IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Baltimore Division

GLENDORA MANAGO, *et al.*,

Plaintiffs,

v.

CANE BAY PARTNERS VI, LLLP, *et al.*,

Defendants.

Case No. 1:20-cv-00945-ELH

CANE BAY AND MAKES CENTS DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO STAY CASE

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Defendants Cane Bay Partners VI, LLLP, David Johnson, Kirk Chewning, Richard Mayer, Karen Rabbithead, David Blacksmith, and Wesley Scott Wilson (collectively, "Defendants") move to stay this case pending a decision in the appeal currently pending before the Fourth Circuit Court of Appeal in *Hengle v. Asner*, Case No. 20-1062.[1]

I. INTRODUCTION

Plaintiffs obtained loans from non-party lender Makes Cents, Inc. d/b/a MaxLend ("Makes Cents"), a Tribal corporation and instrumentality of the sovereign, federally-recognized tribe, the Mandan, Hidasta, and Arikara Nation (hereinafter, the "Nation" or "Tribe"), that engages in consumer lending pursuant to Tribal law. The original complaint, filed by a single named plaintiff, Glendora Manago, named as defendants only a third-party service provider to Makes Cents, Cane Bay Partners VI, LLLP, and two of its owners and officers (the "Cane Bay Defendants"), and alleged only violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and Maryland usury and consumer protection statutes, as well as common law claims for unjust enrichment and civil conspiracy based on alleged violations of Maryland law.

In response to the four motions the Cane Bay Defendants filed in response to the original complaint, *see* Docs. 25-1, 28-1, 29-1, 30-1, Plaintiffs filed a First Amended Complaint ("Complaint") in which they make two amendments that materially change the nature of this case. First, the Complaint adds officers and directors of Makes Cents,[2] as well as members of the Nation's Tribal Business Council, which, Plaintiffs allege, has "ultimate authority and control over [Makes Cents]" (collectively, the "Tribal Defendants"), as individual tribal defendants sued

[1] Case Nos. 20-1063, 20-1358, and 20-1359 have been consolidated with Case. No 20-1062, which is the lead case on appeal.

[2] In 2019, the Nation transferred ownership of the loan portfolio at issue in this case from Makes Cents to a newly created tribal corporation, Uestka Tsakits, Inc. ("Uetska Tsakits"), a commercial arm and subordinate economic instrumentality of the Nation. Compl. ¶ 13, n.2. Makes Cents and Uestka Tsakits are collectively referred to herein as Makes Cents.

in their "official capacities[.]" Second, the Complaint adds seven named plaintiffs who assert Defendants violated the laws of six states, in addition to Maryland: Florida, Texas, North Carolina, Oregon, Michigan, and South Carolina.

These amendments place this case squarely in the path of an appeal currently pending before the Fourth Circuit, *Hengle v. Asner*. In *Hengle*, another tribal lending case in which borrowers have sued tribal officials alleged to be involved in a tribal lending operation, the Fourth Circuit is considering, and will soon resolve, two issues that will materially impact – and could be dispositive of – Plaintiffs' claims against the Tribal Defendants in this case:

(i) Whether private plaintiffs can sue tribal officials in their official capacities for alleged violations of state law pursuant to *Ex parte Young*, 209 U.S. 123 (1908), which provides a limited exception to sovereign immunity to authorize suits against government officials seeking prospective equitable relief to stop ongoing violations of federal law; and

(ii) Whether RICO authorizes private plaintiffs to seek injunctive relief.

With respect to *Ex parte Young*'s application to state law claims, the *Hengle* defendants argue on appeal – and Defendants will argue in this case – that *Ex parte Young* provides an exception to tribal sovereign immunity (i) only to the extent that the plaintiff sues tribal officials to enjoin ongoing violations of federal law, and (ii) even if *Ex parte Young* claims extend to suits against tribal officials for alleged violations of state law, only states (not private plaintiffs) could bring such claims.

As to whether RICO authorizes private plaintiffs to seek injunctive relief, again, the tribal officials argue in the appeal – and Defendants will argue in this case – that RICO does not authorize private plaintiffs to seek injunctive relief, and, as a result, Plaintiffs cannot pursue

RICO claims against tribal officials under *Ex parte Young*.

