IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

LULA WILLIAMS, et al., Plaintiffs, v. BIG PICTURE LOANS, LLC, et al., Defendants.	Case No. 3:17-cv-00461-REP-RCY **JURY TRIAL DEMANDED**

PLAINTIFFS' REPLY IN SUPPORT OF RENEWED MOTION FOR CLASS CERTIFICATION AGAINST DEFENDANT MATT MARTORELLO

INTRODUCTION

Martorello's opposition raises three primary challenges to this motion for class certification. First, Martorello contends that the loan contract's class waiver provisions are enforceable. Second, Martorello contends that the class is not ascertainable because the data needed to identify class members belongs to Big Picture and Ascension Technologies. And third, without identifying a single individualized question, Martorello points to a few immaterial differences between class members—almost all of which have nothing to do with the elements and evidence needed to establish the claims in this case. For the reasons explained below, none of these challenges present a legitimate obstacle to class certification in this case.[1]

ARGUMENT

I. THE CLASS ACTION WAIVER IS UNENFORCEABLE.

A. The loan contracts' plain language prospectively waives all federal rights.

The Supreme Court has repeatedly recognized that, where "choice-of-forum and choice-of-law clauses" operate "in tandem as a prospective waiver of a party's right to pursue statutory remedies," they are unenforceable. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *see also Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313–

[1] Plaintiffs' opening brief contained 20 pages of facts regarding the initial structure of the enterprise, the events leading to the change in structure, and the new structure of the enterprise. *See* Dkt. 968 at 2-22. Martorello's statement of facts does not address or acknowledge these objective facts. Dkt 1007 at 12-29. Rather, Martorello provides his own farcical background, almost all of which have no relevance to Plaintiffs' motion for class certification. *Id*. Moreover, the Court has rejected Martorello's false narrative after an extensive review of this same evidence, as well as a two-day hearing that included live testimony from Martorello. *See* Dkt. 944 (finding that Martorello misrepresented: (1) his involvement in the creation of Red Rock; (2) his control over Red Rock's lending operations; (3) the reasons why Bellicose was "sold" to LVD; and (4) the reasons for the creation of Big Picture). Because the Court has indicated that it will "take into account the record about the misrepresentations and the findings about them," Plaintiffs will not again rehash these issues except where they have any relevance to *this* motion. *Id*. at 39.

14 (2013) ("[C]ourts will not enforce a prospective waiver of the right to gain redress for an antitrust injury, whether in an arbitration agreement or *any other contract*." (emphasis added)); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) ("[A] substantive waiver of federally protected civil rights will not be upheld."). Here, the loan contract's choice-of-law and forum selection provisions unambiguously waive a consumer's federal rights and remedies prospectively.

Prospective waiver of a consumer's rights and remedies is a hallmark feature of tribal lending agreements that has been rejected by the Fourth Circuit *in four cases*. In each case, the Fourth Circuit applied the prospective waiver doctrine to invalidate arbitration provisions that have the same effect of the agreement here— "mak[ing] unavailable to the borrowers the effective vindication of federal statutory protections and remedies." *Gibbs v. Haynes Investments, LLC*, 967 F.3d 332, 344 (4th Cir. 2020); *see also Gibbs v. Sequoia Capital Operations, LLC*, 966 F.3d 286, 293 (4th Cir. 2020); *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 332 (4th Cir. 2017); *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 673 (4th Cir. 2016).

In *Hayes*, the Fourth Circuit refused to enforce an arbitration agreement that expressly stated that no federal law or regulation would apply to the agreement. *Hayes*, 811 F.3d at 669. The Fourth Circuit reasoned that "a party may not underhandedly convert a choice of law clause into a choice of no law clause—it may not flatly and categorically renounce the authority of federal statutes to which it is and must remain subject." *Id.* at 675. The Fourth Circuit expanded on this principal in *Dillon*, holding that a loan agreement that even "implicitly accomplishes" what the agreement in *Hayes* expressly stated was likewise unenforceable. *Dillon*, 856 F.3d at 336.

Like *Hayes and Dillon*, the lending agreement's choice-of-law and forum selection are spread out across three different provisions that are closely intertwined and, at times, repetitive, *i.e.*, the "Governing Law and Forum Selection" provision, the "Tribal Dispute Resolution

Procedure" provision, and the "Waiver of Jury Trial" provision. These provisions must be considered together because they work together to prospectively waive all of a consumer's federal rights and remedies.

First, the "Governing Law and Forum Selection" provision, which precludes the application of any law other than tribal law, states,

> This Agreement will be governed by the laws of the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Tribal law"), including but not limited to the Code as well as applicable federal law. All disputes shall be solely and exclusively resolved pursuant to the Tribal Dispute Resolution Procedure set forth in Section 9 of the Code and summarized below for your convenience.

Ex. 1 at 5 (emphasis added). Although the first sentence of this provision seems to suggest that the contract is governed by "applicable federal law," the very next sentence takes this away by restricting any disputes to be "solely and exclusively resolved" by tribal law. The restriction on the application of federal law is further clarified throughout the contract, including a provision in bold font that provides:

> You acknowledge and agree that this Agreement is subject *solely* and *exclusively* to the Tribal law and jurisdiction of the Lac Vieux Desert Band of Lake Superior Chippewa Indians.

Ex. 1 at 6 (emphasis added). Requiring the "exclusive" application of tribal law clarifies "that only the laws of the Tribe" shall apply to the dispute "to the exclusion" of any other laws, including federal laws. *Hengle v. Asner*, 2020 WL 113496, at *14 (E.D. Va. 2020) (explaining why two similar provisions in an arbitration agreement operated in tandem to waive federal law); *see also Hayes*, 811 F.3d at 676 (interpreting a clause that forbid the application of "any other law other than the law of the [tribe]" as a clause that "almost surreptitiously waives a potential claimant's federal rights" and "flatly and categorically renounce[s]" the authority of federal law).

In another similar case, this Court refused to enforce a nearly identical contract, explaining that a "solitary mention" that the loan was governed by "Tribal Law and such federal law as is applicable" could not save the contract when read as a whole. *Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 672 (E.D. Va. 2019); *see also Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955, 970 (N.D. Cal. 2019) (finding choice-of-law provision unenforceable by reading contract in its entirety and rejecting argument use of "tribal law and such federal law as is applicable" language salvaged the provision).

If the Court has doubt on the effect of the "sole and exclusive" application of tribal law, there will be no uncertainty after review of the contract's "Tribal Dispute Resolution Procedure" and "Waiver of Jury Trial" provisions. The Tribal Dispute Resolution Procedure provides:

> A person's complaint to the Lender shall be considered similar in nature to a petition for redress submitted to a sovereign government, without waiver of sovereign immunity and exclusive jurisdiction, and does not create any binding procedural or substantive rights for a petitioner.

Ex. 1 at 5 (emphasis added). This means precisely what it says—tribal law "does not create any binding procedural or substantive rights" for borrowers beyond the sham dispute resolution procedures. The Waiver of Jury Trial provision reiterates that the Tribal Dispute Resolution Procedure is the sole forum for the adjudication of all of a consumer's claims for all claims relating to the transaction. *Id*. The Waiver of Jury Trial provision, which includes the class waiver clause, is intertwined with the Tribal Dispute Resolution Procedure provision. *Id*.

When considered together (and often alone), these provisions in the contract operate in tandem to prospectively waive federal rights and remedies. First, the "Governing Law and Forum Selection" clause requires the sole and exclusive use of the Tribal Dispute Resolution Procedure. *Id*. at 5. Next, the "Tribal Dispute Resolution Procedure" clause provides that it "does not create any binding procedural or substantive rights for the petitioner," and the "Waiver of Jury Trial"

provision defines covered disputes broadly to include all federal claims. *Id*. And finally, the "Important Acknowledgments" section clarifies that the "Agreement is subject solely and exclusively to Tribal law" and reiterates that the "Tribal Dispute Resolution Procedure is the sole and exclusive forum for resolving disputes and/or claims[.]" *Id*. at 6.

Five years ago, the Fourth Circuit labeled a similar contract a "farce" designed specifically "to avoid state and federal law," and deployed "to game the entire system." *Hayes*, 811 F.3d at 674-76. It surmised that its decision might prompt "future companies" to craft their contracts "on the up-and-up and avoid the kind of mess" confronting the defendants in that case. *Id*. at 676. Not here. Because the class action waiver is part of a contract that attempts to waive all federal rights and remedies, it cannot be enforced.

