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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

KIMETRA BRICE, EARL BROWNE, and JILL NOVOROT,

Plaintiffs,

v.

MICHAEL STINSON; LINDA STINSON; 7HBF NO. 2, LTD.; STARTUP CAPITAL VENTURES, L.P.; STEPHEN J. SHAPER,

Defendants.

Case No. 3:19-cv-01481-WHO

DEFENDANTS' MICHAEL STINSON, LINDA STINSON, 7HBF NO. 2, LTD, HAYNES INVESTMENTS, LLC, L. STEVEN HAYNES, AND STEPHEN J. SHAPER'S RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: June 23, 2021
Time: 2:00 pm
Judge: Hon. William H. Orrick

KIMETRA BRICE, EARL BROWNE, and JILL NOVOROT,

Plaintiffs,

v.

HAYNES INVESTMENTS, LLC, and L. STEPHEN HAYNES,

Defendants

Case No. 3:18-cv-01200-WHO

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Defendants Michael Stinson ("Mr. Stinson"), Linda Stinson ("Ms. Stinson"), Stephen J. Shaper ("Shaper"), 7HBF No. 2, Ltd. ("7HBF"), Haynes Investments, LLC, and L. Steven Haynes (with Haynes Investments, "Haynes"), collectively submit this brief in Opposition to Plaintiffs' Motion for Summary Judgment, ECF 182. For the reasons below, the Court cannot grant summary judgment for Plaintiffs under Fed. R. Civ. P. 56.

INTRODUCTION

Plaintiffs' Motion for Partial Summary Judgment (the "Motion") is merely the latest example of Plaintiffs ignoring the law and slanting the facts. Plaintiffs fill their Motion with hotly contested material facts—ignoring overwhelming contradictory evidence in favor of presenting the Court with a partial (and untrue) factual narrative that could never support summary judgment in their favor. Worse, Plaintiffs advance legal theories which are either inapplicable or contrary to law. In short, the Motion presents no basis in fact or law under which summary judgment is appropriate. The Court should therefore deny the Motion.

COUNTER-STATEMENT OF FACTS

Much of the narrative Plaintiffs present in their Motion crosses the line of artful advocacy into the territory of pure fiction. Plaintiffs spend paragraphs upon paragraphs setting forth 'facts' they know to be either contested or entirely irrelevant. Consider Plaintiffs' repeated references to certain Defendants' 'judicial admissions' that they were advisors to Think Finance's board, or a Defendant's casual use of the pronoun "we" or "our" when e-mailing about Think Finance. While Plaintiffs build these minutia into mountains—arguing such evidence is uncontroverted proof of a Defendant's participation in a nebulous and ever-changing enterprise/scheme/conspiracy far larger than Think Finance—they are really just mole hills showing no more than a particular Defendant's involvement in the affairs of Think Finance, not any RICO enterprise. But a Defendant's participation in the affairs of Think Finance is insufficient to establish liability here. So Plaintiffs push the truth, and hope the Court will overlook their obvious tactics. This runs contrary to Rule 56 and requires denial of their motion.

Similarly, the Motion ignores any contradictory facts and law. For example, the Motion

ignores that the testimony here has uniformly confirmed that the Native American lenders fully controlled their businesses, and Think Finance merely provided contractual services to those lenders. Indeed, the very contracts Plaintiffs cite as "proof" of the existence of an enterprise (Mot. ¶¶ 19-60, Exs. 8-25) prove only that Think Finance provided specific contractual services to the Tribes in return for specified fees.[1] The Motion ignores the record evidence showing in what capacity certain Defendants acted, as well as the full and complete release these Plaintiffs and class members provided to certain Defendants. And the Motion ignores that these Defendants caused no harm to Plaintiffs or class members. All of this requires that the Motion be denied.

In place of this missing evidence, Plaintiffs stuff the Motion full of irrelevant facts that could never support summary judgment. For instance, the Motion spends pages discussing what pronouns a particular Defendant used when speaking about Think Finance, and implies that such linguistics can be used to support liability here. Similarly, Plaintiffs spend pages discussing what actions a Defendant undertook in his capacity as an officer, director, and employee of Think Finance, without so much as mentioning that the Defendant had been released for all claims except those in his capacity as a shareholder.

Plaintiffs have no interest in litigating the actual facts of this case. The actual facts about the Defendants do not result in liability. Instead, Plaintiffs are more interested in continuing to disguise argument and inference as fact in an effort to perpetuate a false narrative. The Court may not accept Plaintiff's inferences or argument on a motion for summary judgment—only facts matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."). Given this

[1] As will become apparent below, Plaintiffs have heavily shaded these facts. Take, for example, the Plaintiffs' representation in Paragraph 44 that as a result of the Participation Agreements between GPLS and the lenders, "GPLS was 'considered for all purposes as, the legal and equitable owner' of its 99% interest in each loan 'and the associated Loan Documents…together with all of the rights, privileges, and remedies applicable thereto." Mot. ¶ 44. What Plaintiffs omit, however, is that "the legal and equitable owner[ship]" described in the document is not of the loan itself, but of a participation interest in that loan (e.g. a right to the profits and losses). Ex. 1 to the Declaration of Jonathan P. Boughrum in Opposition to Plaintiffs' Motion for Summary Judgment ("Boughrum Decl."), GPLV00000717 at 2(c). Plaintiffs' omission of this language from their quotation leaves the Court with a false impression of what, precisely, GPLS had the "non-exclusive right, but not the obligation," to purchase from the lenders.

standard, and with Plaintiffs' strategy laid bare, the Court must deny the Motion for Summary Judgment based upon the actual facts—not the artful and unsupported narrative of counsel.

I. FACTS AS TO THE DEFENDANTS

A. Plaintiffs admit the facts show Linda Stinson was only a shareholder.

As was detailed in the Defendants' Motion for Summary Judgment, Ms. Stinson did nothing that could subject her to liability under the claims Plaintiffs assert against her. The record evidence establishes that Ms. Stinson had no involvement in Think Finance, let alone any other venture that is the subject of Plaintiffs' myriad legal theories or that could even arguably be characterized as a RICO enterprise. Rather, the evidence uniformly shows that Ms. Stinson was a mere passive shareholder in Think Finance who did no more than vote her shares, like any other shareholder, and appoint a director to Think Finance's board. The uncontroverted evidence shows those with day-to-day responsibility for running Think Finance hardly knew Ms. Stinson, let alone that she had some role in the company. When Plaintiffs asked them about the role Ms. Stinson played in the operations of Think Finance, they answered honestly: she had none. Ex. 2 to Boughrum Decl., K. Rees Dep. 77:4-10; Ex. 3, Ja. Harvison Dep. 40:22-41:03; Ex. 4, Chris Lutes Depo. 165:12-15.[2]

Plaintiffs' Motion largely takes no issue with these facts. They fully admit (because they must) that Ms. Stinson was nothing more than a shareholder. Mot. ¶¶ 63-64 (pointing to Ms. Stinson's ownership interests in Think Finance). But rather than drop their insufficient claims, Plaintiffs instead attempt to twist and shape the banal facts into a narrative that leaves the Court with a false impression of what Ms. Stinson actually did.

For example, Plaintiffs assert that Linda Stinson (with her husband) was the founder of Think Finance and that she "sold various interests in the company to raise capital" for the Company. Mot. ¶¶ 61-62. But the sale of interests to "raise capital" for the company Plaintiffs reference was not a recent event—it was in 2002, and involved an equity investment of just $400,000. Ex. 5, L. Stinson Dep. 20:2-9; Ex. 6, Jo. Harvison Dep. 66:21-68:2. There is no

[2] Unless otherwise specified, the exhibits referenced in this brief are the attachments to the Declaration of Jonathan P. Boughrum in Opposition to Plaintiff's Motion for Summary Judgment, which is being filed contemporaneously with this brief.

connection between those actions, and the relevant facts of the case. Similarly, Plaintiffs make much of the fact that Ms. Stinson was granted the right to appoint a director to Think Finance's board, and suggest that in 2015 Ms. Stinson used this power to "remove[] [Kenneth] Rees" from the board in favor of appointing her son-in-law. Mot. ¶¶ 65-69. Not so. Rather, Mr. Rees (not Ms. Stinson) made the decision to step away from the Think Finance board in 2015. Ex. 2, K. Rees Depo. 32:3-16.

The only other references to Ms. Stinson in Plaintiffs' statement of facts concern her level of ownership interests in Think Finance and nebulous allegations that "the Stinsons" received proceeds from Think Finance as a result of their ownership interests.[3] Mot. ¶¶ 105, 115. Indeed, in the 54 paragraphs of "facts" detailing the record as to the Stinsons' liability, Ms. Stinson features in at most 10—all of which relate exclusively to her share ownership and none of which detail her taking any action as to Think Finance (or any other entity) other than appointing a director to Think Finance's board. That is the sum total of the facts concerning Ms. Stinson. They do not support liability.

B. Shaper has been released for all actions Plaintiffs assert support liability.

As to Shaper, the Motion stresses his involvement in the actions of Think Finance as "an owner, investor, consultant, and prior employee of Think Finance." Mot. ¶ 143. The Motion points to evidence that Shaper assisted Think Finance in providing mentorship to Ken Rees, that he was involved in the recruitment of Native American tribes to use Think Finance's services in 2011,[4] and that he otherwise consulted with Think Finance's executives on their tribal servicing relationships once in 2013 and once in 2014. Mot. ¶¶ 146-156. Similarly, Plaintiffs highlight that Shaper and related companies invested funds in GPL Servicing Limited through Victory Park

[3] As discussed in the section concerning Michael Stinson, this representation is misleading. "The Stinsons" never held an ownership interest in Think Finance. Linda Stinson did. Michael Stinson has not held any shares in Think Finance since before 2005. Ex. 7, SEQ-VT0001932 (2009 Cap table); Ex. 8, SEQ-VT0000001 (2014 Cap Table).

[4] To this end, Shaper testified that his involvement in meeting with representatives of the Otoe Missouria tribe was limited to "visit[ing] their office … and me[e]t[ing] with their lawyer one time" in 2011. Ex. 9, Shaper Dep. 76:15–23.

Capital. Mot. ¶¶ 158-161.

While Shaper believes Plaintiffs' facts are cherry-picked and do not accurately represent his level of involvement, ultimately it does not matter. This is because the Motion omits one key fact determinative of Shaper's liability: he has received a release for all actions Plaintiffs ascribe to him. As described in Defendants' Motion for Summary Judgment [ECF 183], as part of the bankruptcy, Plaintiffs and the entire class agreed to release certain individuals and entities from all liability. *See* Ex. 10, Final Order at 9.4 (setting forth broad releases by a nationwide class of consumers to each "Released Party" relating to consumer lending activities). Shaper, as a former director of Think Finance, received the benefit of this broad release with one carveout: that as a "former director or officer of the Debtors [he] shall not be released for purposes of imposing any liability on any shareholder/member **solely in their capacity as a shareholder/member or former shareholder/member**." *Id.* at 1.1.144 (emphasis added). With this one exception, Shaper received a full and complete release from the nationwide class.

No doubt aware of the release binding Plaintiffs and the class, but unwilling to confront the required outcome, Plaintiffs bury in a footnote that their "suit does not seek to hold Shaper liable for decisions he made in his capacity as a Director of Think Finance." Mot. at 23 n.10. But by highlighting the actions Shaper took to assist Think Finance, Plaintiffs are clearly seeking to hold Shaper liable for his actions as a director. The only evidence as to the capacity in which Shaper took certain actions confirms that his actions to assist Think Finance all occurred in his capacity as a director. Ex. 2 K. Rees Dep. at 35:20-36:14; Ex. 9, Shaper Dep. at 21:3-22:8, 114:8-25. Nothing in the record could support a different conclusion.