The Fourth Circuit's resolution of these issues could dramatically change the scope of this case. If, for example, the Fourth Circuit resolves both issues in the Tribal Defendants' favor, then all of Plaintiffs' claims against the Tribal Defendants in this case must be dismissed. Even if the Fourth Circuit only resolves the RICO issue in the Tribal Defendants' favor, the scope of this case will dramatically narrow, because the Court would no longer have personal jurisdiction over the out-of-state plaintiffs' remaining claims against the Tribal Defendants.

These issues are fully briefed before the Fourth Circuit, and oral argument occurred on January 26, 2021, with a decision expected within the next few months. It makes little sense for the parties here to brief, and the Court to address, the numerous, complex issues this case presents without first understanding the Fourth Circuit's position on these critical issues. Moreover, because the issues to be addressed concern the Tribal Defendants' entitlement to sovereign immunity, the issues *must* be addressed and resolved before the case can proceed. Otherwise, the very purpose of sovereign immunity, which is immunity from *suit*, including the burdens of motion practice and discovery, would be lost. In contrast, Plaintiffs have not articulated any meaningful prejudice they would suffer from the relatively brief requested stay of this matter.

For the foregoing reasons, Defendants respectfully request that this case be stayed pending the Fourth Circuit's resolution of the appeal in *Hengle v. Asner*.[3]

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[3] Before filing this Motion, Defendants' counsel met and conferred with Plaintiffs' counsel, who indicated they would oppose the requested stay.

II. BACKGROUND

A. Plaintiffs' Allegations[4]

Plaintiffs are residents of Maryland, Florida, Texas, North Carolina, Oregon, Michigan, and South Carolina who obtained loans from Makes Cents over the internet. First Am. Compl. ("Compl.") ¶¶ 114-134. Some Plaintiffs repaid their loans in full, while others repaid their loans in part or not at all. *Id.*

In 2011, the Nation "organized [Makes Cents] as a tribal company owned entirely by the Tribe through one of its wholly-owned subsidiaries." Compl. ¶ 89. As explained in Plaintiff's loan agreements, Makes Cents is an "economic development arm of, instrumentality of, and [is] wholly-owned and controlled by the Mandan, Hidatsa, and Arikara Nation, a federally-recognized sovereign American Indian tribe," and is "licensed and regulated by the Tribe." *E.g.*, Doc. 29-2 (Declaration of Richard Mayer) ("Mayer Decl."), Ex. A at 8; Ex. B at 5. The Agreements also clearly indicate that they are governed by Tribal law. *Id*.

Plaintiffs, nevertheless, allege that their loans are usurious, and bring this suit on behalf of themselves and a purported nationwide class of borrowers, as well as subclasses of borrowers from each of their respective states, "to recover damages and penalties under state and federal law for the usurious interest and fees obtained by Cane Bay Defendants, as well as prospective injunctive and declaratory relief against the MHA Tribal Business Council, and the Board of Directors and Chief Executive Officer of [Makes Cents] . . . to prevent their continuous and ongoing violations of state and federal law." Compl. ¶ 13.

B. *Hengle v. Asner*

In *Hengle*, Plaintiffs, Virginia residents, sued various tribal officials and two non-tribal

[4] Defendants accept Plaintiffs' factual allegations in the Complaint as true for the purposes of this Motion only.

individuals alleged to be involved in the issuance of purportedly usurious loans by Golden Valley Lending, Inc., Silver Cloud Financial, Inc., Mountain Summit Financial, Inc., and Majestic Lake Financial, Inc. – four entities formed by and under the laws of the Habematolel Pomo of Upper Lake. *Hengle v. Asner*, 433 F. Supp. 3d 825, 838–39 (E.D. Va. 2020), *motion to certify appeal granted*, No. 3:19CV250 (DJN), 2020 WL 855970 (E.D. Va. Feb. 20, 2020). Plaintiffs allege claims based on RICO, Virginia's Consumer Finance Act, and for "Declaratory Judgment" against the tribal officials, seeking to enjoin the defendants from collecting on the allegedly usurious loans and to prevent the tribal lending entities from issuing usurious loans to Virginia consumers in the future. *Id.* at 839. Plaintiffs also seek monetary relief against the two non-tribal individuals for violations of RICO and Virginia's usury and consumer finance statutes, as well as a claim for unjust enrichment. *Id.*

The defendants filed several motions with the District Court, including, as is relevant here, a motion to dismiss the tribal officials on sovereign immunity grounds. *Id.* The District Court denied the motion to dismiss, finding that the plaintiffs can pursue claims against the tribal officials pursuant to *Ex parte Young* based on alleged violations of both federal and state law. *Id.* at 872–77. The District Court also held, however, that the plaintiffs cannot pursue *Ex parte Young*-type claims against the tribal officials under RICO because RICO does not authorize private plaintiffs to seek injunctive relief. *Id.* at 880–86.