B. The Tribe's law—which was partially crafted by Martorello—also prospectively waives federal rights and remedies.

Within the past year, the Fourth Circuit in *Haynes* and *Sequoia Captial* delved deeper into the prospective waiver issue, examining the tribal law to support its holdings that an arbitration agreement prospectively waived federal rights and remedies. Even though the arbitration agreements did not "explicitly disclaim the applicability of federal law," they still operated as a prospective waiver because the tribal law itself "prevent[ed] claimants from vindicating a RICO claim for treble damages against entities and individuals" such as the non-tribal participants in the scheme. *See Sequoia*, 966 F.3d at 293 (describing and applying the analysis in *Haynes*). In so holding, the Fourth Circuit took issue with three sections of the Otoe-Missouria Tribe's code—all of which mirror the Tribal Code "enacted" by the LVD.[2]

[2] Although the Tribe officially enacted the law, Martorello had a significant role in drafting the Code to ensure that tribal law rigged the system, including the claims against him. *See* Exs. 2-4.

In particular, the Fourth Circuit observed that "although § 5.1 of the Otoe-Missouria Tribal Consumer Financial Services Ordinance" provided that lenders shall comply with "federal laws as applicable," that the Racketeer Influence and Corrupt Organizations Act was "noticeably absent from the list of federal consumer protection statutes with which a lender must apply." *Id.* at 343 (citing Otoe-Missouria Tribal Consumer Fin. Servs. Ord. §§ 5.2(a) (2018)). "And even for the laws listed," the Fourth Circuit noted that the "Ordinance makes clear that a lender's compliance does not constitute 'consent . . . related to the applicability of federal laws[.]" *Id.* (citing § 5.2(a)). Since both tribes were represented by Rosette, it is no surprise that § 6.2 of the LVD's Tribal Code is identical in this respect. *Compare* Ex. 5 at pg. 21 (providing that a licensee "shall conduct business in a manner consistent with the principles of federal consumer protection law" and omitting any reference to RICO in the list of statutes); *with* Ex. 6 at pg. 10-11.

In addition, although tribal law allowed for a claim against the lending entity, the Fourth Circuit further found a prospective waiver occurred because tribal law did not allow for claims against individuals or non-tribal entities, such as Martorello, explaining "a borrower's ability to assert a federal statutory claim under tribal law against an individual or entity (such as the Haynes Defendants) related to a lender remains even more elusive: although the Ordinance governs 'licensed lenders' and mandates their compliance with tribal and applicable federal law, it says nothing about non-tribal entities or individuals associated with the lenders who may have violated RICO." *Id*. Again, the Tribal Code in this case is identical in this respect. *See* Ex. 5 at pg. 21.

And "even if the borrowers could assert a RICO claim against the Haynes Defendants under tribal law," the Fourth Circuit concluded that "the rest of the Ordinance fail[ed] to clarify how any consumer could meaningfully pursue any claims under it." *Id*. at 344. Stated differently, "[a]lthough the Ordinance contain[ed] a consumer complaint procedure," the tribal code "does not

provide for or establish a private right of action for violations of any provisions, let alone any federal laws." *Id.* (citing §§ 8.1-8.4). The same is true here—the Tribal Code only allows for the imposition of fines against the lender. *See* Ex. 5 at pgs. 25-26 (detailing fines and penalties permitted to be imposed by the Commission). Worst yet, just as in this case, the Fourth Circuit found it problematic that the "tribal commission overseeing such a claim" was permitted to "grant or deny any relief as the Commission deems appropriate," thereby making it "clear that a claimant would be unable to assert a RICO claim against entities associated with a tribal lender." *Id*. The same is true here—just as in *Haynes*, § 9.3(f) of the Tribal Code likewise provides that the "The Authority may grant or deny any relief as the Authority determines appropriate." Ex. 5 at 28.

These recent decisions in *Haynes* and *Sequoia* completely foreclose any attempt by Martorello to enforce any portion of the contract's dispute resolution procedure, including the class action waiver provision. To find otherwise, the Court must blue pencil this "integrated scheme to contravene public policy." *Hayes*, 811 F.3d at 676. The Fourth Circuit's controlling authority prohibits any such attempts to sever any provisions from these contracts that have been deployed "to game the entire system." *Id*.; *see also Dillon*, 856 F.3d at 336-337 (refusing to sever any provisions of the contract and finding it was unenforceable "in its entirety.").[3]

[3] Every circuit to have considered a request for severance has agreed. *See, e.g., Gingras v. Think Fin., Inc.*, 922 F.3d 112, 128 (4th Cir. 2019) (finding no basis for severance of provisions because "given the pervasive, unconscionable effects of the arbitration agreement interwoven within it, nothing meaningful would be left to enforce"); *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 232 (3d Cir. 2018) (joining "sister circuits in concluding that the CRST arbitral forum clause is integral to the entire arbitration agreement and cannot be severed"); *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 243-44 (3d Cir. 2020) (refusing to sever "the invocations of tribal law").

C. The class action waiver is unenforceable because the entire contract is void under Virginia law.

1. No federal policy favoring enforcement of the class action waiver exists.

Before explaining why Virginia law renders the class waiver unenforceable, it is important to note that the vast majority of class waiver provisions are contained in arbitration agreements and thus trigger the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (quotation omitted); *see also Davis v. Oasis Legal Fin. Operating Co.*, 936 F.3d 1174, 1183 (11th Cir. 2019) (explaining that "[t]he Supreme Court, in multiple cases, has ruled that § 2 of the FAA overrides a state statute or common-law doctrine that attempts to undercut the enforceability of an arbitration agreement."). Where, as here, the "class action waiver is not contained in an arbitration agreement," the "FAA does not stand in the way of enforcing" state statutes or common law regarding the enforceability of contracts. *Davis*, 936 F.3d at 1183.

Of course, the lack of an arbitration agreement does not automatically invalidate a class-action waiver. But, the "logic behind the Supreme Court decisions on FAA preemption of class arbitration waivers is not readily transferable to class actions outside the arbitration setting." *Meyer v. Kalanick*, 185 F. Supp. 3d 448, 458 (S.D.N.Y. 2016); *see also Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1144 (2013). Instead, when a class waiver is included without "an accompanying arbitration agreement, the appropriate test of determining the enforceability of a class-action waiver has two steps." *U1it4Less, Inc. v. FedEx Corp.*, 2015 WL 3916247, at *4 (S.D.N.Y. June 25, 2015). First, a court must ask if the class-action waiver is unenforceable "under applicable state law," and, if not, the second step asks if the statute at issue "suggests legislative intent or policy reasons" weighing against enforcement. *Id*. "If the answer to both questions is

'no,'" then the waiver may be enforced without an arbitration agreement. *Id*. Here, the class waiver is unenforceable "under applicable state law" and the Court need not go beyond the first step.

2. Virginia's anti-waiver statute renders the contract void.

The class action waiver is also unenforceable because it is part of a contract that violates § 6.2-306(A), which is a law of general applicability that applies to all lenders. This statutory section found in Virginia's chapter entitled "Interest and Usury," provides:

> Any agreement or contract in which the borrower waives the benefits of this chapter or releases any rights he may have acquired under this chapter shall be deemed to be against public policy and void.

Va. Code § 6.2-306(A) (emphasis added). This statute, often referred to as an anti-waiver provision, renders the entire lending agreement void and unenforceable. *See Rahmani v. Resorts Intern. Hotel, Inc.*, 20 F. Supp. 2d 932, at 935-936 (E.D. Va. 1998) (explaining a void contract under Virginia law "is a complete legal nullity, one that has no legal force or binding effect").

Here, the contracts are unenforceable in their entirety because they violate the Virginia's legislature's anti-waiver provision. Through a choice-of-law provision selecting tribal law, the enterprise sought to waive, disclaim, and release all benefits and rights created by Virginia's usury laws, such as the 12% interest rate cap mandated by § 6.2-303(A) and the double recovery permitted by § 6.2-305(A). Dkt. 1007 at 8-10 (arguing that state law does not apply to the loans); *see also* Dkt. 664 at 10-11; Dkt. 487 at pg. 13 (arguing that state law does not apply to the loans). Because the anti-waiver provision is a "non-discriminatory state law otherwise applicable to all citizens," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973), it applies to all contracts, including the loan contracts provided to Plaintiffs.

