prejudiced by a ruling that Big Picture's loans are subject to, and violate, Oregon law and so are null and void. Likewise they would be prejudiced by a declaratory judgment that the governing law, forum selection, class action waiver, and dispute resolution provisions in Big Picture's loan documents are void and unenforceable as to Oregon residents. In addition, they would be prejudiced by rulings that Big Picture, Ascension, and Tribal officials have committed mail fraud and wire fraud, that they operate a RICO enterprise, or that a number of their existing agreements and promissory notes with Martorello and Eventide constitute agreements to violate RICO.

Plaintiff argues that the "election" by Big Picture and Ascension "to join in a stipulated dismissal" indicates that they do not believe that their interests would be impaired or impeded by this action proceeding in their absence. (Dkt. 152 at 11.) In support of this contention, he cites *U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901 (9th Cir. 1994), but that case is distinguishable. The district court in *Morongo* clearly had jurisdiction over the party who

[1] Likewise, it has long been the rule that "[p]atentees who have parted with all ownership by assignment are not indispensable parties." *Hook v. Hook & Ackerman*, 187 F.2d 52, 59 n.7 (3d Cir. 1951).

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stipulated to his dismissal, so his action was appropriately viewed as a concession that he would not be prejudiced by the case proceeding in his absence. *See id.* at 908 & n.6. Here, in contrast, Big Picture and Ascension have asserted from the outset that the Court lacks jurisdiction over them because of their tribal immunity. Their acquiescence to being dismissed as parties reflects affirmation of their immunity rather than any concession that their interests would not be impaired or impeded by this case proceeding without them.[2] "Tribes have an interest in preserving their own sovereign immunity, with its concomitant 'right not to have [their] legal duties judicially determined without consent.'" *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (alteration in original) (citation omitted).

Try as he may, plaintiff simply cannot make a persuasive case that the Settlement Agreement extinguishes the interests of Big Picture, Ascension, and the Tribe in this suit. Thus, their interests must be analyzed pursuant to Rule 19.

II. The Court cannot accord complete relief among the existing parties in the absence of Big Picture.

The first inquiry under Rule 19 is whether, in the absence of the missing party, the court can accord complete relief among the existing parties. Fed. R. Civ. P. 19(a)(1)(A). "The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter." Fed. R. Civ. P. 19, Advisory Committee Note (1966). As to the RICO claims, which seek only money damages from Martorello and Eventide, the Court could accord complete relief. *See Ward v. Apple Inc.*, 791 F.3d 1041, 1048–

[2] Because immunity protects sovereigns from the burdens of standing trial, Big Picture and Ascension are not required to choose between invoking immunity and protecting their interests by appearing and litigating this action. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (noting "immunity from suit" is "effectively lost if a case is erroneously permitted to go to trial"); *Bowen v. Doyle*, 880 F. Supp. 99, 134 (W.D.N.Y. 1995) ("A claim of sovereign immunity is forever lost by subjecting [a party] to the very process from which he asserts he is immune.").

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49 (9th Cir. 2015). But not so as to plaintiff's claim for declaratory relief that key provisions in the Big Picture loan documents—the governing law, forum selection, class action waiver, and dispute resolution provisions—are void and unenforceable. A declaratory judgment to that effect issued against Martorello and Eventide would be ineffectual because they are not parties to the loan agreements and Big Picture would not be bound by the judgment. Indeed, the Ninth Circuit has held that "a district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement" because it cannot afford complete relief. *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999).[3]

The Ninth Circuit has repeatedly upheld dismissals pursuant to Rule 19 in situations where tribal immunity prevents a district court from providing complete relief. For example, in *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist*., 276 F.3d 1150 (9th Cir. 2002), an unsuccessful job applicant sued the operator of a power plant on the Navajo reservation, challenging a hiring preference for Navajos that was mandated by the operator's lease with the Navajo Nation. The Ninth Circuit upheld dismissal of the case, ruling that the injunctive relief that plaintiff sought against the operator would be ineffectual because the Nation would not be bound by it. *Id.* at 1155–56.