But even if this were not so, it would not make a difference. The release Plaintiffs signed made clear that Shaper received a complete release from Plaintiffs and the class except "for purposes of imposing any liability on any shareholder/member **solely** in their capacity as a shareholder/member or former shareholder/member" of Think Finance. Ex. 10, Final Order at 1.1.144 (emphasis added). Shaper did not, as Plaintiffs imply, receive a release only for his actions as a director of Think Finance. Such an argument ignores the plain language of Section 1.1.144

and would render the word 'solely' superfluous. Shaper received a complete release from the class except to the extent liability is "solely" based upon his actions as a "shareholder/member." Actions taken in multiple capacities, or which Plaintiffs fail to prove were solely based upon Shaper's status as a shareholder/member of Think Finance have been released. *Id.* Had Plaintiffs desired otherwise, they could have bargained for different language in the definition of "Released Debtor Parties." Their failure to do so is fatal to all of their claims.

And if this were not enough, Shaper also received a separate and complete release by way of his equity ownership in GPL Service, Ltd. Indeed, as detailed below, the Final Order in the bankruptcy court provided the same broad and comprehensive releases to equity holders of any GPLS Secured Party, including both Victory Park Capital and GPL Servicing, Ltd.

Plaintiffs proffer nothing backing up the statements of counsel that the current claims are somehow distinct from those that have been released. Those statements are not only contrary to the record evidence, and inadmissible in support of summary judgment, they are entirely meaningless given the language of the release. Unless Plaintiffs can show that the acts under which they seek to impose liability against Shaper were undertaken "solely" in his capacity as a shareholder/member of Think Finance, their claims fall within the scope of the release. Their failure to provide **any** evidence to this end is determinative of the issue.

C. 7HBF was just a shareholder and is not responsible for the actions of others.

Plaintiffs' facts as to 7HBF are similarly limited and entirely deficient. Like their allegations against Ms. Stinson, Plaintiffs focus numerous paragraphs on 7HBF's purchase of ownership interests in Think Finance in 2002, 7HBF's ability to appoint a director to Think Finance's board, and 7HBF's receipt of dividends commensurate with their ownership interests in Think Finance. Mot. ¶¶ 117-128, 141-142. These statements are, on the whole, correct. 7HBF first appointed Jason Harvison—a Harvison family member without any ownership or beneficial interest in 7HBF—to Think Finance's board from 2002 through September 2015. Ex. 11, 7HBF No. 2 Ltd. Partnership Agreement, 7HBF2_0005104 at 7HBF2_0005114; Ex. 12, 7HBF2_0000369. Thereafter, 7HBF designated Johnny Harvison to serve as a director of Think

Finance. Ex. 12, 7HBF2_0000369.

Notwithstanding these factual allegations as to Jason and Johnny Harvison, Plaintiffs attempt to impute their actions to 7HBF, the company. *E.g.*, Mot. at 29. But Plaintiffs fail to cite any facts to support that either Jason or Johnny Harvison failed to act in accordance with the duties of loyalty owed to Think Finance while each was a director of Think Finance. That is merely assumed by the Plaintiffs. But even so, Plaintiffs have released Jason and Johnny Harvison for their actions as directors, and 7HBF cannot be vicariously liable for such actions even if done within the scope of any association with either individual. *See Women First OB/GYN Assocs., L.L.C. v. Harris*, 161 A.3d 28, 36 (Md. 2017).

The Motion also attempts to impose liability based on John Harvison's status as an invited board observer at Think Finance's board meetings. Mot. ¶¶ 131-140. It highlights that John Harvison attended certain board meetings during which Think Finance's business—including its Native American servicing business—was discussed. These facts are, again, true. All of Think Finance's board minutes—including, as exemplars, those attached to the Motion—for meetings John Harvison attended were accurately recorded by the company's secretary, attorney Paul Tauber, and show that John Harvison did not cast a single vote or otherwise exercise any control over Think Finance. Plaintiffs do not argue otherwise. While testimony confirms that John Harvison would "occasionally" express opinions on certain issues at such meetings, that is precisely why the company's executives invited him to observe and why John Harvison was an advisor to Think Finance, and nothing more. Attending board meetings and occasionally expressing a view does not, however, translate to liability for a wide-ranging RICO enterprise (or the other claims).

But this is the extent of Plaintiffs' allegations as to 7HBF. The Motion does not allege John Harvison, 7HBF, or anyone else provided assistance to anyone other than Think Finance. And there are no facts to support a conclusion that John Harvison acted as representative of 7HBF when attending these board meetings.[5]

[5] Plaintiffs offer no evidence—documentary or otherwise—that could possibly support the

D. The allegations as to Michael Stinson do not match the underlying facts.

Plaintiffs continue their effort to distort the "facts" with regard to Michael Stinson. The Motion confidently asserts "the Stinsons" owned 20% of Think Finance, and "the Stinsons" received millions in dividends from Think Finance. *E.g.*, Mot. ¶ 115. This is entirely wrong. The court need look no further than the cap tables Plaintiffs attach as exhibits to the Motion—none list Michael Stinson as a shareholder at any time relevant to this case. Similarly, Plaintiffs point to an $8,000,000 loan made by Mike Stinson to Think Finance and, without evidence, infer that it was used in furtherance of Think Finance's business dealings with Native American tribes. Mot. ¶ 111; Mot. at 38 (describing Michael Stinson's "$8 million-dollar loan to Think" as evidence that he "facilitate[d] Think Finance in its tribal lending endeavor"). Again, false. Ex. 4, C. Lutes Dep. at 107:8-18 (CFO of Think Finance testifying that money loaned by Stinson to the company was not used in connection with any of the tribal products); Ex. 13, M. Stinson Dep. at 123:14-125:9.

The Motion likewise cites the undisputed facts that Michael Stinson provided advice to Think Finance's executives, that he was invited to Think Finance board meetings (but did not vote), and that he was otherwise a sounding board for the company when asked, as evidence that he violated RICO. But none of these facts demonstrates Michael Stinson's occasional association with, operation of, or assistance to anything besides Think Finance. Indeed, Think Finance's CEO Ken Rees stated that Michael Stinson "contributed as broadly as any board member did" but that there was no "particular area where he was … deemed to have … excessive influence." Ex. 2, K. Rees Dep. 71:16–72:13. Rees also explained that when Michael Stinson provided opinions, it was because Rees "encouraged everyone who was involved in board meetings to put their … opinions in," not that he exclusively solicited Michael Stinson's opinion over the opinions of others. *Id.* at 72:20–73:4. Rees clarified that it was not the case that he would talk to Mike about every single decision he had to make. *Id.* at 75:12–23 ("[T]hat isn't to say that every single decision I had I would talk to Mike about."). And, just as with John Harvison, the detailed board minutes kept by

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implication that John Harvison was acting as a representative of 7HBF when attending Think Finance board meetings. At summary judgment, this Court is not able to accept such naked inferences. *Liberty Lobby, Inc.*, 477 U.S. at 255.

Secretary Tauber do not reveal a single instance in which Michael Stinson voted on or influenced any vote or decision of Think Finance.

If all this were not enough, the Motion resorts to highlighting Mr. Stinson's use of first-person pronouns when speaking about *Think Finance* as evidence that he was somehow involved in a larger enterprise. Mot. ¶¶ 89, 93-94, 96-97, 109-110, 113-114. Linguistic pedantry aside, the mere use of such pronouns establishes, at best, Michael Stinson's ongoing relationship with Think Finance—a company he started over 20 years ago, but over which he has had no operational involvement for 15 years—nothing more.

In sum, the uncontroverted facts Plaintiffs cite in support of the Motion, stripped of conclusory arguments, show only that Michael Stinson provided advice and counsel to Think Finance's executives as a mentor and an invited board observer. Nothing more.

E. Haynes never earned money from Plain Green or resulting from loans.

Finally, the Motion's discussion of the facts as to Haynes is just as distorted and skewed as the rest. Mot. ¶¶ 162-171. Plaintiffs highlight Haynes' initial involvement in introducing the Chippewa Cree Tribe to Think Finance (Mot. ¶¶ 162-164), Haynes' provision of a line of credit to Plain Green under which Haynes earned nothing (Mot. ¶ 167), and Haynes' entry into a Referral Agreement with Think Finance, which entitled him to earn fees from Think Finance (but not Plain Green). Mot. ¶¶ 166, 168. Even these few allegations are misleading. Plaintiffs state that Haynes was paid "a significant amount of money" "in exchange for funding Plain Green originations." Mot. ¶ 168. But that contention (and the evidence Plaintiffs use to support it) is entirely contrary to the finder's fee agreement between Haynes and Think Finance. Indeed, that Agreement makes clear that Haynes was never paid by the Tribe, was not compensated for "funding" anything, and that his compensation was set by reference to revenue received by GPLS. Ex. 14, HAYNES0001159. And, of course, Plaintiffs leave out that the Referral Agreement was terminated by Think Finance as of April 29, 2015—years prior to this lawsuit, and prior to many of the loans being made to class members and the Plaintiffs. Ex. 15, HAYNES0001261.

ARGUMENT

I. PLAINTIFFS FAIL TO CONFRONT OR EVEN DISCUSS THEIR BROAD RELEASES OF LIABILITY AS TO CERTAIN DEFENDANTS.

To begin with, the Motion fails to mention, let alone discuss the impact of the releases Plaintiffs and the class provided as part of Think Finance's Plan of Reorganization eighteen months ago. While Defendants will not set forth at length the arguments made on this point as part of their Motion to Dismiss [ECF No. 183 at 21-26], it bears repeating that Plaintiffs have fully released Shaper and Ms. Stinson (and Jason Harvison and Johnny Harvison, neither of whom is a party to this case but whose acts are ascribed to 7HBF) for all acts except those taken "**solely** in their capacity as a shareholder/member or former shareholder/member," of Think Finance. Ex. 10, Final Order at 1.1.144 (emphasis added). The Motion, however, offers nothing in the way of evidence showing that the actions ascribed to these Defendants, and upon which liability is based, were taken **solely** in these defendant's individual capacity as Think Finance shareholders.

Moreover, to the extent that Plaintiffs introduce a new potential basis of liability as to Shaper premised on his investment into GPLS, that, too, has been released as part of the bankruptcy Court's final order.[6]

Specifically, Section 1.1.145 includes within its definition of "Released Non-Debtor Parties" the GPLS Secured Parties as well as all "Related Non-Debtor Parties" of the GPLS Secured Parties. Ex. 10, Final Order at 1.1.145. Section 1.1.83, in turn, defines the GPLS Secured Parties as including, among others: GPL Servicing, Ltd., Victory Park Capital Advisors, LLC, and each of those company's "respective current, former, and future "Related Non-Debtor Parties." *Id.* at 1.1.83. Finally, Section 1.1.143 includes within the definition of "Related Non-Debtor Parties," an entity's:

[6] Arguably, Plaintiffs have waived this claim—it is found nowhere in their Complaint against Shaper. Similarly, as part of briefing on motions to dismiss, Plaintiffs admitted that their claims against Shaper were "seeking to impose liability against…Shaper in [his] capacity as owne[r]/shareholder[r] of Think Finance." Ex. 16, Pls.' Opp'n to Mot. to Dismiss, ECF 98 at 2. Shaper's investment into VPC/GPLS has never previously been mentioned as a basis for Plaintiffs' claims.

> current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, predecessors, successors, assigns, parents, subsidiaries, affiliates, managed accounts or funds, partners, limited partners, general partners, principals, members, management companies, investment managers, fund advisers, employees, advisory board members, financial advisors, accountants, investment bankers, and consultants.

Id. at 1.1.143. Read together, these sections make clear that Plaintiffs and the class have released all claims against any equity holder—direct or indirect—in either GPL Servicing, Ltd., or Victory Park Capital. But, as the Motion admits, and the record evidence shows Shaper's investment into GPL Servicing, Ltd. was an equity investment into that company. Ex. 17, SHAPER00963 (referring to Shaper and related entities as "shareholders" in GPLS). In other words, Shaper was an equity holder of GPL Servicing, Ltd—one of the GPLS Secured Parties. He is therefore covered under the release for actions and liability arising from that investment.[7]

Thus, as set forth in Defendants' Motion for Summary Judgment, Plaintiffs' broad releases preclude liability against Ms. Stinson, Shaper, and 7HBF, entirely. Summary judgment, therefore, cannot be granted as to these Defendants on any issue raised in the Motion.