Both the Fourth Circuit and the Virginia Supreme Court have strictly enforced similar anti-waiver provisions. For example, in *Volvo Construction Equipment North America, Inc. v. CLM*

Equipment Company, the Fourth Circuit held that § 6.2-306(A) precludes waiver of Virginia's interest and usury protections, including through a choice of law provision. 386 F.3d 581, 587-88 (4th Cir. 2004). In *Volvo*, a manufacturer terminated three separate dealer agreements, each of which contained a provision authorizing the manufacturer to unilaterally terminate the agreement. *Id*. at 588. Despite those provisions, the dealers argued that they were "protected by the state dealer protection statutes" of each of their respective states (Texas, Louisiana, and Arkansas). *Id*. at 591. The district court rejected this argument and entered summary judgment in favor of the manufacturer due to the South Carolina choice-of-law provision in the contracts. *Id*.

On appeal, the Fourth Circuit affirmed summary judgment on the Texas and Louisiana plaintiffs' claims. As to the Texas dealer, the Texas statute "excluded from its protection" purchasers of off-road construction equipment, including the plaintiff. *Id*. at 604. And while the Louisiana dealer technically fell within the state's Dealer Act's protections, see La. Stat. Ann. § 51:482, the Court still affirmed the grant of summary judgment because it determined that Louisiana's statute did not embody a fundamental public policy of the state sufficient to "override a choice-of-law contract provision" selecting South Carolina law. *Id*. at 609. Specifically, unlike other dealer protection statutes, Louisiana's statute did "not contain an anti-waiver provision" or equivalent legislative pronouncement that the statute reflected the state's public policy. *Id*. at 608.

The Fourth Circuit, however, reached a different result for the Arkansas dealer. "[U]nlike the Louisiana Act," the Court explained, the Arkansas Act contained "an anti-waiver provision" providing that a franchisor could not "require a franchisee at the time of entering into a franchise agreement to assent to a . . . waiver" that "would relieve any person from liability" under the Arkansas statute. *Id*. at 609. The Arkansas Act also had an "emergency clause" stating it was enacted to preserve "public peace, health, and safety" of its residents. *Id*. at 610. Both of these

provisions rendered the unilateral termination of a dealer agreement to be "a violation of the fundamental policy of Arkansas." *Id*. In reaching this conclusion, the Fourth Circuit noted that "a legislature simplifies the task of determining whether a state statute embodies fundamental policy when it expressly states that the statute constitutes such policy." *Id*. at 609-610; *see also id*. (citing *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376 (7th Cir. 2003) that a provision deeming contracts "in violation of this chapter" to be "against public policy and [] void and unenforceable" meant that Maine law applied despite waiver through a choice-of-law provision).

The Virginia Supreme Court has strictly enforced similar anti-waiver provisions. *See Blake Const. Co. v. Upper Occoquan Sewage Auth.*, 587 S.E.2d 711, 719 (Va. 2003); *see also Martin Bros. Contractors v. Va. Military Inst.*, 675 S.E.2d 183, 186 (Va. 2009). In *Blake Construction*, that court considered a similar anti-waiver statute establishing that any "provision" in a public construction contract that waives or releases rights to damages for unreasonable delay "shall be void and unenforceable as against public policy." *Blake Constr.*, 587 S.E.2d at 715-16 (quoting Va. Code § 2.2-4335(A)). Despite the importance of freedom to contract, the court held that "parties may not contract to the contrary, and undo what the General Assembly has determined to be the public policy of the Commonwealth." *Id*. at 718. The court added that the anti-waiver statute reflected the General Assembly's determination that "damages for unreasonable delay may not be extinguished as a matter of public policy," and that only the "General Assembly and not the parties or the judiciary" could modify that prohibition. *Id*.

Here, the anti-waiver provision is comparable to the statute in *Blake Construction* and *Cromeens* and even stronger than the one in *Volvo Construction*. This provision unequivocally states that a contract that attempts to "waive[] the benefits" or "release[] any rights" provided by Virginia's usury laws is against public policy and void. Va. Code § 6.2-306(A). Because the

General Assembly has established this as Virginia' public policy, "the role of the judiciary is the narrow one of determining what [it] meant by the words it used in the statute." *Dionne v. Southeast Foam Converting & Packaging, Inc.*, 397 S.E.2d 110, 114 (Va. 1990); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357 (1931) ("Primarily it is for the lawmakers to determine the public policy of the state."). In this case, that task is easy: the contract "shall be deemed to be against public policy and void" because it attempts to waive the rights of Virginia's usury laws.[4]

D. The plain language of the class-action waiver does not cover Martorello.

Regardless of the enforceability of the class waiver by others, such as Big Picture, Martorello's bid to enforce it fails because the plain language of the provision does not cover him. In particular, the class waiver provision states:

> **YOU ARE GIVING UP YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.**
>
> 3. All disputes including any Representative Claims against us and related third parties shall be resolved by the TRIBAL DISPUTE RESOLUTION PROCEDURE only on an individual basis with you as provided for pursuant to Tribal law.

Ex. 1 at 5 (caps and bold in original; underline added). In turn, the loan contract defines "Us" as Big Picture Loans, *id*. at 1, and the term "related third parties" as "[Big Picture Loans'] employees,

[4] Throughout this case, Martorello has repeatedly relied on the Virginia Supreme Court's decision in *Settlement Funding LLC v. Von Neumann-Lillie*, 645 S.E.2d 436 (Va. 2007). According to Martorello, *Settlement Funding* stands for the proposition that any usurious loan does not violate Virginia's public policy against usury so long as the selected law does not have a maximum interest rate. *Settlement Funding* does not stand for this proposition, and this Court and others have repeatedly rejected Martorello's interpretation of *Settlement Funding*. *Gibbs v. Haynes Investments, LLC*, 368 F. Supp. 3d 901, 929 (E.D. Va. 2019); *Hengle*, 2020 WL 113496, at *23; *Commonwealth of Virginia v. NC Fin. Sols., of Utah, LLC*, 2018 WL 9372461 at *12 (Vir. Cir. Oct. 28, 2018) (unpublished). As detailed in these opinions, *Settlement Funding* addressed a narrow issue and did not remotely canvass whether the choice-of-law provision violated Virginia's anti-waiver provision, licensing requirements, or public policy.

agents, directors, officers, shareholders, governors, managers, members, parent company, or affiliated entities." *Id.* at 5 (emphasis added).

Despite devoting the vast majority of his brief to the enforceability of the class action waiver, Martorello's brief only contains three sentences attempting to explain how the class waiver applies to him. *See* Dkt. 1007 at 4. Martorello asserts:

> Martorello is both an "affiliated entity" and an alleged agent. Martorello and companies he managed were "affiliated entities" because they provided consulting and servicing assistance to the Tribal Lender prior to the sale of Bellicose. In addition, Plaintiffs allege (incorrectly) that Martorello and businesses he managed were agents behind the entire lending business.

Dkt. 1007 at 4. Other than this conclusory sentence, Martorello fails to establish or even articulate how he falls within these two possible categories. Martorello's silence is not surprising as the evidence unequivocally establishes that he is neither an agent nor an affiliated entity.

Agent. "Agency is a fiduciary relationship from one person's manifestation of consent to another person that the other shall act on his behalf and subject to his control, and the other person's manifestation of consent so to act." *Giordano v. Atria Assisted Living, Va. Beach, L.L.C.*, 429 F. Supp. 2d 732, 736 (E.D. Va. 2006) (quoting *Reistroffer v. Person*, 247 Va. 45, 439 (1994)). In "determining whether an agency relationship exists, the critical test is the nature and extent of control exercised by the purported principal over the agent." *Butterworth v. Integrated Res. Equity Corp.*, 680 F. Supp. 784, 789 (E.D. Va. 1988) (citing *Murphy v. Holiday Inns, Inc.*, 216 Va. 490, 492 (1975)). The "burden of proving agency rests upon the party alleging that agency exists." *Atria Assisted Living*, 429 F. Supp. 2d at 737.