Similarly, in *Confederated Tribes v. Lujan*, 928 F.2d 1496 (9th Cir. 1991), certain tribes brought an action against federal officials challenging the United States' continued recognition of the Quinault Indian Nation as the sole governing authority of the Quinault Indian Reservation. The Ninth Circuit affirmed the dismissal of the case for failure to join the Quinault Nation as an indispensable party, and held that "success by the plaintiffs . . . would not afford complete relief to them" because "[j]udgment against the federal officials would not be binding on the Quinault

[3] Plaintiff argues that "[a]n entity is not necessarily a required party in a breach of contract action simply because it is a party to the contract at issue," quoting *Wheaton v. Diversified Energy, LLC*, 215 F.R.D. 487, 490 (E.D. Pa. 2003). (Dkt. 152 at 12). The law in the Ninth Circuit is to the contrary. "[A] party to a contract is necessary, and if not susceptible to joinder, *indispensable* to litigation seeking to decimate that contract." *Dawavendewa*, 276 F.3d at 1157 (emphasis added).

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Nation, which could continue to assert sovereign powers and management responsibilities over the reservation." *Id.* at 1498.

In arguing that the Court can provide complete relief among the existing parties in this case, plaintiff simply ignores his claim for declaratory relief. He relies on *Commonwealth of Pennsylvania v. Think Finance, Inc*., No. 14-cv-7139, 2016 WL 183289 (E.D. Pa. Jan. 14, 2016), but that case reasoned that complete relief could be granted among the existing parties because "[t]he Plaintiff is not seeking a declaration that the [loan] contracts themselves are illegal . . . ." *Id.* at *4.[4] Here, in contrast, plaintiff seeks to invalidate provisions of the loan agreements. Accordingly, the Court cannot afford complete relief in the absence of Big Picture, which is an indispensable party. On this basis alone, the case must be dismissed pursuant to Rule 19.

III. Proceeding in the absence of Big Picture, Ascension, and the Tribe will impair their interests.

The second inquiry under Rule 19 is whether the absent party claims an interest relating to the subject of the action that would be impaired or impeded were the suit to proceed without it. Fed. R. Civ. P. 19(a)(1)(B). Big Picture, Ascension, and the Tribe all possess such interests.

A. The interests of Big Picture, Ascension, and the Tribe must be considered under Rule 19(a)(1)(B).

Plaintiff contends that the interests of Big Picture, Ascension, and the Tribe should not even be considered by the Court under Rule 19(a)(1)(B) because they have not "made any attempt to claim an interest in [his] litigation of claims against Martorello and Eventide; therefore, the Settled Parties are not 'necessary parties.'" (Dkt. 152 at 15.) This contention is a reprise of the flawed argument that the Settlement Agreement extinguished the interests of Big Picture, Ascension, and the Tribe in this action. Obviously, Big Picture and Ascension had protected

[4] Furthermore, as discussed below, the decision in *Think Finance* proceeds from the mistaken premise that Rule 19 is inapplicable to an alleged joint tortfeasor, a premise that the Ninth Circuit rejected in *Ward*. *See* 791 F.3d at 1048.

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interests in this action when it was initially filed because plaintiff named them as defendants. Plaintiff argues that those interests have now disappeared unless Big Picture, Ascension, and the Tribe step forth to assert them. This is nonsense. Although Big Picture and Ascension have been dropped as defendants, the First Amended Complaint makes essentially the same allegations about both of them as the original Complaint did. (*See, e.g.*, Dkt. 100 ¶¶ 94–97, 149, 165–66, 181, 189.)

There is no need for Big Picture and Ascension to step forward now and affirmatively assert their interests. A contracting party is "a necessary (and indispensable) party to a suit by an individual challenging [the contract] simply by virtue of being a signatory to the [contract]." *Dawavendewa*, 276 F.3d at 1156. Furthermore, "[t]hough a nonparty may formally claim an interest in an action, a 'court with proper jurisdiction may also consider *sua sponte* the absence of a required person and dismiss for failure to join.'" *Gunvor SA v. Kayablian*, 948 F.3d 214, 220 (4th Cir. 2020) (quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 861 (2008)). This follows because "Rule 19 is 'designed to protect the interests of absent parties, as well as those ordered before the court, from multiple litigation, inconsistent judicial determinations or the impairment of interests or rights.'" *Rediger v. Country Mut. Ins. Co.*, 259 F. Supp. 3d 1151, 1154 (D. Or. 2017) (citation omitted). Indeed, "courts and commentators generally agree that [Rule 19] is not waivable, and that a reviewing court has 'an independent duty to raise it *sua sponte*.'" *Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 892 (10th Cir. 1989) (citation omitted).