II. PLAINTIFFS OFFER NO LEGITIMATE BASIS TO AVOID THE CONSEQUENCES OF THE CHOICE-OF-LAW PROVISIONS IN EACH OF THEIR LOAN AGREEMENTS.

Plaintiffs begin their Motion with their latest attempt to avoid their contractually bargained-for choice-of-law provision. Their arguments are baseless and entirely inappropriate for disposition at summary judgment given the tremendous number of disputed material facts that underlie the choice-of-law arguments.

Plaintiffs do not contend the choice-of-law clauses are contrary to law, unconscionable, or otherwise unfair. Nor could they—such allegations are found nowhere in their Complaint or, more importantly, in the factual record. Instead, Plaintiffs advance a single reason to avoid their

[7] Given the language of the release Shaper received as a former board member of Think Finance—releasing him from all liability except for actions arising "solely" in his capacity as a shareholder of Think Finance—Shaper's investment into GPLS would arguably be covered without reference to the provisions of Sections 1.1.143 and 1.1.145. For the avoidance of all doubt, however, Shaper makes clear that he has also received a release as a shareholder of GPLS.

contractual choice-of-law provision: the prospective waiver doctrine. *E.g.*, Mot. at 30. But Plaintiffs are wrong to suggest that doctrine applies to choice-of-law provisions generally—it does not. Indeed, it has never been applied outside the limited scope of a decision to enforce choice-of-forum and choice-of-law provisions in tandem. At summary judgment, however, there is no choice of forum provision for the Court to rule upon, and thus, the doctrine is inapplicable.

More fundamentally, Plaintiffs' request for summary judgment on this point is wholly inappropriate because many disputed material facts must be resolved before applying California law to these claims. Plaintiffs know this full well—they lost an identical motion for summary judgment previously as part of the bankruptcy litigation in the Northern District of Texas. So, not only are the Plaintiffs wrong on the law, and on the facts, they are also trying to relitigate issues in front of a new Court that they have already lost elsewhere in the hope that they can convince it to come to a different result. The Court should not permit such gamesmanship—the bankruptcy court's decision on this point was well-reasoned and there is no reason why the Court should not reach the same conclusion. Summary judgment on this point is inappropriate and must be denied.

A. The Prospective Waiver Doctrine does not invalidate choice-of-law clauses, generally.

As Plaintiffs admit in the opening line of their argument, to avoid the agreed-to choice-of-law clauses, it is only "where '**choice-of-forum and choice-of-law clauses**' operate 'in tandem as a prospective wavier of a party's right to pursue statutory remedies,' [that] they are unenforceable." Mot. at 30 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (emphasis added)). By its very terms, the doctrine applies only in circumstances where *two* choice clauses act in concert to deny any remedy to pursue or effectively vindicate a federal statutory right. But there is no forum selection provision that is being enforced here. The doctrine, therefore, does not apply. Yet the Motion seeks to expand the prospective waiver doctrine in an attempt to transform it into a general contract defense applicable outside of motions involving forum selection clauses and choice of law clauses. That is wrong and contrary to existing law.

Consistent with the balance of the Motion, Plaintiffs fail to present legitimate support for

their incorrect view of the law. The Motion advances two bases upon which the Court should greatly expand existing law: (1) a quote purportedly from *Italian Colors* appearing to state that the doctrine applies to contracts generally, and (2) excerpts from opinions issued by lower courts that Plaintiffs assert apply the prospective waiver doctrine to invalidate a contractual choice-of-law clause, generally. Those citations are, at best, incorrect.

First, the Motion supplies a quote from *Italian Colors* that appears to assert that the Supreme Court has found that the prospective waiver doctrine can be applied to invalidate any contract. Mot. at 30 (quoting *Italian Colors*, for the proposition that "[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 in Motion)). But this quote is from a **dissent** (of Justice Kagan) in that case. It forms no part of the holding of *Italian Colors*.

Even if Plaintiffs had stated that their quote comes from a dissent, it still would not matter. This is because the majority opinion in *Italian Colors* went to great lengths to note that the cited passage from *Mitsubishi Motors* was both *dictum* and limited exclusively to situations seeking to enforce choice-of-law clauses and forum-selection/arbitration clauses, in tandem. 570 U.S. at 235-36, 236 n.2. To this end, as the majority in *Italian Colors* also recognized, the Supreme Court has never used the effective vindication exception "to invalidate the arbitration agreement as issue." *Id.* at 235; *see also id.* at 236-238 (exploring every effective vindication case examined by the Supreme Court since *Mitsubishi Motors*, noting that each arose in the context of an arbitration agreement).[8] Thus, to the extent Justice Kagan's dissent expresses a view of the prospective

[8] Plaintiffs also omit that even Justice Kagan retreated from the position quoted by the Motion elsewhere in her dissent, stating that the prospective waiver doctrine "ensure[s] that it does not diminish arbitration's benefits," and "comes into play only when an agreement 'operate[s] … as a prospective waiver'—that is, forecloses (not diminishes) a plaintiff's opportunity to gain relief for a statutory violation." 570 U.S. at 244 (Kagan, J., dissenting) (quoting *Mitsubishi*, 473 U.S. at 637, n.19). Similarly, the dissent recognizes that the effective waiver doctrine "comes into play only when the FAA is alleged to conflict with another *federal* law," but has no applicability to state law claims and rules. *Id.* at 252 (emphasis in original). This, again, confirms the dissent's recognition that the doctrine applies only in the context where a choice of forum provision (an arbitration agreement subject to the FAA) works together with a choice-of-law provision to deny effective vindication of certain federal rights. It also confirms that the doctrine has no application to claims

waiver doctrine that is more expansive, it was squarely rejected by the majority, whose decision binds the Court.

Second, the Motion spends pages pointing the Court to decisions from other courts and argues that they have similarly invalidated choice-of-law clauses under the prospective waiver doctrine. Mot. at 31-32. Not so. Rather, the decisions Plaintiffs cite in support of this position merely used the effective vindication doctrine in refusing to compel arbitration; none used the doctrine to invalidate a choice-of-law clause, generally. As described below, those cases do not apply to the proper analysis of the doctrine in this Circuit. But even if that were not the case, that none of them have applied the effective vindication doctrine outside the context of a motion to compel arbitration is all but determinative of this issue.

Plaintiffs are clearly attempting to expand the effective vindication doctrine beyond its limited, judge-made scope. But the idea that the doctrine applies as a general contract defense finds **no support** in the law. None of the cases cited in the Motion actually supports such a conclusion. Given this complete lack of support, the Court should deny the Motion to the extent it seeks to apply the doctrine outside the context of an arbitration agreement.

B. Even if the prospective waiver doctrine applies generally, Plaintiffs remain wrong on the doctrine's applicability to this case.

Even if Plaintiffs were correct in their formulation of the effective vindication doctrine—and they are not—the authorities relied upon in the Motion conflict with mandatory authority from the Ninth Circuit. Specifically, the Ninth Circuit's *en banc* opinion in *Richards v. Lloyd's of London*, a case Plaintiffs neither address nor cite, delineates the effective waiver doctrine that guides this Court's analysis. 135 F.3d at 1289 (9th Cir. 1998) (en banc). To the extent the out-of-circuit authorities relied upon by Plaintiffs are contrary to *Richards*, the Court lacks discretion to apply Plaintiffs' preferred authorities and reach Plaintiffs' preferred conclusion on this issue.

The Motion, for example, repeatedly cites to, and quotes from, the Fourth Circuit's decision

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such as those under state law, such as those advanced here for usury, unjust enrichment, and purported UCL violations.

in *Gibbs v. Haynes Invs., LLC*, to support Plaintiffs' conclusion that the effective vindication doctrine applies here. 967 F.3d 332 (4th Cir. 2020). As the Motion highlights, the Fourth Circuit refused to compel arbitration because: (1) plaintiffs there had no ability to assert their RICO claims under tribal law, (2) the relevant tribal laws only allowed claims against certain individuals, but not those plaintiffs wanted to sue, and (3) the relevant tribal laws did not authorize the recovery of treble damages available under RICO. Mot. at 31-32 (citing *Haynes Invs.*, 967 F.3d at 342-44).

Such reasoning, however, can hold no weight here. This is because, in *Richards*, the Ninth Circuit could not have been clearer: a choice-of-law clause that causes the complete loss of a RICO claim, or the complete immunization of certain defendants for claims under certain federal laws, is not invalidated by the effective vindication doctrine where there is *some* remedy available under foreign law. *Id.* at 1296. There is no room for interpretation on this point. The *en banc* court in *Richards* held that even if the choice clauses caused "the loss of RICO claims," it would "not alter our conclusion." *Id.* So too where the choice clauses selected laws that would only permit claims against certain defendants (alleged to be insolvent), but otherwise "immunize[] [plaintiff's preferred defendant] from many actions possible under our securities laws," because there was no evidence that such "immunity would bar recovery," or that the plaintiffs were "deprived of any reasonable recourse." *Id.*

Richards, not any of the cases cited by the Motion, sets forth the proper analysis of the prospective waiver doctrine in this Circuit. Under that mandatory authority, there is only one proper conclusion that can be reached when applying the prospective waiver doctrine to these facts—there is no basis, factual or legal, to refuse to enforce the choice-of-law clauses present in Plaintiffs' contracts. Even if other courts have reached a different conclusion based on a consumer's inability to assert a RICO claim against these Defendants, or their inability to secure treble damages, *Richards* mandates a different result.[9] Because there are real remedies available

[9] Indeed, the reasoning highlighted by the Motion again mirrors the positions taken by the *dissent* in *Richards*, which would have seen the prospective waiver doctrine invalidate the choice clauses as "unreasonable under the circumstances" because, *inter alia*, "[n]ot only do the choice clauses preclude the plaintiffs from seeking the substantive remedies the [federal securities laws] offer, but

under both Chippewa Cree and Otoe Missouri law, though perhaps not Plaintiffs' preferred remedies, the effective vindication doctrine does not apply.[10]

C. Summary judgment applying California law to the loans is inappropriate because the analysis relies on multiple disputed material facts—an issue Plaintiffs have previously lost elsewhere.

Apart from their deficient effective vindication arguments, Plaintiffs also attempt to have the Court apply California's usury laws to the loans through the back door—by asking for summary judgment on the issue on whether California law applies to the loans. Mot. at 32-34. Summary judgment on this issue is inappropriate for at least three reasons.

First, Plaintiffs' counsel argued, **and lost**, a motion for summary judgment on this precise issue as part of the bankruptcy litigation. Ex. 18, Sept. 26, 2018 Hr'g Tr., *In re Think Finance, LLC*, ECF No. 1017 (N.D. Tex. Bankr. Sept. 26, 2018). The bankruptcy court examined practically identical evidence, identical case law under the Restatement (Second) of Conflict of Laws, and ultimately concluded that summary judgment was inappropriate given the overwhelming number of disputed material facts. The issues here are identical. The factual record is effectively identical. There is no reason to reach a different conclusion.

Second, even if the Court were to ignore the prior decision of the bankruptcy court refusing summary judgment on identical issues, Plaintiffs' analysis under the Restatement is still incomplete. Rather, the Motion offers only stunted analysis that omits material portions and merely assumes the very conclusions the Court must actually analyze to reach its conclusions. Under any proper conflict of laws analysis, there are no undisputed material facts that could

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the protections they provide under English law are markedly inferior to [those available under federal securities laws]." 135 F.3d at 1299 (Thomas, J., dissenting). Indeed, the dissent in *Richards* took umbrage (as Plaintiffs do) with the resulting inability of a plaintiff, under operation of the choice clauses, to assert specific federal claims, the inability to secure liability under English law against Lloyd's as well as 'controlling persons,' and to obtain certain damages available under federal law. *Id.* at 1299-1300. This reasoning from is practically identical to the arguments advanced in the Motion. That rationale was rejected by the en banc Ninth Circuit in *Richards*. So too should it be rejected here.

[10] Defendants have repeatedly set forth the remedies available under these laws in prior briefing to this Court and the Ninth Circuit. *See* Mot. to Compel Arb., ECF 25 at 15-16, 19.

support a conclusion that California law applies here.