Martorello does not come close to satisfying his burden of proving an agency relationship with Big Picture; nor could he given the positions he has taken throughout this case. Martorello claims only to have "had limited involvement with LVD and its businesses related to the Note and

at times anecdotal ideas and recommendations to the online lending industry as a whole." Ex. 7 at ¶ 70. Martorello further asserts that he has: (i) "never made any decisions on behalf of Big Picture," (ii) "never provided any consulting services or advice to Big Picture, LLC as to how to operate their business, (iii) "never hired or fired any employee of Big Picture," (iv) "never made the decision whether or not to lend to any consumer on behalf of Big Picture[,]" and (vi) "never provided services of any kind to Big Picture." *Id*. at ¶¶ 76-84 (emphasis added). Unless Martorello retracts these statements, he cannot possibly satisfy his burden of proving that he is an agent.[5]

Martorello's own statements should end this inquiry, but there is more. The Loan and Security Agreement (drafted by Martorello's attorney) between TED and Eventide also expressly states "[n]one of the covenants or other provisions contained in this Agreement or any of the other Transaction Documents shall, or shall be deemed to, give [Eventide] the right or power to exercise control over the day to day affairs or management of" TED or its subsidiaries, including Big Picture. Dkt. 986-44 at § 7.15(a). The Loan Agreement further provides "[t]he relationship between [Eventide], on the one hand, and [TED] and any Subsidiary, on the other hand, is solely that of creditor and debtor. [Eventide] shall not have (or be deemed to have) any fiduciary relationship… and there is no agency or joint venture relationship between" Eventide and TED. *Id.* at § 7.15(b) (emphasis added). Because "there is no agency" relationship between Eventide and Big Picture, there can be no agency relationship between Big Picture and Martorello, who claims to be nothing more than a representative of Eventide.

Affiliated entity. The class waiver includes "affiliated entities," but does not define the phrase so it must be interpreted in accordance with its common and ordinary meaning. *See, e.g.,*

[5] While much of this is a half-truth—because Martorello was the brains and created the structure—it is certainly inconceivable that Martorello is an "agent."

Nationwide Mut. Ins. Co. v. Overlook, LLC, 785 F. Supp. 2d 502, 518 (E.D. Va. 2011) (citing *D.C. McClain, Inc. v. Arlington Cnty.*, 249 Va. 131, 135 (1995)) ("Words that the parties used are normally given their usual, ordinary, and popular meaning."). "To determine the common and ordinary meaning, the Court looks to a reputable dictionary and considers a term's common usage." *Nationwide Mut.*, 785 F. Supp. at 518-19.

"The term 'affiliate' carries its own, independent legal significance." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009). It "refers to a 'corporation that is related to another corporation by shareholdings or other means of control. . . ." *Id*. (quoting *Delaware Ins. Guar. Ass'n v. Christiana Care Health Servs., Inc.*, 892 A.2d 1073, 1077 (Del. 2006)); *see also Cacique, Inc. v. Reynaldo's Mexican Food Co., LLC*, 2014 WL 505178, at *5 (C.D. Cal. Feb. 7, 2014) ("There are a number of definitions of 'affiliate,' and all include some element of control."); *Texas Molecular Ltd. P'ship v. Am. Int'l Specialty Lines Ins. Co.*, 424 F. App'x 354, 357 (5th Cir. 2011) (defining an affiliate as a "company effectively controlled by another or associated with others under common ownership or control.") (quotation omitted).

To be clear, Plaintiffs contend that Eventide retained control mechanisms over significant aspects of the business, such as its consent to terminate the co-managers.[6] This type of control, however, does not amount to the type of control necessary to be considered an "affiliate." AFFILIATE, Black's Law Dictionary (11th ed. 2019) ("A corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation."). Further, the Loan and Security Agreement provides:

7.15 Lender is Not In Control; Lender-Credit Relationship.

[6] Brian McFadden's dual role as Eventide shareholder and Ascension's president—as well as his compensation structure—further ensured that the enterprise would be run in a manner that protected Eventide's interest.

> (a) None of the covenants or other provisions contained in this Agreement or any of the other Transaction Documents shall, or shall be deemed to, give Lender the right or power to exercise control over the day to day affairs or management of Borrower or any Subsidiary, the power of Lender being limited to the right to exercise the remedies provided for in this Agreement and the other Transaction Documents.
>
> (b) The relationship between Lender, on the one hand, and Borrower and any Subsidiary, on the other hand, is solely that of creditor and debtor. Lender shall not have (or be deemed to have) any fiduciary relationship or duty to any of Borrower or any Subsidiary, arising out of or in connection with, and there is no agency or joint venture relationship between Lender, on the one hand, and Borrower. . .

Dkt. 986-44 at § 7.15(a)-(b) (emphasis added). In light of this provision, neither Eventide nor Martorello can establish the requisite control to be an affiliate or even a "joint venture," which would indicate even less control then affiliation. JOINT VENTURE, Black's Law Dictionary (11th ed. 2019) ("A business undertaking by two or more persons engaged in a single defined project.").

Martorello has another problem: it is inconceivable that he is an "entity." ENTITY, Black's Law Dictionary (11th ed. 2019) (defining "entity" as an "organization (such as a business or a governmental unit) that has a legal identity apart from its members or owners"). By using the word "entity," the drafter categorically excluded natural persons like Martorello. If the loan contract was intended to cover the affiliated entities' employees, officers, and directors, it could have easily stated so—just as it did for Big Picture's employees, officers, and directors. Because the language "could not be any plainer or less ambiguous," it must be enforced as written to exclude individuals. *Nat'l Am. Ins. Co.v. Ruppert Landscaping Co.*, 25 F. App'x 116, 120–21 (4th Cir. 2001).

Red Rock. The same analysis applies to those consumers, like Mr. Hengle, who had loans with Red Rock. Dkt. 986-49. Drafted largely by Martorello's attorney,[7] Red Rock's class waiver

[7] *See generally* Ex. 9 at Rosette 010990 (email from Jennifer Weddle, Martorello's attorney, with changes to the template contract); *id*. at Rosette 10998 (showing Weddle's substantial edits to the Tribal Dispute Resolution Procedure).

provision is virtually identical to Big Picture's, *i.e.*, waiving the right to bring a class action against Red Rock and "related third parties," which is expressly defined as its "employees, agents, directors, officers, shareholders, governors, managers, members, parent company, or affiliated entities." Ex. 8 at 5.

With respect to Red Rock consumers, Martorello cannot establish agency or affiliation for similar reasons identified above. The Servicing Agreement between SourcePoint and Red Rock repeatedly identifies SourcePoint's relationship (and, thus, potentially Martorello) as that of an "independent contractor." Dkt. 986-5 at § 1.4 ("[Red Rock], through a contractual relationship, desires to retain and engage [SourcePoint] as its independent contractor. . . ."); *id*. at § 3.1 ("[Red Rock] hereby retains and engages [SourcePoint] as its independent contractor . . . ."); *id*. ("[SourcePoint] hereby acknowledges such retention and engagement as an independent contractor."); *id*. at § 13 (same). Further, the agreement further provides SourcePoint with complete autonomy in performing its obligations. *Id*. at § 4.1.1.

Martorello has failed to establish that he is either an agent or authorized entity as posited in the single sentence of his submission. To the extent the Court finds any ambiguity, it should be construed against the drafters, including Martorello. *Verizon Virginia, LLC v. XO Commc'ns, LLC*, 144 F. Supp. 3d 850, 867 (E.D. Va. 2015) ("In the case of contracts, ambiguity is construed against the drafter under the rule of contra proferentem." (citations omitted)).

II. THE PROPOSED CLASSES ARE ASCERTAINABLE.

Martorello contends that Plaintiffs "cannot demonstrate ascertainability" for "at least four reasons." Dkt. 1007 at 31. Each of these should be rejected. First, Martorello contends that the classes are not ascertainable because "the loan information is largely under Tribal control" and, thus, "subject to sovereign immunity." *Id*. As explained in Plaintiffs' opening brief, however, the

tribal entities have agreed to voluntarily provide the data. *See, e.g.*, Dkt. 986-52 (indicating the Tribal Defendants "will ensure the appropriate class data is supplied" in the event the Court certifies the class). Indeed, this was an integral and material term of the Settlement Agreement between Plaintiffs and the Tribal Defendants. *See* Ex. 10 at § 6.3.