B. Big Picture, Ascension, and the Tribe have legally protected interests under Rule 19 and are not mere joint tortfeasors.

Relying on *Commonwealth of Pennsylvania v. Think Finance, Inc*., 2016 WL 183289, and *Dillon v. BMO Harris Bank, N.A*., 16 F. Supp. 3d 605 (M.D.N.C. 2014), plaintiff argues that this case "involves nothing more than a party seeking monetary damages from a joint tortfeasor" and that "Rule 19 is inapplicable in such situations." (Dkt. 152 at 13.) Plaintiff is wrong. In making

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this argument, plaintiff fails to address the Ninth Circuit's decision in *Ward*, 791 F.3d 1041, which controls the issue and refutes his contention.

Ward carefully distinguishes how the different tests of Rule 19(a)(1)(A) and Rule 19(a)(1)(B) apply to an alleged joint tortfeasor. The Ninth Circuit explained that an alleged joint tortfeasor generally will not be a required party under Rule 19(a)(1)(A) because, where only money damages are sought, a court can afford complete relief in the absence of the alleged tortfeasor. *See* 791 F.3d at 1048–49.[5] In contrast, "there may be circumstances in which an alleged joint tortfeasor has particular interests that cannot be protected in a legal [*i.e.*, damages] action unless it is joined under Rule 19(a)(1)(B)." *Id.* at 1048. In particular, "an absent party's contract rights may give it a legally protected interest in an action. For instance, it is well established that all parties to a contract are necessary in an action to set aside the contract." *Id.* at 1053 (citations omitted).

1. Big Picture and Ascension have contract interests at stake.

Here, the contract rights of Big Picture and Ascension indisputably give them protected interests in this action. This case revolves around Big Picture's loan agreements with the borrowers. In addition, there are multiple contracts between Big Picture or Ascension and Martorello and Eventide that allegedly constitute agreements to violate RICO: (1) service agreements, promissory notes, other agreements; (2) agreements to provide the necessary funds to conduct and expand the affairs of the lending enterprise; (3) agreements to investigate, solicit, and/or consent to investors in furtherance of the affairs of the lending enterprise; (4) agreements to generate loans; and (5) agreements to refinance the lending enterprise, including the agreement for the acquisition of Bellicose Capital and the note payments to Eventide. (Dkt. 100 ¶ 189.)

Any finding that Martorello or Eventide are liable under RICO would necessarily entail a finding that some or all of these agreements are unlawful. Plaintiff cannot prevail unless he first

[5] As discussed above, Big Picture, Ascension, and the Tribe are required parties under Rule 19(a)(1)(A) in this case because, in addition to the RICO claims, plaintiff seeks declaratory relief invalidating provisions of the loan agreements.

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establishes that the governing law provision in the loan agreements is void, and that state usury laws govern those agreements. "Here, the [plaintiff] must establish the illegality of the [loan agreements] in order to succeed on the merits of any of [his] claims." *Wilbur v. Locke*, 423 F.3d 1101, 1112 (9th Cir. 2005), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010). Because Big Picture and Ascension have a protected interest in retaining their contractual rights, and because the disposition of this action in their absence may impair or impede their ability to protect their interests, they are required parties. *See id.* at 1112–13; *see also Dewberry*, 406 F. Supp. 2d at 1147 (finding that "the Tribes have legally protected interests in this action that 'arise from terms in bargained contracts,' and disposition in this matter in the Tribes' absence would impede if not impair the Tribes' ability to protect their claimed interests").[6]

2. The Tribe has sovereign interests at stake.

Plaintiff's claims also implicate the Tribe's sovereign interests. "[T]he absent tribes have an interest in preserving their own sovereign immunity, with its concomitant 'right not to have [their] legal duties judicially determined without consent.'" *Shermoen*, 982 F.2d at 1317. "[A] judgment rendered in the [tribe's] absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the [tribe's] reservation." *Dawavendewa*, 276 F.3d at 1157. "Undermining the [tribe's] ability to negotiate contracts also undermines the [tribe's] ability to govern the reservation effectively and efficiently." *Id.* Further, the Tribe's "interests may well be affected *as a practical matter* by the judgment that its operations are illegal." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002) (emphasis in original). For example, "enforcement authorities may consider themselves compelled to act against the tribe[]." *Id.* "[T]he

[6] "That [Big Picture and Ascension] could litigate the [legality of the contracts] free of the constraints of res judicata or collateral estoppel does not by itself excuse their absence as necessary parties. Otherwise Rule 19(a) would become a nullity: a person's interests could never be impaired or impeded in the absence of joinder." *Am. Greyhound Racing*, 305 F.3d at 1024.