Third, even if the Court were convinced to apply California law, that is not the end of the analysis. Rather, as California law makes clear, courts should enforce contractual choice-of-law in loan agreements even where it results in application of the laws of a jurisdiction with no maximum rate of interest. Thus, there is no reason to grant summary judgment on this issue.

1. *These issues have been litigated previously—Plaintiffs' counsel lost, and summary judgment was not granted.*

To begin, the Motion fails to discuss, or even alert the Court to, authority that denied a practically identical summary judgment argument advanced by Plaintiffs' counsel. After examining a similar factual record, the Texas bankruptcy court denied cross-motions for summary judgment filed by Think Finance and a set of consumer plaintiffs. *See* Ex. 18, Sept. 26, 2018 Hr'g Tr., *In re Think Finance, LLC*, ECF No. 1017 (N.D. Tex. Bankr. Sept. 26, 2018) (finding genuine issues of material fact on all of the inquiries conducted under Section 187(2)).[11] The bankruptcy court held that there was "a genuine issue of material fact regarding whether there is a substantial relationship between the chosen jurisdiction and the lending entities or transactions, and this matter is more appropriately reserved for trial." *Id.* at 19. And in specifically analyzing the issues under Section 188 of the Restatement (Second), the Court noted that such an analysis was "problematic for the Court in a summary judgment context," and that "[t]he factors for the Court to consider all appear to be fact-intensive," requiring the court to "weigh the evidence at trial." *Id.* at 22.

Plaintiffs do not explain why the Court should reach a different decision than the Texas bankruptcy court did after considering these same issues and evidence. The Motion ignores that these precise issues have been previously litigated and hopes that this Court will provide a different

[11] Twice, Think Finance has expertly briefed the law and applicable facts under Section 187(2) to the Texas bankruptcy court—once at Summary Judgment, and again in pretrial briefing. *See* Ex. 33, Debtors' Consolidated Br. in Support of Mot. for Summ. J., *In re Think Finance, LLC*, ECF No. 711 at (N.D. Tex. Bankr. July 27, 2018); *see also* Ex. 19, Debtors' Pre-Trial Brief, *In re Think Finance, LLC*, ECF No. 1122 (N.D. Tex. Bankr. Oct. 24, 2018). Under Fed. R. Civ. P 10(c), the Defendants fully adopt, and incorporate as if set forth in full herein, these two briefs of Think Finance.

result. The law is not so cynical. There is no reason for this Court to reach a different conclusion on what are effectively identical facts and identical law.

2. *Plaintiffs ignore the proper analysis under the Restatement.*

Plaintiffs' choice-of-law analysis is hopelessly flawed because it skips over much of the required analysis. Both California conflicts law and federal common law follow the approach outlined by the Restatement (Second) of Conflict of Laws (the "Restatement") to resolve choice-of-law questions. *See Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006); *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1210 (9th Cir. 2001). Under both California and federal law the first step of the choice-of-law analysis looks to Section 187 of the Restatement (Second). But Plaintiffs provide no analysis of Section 187—instead skipping directly to a perfunctory and incomplete analysis of Section 188. Mot. at 32-34. That is improper. Rather, under both California and federal law, the Court cannot skip over the Section 187 analysis. But that analysis requires the Court to resolve disputed material facts. As a result, the Court cannot enter summary judgment on this point given the factual disputes in the record.

Under California and federal law, the first step in a choice of law analysis looks to Section 187 of the Restatement (Second) Conflict of Laws. *Frenzel v. Aliphcom*, No. 14-CV-03587-WHO, 2015 WL 4110811, at *7 (N.D. Cal. July 7, 2015). Section 187, in pertinent part provides:

> the law of the state chosen by the parties to govern their contractual rights and duties ***will be applied*** …unless either:
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> >
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice-of-law by the parties."

Restatement (Second) of Conflicts of Laws § 187(2) (1988) (emphasis added). Thus, the first question a court asks is whether there is a "reasonable basis for the parties' choice-of-law," including whether the selected forum "has a substantial relationship" to the parties or their transaction. *Id.*, (citing *Wash. Mut. Bank, FA v. Super. Ct.*, 24 Cal.4th 906, 916 (2001)). If either

test is satisfied, the contractual choice-of-law "generally will be enforced unless the [party opposing the clause] can establish *both* the chosen law is contrary to a fundamental policy of California and that California has a materially greater interest in the determination of the particular issue." *Abat v. Chase Bank USA, N.A.*, No. SACV0701476CJCANX, 2010 WL 11465416, at *1 (C.D. Cal. Oct. 28, 2010) (citing *Wash. Mut. Bank*, 24 Cal.4th at 917).

At this first step of the analysis (which the Motion skips, entirely), Defendants believe the facts will ultimately favor enforcement of the parties' contractual choice-of-law provision selecting the laws of the Chippewa Cree Tribe and Otoe Missouria Tribe. Both of the lenders, Plain Green and Great Plains, had a substantial relationship to the laws of their respective reservations. Indeed, courts have held that these businesses have principal places of business on their respective reservations and are arms of their respective tribes. *Howard v. Plain Green, LLC*, No. 17-cv-0302, 2017 WL 3669565, at *1, *3-*6 (E.D. Va. Aug. 7, 2017*); Great Plains Lending, LLC v. Dep't of Banking*, No. 20340, 2021 WL 2021823, at *12 (Conn. May 20, 2021) (precedential opinion from state's highest court on a full evidentiary record ultimately holding "Great Plains is an arm of the tribe as a matter of law," because "the record reflects that it was created under tribal law and is controlled by directors appointed by the council for the purpose of promoting tribal economic development and welfare," and that there exists "a significant financial relationship between the tribe and Great Plains"). Similarly, the evidence uncovered in discovery revealed these tribal businesses had full control over: the origination of loans, all aspects of the loan product, marketing materials, and collection efforts; moreover, the loans were ultimately originated on the reservation of the two tribes. Indeed, as is set forth below (at 27-28), these tribes employed dozens of employees on the reservation, created tremendous wealth for the tribes, and operated exclusively from the reservation. *See also, e.g. Great Plains* 2021 WL 2021823, at *8-12.

The Motion offers **only two pieces of evidence** on this point. Specifically, while Plaintiffs blithely state that there is an "abundance of evidence [that] shows that Great Plains and Plain Green were created and operated to allow Think Finance to evade state usury laws," they support this statement solely with a reference to two Power Point presentations (Exs. 6 & 7 to the Motion),

which both make abundantly clear that Think Finance only provided the tribes with limited contractual services and stressed the Tribe's ownership of all material aspects of that business. Moreover, again as set forth below (at 27-28), all the testimony in this case uniformly confirms that Think Finance was not controlling, operating, or managing these businesses—the individual tribes were. The Tribes' ownership and outsourcing of certain functions of their business, however, does not change either the choice-of-law analysis or the outcome. Ex. 20, Report of Lance Morgan at pp. 4-8, 15, 27-32; Ex. 21, Report of Eric Henson at ¶¶ 22-30.

Ultimately, however, Defendants acknowledge that the record here is not undisputed on this issue. That is why they did not move for summary judgment on it. The bankruptcy court in Texas considering the same facts and law held as much. Plaintiffs offer no reason why the decision here should be any different. The law applied is identical—Plaintiffs admit that federal common law follows the Restatement (Second), which is what the court in Texas applied. While Defendants believe that the facts will ultimately be in their favor, the application of Sections 187 and 188 plainly involve resolution of significant disputed material facts. Thus, those disputes must be resolved at trial, not at summary judgment.

3. *Even if Plaintiffs' incomplete analysis is accepted, tribal law still applies.*

Even if the Court were to accept Plaintiffs' conclusions and invalidate the contractual choice-of-law provisions in the loan agreements, this would not change the outcome here. To the extent the Court finds that there is no substantial relationship, the Court would revert to the standard conflict-of-laws analysis. *See Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1210 (9th Cir. 2001). Under that law, "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Cal. Civ. Code § 1646.

California courts routinely enforce contractual choice of law clauses even where the underlying loans select the laws of states with significantly higher interest rates (or indeed no maximum rate of interest) than permissible under California law. *Ury v. Jewelers Acceptance Corp.*, 227 Cal. App. 2d 11, 20 (1964) (noting in conflict-of-laws analysis that given the numerous

statutory exceptions to California Constitutional provision addressing usury, "California does not have such a strong public policy against any and all contracts which would be usurious if they were made and to be performed here…"). As California courts have pointed out, while there is a public policy against usury, there is "no strong public policy against a particular rate of interest so long as the charging of that rate is permitted by law to the specific lender." *Gamer v. duPont Glore Forgan, Inc.*, 65 Cal. App. 3d 280, 287 (1976).

Yet, under that analysis, the result will ultimately be the same, though it still requires resolution of multiple disputed material facts. The contracts were all formed on the Native American lenders' respective reservations, funds were disbursed from the reservations, payments were sent to the Native American lenders on their reservations—where the Native American lenders are located and have their headquarters. Plaintiffs' loan agreements all acknowledge these facts. On similar facts the Ninth Circuit has found that under Section 1646, the law of the lender's home state, will apply. *Shannon-Vail*, 270 F.3d at 1211. Moreover, it is entirely improper for the choice of law analysis to focus exclusively on the residency of loan recipients. *See F.T.C. v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 941 (D.S.D. 2013) (noting that for tribal lender seeking to enforce choice of forum provision, "[i]n fairness, both sides of the transaction must be considered"). When considering "both sides," the calculus changes significantly.

It is also beyond dispute that the loans are all either manually accepted by employees of the Native American lenders while on Tribal lands, or through the use of computerized underwriting criteria set (and routinely revised) by the tribal lender to meet the financial goals of the lender. *See infra.* at 27-28. In other words, the last act for each of these loans occurred on the reservation. The loans, therefore, were indisputably made on the reservations where these lenders operated and employed dozens. As such there is a strong connection between the loans and the tribal forum.

Plaintiffs' failure to acknowledge facts relating to the other side of this transaction is revealing, particularly where the Court is not able to weigh facts and competing inferences in ruling on summary judgment. There are clear, legitimate, and disputed facts relating to whether California or the respective tribes have a materially greater interest in the loan transactions. As

such, summary judgment is inappropriate here.

III. PLAINTIFFS MISCONSTRUE ONE OF DEFENDANTS' AFFIRMATIVE DEFENSES.

Plaintiffs request summary judgment as to Defendants' assertion of a single affirmative defense: that Native American sovereign immunity applies and acts as a defense to liability. Mot. at 34-35. While the Motion asserts that this defense is improper, it does so by distorting Defendants' arguments. Defendants have admitted that they, personally, are not entitled to assert or invoke tribal sovereign immunity as a defense to these claims, generally. Rather, the Native American lenders are all businesses created and operated by their respective tribes as arm-of-the-tribe entities entitled to assert tribal sovereign immunity.

Plaintiffs' attempt to litigate these claims against shareholders of entities providing contractual services to those lenders is a significant infringement on the sovereignty the tribes are validly able to assert. Such a suit is an attempt to improperly infringe upon the respective tribes' sovereignty, and must be rejected. *Cf. Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989) ("If the state law interferes with the purpose or operation of a federal policy regarding tribal interests, it is preempted.").

IV. SUMMARY JUDGMENT CANNOT BE GRANTED, IN WHOLE OR IN PART, AS TO PLAINTIFFS' RICO CLAIMS, OR ANY PART OF SUCH CLAIMS.

Plaintiffs' Motion at last gives up the ghost on RICO. Plaintiffs do not (because they cannot) allege that any of these Defendants were involved in the larger RICO enterprise they have asserted is at the heart of their Complaint. Instead, they focus exclusively on evidence that cannot possibly prove a violation of Section 1962. The Motion focuses exclusively on Defendants' association with Think Finance. But Plaintiffs cannot establish a violation of RICO based on Defendants' mere relationship with Think Finance, as opposed to a relationship with a larger association-in-fact enterprise. This overriding issue alone prevents summary judgment.