Martorello's complaint regarding the current restriction on Plaintiffs' access to the class list confuses the requirement that a class can be ascertained with Defendants' apparent belief that the class be identified before certification. Rule 23 only requires the former, namely that a court be *able* to "identify the class members in reference to objective criteria." *Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 196 (E.D. Va. 2015). The fact that it may be difficult or time consuming to identify class members is of no moment. Big Picture and Ascension currently possess the information. While more litigation is required to obtain that information, "the time and effort required have no bearing on whether the individuals are or are not objectively ascertainable." *Id*. (citation omitted).[8]

Here, Plaintiffs have identified a clear method for objectively determining class membership that involves three discrete steps: (1) determining whether a person had a loan with

[8] In this section, Martorello also complains that the unavailability of the data violates his rights to due process. Dkt. 1007 at 31. But if a class is certified, Big Picture and Ascension will provide this unremarkable data, which will simply confirm the names, addresses, and amounts paid by each of the class members. With this information, Martorello will be in the same position as every other defendant in any class case. Moreover, the Fourth Circuit has expressly permitted a post-trial claims process to identify class members and their damages. *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 659 (4th Cir.) ("The court left the question of whether particular names and addresses matched those numbers to the post-trial claims process. This was appropriate."), *cert. denied*, 140 S. Ct. 676 (2019). Other courts have similarly rejected alleged due process violations based on unidentified class members. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 670 (7th Cir. 2015) ("The due process question is not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair opportunity to present its defenses when putative class members actually come forward.").

Big Picture or Red Rock; (2) for all such consumers, determining whether they had a Virginia address when they executed their loan agreement; and (3) identifying any payments made after June 22, 2013. The answers to these questions are "readily discernible" and "always binary." *See Soutter,* 307 F.R.D. at 197; *see also MacDonald v. CashCall, Inc*., 333 F.R.D. 331, 347 (D.N.J. 2019) (ascertainability satisfied in similar case because classes "defined by reference to objective criteria, namely, whether a borrower made payments on a loan, originated during a given time period, and was a New Jersey resident."); *Inetianbor v. CashCall*, *Inc.*, Case No. 13-cv-60066-JIC (S.D. Fla. Sept. 19, 2016), Dkt. 284 at 8 (similar class definition "readily ascertainable"). And in fact, this Court has already found that a similar class is ascertainable, and certainly it has been successfully identified in the class certification and approved settlement directly with the Big Picture defendants. *Galloway v. Williams*, 2020 WL 7482191, at *1 (E.D. Va. Dec. 18, 2020).[9]

Martorello's first argument is nothing more than "a paper obstacle," which is "insufficient to defeat class certification." *Soutter,* 307 F.R.D. at 197. Although Big Picture has not produced the data at this stage, a plaintiff "need not be able to identify every class member at the time of certification." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014).[10]

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[9] Martorello's claim that his "due process" rights may be somehow infringed by his inability to discover the class data is also disproven by the Big Picture settlement. Now, the class data is now in the possession of the non-Tribal class administrator. In a comparable case now defended by Martorello's previous counsel here, those non-Tribal investor defendants obtained the class data from the settlement administrator by subpoena and featured whatever challenges they could contrive in their class certification opposition. *See Gibbs v. Stinson*, Case No. 3:18-cv-676 at ECF 210. While the opposition arguments in that matter will not go any further than Martorello's here, the point is that if Martorello really wanted the Big Picture loan data, he could have done something to obtain it.

[10] Martorello mis-cites the now largely rejected decision in *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3rd Cir. 2012) as standing for the proposition that ascertainability is "problematic where requisite parts manifest was in possession of third-party foreign corporation." Dkt. 1007 at 21. But the problem in that case was not that the "parts manifest" was in the possession of a third party; it was that the BMW vehicles did not have the same tires on each of its cars. 687 F.3d at 594. "To complicate matters further," dealerships changed tires at a customer's request and the

Second, Martorello contends that "even if the loan information could be acquired, its review and application to Martorello likely would be individualized and complicated" because "Martorello was not the lender, and Martorello's assistance to the Tribe… varied considerably over time." Dkt. 1007 at 32 (emphasis in original). This argument is misplaced because it does not concern the "inability to determine the members of the class by reference to objective criteria." *Soutter,* 307 F.R.D. at 197. What Martorello "is really arguing when it laments the burden imposed is manageability" and predominance, "not ascertainability." *Id*. Because Plaintiffs propose "objective criteria capable of identifying those individuals described in the class definition, the ascertainability requirement is satisfied." *Id*. at 199. "The fact that applying the criteria could take a significant time and effort may be a relevant consideration for weighing the manageability of the class device," but it is "not a factor" in the "ascertainability determination." *Id*.

Third, Martorello spends a single sentence arguing that "individualized mini-trials" would be likely "to verify proposed class members have not released their rights, already recovered, or are otherwise estopped through settlement in *Galloway III*." Dkt. 1007 at 34. But again: this argument does not concern the ability to determine members of the class by objective criteria. It is also disingenuous as Martorello is well aware that he was expressly carved out of that settlement, which prompted him to attempt to intervene and block it. *See* Ex. 10 at §§ 2.16, 2.22; *Galloway v. Williams*, 3:19-cv-00470-REP, Dkt. 43 (E.D. Va. Dec. 18, 2019).

Finally, Martorello contends that whether a loan payment occurred within the statute of limitations requires individual analysis. Again, this argument does not concern the ability to determine class members by objection criteria. It also ignores that Plaintiffs' class definitions take

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defendant's records would not indicate which tires had been replaced. *Id*. Here, there are no comparable issues.

into account the applicable statute of limitations for each one of the claims. *See* Mtn. at 24. The classes will not implicate any statute of limitations issues because Plaintiffs have tailored their class definitions to account for these differences. Thus, "the statute-of-limitations question is straightforward and susceptible to class-wide determination." *Alig v. Quicken Loans Inc.*, --- F.3d ---, 2021 WL 899305, at *6 (4th Cir. Mar. 10, 2021).

III. MARTORELLO FAILS TO IDENTIFY ANY INDIVIDUALIZED ISSUES THAT PREDOMINATE.

In his opposition, Martorello raises six challenges to Rule 23(b)(3)'s predominance element. These largely ignore the facts, elements, and evidence that matter, *i.e.*, those that state a violation of §§ 1692(c)-(d) of RICO, as well as Virginia's usury and unjust enrichment laws. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011) ("Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action."). Martorello focuses on largely irrelevant differences between class members. But the "entire notion of predominance implies that the plaintiffs' claims need not be identical, and, as the Supreme Court has noted, a class can meet this requirement 'even though other important matters will have to be tried separately.'" *Krakauer*, 925 F.3d at 658 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045, (2016)). Because "all of the major issues in the case" revolve around common questions, *id*., none of Martorello's challenges present an obstacle to class certification.

A. Martorello's receipt of loan payments is irrelevant, and the minor changes to payment allocation does not create individualized issues that will predominate.

Martorello contends that individual issues will predominate because "Plaintiffs cannot show that Martorello throughout the class period uniformly received loan payments from borrowers in the purported class, and the usury and damages questions as to Martorello therefore

do not predominate." Dkt. 1007 at 36. According to Martorello, "the issue of whether the specific interest payments" reached him "requires individualized analysis." *Id*. at 36-37. That is wrong.

First, members of the enterprise have joint and several liability for the damages under RICO, negating any need to apportion damages based on Martorello's receipt of the proceeds. *See United States v. Philip Morris*, 316 F. Supp. 2d 19, 27 (D.D.C. 2004) ("Every circuit in the country that has addressed the issue has concluded that the nature of both civil and criminal RICO offenses requires imposition of joint and several liability because all defendants participate in the enterprise responsible for the RICO violations."); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1301 (6th Cir. 1989) (same). Because Martorello is liable as a participant for all damages arising from the usurious loans, it makes no difference if he received 98% of the proceeds or some lesser amount.