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risk that an action will trigger regulatory scrutiny may give an absent [joint tortfeasor] a legally protected interest under Rule 19(a)." *Ward*, 791 F.3d at 1051.

In addition, the Tribe has a protected interest arising from the potential economic impact of this litigation on the Tribe. *See Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 857 (9th Cir. 2019) ("The Navajo Nation . . . would be prejudiced if this lawsuit were to proceed and Plaintiffs were to prevail—at stake is an estimated 40 to 60 million dollars per year in revenue for the Navajo Nation . . . .").

The Tribe's sovereign interests are protected under Rule 19 regardless of whether plaintiff labels it as a joint tortfeasor. In *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015), individual Indians who had leased oil and gas rights to land held in trust for them by the United States filed putative class actions against the lessees, claiming that the United States breached its fiduciary duty by approving the leases, and that the defendants aided, abetted, and induced the United States to breach that duty. The Eighth Circuit affirmed the dismissal of the suits under Rule 19 based on the sovereign immunity of the United States. *Id.* at 799. It ruled that "whether the United States has acted illegally in approving the oil and gas leases for plaintiffs' allotments 'cannot be tried behind its back.'" *Id*. at 796 (citation omitted). It rejected the contention that "Rule 19 lacks application to all who are alleged to share liability for a wrong. Instead, the rule instructs courts to examine the interests of an absent party in an effort to determine whether 'as a practical matter' its ability to protect those interests will be hindered." *Id*. at 797. In that case the United States claimed a protected interest in the "administration, enforcement, and interpretation of its laws and regulations." *Id.*

Here, likewise, the legality of the loan agreements and of the various contracts between Big Picture or Ascension and Martorello and Eventide should not be tried behind the back of the Tribe. The administration, enforcement, and interpretation of the Tribe's laws and regulations governing its lending are at stake in this action and "a judgment rendered in the [tribe's] absence

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will impair its sovereign capacity to negotiate contracts and, in general, to govern the [tribe's] reservation." *Dawavendewa*, 276 F.3d at 1157.

C. Martorello and Eventide do not adequately represent the interests of Big Picture, Ascension, and the Tribe.

Plaintiff argues that the interests of Big Picture, Ascension, and the Tribe will not be impaired or impeded because those interests will be adequately represented by Martorello and Eventide. This argument does not survive scrutiny. The Ninth Circuit has noted that "[b]oth tribal officers and federal agencies may, in some circumstances, adequately represent the interests of an absent tribe." *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 997 (9th Cir. 2020). Beyond that, however, the courts have not found that other parties can adequately represent absent tribes. *See, e.g.*, *White*, 765 F.3d at 1027 (holding a state university could not adequately represent the interests of absent tribes); *Deschutes River Alliance v. Portland General Elec. Co.*, 323 F. Supp. 3d 1171, 1179 (D. Or. 2018) (holding private entity could not adequately represent absent tribe); *Union Pacific R. Co. v. Runyon*, 320 F.R.D. 245, 252 (D. Or. 2017) (holding county commissioners and public interest groups could not adequately represent absent tribe). Furthermore, it is well established that other parties to a contract cannot adequately represent the contractual interests of absent parties. *See Wilbur*, 423 F.3d at 1113–14 ("Under the Wilburs' logic, one seeking to nullify an agreement could simply sue one of the signatories and then argue that the remaining signatories were not necessary because the existing defendant would 'adequately represent' their interest in defending the contract. However, the general rule is exactly the opposite . . . ."). Finally, Martorello and Eventide disclaim that they have the ability to represent the interests of Big Picture, Ascension, and the Tribe. *See Runyon*, 320 F.R.D. at 252 (holding Treaty Tribes were necessary parties because "neither defendants nor intervenors have represented that they have the intent or ability to represent the Treaty Tribes' interests.").