A. Plaintiffs fail to establish various elements of a Section 1962(c) violation.

1. *Plaintiffs fail to establish the existence of an association-in-fact enterprise.*

As is typical of their RICO claims generally, Plaintiffs ask the Court to stretch the

enterprise requirements beyond the breaking point. The Motion is even unclear as to the precise definition of the purported enterprise at the center of their RICO claims. Yet while the Motion continuously shifts in its definition of the purported enterprise (and Defendants' purported participation in it), Plaintiffs ask the Court for summary judgment in their favor on this element of their claims. Mot. at 41-43. That would be inappropriate because Plaintiffs fail to put forth any evidence that can be used to establish that any association-in-fact enterprise actually existed. Rather, all the Motion does is point to typical servicer/lender commercial agreements and offer characterizations of those otherwise lawful agreements. That is not enough.

As an initial matter, the Motion fails to define the proposed enterprise, and proceeds as if this were not a critical point needed to support their request for summary judgment. Instead, throughout the Motion Plaintiffs shift the definition of the purported enterprise to fit whatever allegation they are making at that moment. For example, Plaintiffs define the purported enterprise as just Think Finance in places. *E.g.* Mot. at 1-2 (arguing, in part, that because Plaintiffs believe "Think Finance was engaged in the collection of unlawful debt and Defendants knew about and furthered the scheme," summary judgment is appropriate on Plaintiffs' claims under 1962(d)); Mot. at 40-41 (arguing Defendants violated Section 1962(d) because they "took numerous steps to further the success and affairs of Think Finance"). Elsewhere the enterprise is defined as Think Finance and FBD. *E.g.*, *id.* at 42. Still elsewhere the enterprise is either Think Finance and the Otoe Missouria Tribe, *id.* at 6 ("Think Finance and the Otoe-Missouria Tribe enter into a conspiracy to make and collect unlawful debt"), or Think Finance and the Chippewa Cree Tribe. *Id.* at 7-9 ("Think Finance and the Chippewa Cree Tribe form a similar enterprise and enter into a conspiracy to make usurious loans"). And finally, Plaintiffs seek to cover their bases by alleging that the enterprise is "Think Finance, Plain Green, Great Plains, Victory Park, GPLS, Haynes Investments, as well as their executives, officers, directors, and agents." *Id.* at 43. Plaintiffs never settle on a precise definition of the enterprise, leave out all detail as to how that enterprise actually functioned, and fail to otherwise set forth the elements necessary to show that an enterprise even existed.

Perhaps recognizing that they cannot appropriately define a specific enterprise in which these Defendants participated, Plaintiffs instead attempt to save their Motion by falling back on what they see as the expansive definition of enterprise set forth *Boyle v. United States*, 556 U.S. 938 (2009). Mot. at 42-43. But *Boyle* does not excuse Plaintiffs from setting forth specifics showing the extent of the specific enterprise. To the contrary, while the Supreme Court in *Boyle* noted the breadth of the statute's language with respect to association-in-fact enterprises, that breadth was not unlimited. "Even after *Boyle*, courts still require *some* indication that a RICO enterprise exists separate and apart from the bare pattern of activity in which it engages." *Oriska Ins. Co. v. Avalon Gardens Rehab. & Health Care Ctr., LLC*, No. 6:18-CV-1030, 2019 WL 4195267, at *11 (N.D.N.Y. Sept. 4, 2019) (emphasis in original) (dismissing RICO claims for failure to allege an enterprise because even assuming the defendants "worked together in some respects to steal plaintiff's funds," there was no plausible allegation defendants "did so to advance the agenda of their purported enterprise or for any shared purpose").

Even the Supreme Court's decision in *Boyle* recognized that the enterprise must be "a group with a common purpose and course of conduct," which is a separate element from "the actual commission of a pattern of predicate offenses." *Boyle*, 556 U.S. at 950. Moreover, the *Boyle* Court recognized that the enterprise must still have "some sort of framework, formal or informal, for carrying out its objectives and that the various members and associated of the association functioned as a continuing unit to achieve a common purpose." *Id.* at 951 (alterations and quotation marks omitted). And while evidence necessary to support a showing that a defendant engaged in unlawful predicate acts "may in particular cases coalesce" with the evidence necessary to show the existence of an enterprise, "proof of one does not necessarily establish the other." *United States v. Turkette*, 452 U.S. 576, 583 (1981). To this end, a RICO enterprise "is an entity separate and apart from the pattern of activity in which it engages," and must always remain so. *Id.*[12] An enterprise must therefore be precisely defined since a defendant can only be liable if he or

[12] As the Eighth Circuit long ago recognized, there can be no legitimate allegation that "simple criminal conspiracy to commit the predicate crimes," functions to satisfy the enterprise element because if accepted, "then a conspiracy to commit a 1962(c) violation would be defined as when a

she "conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (emphasis in original); *United Food & Comm. Workers Unions & Emp'rs Midwest Health Benefits Fund v. Walgreen Co.*, 719 F.3d 849, 854 (7th Cir. 2013) (holding that plaintiff failed to satisfy the RICO enterprise element because there were no allegations that the defendants acted "on behalf of the *enterprise* as opposed to on behalf of [themselves] in their individual capacities, to advance their individual self-interests." (emphasis in original)).

Despite this clear case law (some of which is even found in the Motion) Plaintiffs offer no evidence that Defendants, or indeed any of the proposed members of the enterprise—Plain Green, Great Plains, Think Finance, Victory Park, or anyone else—functioned as a continuing unit, rather than exclusively in their respective self-interests. In fact, even the Motion confirms that the relationships supposedly defining and supporting a finding of an enterprise are nothing more than the typical commercial relationships between a lender and a servicer. Mot. at 43 (arguing that the enterprise is established by reference to "the series of written agreements tying the parties to each other through contractual and financial obligations," including various contracts such as "the Participation Agreement, Administrative Agency Agreement, License and Support Agreement, Servicing Agreement, and Marketing Agreement.").[13] But run of the mill commercial agreements

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person, associated with a conspiracy to commit criminal acts, conspires to conduct those criminal acts," which is a nonsensical interpretation of the RICO statute that cannot be accepted. *United States v. Anderson*, 626 F.2d 1358, 1369 (8th Cir. 1980).

[13] The Motion also asserts that certain presentations establish the "common purpose of the enterprise." Mot. at 42. But those presentations set forth nothing more or different than what is present in the commercial agreements that make clear the lender/servicer relationship between the parties. Take, for example, the presentation Plaintiffs' allege was used as part of the initial outreach to the various tribes. Mot. at 42, Ex. 7. That presentation makes abundantly clear that Think Finance would only provide certain contracted-for services, while the Tribes are responsible for actual operations of the business. Mot. Ex. 7 at TF-VA0290556 (describing "who does what"), at TF-VA0290561 (diagram showing Think Finance merely "sells leads & licenses brand" and "licenses IT & risk mgmt. [sic] services"). Similarly, another presentation given to the Otoe-Missouria Tribe in January 2011 makes clear that the Tribe would be responsible for all underwriting criteria, changes, and approval of marketing materials and campaigns. Mot. Ex. 8 at TF-VA000921-TF-VA000926.

do nothing to establish the presence of a RICO enterprise—even an association-in-fact one.

Courts considering an enterprise based upon commercial agreement have almost uniformly reached the same conclusion: "RICO liability must be predicated on a relationship more substantial than a routine contract between a service provider and its client." *Gomez v. Guthy-Renker, LLC*, No. EDCV1401425JGBKKX, 2015 WL 4270042, at *11 (C.D. Cal. July 13, 2015); *see also Jubelirer v. MasterCard Int'l, Inc.*, 68 F. Supp. 2d 1049, 1053 (W.D. Wis. 1999) (holding "an enterprise must be more than a routine contractual combination for the provision of financial services," because in such circumstances, "each party conducts its own affairs which include certain contracts for services with others"); *Taylor v. Ocwen Loan Servicing, LLC*, No. 416CV04167SLDJEH, 2017 WL 3443209, at *4 (C.D. Ill. Aug. 10, 2017) (holding "[n]ot every case of alleged fraud on the part of a debt servicer is a RICO enterprise by simple virtue of aligned incentives"); *Flagg v. First Premier Bank*, 257 F. Supp. 3d 1351, 1362-63 (E.D.N.Y. 2017) (rejecting arguments from counsel at Tycko & Zavareei alleging payday lender and ACH provider formed association-in-fact enterprise based upon allegations that the businesses associated together through the ACH Network for the purpose of obtaining profits through the collection of unlawful debts; such allegations were nothing more than typical contractual relationships that could not support a finding that a RICO enterprise existed, even where the products or services provided by the ACH provider were known to be fraudulent or illegal).

Rather, the only cases in which courts have found such typical commercial relationships to serve as the basis of a RICO enterprise turn on a finding that the companies had "involvement…in each other's' affairs," rather than just the provision of services to each other. *Ocwen Loan Servicing*, 2017 WL 3443209, at *5 (collecting cases); *Gomez*, 2015 WL 4270042, at *6 (noting the improper strategy of "construct[ing] a novel 'enterprise' out of nothing more than the allegation that Provider provides services to Business"). No such facts exist here.

When separated from the conclusory statements of counsel, the factual record indisputably shows that Think Finance was nothing more than a service provider to Plain Green and Great Plains—not part of an association-in-fact enterprise with those companies (and others). For

example, the evidence shows:

- Both of the tribes behind Plain Green and Great Plains were lending online prior to entering into a commercial relationship with any member of the purported enterprise. Ex. 22, Nguyen Dep. 252:12–19 ("[B]oth the Otoe and the Chippewa Cree tribe already had lending products. They were online."); Ex. 3, Ja. Harvison Dep. 57:21–58:4, 58:5–59:1, 59:2–8.

- Both of the tribes behind Plain Green and Great Plain continue to operate through to the present, independent of the services offered by Think Finance. Ex. 6, Jo. Harvison Dep. 232:15–233:07 ("Plain Green left and started doing their own thing. They hired some of our employees. And so they – so they were off – they started their own lending – they bought the software and went in their own direction."); Ex. 23, J. Dean Dep. 115:18–116:8 ("Great Plains did leave the relationship, in terms of they went off on their own, which is fine, and have continued to provide this lending service and employ on or near the reservation – I don't know whether it's 50 or 100 people.").

- Both Plain Green and Great Plains had complete control over all aspects of their products and loans. Indeed, the record is complete with hundreds of "change control" documents and supporting communications showing that Plain Green and Great Plains officials selected and approved (or not) all aspects of marketing, underwriting, collections, communications, and loan terms associated with their product. Ex. 22, Nguyen Dep. 102:25–103:17, 108:9-109-8, 169:13-22, 283:11-285:21; Ex. 3, Ja. Harvison Dep. 56:4-18; Ex. 24, Raining Bird Dep. 66:23-71:23 (former CEO of Plain Green reviewing contemporaneous examples of active control over all aspects of the Plain Green product and rejecting suggestions from Think Finance); Ex. 25, Decl. of S. Smith, *In re Think Finance*, No. 17-33964, ECF No. 714-2 at ¶ 23 (N.D. Tex. Bankr. July 27, 2018) (noting almost 500 non-underwriting change controls executed by Great Plains Lending and Plain Green in 2015 through 2017); Ex. 21, Report of E. Henson, at ¶¶ 11-21.

- Both Plain Green and Great Plains employed scores of employees on their respective reservations, creating significant jobs and economic opportunities for their members. Ex. 22, M. Nguyen Dep. 89:7-18; Ex. 23, J. Dean Dep. 115:18–116:8; *see also* Ex. 26, Lungren, Sam, ROCKY BOY'S—PAID ON THE PLAINS, University of Montana School of Journalism (2012) (available at https://perma.cc/V4ND-WXK2) (2012 news article and video journalism showing Plain Green offices, employees, and operations on the Chippewa Cree Reservation); Ex. 21, Report of E. Henson, at ¶¶ 11-21.

- Both Plain Green and Great Plains had the final decision to originate (or not) each loan made to a consumer. Ex. 4, Lutes Dep. 107:25–108:24 (explaining that Think Finance "licensed [its] loan technology platform and underwriting scores that were subject to [the tribes'] ultimate approval" which they could use "to help determine whether or not they wanted to make

a loan to the customer.").