Second, with respect to the usury claim, questions regarding Martorello's liability under the statute predominate. In relevant part, this statute provides that "[i]f interest in excess of that permitted by an applicable statute is paid upon any loan," the borrower may bring an action "to recover from the person taking or ***receiving***" such payments. Va. Code. § 6.2-305 (emphasis added). Broken down, a claim under § 6.2-305 requires proof of two elements: (1) payment of interest at a rate greater than 12% per year and (2) taking or receipt of such payments. *Id*.[11]

The first element is an individualized issue, but it is quantitative rather than qualitative. And the evidence shows that all loans had interest rates greater than 12%, and thus, this is not an individualized *question* that will predominate.[12] The second element then determines liability, *i.e.*,

[11] Martorello also contends that individualized issues regarding the identity of the "true lender" predominate common questions. Dkt. 1007 at 38. Unlike some other jurisdictions, Virginia law imposes liability on the recipient of the money and, thus, there is no need to identify the "true lender." *Id*. Because Plaintiffs seek to impose liability under Va. Code § 6.2-305, the true lender theory is irrelevant.

[12] *See* Dkt. 986-50 (stating that Big Picture loans have interest rates ranging from 499% to 768%).

whether Martorello was "taking" or "receiving" the payments within the meaning of the statute. This is a common question because Martorello received (or did not receive) the payments in the same way: (1) through the servicing agreement between SourcePoint and Red Rock; or (2) through the promissory note between Big Picture and Eventide. *See* Dkt. 986-5 (Servicing Agreement); Dkt. 986-46 (Promissory Note). The Red Rock Servicing Agreement provides:

> **3.5 Servicing Fee.**
>
> The parties hereto have agreed that the success of the business is based in large part upon the services provided to [Red Rock] by [SourcePoint]. As a result, [Red Rock] has agreed to a performance-based fee equal to cash basis revenue remaining after payment of Tribal Net Profits, Servicer advances, and all Servicing Expenses.

Dkt. 986-5 § 3.5.1. "Tribal Net Profits," in turn, was calculated as two percent of the gross revenues of the loans, minus charge offs. *Id.* at § 2.25. Because Red Rock always received the same allocation of the proceeds—2% of the revenue—whether Martorello took or received the remaining 98% is a common question for each class member. The same is true for borrowers who had loans with Big Picture except that it received 5% of the gross revenues on the loans. Dkt. 986-46. Because the allocation of the proceeds was the same for each consumer, Martorello's liability (or lack thereof) will be a common question for each class member.

Ignoring the uniform nature of the allocation, Martorello contends that individualized issues predominant because "the variable payment provisions in the Servicing Agreement yielded changing or no payments" because "they depended not on loan repayment, but rather on the total profitability (or not) of the lender." Dkt. 1007 at 36. This is a distinction without a meaningful difference. A company still "takes" or "receives" a payment even if it is used to pay expenses, such as an internet bill or marketing expenses. Here, Red Rock only received 2% of the gross revenues; Martorello's companies were entitled to the remaining amounts. And if Martorello paid some expenses (such as the call center), it does not change the fundamental allocation of the

distribution of payments between the members of the enterprise. Between 2013 and 2016, Red Rock received 2% of the gross revenue on the loans, the rest went to Martorello. Between 2016 and 2020, Big Picture received 5% of the gross revenue on the loans, the rest went to Martorello.

Tracking these nominal changes to the allocation does not create individualized issues that predominate, especially because "it is black-letter law in Virginia that although a plaintiff 'must show the amount of [her] damages with reasonable certainty, [p]roof with mathematical precision is not required.'" *Allan v. United States*, 401 F. Supp. 3d 681, 718 (E.D. Va. 2019) (quoting *Hailes v. Gonzales*, 207 Va. 612, 151 S.E.2d 388, 390 (1966)); *see also Higgins v. John Hancock Mut. Life Ins. Co.*, 1988 WL 214513, at *6 (E.D. Va. Oct. 19, 1988) ("Proof with mathematical precision is not required, but there must be sufficient evidence to permit an intelligent and probable estimate of the amount of damage."). Here, there is sufficient evidence to permit an intelligent and probable estimate of the amount of damages that should be attributable to Martorello. This evidence will be the same as to each class member and, thus, is one of several common questions that predominate.

What's more, Martorello's assertion that any estimate of his proportion of culpability is too speculative does him no favors. Instead, "under Virginia law, when two or more tortfeasors cause a single indivisible injury to a third-party and 'it is impossible to determine in what proportion each contributed to the injury,' then an individual tortfeasor can be held liable for the entire injury." *Gross v. Shearson Lehman Bros. Holdings, Inc.*, 43 F. App'x 672, 677 (4th Cir. 2002) (quoting *Dickenson v. Tabb*, 156 S.E.2d 795, 801 (Va.1967)); *see also AdvanFort Co. v. Int'l Registries, Inc.*, 2015 WL 4254988, at *10 (E.D. Va. July 13, 2015). Here, Plaintiffs and the class members suffered a single indivisible injury: the payment of usurious interest that was then distributed to multiple joint tortfeasors. Because Virginia law imposes joint and several liability where "it is impossible to determine" the proportion to allocate to each joint tortfeasor, Martorello

can be held liable for the full amount of usurious interest paid by each borrower (as opposed to the 90%+ he received pursuant to the revenue distribution).

B. Martorello's purported "decreasing involvement" in the enterprise does not create any individualized issues.

Next, Martorello claims that "whether Martorello conducted or participated in the" enterprise cannot be "evaluated in the same manner over the class period, due to Martorello's *decreasing involvement* and ultimate 2016 sale of Bellicose to the Tribe." Dkt. 1007 at 37 (emphasis added). This argument not only ignores the substantial evidence of Martorello's continued involvement, but it is disconnected from the actual elements needed to establish a violation of § 1962(c). In order to establish a § 1962(c) violation, Plaintiffs must prove that: (1) Martorello is a person; (2) associated with an enterprise engaged in interstate commerce; (3) he participated, directly or indirectly, in the conduct of the enterprise's affairs; and (4) collection of unlawful debt. *See D'Addario v. Geller*, 264 F. Supp. 2d 367, 396 (E.D. Va. 2003) ("[P]laintiff must allege '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'"); *Salinas v. United States*, 522 U.S. 52, 62 (1997) (same).

Here, Martorello only takes issue with the third element—whether Martorello conducted or participated in the enterprise's affairs. To satisfy § 1962(c)'s participation requirement, it must be established that the person "participate[d] in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (citation omitted) (quoting § 1962(c)). The purpose of the "operation or management test" assures that § 1962(c) claims "do not reach complete 'outsiders,'" such as an auditor that merely prepared the enterprise's financial statements. *Reves*, 507 U.S. at 185; *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 633 F. Supp. 2d 214, 230 (E.D. Va. 2008) (*Reves* "made clear that it is necessary to distinguish between an individual or entity 'acting in an advisory professional capacity (even if in a knowingly

fraudulent way) and [one] acting as a direct participant in corporate affairs.'" (quoting *In re Am. Honda Motor Co. Inc. Dealerships Relations Litig.*, 941 F. Supp. 528, 560 (D.Md.1996))).

Martorello's "operation or management" of the enterprise is established by the Servicing Agreement between SourcePoint and Red Rock. In his capacity as the president and owner of SourcePoint, Martorello executed the servicing agreement and, among other things, agreed that his company would provide "managerial, technical and financial experience and expertise for the development and operation of the new Unsecured Lending Business." Dkt. 986-5 at § 1.3. To that end, Martorello agreed that SourcePoint would "develop, manage, and provide operational guidelines regarding the Unsecured Lending Business," as well as "investment and capital management services, management, operations, and marketing consulting." *Id.* § 1.4. The servicing agreement further outlined the extensive duties performed by SourcePoint, including its authority to "collect all gross revenues and other proceeds connected with or arising from the operation of [Red Rock.]" *Id.* § 4.9. This agreement remained in effect from 2012 through the sale of Bellicose. Thus, this same evidence—as well as other evidence showing the implementation of the same—may be used by each class member to establish that Martorello participated in the "operation or management" of the enterprise.

Beyond the Servicing Agreement, there is a substantial amount of common evidence further showing that Martorello participated in the operation and management of the enterprise between 2011 and 2016. For example, when negotiating the initial terms of the Servicing Agreement, Red Rock's representatives explained that Martorello's "ENTITY WOULD BE THE SERVICER FOR THE LENDING OPERATION. THE LLC MANAGERS ARE MANAGERS OF THE LLC ENTITY ON BEHALF OF THE TRIBE BUT ARENT INVOLVED IN THE BUSINESS." Dkt. 986-3 at 052500 (caps in original). And, when asked by Martorello to further

elaborate on this point, Richardson explained that "REPRESENTATIVES FROM THE TRIBE ARE THE LLC'S 'MANAGERS'. THE SERVICER, BELLICOSE OPERATES THE BUSINESS COMPLETELY." *Id*. at 052498. This is also consistent with the declaration of Joette Pete, the Tribe's former Vice Chairwoman, who attested: that the Tribal Counsel "understood that all aspects of the lending business would be handled by Martorello and that the Tribe would have no risk. It was understood that Martorello's company would handle everything, including underwriting, marketing, servicing, funding, and collection of the loans." Dkt. 986-4 at ¶ 3.