The defendants appealed, and "[o]n its own initiative," the District Court certified the question of whether RICO "permits *Ex parte Young*-style relief against the Tribal Officials," recognizing that such an issue is a controlling question of law and that immediate resolution would materially advance termination of the case. 2020 WL 855970, at *11. The appeal is fully briefed, and oral argument was held on January 26, 2021. *See* Case. No. 20-1062 (4th Cir.), Doc.

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III. LEGAL STANDARD

"The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706–07 (1997) (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)); *see also United States v. Georgia Pac. Corp.*, 562 F.2d 294, 296 (4th Cir. 1977) ("The determination by a district judge in granting or denying a motion to stay proceedings calls for an exercise of judgment to balance the various factors relevant to the expeditious and comprehensive disposition of the causes of action on the court's docket."). "When considering a discretionary motion to stay, courts typically examine three factors: (1) the impact on the orderly course of justice, sometimes referred to as judicial economy, measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected from a stay; (2) the hardship to the moving party if the case is not stayed; and (3) the potential damage or prejudice to the non-moving party if a stay is granted." *Int'l Refugee Assistance Project v. Trump*, 323 F. Supp. 3d 726, 731 (D. Md. 2018) (citation omitted). "The party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) (citing *Landis*, 299 U.S. at 254–55 ("The suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.")).

The District Court's discretion to stay actions includes issuing a stay "when proceedings in another matter involve similar issues." *Bureau of Consumer Fin. Prot. v. Fair Collections & Outsourcing, Inc.*, No. GJH-19-2817, 2020 WL 7043847, at *2 (D. Md. Nov. 30, 2020) (citations and internal quotation marks omitted). Thus, district courts have granted motions to stay

pending resolution of issues on appeal in other matters, even where the appeal will not fully resolve the stayed case. *See, e.g., Orr v. Nat'l Rifle Ass'n of Am.*, No. 117CV00157GBLMSN, 2017 WL 11501503, at *2 (E.D. Va. May 19, 2017) (granting motion to stay pending appellate court decision in another matter because "doing so will preserve judicial resources, narrow the issues in this case, and limit unnecessary discovery"); *Actelion Pharms. Ltd. v. Lee*, No. 1:15-CV-1266, 2016 WL 205377, at *4 (E.D. Va. Jan. 13, 2016) (granting motion to stay pending resolution of appeal in another matter, finding in relevant part that a stay would serve judicial economy because the "two cases are very similar and present almost identical legal questions").

IV. THIS CASE SHOULD BE STAYED PENDING THE FOURTH CIRCUIT'S DECISION IN *HENGLE v. ASNER*

A. Judicial Economy Strongly Favors A Stay

Two issues the Fourth Circuit is considering in *Hengle* will materially impact – and could be dispositive of – Plaintiffs' claims against the Tribal Defendants in this case and could significantly impact the claims against the Cane Bay Defendants as well.

Because Plaintiffs have sued the Tribal Defendants in their official capacities, the Tribal Defendants are entitled to sovereign immunity unless Plaintiffs' claims against the Tribal Defendants fall within the *Ex parte Young* exception to sovereign immunity. Under the "fiction" of *Ex parte Young*, sovereign immunity "does not preclude private individuals from bringing suit against State officials for prospective injunctive or declaratory relief designed to remedy ongoing violations of federal law." *Bragg v. W. Virginia Coal Ass'n*, 248 F.3d 275, 292 (4th Cir. 2001). In determining whether the *Ex parte Young* exception applies, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (citation omitted).

Two issues critical to the *Ex parte Young* inquiry this Court must conduct here are squarely before the Fourth Circuit in *Hengle*: (i) whether private plaintiffs can sue tribal officials in their official capacities pursuant to *Ex parte Young* based on alleged violations of state law; and (ii) whether RICO authorizes private plaintiffs to seek injunctive relief. Resolution of these issues will have a material impact on – and could be dispositive of – Plaintiffs' claims against the Tribal Defendants in this case.