- Victory Park Capital had the right, but not the obligation, to purchase participation interest in loans (entitling it to a share of the profits or loss from each loan). Ex. 2, Rees Dep. 108:12–15 ("Victory Park Capital, as the purchaser of loans coming out of these lenders, was trying to decide if – if they wanted to continue purchasing. And as you know, they have a right to purchase from those three lenders, but didn't have a requirement to."); Ex. 4, Lutes Dep. 22:7–24:3 (explaining that the tribes would sell loan participations to special purpose vehicles in order to ease capital constraints, and that one such vehicle was set up, owned, and run by Victory Park, which, if it chose to purchase a loan participation, would be entitled to a share of the profits or losses from each loan).

- When Victory Park ceased purchasing participations in certain loans, the lenders would find buyers other than Victory Park or maintain full ownership of all participation interests. Ex. 27, TF-PA-393463; Ex. 28, TF-PA-387207.

- There is absolutely no evidence that Think Finance made decisions for Plain Green or Great Plains, or that Think Finance was otherwise involved in the affairs of Plain Green or Great Plains beyond those services for which it was contracted. Ex. 4, Lutes Dep. 68:19–25 ("I don't recall any day-to-day activity involvement in – in the tribal operations of the company."); Ex. 22, Nguyen Dep. 283:11–285:21 (explaining the process of "change control" documents to reflect updates to the platform after tribe approval, and that "nothing will be implemented until [the tribes are] approving it because it's – it's their offering.").

- Think Finance merely provided specific outsourced services to the lenders. Ex. 29, L. Rogenski Dep. 22:21-24:10.

In the face of all this evidence showing that these businesses were truly run separately as loan originator and servicer, the Motion offers only conjecture, characterizations by counsel, and the commercial agreements as evidence that an enterprise existed. But, as set forth above, those contracts (particularly given the above facts showing that the companies acted in their own interests, rather than as a continuing unit) cannot establish the existence of an enterprise. Summary judgment, therefore, is inappropriate.

2. *Summary Judgment cannot be granted on the issue of whether the loans constituted unlawful debts.*

Plaintiffs next ask the Court for summary judgment on the issue of whether the loans constitute unlawful debts under RICO. But, as they have done throughout their Motion, Plaintiffs

merely assume that the facts necessary to reach their conclusions have been established. That is simply improper at summary judgment, where this Court can no longer simply accept Plaintiffs' representations as to the facts (and the law) to be true. Where, as here, there are significant factual disputes about the elements needed to establish whether the class members' debts are unlawful, summary judgment is inappropriate.

As the Ninth Circuit recognized in *Sundance*, there are four separate elements needed to establish whether a particular debt can even be considered unlawful under 18 U.S.C. § 1961(6): "[1] the debt was unenforceable in whole or in part because of state or federal laws relating to usury, [2] the debt was incurred in connection with the business of lending money ... at a [usurious] rate, ... [3] the usurious rate was at least twice the enforceable rate ... [4] as a result of the above confluence of factors, it was injured in its business or property." *Sundance*, 840 F.2d at 666.

For one, the Court may not simply assume (as the Motion does) that California law, and a 10% usury rate, applies to these loans. Mot. at 44 (citing the 10% interest rate set by Cal. Civ. Code § 1916-2, and arguing that under the definition set by 18 U.S.C. § 1961(6), "a loan to a California consumer constitutes 'unlawful debt' under RICO if the interest rate exceeds 20%"). This is wrong for several reasons. *First*, as explained above, there is no basis for the Court to enter judgment on the issue that California's usury laws apply to these loans. There are significant factual disputes underpinning any analysis of the choice-of-law issues, none of which are amenable to resolution on summary judgment (as other courts have held). *Second*, even to the extent the contractual choice of law provision fails (and it should not under any rational reading of the choice of law principles applicable here), California law would still enforce the usury rate as set by the tribe. *Nedlloyd Lines B.V. v. Super. Ct.*, 3 Cal.4th 459, 467 (1992); *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1210 (9th Cir. 2001). *Third*, the 10% rate set by Cal. Civ. Code § 1916-2 applies only to certain loans made under California law, and there are numerous exceptions to the 10% rate cap. *E.g.*, Cal. Fin. Code § 22303 (2019) (prior version of California's financial code stating that maximum rates of interest that can be charged by lenders "does not apply to any loan of a bona fide principal amount of two thousand five hundred dollars ($2,500) or more…"). As such,

Plaintiffs fail to establish that the debts were "unenforceable, in whole or in part because of state or federal laws relating to usury." 18 U.S.C. § 1961(6).

There is also no evidence as to the actual rates tens of thousands of consumers paid on their loans. While Plaintiffs summarily assert that there is "ample, indisputable evidence that all loans to Class Members exceeded 20%," their support for that statement is ultimately two inadmissible statements of hearsay[14] contained in interrogatory responses from an absent party, Think Finance, and the inadmissible statements of counsel in the Haac Declaration.[15] Yet even the Haac declaration fails to show what 'actual' interest rate a consumer paid in relation to their loan. Rather, Ms. Haac points only to the "interest rate" column in the RSM data and asserts (without evidence) that all consumers paid an interest rate equal to the number in the column. Haac Decl. ¶¶ 5-6. The RSM deposition, however, confirmed that the interest rate column in the data did not correlate to the actual interest rate a consumer was charged—a complex calculation (which RSM did not even perform) was needed. Ex. 30, RSM Dep. at 48:24-52:4, 57:16-59:23. RSM also confirmed that the interest rate column Ms. Haac refers to in her declaration was not something RSM "used in [their] calculation." *Id.* at 70:17-71:4. Moreover, RSM freely admitted its data lacked the specific payment data (including dates of payments) needed to **accurately** calculate the rate of interest paid. *Id.* at 117:12-124:1.

Finally, Ms. Haac's declaration is also inappropriate and must be discounted because it

[14] Statements made by Think Finance, an absent third-party who cannot be compelled to testify at trial, are inadmissible hearsay, even if made as part of discovery responses in other cases. Fed. R. Evid. 801(c). The Court should not consider such statements in support of Summary Judgment. Fed. R. Civ. P. 56(c).

[15] Ms. Haac, an attorney with no firsthand knowledge as to the RSM data, is unqualified to testify as to the meaning of that data. She admits that the sole basis for her knowledge of these facts is her "review of the records of my law firm." Haac Decl. ¶ 3. But Ms. Haac's review of her law firm's records does not qualify her to testify as to the meaning of certain data fields in the RSM data. The Court cannot consider Ms. Haac's attempt to testify on matters to which she lacks firsthand knowledge. Fed. R. Civ. P. 56(c)(2); 56(c)(4). Alternatively, should the Court refuse to strike the inadmissible portions of the Haac Declaration, the Court must permit Ms. Haac to be deposed, immediately, pursuant to Fed. R. Civ. P. 56(d)(2), to learn the source of Ms. Haac's personal knowledge of the facts to which she is testifying.

presents a misleading and incorrect picture of California law. Ms. Haac's conclusion that a single field (the interest rate) in the RSM data correlates to the rate of interest paid by a deviates from the principle of California law that "payments on a usurious note are deemed to apply first to principal…." *Hardwick v. Wilcox*, 11 Cal. App. 5th 975, 991 (2017). To this end, and contrary to Ms. Haac's declaration, a consumer cannot be said to have paid usurious interest (regardless of the rate set forth in the contract) if he or she has failed to at least pay back their principal. Given all this, summary judgment on this issue is inappropriate.

3. *The motion fails to establish a person collected unlawful debts.*

On similarly shaky footing is Plaintiffs' request for summary judgment on the issue of whether "persons associated with the enterprise engaged in the unlawful collection of debt," from the class. Mot. at 44-45. Just as with many of the other essential elements of their claims, Plaintiffs' analysis of this issue is superficial and conclusory, at best. Yet the evidence the Motion points to in support of this proposition fails to establish the statutory requirements to show that anyone collected unlawful debts. As discussed at length above, the Motion fails to properly establish that the debts are unlawful. This, alone, requires denial of summary judgment on this point. But even if the Court were to look past this fatal flaw, there is no evidence to support the idea that anyone "collected" such unlawful debts such as that phrase is understood by RICO. Instead, the Motion points to evidence that repayments were made, and then concludes (without further evidence) that some unnamed person or entity associated with an ill-defined, amorphous enterprise, must be said to have engaged in the collection of unlawful debts in violation of RICO. But there is no basis upon which to make that logical leap.

As the few courts to have considered this issue have concluded, collection of an unlawful debt under RICO requires a defendant take some action to induce repayment on a loan—mere repayment is not enough. For example, in *United States v. Pepe*, the court noted that the "proper definition of the term 'collection' in RICO," was "inducing in any way any person to make repayment." 747 F.2d 632, 674 (11th Cir. 1984) (alterations in original omitted). In that case, the defendant Albert Facchiano was found to have collected an unlawful debt based upon evidence that

he personally traveled to New York City for a meeting in which he and another defendant worked in tandem to use violence to induce repayment of a debt from an individual. *Id.* at 660. Similarly, in *United States v. Eufrasio*, the Third Circuit defined the predicate act as the taking of "a single act which would tend to induce another to repay…." 935 F.2d 553, 576 (3d Cir. 1991).

But Plaintiffs offer nothing in the way of evidence (instead supplying only conjecture) to show that any person induced a Plaintiff or any other class member to repay their loan. The Motion fails to identify any individuals who took an action to induce repayment of the underlying debts, whether those individuals were associated with the alleged enterprise, or any of the other required evidence that would be needed for this Court to enter summary judgment on this issue. Instead, the Motion sets forth only that Plaintiffs repaid their loans, and therefore "the actual collection of unlawful debt occurred." Mot. at 45. Such clear fallacious reasoning cannot serve as the basis for summary judgment on this issue.[16]

4. *Plaintiffs fail to support their request for summary judgment to establish a Section 1962(c) violation.*

Plaintiffs conclude the Motion by asking the Court to grant summary judgment for the purpose of establishing "that substantive violations of Section 1962(c) occurred," because there is evidence that an enterprise existed "whose sole purpose was to collect illegal debts." Mot. at 45; *see also id.* at 36 n. 14 (arguing that Plaintiffs can prove a violation of Section 1962(c) through evidence showing that "some members of the conspiracy…conducted the affairs of an enterprise engaged in the collection of unlawful debts"). Plaintiffs' misapprehension of RICO is nowhere more apparent than in these few sentences.

Time and again, courts have confirmed that Section 1962(c) requires more than the mere presence of an enterprise and the commission of predicate acts. *Sedima*, 473 U.S. at 496 (noting

[16] It is similarly inappropriate reasoning for Plaintiffs to assert that because Plaintiffs repaid their debts, "the trial should … focus on the amount to be awarded to Class Members, not whether the loans constituted 'unlawful debt' in the first place." Mot. at 45. Plaintiffs, again, fail to grapple with the significant issues and statutory elements at issue in their claims. They cannot merely ignore these essential elements, and ask the Court to focus exclusively on damages.

that a plaintiff must demonstrate that a defendant violated all elements of Section 1962(c) to face liability because "[c]onducting an enterprise that affects interstate commerce is obviously not, in itself, a violation of § 1962, nor is mere commission of the predicate offenses"); *United States v. Pepe*, 747 F.2d 632, 661 n.48 (11th Cir. 1984) (holding that "RICO does not criminalize […] collecting unlawful debt, but rather criminalizes participation in the affairs of an enterprise through those means."). This is particularly true where the underlying predicate act is the collection of unlawful debts because, as the Ninth Circuit recognized, "the civil RICO action is not simply an action to recover excessive interest or to enforce a penalty for the overcharge" because "RICO is concerned with evils far more significant than the simple practice of usury." *Sundance*, 840 F.2d at 666.