Although the Tribe's co-managers held titles supposedly giving them a voice in Red Rock's lending operation, the Court has also found that the co-managers actually played a "rather meaningless role" with limited involvement in or knowledge about the lending enterprise. Dkt. 944 at 14. Martorello's own internal emails unequivocally confirm that "as far as [he] knows," the co-managers "don't really do anything." Ex. 11 at ROSETTE43978. And as the Court recently found, "[n]either the establishment of the actual underwriting criteria for making the loans nor the decision actually to make them (or not) was done by the Tribal entity or by its employees." Dkt. 944 at 15. In fact, the relevant "intellectual property was kept by Martorello's company, SourcePoint, and was not known by, or available to, the Tribal entities that nominally were making the loans at issue." *Id*. at 18.

Martorello's *purported* diminished role between 2014 and 2016 makes no difference to whether he meets the "operation or management" test. While he claims to have "decreasing involvement" in the day-to-day operations, this hurts rather than helps his cause as it shows that Martorello held the highest position within the enterprise, capable of directing the activities of the other members. Even if these others performed the day-to-day activities, those acts were performed on behalf of Martorello, who established the operational guidelines of the companies and oversaw

the work of lower-rung members of the enterprise. Dkt. 986-5 at § 1.4. Accordingly, Martorello's purported diminished role does not create any individualized issues because RICO prohibits "operation or management" of the enterprise, not completion of the daily minutia needed to run the day-to-day operations. *Robinson v. Fountainhead Title Grp. Corp.*, 257 F.R.D. 92, 94 (D. Md. 2009) ("the crux of a RICO claim based on mail fraud is the fraudulent scheme itself."). If Martorello is liable to any class member for a § 1962(c) violation, it is because of his high-level involvement as the leader of SourcePoint, Bellicose, and Eventide; not due to his specific interaction with any consumer.

Even if the court finds the vague changes sufficient to create individualized issues as to the § 1962(c) claim for Red Rock loans, it may still certify a class as to Big Picture loans because Martorello fails to identify a single post-restructure change that would create an individualized issue. Instead, Martorello's entire defense to the post-restructure aspect of the case is uniform—he claims he "was no longer involvement with the consumer lending operations" of Big Picture and Ascension. Dkt. 1007 at 38. While Plaintiffs disagree, the more Martorello premises his entire defense on his complete lack of involvement with Big Picture, the more it creates a single common question: whether Martorello participates in the operation and management of the enterprise through Eventide and its significant control over the operations of Big Picture and Ascension.

C. Common questions predominate as to RICO's proximate cause requirement.

Without identifying any specific individualized questions, Martorello contends that RICO's proximate cause requirement predominates over common questions. Dkt. 1007 at 42. Martorello asserts that proximate cause requires consideration of "each class member's claims" and whether they are "connected" to "actions by Martorello" to determine whether the alleged conduct caused the borrower's injuries. *Id*. This overstates RICO's proximate cause requirement,

which merely requires a direct connection between the misconduct and the injury. In this case, the direct connection between Martorello's misconduct and Plaintiffs' injuries is straightforward: Martorello participated in the operations and management of the rent-a-tribe enterprise and worked together with the other members of the enterprise to facilitate the unlawful debt collection scheme.

Martorello mischaracterizes "proximate cause" as requiring consumer-by-consumer determination of whether a defendant's misconduct the sole cause of a class member's injury. But proximate cause "is not the same thing as a sole cause." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994). And of course, "[P]roximate cause is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent." William Keeton et al., *Prosser & Keeton on the Law of Torts § 42*, at 279 (5th ed. 1984). Proximate cause "must be assessed on a case-by-case basis." *Wallace v. Midwest Fin. & Mortg. Servs., Inc.*, 714 F.3d 414, 419 (6th Cir. 2013) (citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008)).

In *this* case, the class definitions—segregating borrowers who had loans with Red Rock and Big Picture—overcomes any possibility that there will be any individualized issues with respect to RICO's proximate cause requirement. While it is theoretically possible Plaintiffs may fail on the merits on their claims, there are no individualized differences between Martorello's conduct, *i.e.*, executive-level management of an enterprise, and each class member's injuries, *i.e.*, "payment of interest at excessive rates." *Gingras v. Rosette,* 2016 WL 2932163, at *29 (D. Vt. May 18, 2016). In fact, as Martorello never directly interacted with any consumer, his misconduct at the highest control level of the enterprise—as its developer and primary beneficiary—creates no individualized questions as to whether Defendant's conduct proximately caused the harm to every class member. *See Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955, 985 (N.D. Cal. 2019)

(finding that defendants who "were instrumental in setting up, and knowingly set up, an enterprise whose sole purpose was to collect illegal debts" were the proximate cause of plaintiff's injury).

The Tenth Circuit's opinion in *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014), is instructive on this point. There, real estate purchasers brought a RICO class action against "a group of lenders, claiming the lenders conspired to create a fraudulent scheme to obtain non-refundable up-front fees in return for loan commitments the lenders never intended to fulfill." *Id*. at 1081. On appeal of the district court's class certification decision, the Tenth Circuit considered whether the "the defendants' actions and the class's injuries can be adduced through common evidence" to satisfy RICO's proximate cause requirement. *Id*. at 1088. The court found that "the putative class members are permitted to use the common fact that they all forfeited advanced fees as evidence that the class's damages were caused 'by reason of' defendants' alleged RICO violations." *Id*. at 1093. In reaching this conclusion, the court explained that the "plaintiffs will still have to prove RICO causation" to "win on the merits," but the nature of their injuries permitted the plaintiffs "to utilize it as common evidence to establish the class's prima facie claims under RICO." *Id*. Other courts have reached similar conclusions.[13]

This Court's decision in *Solomon* also is instructive. 2019 WL 1320790 (E.D. Va. Mar. 22, 2019). In that case, a financier of a tribal lending enterprise argued that the plaintiffs failed to allege facts sufficient to show that the financier—rather than the tribal lender or its operator—caused the plaintiff's injury. *Id*. at *11. In other words, the financier asserted that their role did not

[13] *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 640–41 (5th Cir. 2016) (finding "individualized issues of causation" would not predominate where the "participant's injuries arise from the [pyramid] scheme's payment structure"); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 122 (2d Cir. 2013) (holding that RICO causation was "a question subject to generalized proof—and a question that, barring class action treatment, will have to be endlessly re-litigated in individual actions."); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 492 (C.D. Cal. 2006) (same); *Robinson*, 257 F.R.D. at 95 (same).

have a "direct, first-step relation to Plaintiffs' alleged injury" as "they did not collect usurious interest from Plaintiffs." *Id*. In rejecting this argument, this Court found that the financiers' "participated in extensive ongoing monitoring and rigorous oversight" regarding the loans, and "Plaintiffs would not have been subjected to the allegedly usurious loans if Medley did not incentivize the profitability of those loans." *Id*. The same is true here—if Martorello did not create, develop, implement, and finance the scheme, Plaintiffs would not have been subject to the loans. And regardless, answering this question is the same for all class members.

Because Plaintiffs suffered the same injuries and will utilize common evidence to establish the RICO claims, RICO's proximate cause requirement does not create individualized questions that will predominate. Instead, the proximate cause question is an overarching liability question that is the same for Plaintiffs and all class members. If a jury finds that Martorello proximately caused Plaintiffs' injuries by creating, developing, implementing, overseeing, and facilitating the enterprise, the same is true for the remaining members of the class. And if a jury finds that Martorello was too far removed to be held liable, it will be the same result for Plaintiffs and the class members. Thus, RICO's proximate cause requirement does not create any individualized issues that will predominate.