For example, if the Fourth Circuit finds in *Hengle* both that (i) *Ex parte Young* claims can only be brought against tribal officials for violations of federal law (or only states can assert state law *Ex parte Young* claims against tribal officials) and (ii) RICO does not permit private plaintiffs to assert claims for injunctive relief, then *all* of Plaintiffs' claims against the Tribal Defendants in this case must be dismissed.

RICO is the only substantive federal claim Plaintiffs have asserted against the Tribal Defendants. If RICO does not authorize private plaintiffs to assert claims for injunctive relief, then the statute cannot form the basis of an *Ex parte Young* claim. *E.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73-76 (1996) (finding "*Ex parte Young* inapplicable to petitioner's suit against the Governor of Florida" because statutory scheme did not provide for prospective injunctive relief); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (finding Indian Civil Rights Act did not authorize declaratory or injunctive relief claims to enforce its substantive provisions and thus could not form the basis of an *Ex parte Young* claim against tribal officials); *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 905 (6th Cir. 2014) ("*Ex parte Young* provides a path around sovereign immunity" only "if the plaintiff already has a cause of action from somewhere else."). Likewise, if the Fourth Circuit finds Plaintiffs cannot assert state law claims against the Tribal Defendants, Plaintiffs' two remaining claims against the Tribal

Defendants would have to be dismissed.[5]

A stay is equally important to the Cane Bay Defendants. Because only Plaintiffs' claims against the Cane Bay Defendants could potentially remain,[6] then this action cannot proceed because Makes Cents is a necessary party that cannot be joined due to its sovereign immunity. As the Fourth Circuit has long recognized, a contracting party like Makes Cents is the "paradigm of indispensable party" under Federal Rule of Civil Procedure 19. *Nat'l Union Fire Ins. Co. v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 252 (4th Cir. 2000); *see also* Doc. 25-1 (Defs.' Mot. to Dismiss Pursuant to Rule 19).

Alternatively, if the Fourth Circuit finds that tribal officials can be sued for violations of state law, but that RICO does not authorize private plaintiffs to assert claims for injunctive relief, then this Court will not have personal jurisdiction over the out of state Plaintiffs' remaining claims against the Tribal Defendants.[7] In such a situation, the RICO claims against the Tribal Defendants would have to be dismissed. And even if the RICO claims against the Cane Bay

[5] Plaintiffs' only other claims against the Tribal Defendants are under the Declaratory Judgment Act, 28 U.S.C. § 2201 and for "Violation of State Law[.]" Compl. ¶¶ 266-292. Neither is a standalone claim for relief. *See, e.g., Artis v. T-Mobile USA, Inc.*, No. PJM 18-2575, 2019 WL 1427738, at *5 (D. Md. Mar. 29, 2019) ("[B]oth a declaratory judgment and an injunction are remedies, not independent claims themselves. . . . Since declaratory and injunctive relief are remedies unavailable to plaintiffs under both the [Maryland Consumer Protection Act] and the [Maryland Consumer Debt Collection Act], and because Artis has failed to plead plausible claims of common law defamation and fraud, there is no basis for the Court to grant his request for declaratory and injunctive relief."); *Young v. Ditech Fin., LLC*, 2017 WL 3066198, at *8 (D. Md. July 19, 2017) (explaining that a court cannot issue a declaratory judgment under 28 U.S.C. § 2201 or an injunction under FRCP 65 "unless an independent valid cause of action survives challenge").

[6] Defendants intend to move to dismiss the claims against the Cane Bay Defendants on other grounds. *See, e.g.*, Doc. 29-1 (Defs.' Mot. to Dismiss Pursuant to Rule 12(b)(6)).

[7] Each named plaintiff must establish, for each claim and each Defendant, that the Court has personal jurisdiction over her claims. *Lincoln v. Ford Motor Co.*, No. CV JKB-19-2741, 2020 WL 5820985, at *5 (D. Md. Sept. 29, 2020) ("[T]his Court will require each named plaintiff in a class action suit to demonstrate personal jurisdiction over a defendant"); *North Carolina Mut. Life Ins. Co. v. McKinley Fin. Serv., Inc.*, 386 F. Supp. 2d 648, 656 (M.D.N.C. 2005) ("A plaintiff must establish the court's jurisdiction with respect to *each* claim asserted.") (quoting *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 24 (2d Cir. 2004) (emphasis in original).