Rather, Section 1962(c) prohibits individual persons—the RICO defendant(s)—from operating or managing an enterprise through the collection of unlawful debts. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 371 (3d Cir. 2010) (proof that "a defendant 'participated in the operation or management' of an enterprise,' … is not enough to make out a violation," of the statute because "the defendant must have done so through a pattern of racketeering activity.'"); *accord Walter v. Drayson*, 538 F.3d 1244, 1248 (9th Cir. 2008) (holding that a RICO defendant was not liable under Section 1962(c) because, among other deficiencies, "the factual allegations raise no inference that [defendant] tried to control the enterprise by anything akin, for example, to bribery"). Section 1962(c) is not violated every time an enterprise exists, and persons associated with that enterprise commit the prohibited predicate acts. *Id.* Similarly, "RICO is not violated every time two or more individuals commit one of the predicate crimes listed in the statute." *United Food & Com. Workers Unions & Emps. Midwest Health Benefits Fund v. Walgreen Co.*, 719 F.3d 849, 851 (7th Cir. 2013). To do so would be to ignore the portion of the statutory text which requires a defendant's participation in the operation or management of the enterprise to be "through" the collection of unlawful debts. This element, of course, must also be read in conjunction with the Supreme Court's mandate that a violation of Section 1962(c) be based upon a defendant's operation or management "of the '*enterprise's* affairs,' not just their *own* affairs."

Reves, 507 U.S. at 185 (emphasis in original).

Here, however, the Motion entirely skips over these important statutory elements. It makes no attempt to hide this fact either. Instead, Plaintiffs admit they are seeking summary judgment based on no more than allegations that an enterprise existed, and unlawful debts were collected by some unnamed participant in the purported enterprise. Mot. at 41-45. But the Motion says no more than that Section 1962(c) is violated because the purpose of the purported enterprise collected unlawful debts. *Id.* That is clearly not enough to show that some individual operated or managed the enterprise through such acts. As such, the Motion fails to establish an actionable violation of Section 1962(c).

B. Plaintiffs fail to prove each defendant violated Section 1962(d) through a conspiracy to violate Section 1962(c).

As is abundantly clear from the previous section, Plaintiffs have failed to provide undisputed material evidence to support, much less establish, all requisite elements of a violation of Section 1962(c). Without a violation of Section 1962(c), summary judgment is inappropriate on Plaintiffs' Section 1962(d) claim. *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) ("Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not adequately plead a substantive violation of RICO"). Yet even if this were not the case, Plaintiffs still fail to demonstrate that each of the Defendants, individually, violated Section 1962(d) and that their harm (and that of the class) was proximately caused by each defendant's violation of Section 1962(d) rather than simply through the payment of usurious interest.

1. *The Motion fails to show each of the Defendants conspired to operate or manage an enterprise through the collection of unlawful debts.*

As courts have recognized for decades, "the agreement proscribed by section 1962(d) is conspiracy to participate in a charged enterprise's affairs, not conspiracy to commit predicate acts." *United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987); *accord Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 539 (3d Cir. 2012) (holding that a "RICO conspiracy is not a mere conspiracy to commit the underlying predicate acts. It is a conspiracy to violate RICO—that is, to conduct or participate in the activities of a corrupt enterprise."); *Negrete v. Allianz Life Ins. Co. of N. Am.*,

287 F.R.D. 590, 605 (C.D. Cal. 2012) ("The essential element of a § 1962(d) claim is a conspiracy to violate other sections of the RICO statutes"). To this end, in order to establish a violation of Section 1962(d), Plaintiffs must allege either (1) "an agreement that is a substantive violation of RICO," or (2) "that the defendants agreed to commit, or participated in, a violation of two predicate offenses." *Howard*, 208 F.3d at 751 (9th Cir. 2000); *see also United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004) (holding that a defendant can be liable under Section 1962(d) where "the evidence show[s] that she 'knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise.'").

The Motion does neither. Instead, the Motion openly admits that it seeks summary judgment based upon the Defendants' purported involvement with *Think Finance*—not the enterprise. *E.g.*, Mot. at 38 (asserting that summary judgment on Plaintiffs' Section 1962(d) claims is appropriate because "no reasonable jury could find that Defendants did not agree to facilitate *Think Finance* in its tribal lending endeavor." (emphasis added)). But a defendant's agreement to facilitate something other than the enterprise cannot demonstrate a violation of Section 1962(d). Indeed, allegations that Defendants intended to facilitate *Think Finance* (rather than the association-in-fact Tribal Lending Enterprise) is particularly inappropriate given that black letter case law confirms that Think Finance cannot conspire with its agents and employees to violate Section1962(d). *E.g., Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir.1994) (noting that courts have consistently rejected the idea that a RICO enterprise may consist "merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant").

Even if this were not the case, the Motion fails to set forth evidence showing that these defendants actually agreed to operate or manage an enterprise through predicate acts or that they agreed to commit, or participated in, the actual collection of unlawful debts. Merely having knowledge of facts showing that others were engaging in a violation of RICO does not suffice to support liability under Section 1962(d). In this respect, the facts in *Fernandez* are significant and should inform the Court's analysis of these issues. Specifically, in *Fernandez*, the Ninth Circuit

upheld the conviction of the wife of a gang member under Section 1962(d). 388 F.3d at 1228-30. But the defendant/wife was not convicted of under Section 1962(d) merely because she was associated with her husband/gang member, but rather for her individual acts that furthered the gang's actions. *Id.* at 1230. Specifically, the Ninth Circuit found probative evidence showing the defendant personally "collected protection money for the [gang] on behalf of her husband, an [gang] member; passed messages to her husband and other [gang] members in order to facilitate communication between murder conspirators; smuggled drugs into prison; and accepted payment for drugs sold on the street." *Id.* There, unlike here, the defendant's liability under Section 1962(d) was premised upon her direct involvement in the actions of the purported RICO enterprise (the gang) and her facilitation and commission of predicate acts of racketeering. *Id.* While the defendant/wife could not be said to have operated or managed the enterprise through predicate acts of racketeering so as to support a conviction under Section 1962(c), her actions in directly supporting the predicate acts committed by others rendered her liable under Section 1962(d).

Here, unlike in *Fernandez*, the Motion provides no evidentiary basis to show that any of the Defendants violated Section 1962(d). Indeed, tucked into their conclusion section concerning the purported Section 1962(d) violations, Plaintiffs finally, but likely unwittingly, admit their RICO conspiracy claims are without merit. In describing the sum total of their evidence that each of these Defendants violated Section 1962(d) Plaintiffs come out and admit that their claim is based upon evidence showing nothing more than "each Defendant took numerous steps to **further the success and affairs of Think Finance**…." Mot. at 40 (emphasis added). Similarly, the Motion spends pages discussing what knowledge the Defendants had concerning the actions of Think Finance. *Id.* at 36-38. They go on to admit that the evidence they have uncovered shows only that "Defendants Michael Stinson, Linda Stinson, and 7HBF were involved in the creation and strategic decision of the company [Think Finance], including appointment of the individuals carrying out its day-to-day activities," while Shaper is alleged to have been "crucial in recruiting Think Finance's tribal partners and invested in GPLS." *Id.*

Conspicuously missing from these allegations is evidence that any of these Defendants had

any involvement or interactions with some larger association-in-fact enterprise, let alone an agreement to operate or manage that larger enterprise. To the contrary, Plaintiffs repeatedly admit throughout the Motion that their claims are based upon facts showing defendants had "knowledge and furtherance **of the conspiracy to collect usurious loans**," not a conspiracy to operate or manage a RICO enterprise. Mot. at 11 (as to the Stinsons), at 19 (as to 7HBF), at 27 (as to SCV) (emphasis added). This frank admission is fatal to Plaintiffs' **RICO** conspiracy claims. *Persico*, 832 F.2d at 713. For the avoidance of doubt, however, the acts of each Defendant are discussed below—none of which establish an actionable violation of Section 1962(d) by the Defendants.

Linda Stinson: The Motion asserts that summary judgment should be granted as to Ms. Stinson, and that she be held liable under Section 1962(d) by reference to three main facts: (1) Ms. Stinson started Think Finance with her husband in 2001(ten years before any purported enterprise existed) (*see* Mot. at 37); (2) Ms. Stinson was a "key holder" of Think Finance's stock and had the ability to unilaterally appoint a member to Think Finance's board of directors, "one of the very people tasked with running the company [Think Finance]," (Mot. at 37, 38), and (3) Ms. Stinson received certain dividends as a result of her ownership interests in Think Finance (Mot. ¶¶ 105-106, 115).[17]

None of these allegations, however, establish that Ms. Stinson conspired with anyone to operate or manage some association-in-fact enterprise—they merely establish what is uncontested (and which cannot lead to liability): that Ms. Stinson held shares in *Think Finance*. But Plaintiffs do not even point to facts that could establish Ms. Stinson's knowledge as to the operations of *Think Finance*, let alone some larger association-in-fact enterprise. For good reason, the record evidence uniformly shows that Ms. Stinson had no knowledge about the operations of Think Finance during the relevant period, had no interactions with Think Finance's executives, and had

[17] The Motion also seeks to hold Ms. Stinson liable for the actions of her husband. As discussed herein, the actions of Michael Stinson similarly do not permit a finding of liability under Section 1962(d) as to him. But, as the court in *Fernandez* made clear, merely being married to a member of an enterprise does not suffice for purposes of liability under Section 1962(d)—only a defendant's actions will subject them to conspiracy liability.

no input on the company's direction (including the payment of dividends). Ex. 3, Ja. Harvison Depo. 40:22-41:03; *see also* Ex. 2, K. Rees Depo. 77:4-10 (same); Ex. 4, C. Lutes Depo. 165:12-15; Ex. 31, K. Keenum Depo. 37:22-38:5, 42:6-22, 44:17-45:4; Ex. 32, T. Head Depo 18:15-21:3, 46:3-48:18, 111:12-112:10, 150:3-10; Ex. 5, L. Stinson Depo at 120:11-25. And there is absolutely no evidence that Ms. Stinson had any involvement with any of the Native American tribes or the other individuals and entities involved in the purported enterprise (nor does the Motion point to any such evidence). *E.g.*, Ex. 32, T Head Depo. 153:12-15 (Discussing Ms. Stinson's lack of involvement with Native American tribes).

And, as a matter of black-letter corporate law, Ms. Stinson's ability to appoint a director to the Think Finance board does nothing to show that she can be said to have operated or managed *Think Finance*, let alone a larger association-in-fact enterprise. *Hollinger Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 387 (Del. Ch. 2004) (noting even "a controlling stockholder must live with the informed (i.e., sufficiently careful) and good faith (i.e., loyal) business decisions of the directors"); *accord In re Orchard Enterprises, Inc. Stockholder Litig.*, 88 A.3d 1, 36 (Del. Ch. 2014) ("[D]irector primacy remains the centerpiece of Delaware law, even when a controlling stockholder is present."). Thus, "[t]he only power which stockholders normally have to control the corporate machinery is exhausted when they elect corporate directors." *Sec. & Exch. Comm'n v. Transamerica Corp.*, 67 F. Supp. 326, 330 (D. Del. 1946), *modified*, 163 F.2d 511 (3d Cir. 1947). Instead, no matter who elects or appoints a director to the board, that director always owes his or her duties to the company (not the shareholder) and the actions of that director cannot—as a matter of law—be imputed to the shareholder.

In short, then, the Motion fails to demonstrate that Ms. Stinson conspired to do anything connected to a RICO enterprise, let alone acts that could suffice to prove a violation of Section 1962(d). Rather, the Motion focuses on acts showing only that Ms. Stinson held shares in, and elected a single director of, Think Finance. Such allegations are insufficient to impose liability under Section 1962(d) against Ms. Stinson.

7HBF: Like Ms. Stinson, the allegations against 7HBF revolve around the company's

involvement with Think Finance, rather than some larger RICO enterprise. Plaintiffs point to the following facts in support of liability: (1) that 7HBF (like Ms. Stinson) could appoint a director to Think Finance's board, "one of the very people tasked with running the company [Think Finance]," and that 7HBF appointed Jason Harvison[18] to serve on the board; (2) an individual associated with 7HBF, John Harvison, was an invited board observer at Think Finance's board meetings, and received privileged information from Think Finance given his invitation to Think Finance's board meetings; (3) John Harvison shared his opinions with Think Finance's executives regarding the operation of Think Finance; (4) John Harvison was kept informed of certain litigation and matters involving Think Finance; and (5) 7HBF received certain dividends. Mot. at 38, 39.