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D. The interests of Big Picture, Ascension, and the Tribe cannot be minimized.

In a last gasp argument, plaintiff contends that Big Picture, Ascension, and the Tribe have no "meaningful interest" in his claims against Martorello and Eventide. (Dkt. 152 at 17.) But "[a] plaintiff cannot avoid the requirements of Rule 19 merely be asserting that a party has no legally protected interest." *Turley v. Eddy*, 70 F. App'x 934, 936 (9th Cir. 2003). "[A] party cannot avoid a finding of necessity under Rule 19 by its characterization of the issue, especially when the outcome of the litigation would affect tribal interests." *Union Pac. R. Co.*, 320 F.R.D. at 251.

IV. This Action must be dismissed because Big Picture, Ascension, and the Tribe cannot be joined.

Under the applicable four-factor test, *see Pimentel*, 553 U.S. at 862, it is clear that Big Picture, Ascension, and the Tribe are indispensable parties and that this case must be dismissed in their absence. Here, the tribal immunity of Big Picture, Ascension, and the Tribe "'may be viewed as the compelling factor'" in this analysis. *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (quoting *Confederated Tribes*, 928 F.2d at 1499). "[T]here is a 'wall of circuit authority'" in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—"virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity." *Dine Citizens*, 932 F.3d at 857 (quoting *White*, 765 F.3d at 1028).

The first factor is the extent to which a judgment rendered in the party's absence might prejudice that party or the existing parties. This factor "largely duplicates the consideration that made a party necessary under Rule 19(a)[.]" *Dine Citizens*, 932 F.3d at 857 (citation omitted). As discussed above, Big Picture and Ascension have protected interests in the claims asserted in the First Amended Complaint because they are parties to the contracts at issue in those claims. "[A]

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party to a contract is necessary, and if not susceptible to joinder, *indispensable* to litigation seeking to decimate that contract." *Dawavendewa*, 276 F.3d at 1157 (emphasis added).

Similarly, the Tribe has protected interests in this action because "a judgment rendered in the [tribe's] absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the [tribe's] reservation." *Id*. "Undermining the [tribe's] ability to negotiate contracts also undermines the [tribe's] ability to govern the reservation effectively and efficiently." *Id.* Further, the Tribe's "interests may well be affected *as a practical matter* by the judgment that its operations are illegal." *Am. Greyhound Racing*, 305 F.3d at 1024 (emphasis in original). Finally, the Tribe has a protected interest arising from the potential economic impact of this litigation on the Tribe. *See Dine Citizens*, 932 F.3d at 857.

The second factor is the extent to which the Court can shape relief to avoid prejudice to the absent parties. This factor also favors dismissal because Big Picture, Ascension, and the Tribe "inevitably would be prejudiced if Plaintiff[] ultimately succeeded." *Dine Citizens*, 932 F.3d at 858. Entering judgment for plaintiff will impugn the legality of Big Picture's loan agreements and business methods, as well as the existing business arrangements between Big Picture, Ascension, and Eventide, and there is no way to shape relief to avoid this prejudice. "[T]here is no middle ground—either the transactions violate statutory requirements and are void . . . or they comply with the law and are valid." *Hall v. Tribal Dev. Corp*., 100 F.3d 476, 480 (7th Cir. 1996); *see also Am. Greyhound*, 305 F.3d at 1025 (noting second factor favored dismissal where modifying relief "would not protect the tribes from other potential effects of the declaration that the gaming conducted by the tribes pursuant to their compacts is illegal"). Because "[t]here is no middle ground," an adverse judgment would inevitably harm the Tribe, Big Picture, and Ascension.

The third factor is whether a judgment rendered in the absence of the missing party would be adequate. This factor focuses on "the interests of the courts and the public in complete, consistent, and efficient settlement of controversies." *Paiute-Shoshone Indians v. City of Los Angeles*, 637 F.3d 993, 1000 (9th Cir. 2011). This factor favors dismissal because the Court cannot

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render an adequate judgment in the absence of Big Picture. Plaintiff seeks a judgment that the Big Picture loan agreements are unlawful and unenforceable as to Oregon residents, but Big Picture will not be bound by any such judgment. The controversy regarding the legality and enforceability of the loans would remain alive and incapable of resolution in the absence of Big Picture. Accordingly, "the interest of the courts and the public in a complete and efficient settlement does not support [proceeding with the action]." *Id.* at 1001–02. Furthermore, an adequate judgment is not possible when, as here, the plaintiff's claim cannot be addressed without prejudicing the absent parties. *See Wilbur*, 423 F.3d at 1114–15; *Dewberry*, 406 F. Supp. 2d at 1148 (noting third factor favors dismissal where plaintiffs seek nothing less than nullification of a tribal contract). For these reasons, "a district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement" because it cannot afford complete relief. *Clinton*, 180 F.3d at 1088.