Defendants were to survive the pleadings stage, those claims cannot be used to establish personal jurisdiction over the Tribal Defendants as to the out-of-state Plaintiffs' claims. Pendent personal jurisdiction "provides a basis only for the exercise of personal jurisdiction over a plaintiff's related claims against the same party." *In re BitConnect Sec. Litig.*, No. 18-cv-80086, 2019 WL 9104318, at *5 (S.D. Fla. Aug. 23, 2019) (declining to exercise pendent personal jurisdiction against defendant where plaintiff alleged securities fraud claims against other defendants but not that particular defendant); *see also Morley v. Cohen*, 610 F. Supp. 798, 823 (D. Md. 1985) (dismissing claims against defendants against whom plaintiffs did not also allege underlying federal claims); *Al Seraji v. Wolf*, No. 19-2839, 2020 WL 7629797, at *6 (D.D.C. Dec. 22, 2020) (pendent personal jurisdiction applies only where "the court has personal jurisdiction over one claim against the defendant, and then exercises personal jurisdiction over any remaining claims against the same defendant and it is not a vehicle for asserting personal jurisdiction over additional parties where no such jurisdiction would otherwise lie") (citation and quotation marks omitted).[8]

Consequently, if the RICO claims against the Tribal Officials are dismissed, Plaintiffs must establish personal jurisdiction under the Maryland long-arm statute.[9] The out-of-state

[8] Similarly, absent the RICO claim, venue would be improper as to the out-of-state plaintiffs' claims against the Tribal Defendants. Pendent venue is limited to claims against the same defendants for which venue is proper under a federal claim. *Philadelphia Metal Trades Council v. Allen*, No. 07-145, 2007 WL 1875791, at *4 (E.D. Pa. June 26, 2007) ("[T]he 'novel concept' of pendent venue 'is generally applied when the causes of action have identical parties and proofs.'") (quoting *Lomanno v. Black*, 285 F. Supp. 2d 637, 641 n.7 (E.D. Pa. 2003)); *Schultz v. Ary*, 175 F. Supp. 2d 959, 964 (W.D. Mich. 2001) (noting that pendent venue "does not appear to be applied where differing claims are asserted against multiple defendants"). Therefore, RICO claims against the Cane Bay Defendants also cannot create pendent venue over the Tribal Defendants. *Lomanno*, 285 F. Supp. at 641 & n.7 (finding venue improper as to independent tort claims against certain defendants after declining to apply pendent venue based on Title VII claim against another defendant, and ordering transfer of venue of entire case).

[9] Neither Plaintiffs' remaining federal claim under Declaratory Judgment Act nor the Class Action Fairness Act establish an independent basis for personal jurisdiction over nonresident defendants. *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) (holding Declaratory Judgment Act does not provide for nationwide service of process and therefore personal

Plaintiffs do not and cannot allege facts to satisfy the Maryland long-arm statute or due process. *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396-97 (4th Cir. 2003) ("The Maryland courts have consistently held that the state's long-arm statute is coextensive with the limits of personal jurisdiction set by the due process clause of the Constitution.") (citing *Mohamed v. Michael*, 279 Md. 653 (1977)). Plaintiffs do not allege, and ultimately cannot show, that the Tribal Defendants are subject to general jurisdiction in Maryland,[10] or that the out-of-state Plaintiffs' claims have any connection with Maryland. *E.g., Lincoln v. Ford Motor Co.*, No. CV JKB-19-2741, 2020 WL 5820985, at *5 (D. Md. Sept. 29, 2020) (because claims were "based exclusively on alleged actions that occurred in New Mexico, the Court dismisses all claims brought by [out of state plaintiff]—under the New Mexico Unfair Trade Practices Act, MMWA, and New Mexico common law"). Indeed, each of the out-of-state Plaintiffs' claims is premised on violations of those Plaintiffs' home states' laws arising from their applying for loans from their home states. *See* Compl. ¶¶ 117-134, 185-292.

For similar reasons discussed above, a ruling on these issues is equally significant to Plaintiffs' claims against the Cane Bay Defendants. If the out-of-state Plaintiffs' claims against the Tribal Defendants are dismissed, then such claims must likewise be dismissed against the Cane Bay Defendants pursuant to Rule 19, because Makes Cents is a necessary party that cannot be joined due to its sovereign immunity. *See* Doc. 25-1 (Defs.' Mot. to Dismiss Pursuant to Rule 19).