Just as with Ms. Stinson, however, noticeably absent are allegations showing 7HBF's involvement in, or assistance to, any larger association-in-fact enterprise. Instead, Plaintiffs trot out the same, incorrect, arguments trying to impose liability on a shareholder based upon the actions of a director the shareholder elects. That is wrong, as explained above. Identically deficient are their allegations that 7HBF conspired in a larger association-in-fact enterprise based upon the company's receipt of dividends *from Think Finance*.

Moreover, Plaintiffs attempt to ascribe the actions of an individual (John Harvison) to the defendant (7HBF), without any evidence that John Harvison was acting on, or on behalf of, 7HBF when acting. It is merely assumed (without evidence) that all actions of John Harvison are those of 7HBF. That, too, is entirely wrong as a matter of corporate law and goes against the very concept of corporate separateness. *Cf. Katzir's Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1149 (9th Cir. 2004). It is also at least contrary to 7HBF's partnership agreement, which vested exclusive power to manage 7HBF in its General Partner, 7HBF Management Co., Ltd. (later changed in 2018 to Associated Properties, L.P.). Ex. 11, 7HBF2_0005104 at 7HBF2_0005114. But Plaintiffs cannot simply say, without evidence, that any and all actions taken by John Harvison are attributable to 7HBF. Even if John Harvison was the 100% owner and manager of 7HBF,

[18] As explained in Defendants' Motion to Dismiss, 7HBF cannot be held vicariously liable for the actions of Jason Harvison or Johnny Harvison for actions undertaken by those individuals for which they have received a full release. ECF 183 at 23-26 of 54.

without evidence that he was acting on behalf of 7HBF (and not himself), there is no basis upon which the Court can simply impute his actions onto the Defendant, 7HBF. That is contrary to clear and well-established law as set forth in Defendants Motion for Summary Judgment (at 23-26). Plaintiffs must show, with evidence and not conjecture, the capacity in which John Harvison was acting—an inference is not enough. Plaintiffs' failure to do so means summary judgment cannot be granted.

Most importantly, none of the actions ascribed to John Harvison (and then imputed to 7HBF) establish a violation of Section 1962(d). Rather, just as with all the other Defendants, John Harvison is alleged to have, at most, provided advice to Think Finance's executives and directors—though there is not one vote or decision of Think Finance that John Harvison made during the relevant period. There is absolutely no evidence in the Motion that John Harvison had any involvement, or provided any support to, some larger RICO enterprise.

Michael Stinson: The Motion continues Plaintiffs' attempts to impose liability upon Michael Stinson by casting him as a RICO boogeyman. But when broken down, none of the allegations against Michael Stinson result in liability under Section 1962(d). Indeed, Plaintiffs' insist that RICO conspiracy liability against Michael Stinson is appropriate because: (1) he started Think Finance with his wife in 2001 (ten years before any purported enterprise existed); (2) he "attended numerous [Think Finance] board of directors meetings as an 'observer,' where operational and regulatory issues related to" Think Finance's servicing business; (3) he was copied on emails from Think Finance executives regarding Think Finance's servicing business; (4) as part of his attendance at Think Finance board meetings, he was provided with privileged information in his capacity as a trusted individual of Think Finance; (5) he provided advice and opinions to Think Finance's executives as to the strategic direction *of Think Finance*; (6) he made a loan to Think Finance unrelated to Think Finance's servicing business; and (7) he used first-person pronouns ('we' and 'our') *when discussing Think Finance*. Mot. at 37-38.

Even if true, these allegations fail to establish that Michael Stinson violated Section 1962(d). Rather, they show only that Michael Stinson simply had a connection to Think Finance—

not that he agreed to facilitate a larger RICO enterprise or otherwise conspired to commit a substantive violation of the RICO statute. Yet the record makes clear that even Plaintiffs' facts are either incomplete, misleading, or wrong.

For example, Plaintiffs' assertion that RICO liability is appropriate, at least in part, because Michael Stinson "provided an $8 million-dollar loan to Think." Mot. at 38; Mot. ¶ 111. But Plaintiffs neglect to inform the Court that the evidence shows that the loan was entirely unrelated to the Native American services Think Finance provided to Plain Green and Great Plains, and was instead used by Think Finance for general operating capital and to support Think Finance's direct lending business. Ex. 4, C. Lutes Dep. at 107:8-18 (CFO of Think Finance testifying that money loaned by Stinson to the company was not used in connection with any of the tribal products); Ex. 13, M. Stinson Dep. at 123:14-125:9. Similarly absurd is Plaintiffs' attempt to use Michael Stinson's use of first-person pronouns when referring to *Think Finance* to support the idea that he conspired to operate or manage some larger RICO enterprise. Mot. at 39, Mot. ¶¶ 97, 109-110, 113-114. Indeed, even Plaintiffs admit that this linguistic trick shows nothing about Stinson's involvement in a larger RICO enterprise, but rather "Stinson's repeated use of possessive pronouns…is indicative of his opinion of **his and Think Finance's** shared objective and mutual benefit." Mot. at 16 n.5 (emphasis added).

And, of course, advice that Michael Stinson provided to Think Finance's executives was just that—advice. There is not one board vote or decision that Stinson made for Think Finance during the relevant period, he did not participate in day-to-day operation of Think Finance, and he lacked authority to do anything on behalf of Think Finance, or any purported RICO enterprise. Ex. 13, M. Stinson Dep. 107:12-108:7, 170:12–171:1; Ex. 31, Keenum Dep. at 64:22–65:7; Ex. 2, K. Rees Dep. 67:15-23; 70:18-76:22; Ex. 3, Ja. Harvison Dep. 37:03-40:20. Indeed, as Michael Stinson himself testified:

> I certainly can't say that the board would give me any information that I wanted or that our family wanted. I observed the board meetings, got the board packet. Beyond that, you know, the company, candidly, to sort of frame this, I've got five grandchildren. And the company is a bit like my five grandchildren. I had something to do with them getting started. I'm rarely asked my opinion about anything having to do with raising those five grandchildren. And even more rarely

> give advice. So that's the nature of the relationship for the last 15 years that I've had with Think.

Ex. 13, M. Stinson Dep., 145:12-145:25.

In sum, these facts fail to establish that RICO liability is appropriate as to Michael Stinson. Mr. Stinson's relationship with Think Finance does nothing to show he violated Section 1962(d) by conspiring with anyone to violate Section 1962(c).

Shaper: Perhaps the most straightforward of these analyses is that relating to Mr. Shaper. Specifically, Plaintiffs support their RICO conspiracy allegations against Shaper based upon his "extensive outreach to Native American tribes, his reinvestment in GPLS, and his mentoring of Ken Rees." Mot. at 39. As described above, Shaper has received a release for all of these actions. The uncontroverted evidence (which Plaintiffs ignore) shows Shaper's mentorship of Rees and his involvement in the operations of Think Finance occurred as a result of his position as a director at Think Finance. Ex. 9, Shaper Dep. at 21:3-22:8 ("All the consulting work I do is a byproduct of my board work…. I'm on boards, and I help those companies. That's the only consulting I do…. I've never been an outside consultant … to anyone in any industry."); *id*. at 114:8-25 (Shaper provided comments on materials provided by CEO Ken Rees in capacity as board member; "[H]e sent it out and said, you know, board members comment on what you think…. I was commenting as a board member"). Shaper has unquestionably been released for all actions taken as a board member.

Similarly, Shaper's investment of funds into Victory Park provides a second basis for a release. Specifically, Section 1.1.145 the Final Order in the Bankruptcy Court (Ex. 10) makes clear that the nationwide class of consumers provided a full and complete release to the GPLS Secured Parties, as well as all Related Non-Debtor Party of the GPLS Secured Parties. Section 1.1.143, in turn, defines, in pertinent part, a "Related Non-Debtor Party" of the GPLS Secured Parties to include all "equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, predecessors, successors, assigns, … partners, limited partners, general partners, principals, members, management companies, investment managers, … and consultants." As the unquestioned evidentiary record makes clear, Shaper's

investment in GPLS made him a shareholder—an equity holder—in GPLS. Ex. 17, SHAPER00963. Shaper has thus received a complete release associated with this investment.

Haynes: Finally, as for Haynes, there is similarly no proof that he conspired to violate Section 1962(d). As outlined in Defendants' Motion for Summary Judgment (at 49-50) there is myriad authority to support the concept that Haynes cannot be liable under RICO for investing in, or lending money to, a RICO enterprise—even where he knows of the underlying illegal activity. Yet lending money to Plain Green (and the receipt of a finder's fee from Think Finance) is the only conduct that the Motion highlights when asking the Court to impose liability under Section 1962(d) against Haynes. Mot. at 40. That is, as a matter of law, insufficient.

2. *Plaintiffs fail to demonstrate (or even mention) that each defendant's participation in a RICO conspiracy was the proximate cause of their harm.*

Finally, Plaintiffs' RICO conspiracy claims are deficient—and summary judgment cannot be entered on this issue—for another reason: Plaintiffs have failed to address, let alone prove, that their harms were caused by reason of the Defendants' participation in the purported RICO conspiracy. As the Supreme Court noted in *Beck v. Prupis*, to possess RICO standing under Section 1964(c), a plaintiff must allege both causation and injury from "an act that is independently wrongful under RICO." 529 U.S. 494, 505-06 (2000). This means the injury must be caused by "the underlying substantive violation [of the RICO statute] the defendant is alleged to have committed." *Id.* at 506. So, for example, "arguably a plaintiff suing for a violation of § 1962(d) based on an agreement to violate § 1962(a) is required to allege injury from the 'use or invest[ment]' of illicit proceeds." *Id.* at 506 n.9 (alterations in original).

Here, the Motion requests summary judgment on Plaintiffs' Section 1962(d) claims based on a violation of Section 1962(c). As set forth above, the violation of Section 1962(d) based on a violation of Section 1962(c) is not satisfied by a conspiracy to collect unlawful debts—it requires something far more serious. Thus, to have standing to pursue their Section 1962(d) claims (and for this Court to enter judgment in their favor on this issue) Plaintiffs are required to show that their injury was proximately caused by the operation or management of an enterprise through the collection of unlawful debts. They have failed to even argue this point in the Motion. For this

reason alone, summary judgment on Plaintiffs' 1962(d) claim is inappropriate.

CONCLUSION

Plaintiffs have failed to demonstrate that the material, undisputed facts of this case require judgment in their favor. Instead, the Motion presents numerous disputed issues as fact, ignores contrary evidence and case law, and includes irrelevant and misleading facts offered to confuse the record. But even if that were not the case, the best response Defendants have to the Motion is, 'to what end?'

Even if Ms. Stinson and 7HBF could appoint a director to Think Finance's board, to what end? Ms. Stinson and 7HBF are not responsible for the actions of that director or the company in which they hold shares.

Even if Shaper interacted with the Native American lenders and made investments into Victory Park Capital, to what end? Shaper has been fully released by the class for those actions because he was not acting "solely" as a shareholder/member of Think Finance.

Even if Michael Stinson provided advice to Think Finance's executives, received privileged information as a trusted individual of that company, and used possessive pronouns when referring to the company, to what end? There are no facts showing Michael Stinson made any decisions on behalf of Think Finance and no evidence that Michael Stinson was involved in the operation of some enterprise's affairs (rather than just his own affairs, or those of Think Finance).

Even if Haynes had a credit agreement that permitted Plain Green to draw on a line of credit, to what end? Haynes's lending of funds to a company alleged to be violating RICO, even where done with knowledge, is insufficient to support liability. And, of course, the money he earned from Think Finance was not part of a loan participation or other interest Haynes held in any loan—and that agreement terminated years prior to this case (and the loans of thousands of class members).

None of the actions these Defendants are alleged to have taken, nor any other fact or argument presented in the Motion, allows the Court to grant the Motion and enter judgment in favor of Plaintiffs. The Motion should therefore be denied.

Respectfully submitted,

Dated: June 2, 2021 By: */s/Richard L. Scheff*

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