The fourth factor is whether the plaintiff would have an adequate remedy if this action were dismissed. Defendants pointed out in their motion that plaintiff and the putative class of borrowers have an adequate alternative remedy because they can pursue relief under the Tribal Dispute Resolution Procedure to which they assented in their loan agreements. In addition, they can seek relief through the Consumer Financial Protection Bureau ("CFPB") dispute resolution process. Plaintiff retorts that he no longer can seek relief under the Tribal Dispute Resolution Procedure because he has settled his claims against Big Picture, Ascension, and the Tribe. But if this alternative remedy is no longer available to plaintiff, it is only because he *voluntarily relinquished* it in return for compensation that he deemed adequate. And, as discussed above, virtually all the members of the putative class —99% of the borrowers who received loans from Big Picture before December 20, 2019, and 100% who received loans after that date—can still seek relief under the Tribal Dispute Resolution Process. Moreover, plaintiff says nothing about the alternative relief available through the CFPB dispute resolution process. Accordingly, this factor also favors dismissal.

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Even if plaintiff lacks an alternative forum, dismissal is still warranted because "the tribal interest in immunity overcomes the lack of an alternative remedy." *Dine Citizens*, 932 F.3d at 858. "[T]his result is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *Am. Greyhound,* 305 F.3d at 1025.

In sum, an analysis of the four factors in Rule 19(b) demonstrates that this action must be dismissed in the absence of Big Picture, Ascension, and the Tribe.

V. Rule 19 does not create a "legal loophole" and this motion is timely.

Plaintiff maintains that 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." (Dkt. 152 at 24.) But the very point of Rule 19(b) is to determine "whether the court should decline to adjudicate the dispute because certain persons are absent." 7 Wright & Miller, *Fed. Prac. & Proc. Civ.* § 1601 (3d ed.). Dismissal of an action against multiple defendants due to an absent party's immunity is a recurring consequence of Rule 19, and has been approved by the Supreme Court. "*Pimentel* stands for the proposition that where a sovereign party should be joined in an action, but cannot be owing to sovereign immunity, the entire case must be dismissed if there is the potential for the interests of the sovereign to be injured. And this result obtains even when no alternative forum exists in which the plaintiff can press its case." *Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 96 (2012), *aff'd sub nom. Klamath Claims Comm. v. U.S.*, 541 F. App'x 974 (Fed. Cir. 2013).

Likewise, plaintiff's contention that defendants' motion is untimely because they failed to file it before confirmation of the Settlement Agreement lacks merit. There has been no tactical delay in this case. Defendants raised the Rule 19 issue promptly after the dismissal of Big Picture and Ascension, and while this action is at an early stage. This case is not remotely like *Fireman's Fund Ins. Co. v. Nat'l Bank of Cooperatives*, 103 F.3d 888, 896 (9th Cir. 1996), on which plaintiff

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relies, where the Rule 19 issue was not raised until the eve of summary judgment (after the party's opposition to summary judgment had already been filed) and, moreover, the issue lacked merit. Plaintiff implies that defendants should have taken some action to object to the Settlement Agreement and/or the dismissal of Big Picture and Ascension, but there is nothing that defendants might have done that would alter the Rule 19 calculus. The sovereign immunity of Big Picture, Ascension, and the Tribe has existed since before this action was filed. The immunity of Big Picture and Ascension was initially contested but that contest was resolved by the decision in *Williams*, 929 F.3d at 185. The Settlement Agreement had no effect on the immunity of Big Picture, Ascension, and the Tribe. In sum, plaintiff's argument that defendants have engaged in some sort of gamesmanship with respect to their Rule 19 motion is specious.

CONCLUSION

For the foregoing reasons, Martorello and Eventide respectfully request that this action be dismissed pursuant to Federal Rule of Civil Procedure 19.

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