D. Common questions predominate as to Plaintiffs' unjust enrichment claims.

Despite Martorello's assertion to the contrary, courts routinely grant class certification of unjust enrichment claims. *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 925 (10th Cir. 2018) ("Because the class members' theory of unjustness depends on shared rather than individualized circumstances, the unjustness question is common to the class and does not defeat

predominance."), *cert. denied*, No. 17-1648, 2018 WL 2875867 (U.S. Oct. 1, 2018).[14] Like these cases, the benefit conferred on Martorello, *i.e.*, the receipt of unlawful debt, is the same for all class members. And Martorello's conduct was the same in all relevant respects, *i.e.*, receipt of the proceeds as the owner of SourcePoint or Eventide. Thus, the question of whether it is equitable for Martorello to retain the amounts is a common question that will predominate.

Here again, Martorello rehashes his argument that "whether any interest ultimately reached Martorello depended upon the given loan, Martorello's role at the time," including whether Big Picture made a payment to Eventide. Dkt. 1007 at 44. But again: Plaintiffs are not required to directly trace the money to Martorello's bank account. And more importantly for Rule 23 purposes, Plaintiffs cannot trace their commingled payments to Martorello's bank account any more than the next borrower. Instead, Plaintiffs intend to use common evidence—the Servicing Agreement and Promissory Note—to broadly establish "an intelligent and probable estimate of the amount of damage" to be allocated to Martorello. *Higgins*, 1988 WL 214513, at *6 ("Proof with mathematical precision is not required, but there must be sufficient evidence to permit an intelligent and probable estimate of the amount of damage."). And to the extent this intelligent estimate is insufficient, it naturally follows that Plaintiffs and the class members suffered a single indivisible injury caused by joint tortfeasors, including Martorello. Because Virginia law imposes joint and several liability where it is impossible to determine the proportion to allocate to each joint tortfeasor, Martorello

[14] *In re Checking Account Overdraft Litig.*, 307 F.R.D. 656, 675 (S.D. Fla. 2015) ("Unjust enrichment claims can be certified for class treatment where common circumstances bear upon whether the defendant's retention of a benefit from class members was unjust."); *Cleary v. Philip Morris, Inc.*, 656 F.3d 511, 517 (7th Cir.2011) ("[I]f an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim."); *James D. Hinson Elec. Contracting Co., Inc. v. BellSouth Telecommunications, Inc.,* 275 F.R.D. 638, 647 (M.D. Fla.2011) (same).

can be held liable for the full amount of usurious interest paid by each borrower regardless of whether he specifically received the funds.[15]

E. Common questions predominate regarding the RICO conspiracy claims.

There are no material individualized issues as to the alleged conspiracy claim, which "does not require that a defendant have a role in directing an enterprise." *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012). Rather, in the Fourth Circuit, "simply agreeing to advance a RICO undertaking is sufficient." *Id*. "Once it has been shown that a conspiracy exists, the evidence need only establish ***a slight connection*** between the defendant and the conspiracy" to support a violation of § 1962(d). *See United States v. Brooks*, 957 F.2d 1138, 1147 (4th Cir. 1992) (emphasis added). A "slight connection" is satisfied by showing "knowledge of the essential nature of the plan." *United States v. Morrow*, 914 F.2d 608, 612 (4th Cir. 1990).

Ignoring this low threshold, Martorello spends a few sentences arguing that "questions pertinent to conspiracy do not predominate because Martorello's consulting services significantly decreased over the class period." Dkt. 1007 at 47. But the level of services is irrelevant to the elements needed to establish a RICO conspiracy claim. Even assuming it is accurate, this is immaterial because "a defendant who has joined a conspiracy continues to violate the law 'through every moment of [the conspiracy's] existence,' and he becomes responsible for the acts of his co-conspirators in pursuit of their common plot." *United States v. Cornell*, 780 F.3d 616, 631–32 (4th Cir. 2015) (alteration in original) (citations omitted).

[15] Martorello further contends that "many putative class members did not confer a benefit on anyone" because "they paid back less than the principal on their loans." Dkt. 1007 at 45. This is not an individualized issue. If the Court determines that these individuals did not confer a benefit, they will not be entitled to an award of damages. Rather than creating an individualized issue that predominates, this is a common question that will resolve the claims of thousands of class members—even assuming that repayment of principal on a *void* loan is found to have inured no benefit to the recipient. The Court also could adjust the class definition to account for this issue.

"Once it is proven" through the Servicing Agreement that Martorello "was a member of the conspiracy," his "'membership in the conspiracy is presumed to continue until he withdraws from the conspiracy by affirmative action.'" *Id.* at 632 (quoting *United States v. Bennett*, 984 F.2d 597, 609 (4th Cir. 1993)); *see also United States v. DePriest*, 6 F.3d 1201, 1206 (7th Cir. 1993) (same); *United States v. Starrett*, 55 F.3d 1525, 1550 (11th Cir. 1995) (same). Because Martorello never withdrew from the conspiracy—and the evidence shows his continued connection to the conspiracy through Eventide—he is liable for the actions of the co-conspirators regardless of whether his active involvement diminished over the years.

IV. MARTORELLO'S SUPERIORITY CHALLENGES LACK MERIT.

Martorello raises two challenges related to Rule 23(b)(3)'s superiority requirement. First, Martorello contends that "98%" of the "proposed class never signed up for restitution" in connection with settlement with the tribal entities and, thus, "the purported class could still bring individual claims." Dkt. 1007 at 48. Second, Martorello claims that Plaintiffs "cannot uniformly attribute liability to Martorello" because of the "ever-shifting roles, relationships, and responsibilities over time." *Id*. at 49.

Both of Martorello's arguments misunderstand the superiority requirement, which does not consider whether class treatment would be superior *for a defendant*. It would rarely be so. Instead, the superiority element asks whether class treatment would be superior for the class and for the judicial system generally. As noted in Plaintiffs' opening brief, there "is a strong presumption in favor of a finding of superiority" where, as here, "the alternative to a class action is likely to be no action at all for the majority of class members." *Cavin v. Home Loan Center, Inc*., 236 F.R.D. 387, 396 (N.D. Ill. 2006); *Soutter*, 307 F.R.D. at 218. Here, the low number of consumers who signed up for restitution demonstrates that the alternative is likely no action at all. "Furthermore, even if

just a fraction of the class members were to bring individual suits," such as the thousands that did sign up for restitution, "the adjudication of the common issues in a single proceeding would be more efficient than the separate adjudication of individual claims," *id*., where courts would need to resolve similar motions to dismiss, motions to stay, discovery disputes, and the same basic presentation of the merits of a case to a jury. This Court certainly understands the burden that this one case—with over 1,000 docket entries—has placed on the judiciary.

Martorello's manageability complaint really boils down to the same flawed arguments in his predominance section, *i.e.*, that it will be potentially difficult to determine his damages liability due to his vague assertions regarding his ever-shifting role, authority, and control over time. Dkt. 1007 at 49. But as explained at length above, RICO imposes joint and several liability on members of the enterprise. *Philip Morris*, 316 F. Supp. 2d at 27 (gathering cases); *Fleischhauer*, 879 F.2d 1290 at 1301. Similarly, the Virginia usury and unjust enrichment claims are based on his *receipt* of 90% proceeds from the usurious loans as the owner of Bellicose/Eventide. Put differently, Martorello's "ever-shifting role" or control would have a bearing on the underlying claims if, and only if: (1) Martorello withdrew from the enterprise or (2) stopped receiving proceeds from usurious loans in violation of Virginia's usury laws. Neither of these events occurred. Accordingly, manageability will not be a serious problem because the claims rely "on basic legal principles applied to a case-specific set of facts." *Soutter*, 307 F. R.D. at 219.[16]

For all these reasons, Plaintiffs' motion should be granted, the Classes certified.

[16] Martorello also contends that an administrator of an estate may not serve as a class representative. Dkt. 1007 at 49. *In re Pharmaceutical Indus. Average Wholesale Price Litig*., 277 F.R.D. 52, 60–61 (D.Mass.2011); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 2013 WL 3353852, at *4 (C.D. Cal. July 3, 2013); *see also* 1 Newberg on Class Actions § 3:71 (5th ed.) (observing that courts "will normally permit the estate's representative to be substituted for the decedent as the class's representative.").

RESPECTFULLY SUBMITTED AND DATED this 22nd day of March, 2021.

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I hereby certify that on March 22, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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