Ultimately, regardless of how the Fourth Circuit rules on these issues, its decision will

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jurisdiction was dependent on state law); *Chufen Chen v. Dunkin' Brands, Inc.*, No. 17CV3808CBARER, 2018 WL 9346682, at *4 (E.D.N.Y. Sept. 17, 2018), *aff'd*, 954 F.3d 492 (2d Cir. 2020) (CAFA does not permit nationwide service of process and does not provide independent basis for personal jurisdiction).

[10] Merely conducting business in a forum, even very substantial and systematic business, is insufficient to support general personal jurisdiction. *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014)); *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 134 (2020).

almost certainly impact this Court's rulings and will likely require additional briefing by both sides. It makes little sense from an efficiency and judicial economy perspective for the parties to incur the time and expense of briefing and, from the Court's perspective, deciding, numerous substantive issues that will be materially impacted by (and may not require any briefing as a result of) the Fourth Circuit's decision, particularly given that a decision on these issues will be forthcoming in the near future.

B. Proceeding Without A Stay Will Prejudice Defendants

Proceeding with this case before the Fourth Circuit rules in *Hengle* plainly will prejudice Defendants. If the Tribal Defendants are entitled to sovereign immunity because the *Ex parte Young* claims cannot proceed, forcing the Tribal Defendants to defend this case without resolving their entitlement to immunity will cause irrevocable prejudice. It is well settled that "sovereign immunity deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction." *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 649 (4th Cir. 2018) (citation omitted). Thus, "[s]overeign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002).

"Unlike a defense to liability, which confers only a right not to pay damages, an immunity from suit confers a right not to bear the burdens of litigation and cannot be 'effectively vindicated' after litigation." *Nero v. Mosby*, 890 F.3d 106, 121 (4th Cir. 2018) (citation omitted). "[F]or immunity to have meaning, it must work to protect the government from the burdens of litigation, not just the burdens of an adverse judgment." *Blanco Ayala v. United States*, 982 F.3d 209, 217 (4th Cir. 2020) (citation omitted); *see also Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 218 (4th Cir. 2012) (citations omitted) ("[I]mmunity has consistently been administered as a

protection against the burden of litigation altogether."). Because "immunity from suit" is "effectively lost if a case is erroneously permitted to go to trial[,]" *Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985), the Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Here, forcing the Tribal Defendants to proceed without waiting for the Fourth Circuit to resolve critical issues impacting their entitlement to sovereign immunity will deprive them of the very benefit such immunity is intended to provide. In addition, all Defendants will be prejudiced by expending substantial time and resources briefing issues that will be directly impacted by the Fourth Circuit's ruling in the coming months. As discussed above, it would be a waste of both the Court's and the parties' resources to brief the numerous issues in this case that will only have to be re-briefed once the Fourth Circuit rules in the near future.

C. A Stay Will Not Prejudice Plaintiffs

Plaintiffs will not suffer any prejudice if this matter is briefly stayed pending the *Hengle* ruling. Defendants do not have any reason to believe that the Fourth Circuit's opinion should not be forthcoming promptly after oral argument on January 26, 2021, *see* https://www.ca4.uscourts.gov/faqs/faqs-opinions ("The court's median disposition time for cases decided on the merits is about six months from notice of appeal to entry of judgment."), and a stay will benefit Plaintiffs by providing clarity and obviating the need for unnecessary additional briefing. To the extent Plaintiffs' argue they will be prejudiced by the short delay that a stay in this circumstance would impose, such claims of prejudice ring hollow. Plaintiffs filed this case in April 2020, yet they waited until December 2020 to file their amended complaint, which materially changes the nature of the case. Even if briefing on Defendants' motions is completed before the Fourth Circuit rules in *Hengle*, it is likely that the parties will need to amend or

supplement their briefing to address the Fourth Circuit's decision. It would be much more efficient for the parties and the Court to brief all of the myriad issues in this case that could be impacted by the *Hengle* decision after the Fourth Circuit issues its decision there. Moreover, if Plaintiffs were truly concerned about resolving this case as expeditiously as possible, they should have initiated arbitration as they agreed to do in their loan agreements. *See* Defs.' Motion to Compel Arbitration, ECF Nos. 28, 28.1.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court stay this case pending the Fourth Circuit's decision in *Hengle v. Asner*. If a stay is granted, Defendants propose that the parties file a status report and, if applicable, proposed scheduling order, with this Court two weeks after the Fourth Circuit's decision.

Dated: January 27, 2021

Respectfully submitted,

By: /s/ Ashley Vinson Crawford

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