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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KIMETRA BRICE, EARL BROWNE, and JILL NOVOROT,

Plaintiffs,

v.

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

Defendants.

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

KIMETRA BRICE, EARL BROWNE, and JILL NOVOROT,

Plaintiffs,

v.

HAYNES INVESTMENTS, LLC, and L. STEPHEN HAYNES,

Defendants

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Defendants' opposition to this motion for summary judgment ignores the facts submitted by Plaintiffs. These facts established that a usurious lending scheme existed, and that Defendants knew about, benefitted from, and facilitated the scheme. Unable to refute these objective facts, Defendants attempt to avoid summary judgment by mischaracterizing the scope of the Think Finance bankruptcy case's release and misrepresenting the governing law regarding RICO liability and the prospective waiver doctrine. In addition, Defendants attempt to create a factual dispute as to the level of involvement of the tribes in the usurious lending scheme, but these facts are immaterial to any issue in this motion. Regardless of whether the tribe had meaningful involvement (which they did not), "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973). No level of involvement "transfigure[s] debts that are otherwise unlawful under RICO into lawful ones." *United States v. Neff*, 787 F. App'x 81, 92 (3d Cir. 2019). Because Defendants knew about and facilitated the usurious lending scheme, summary judgment should be entered against them as to the § 1962(d) claim.

REPLY REGARDING STATEMENT OF FACTS

I. Defendants failed to properly address the Plaintiffs' facts as required by Rule 56.

Rule 56 establishes the "Procedures" for "Supporting Factual Positions" in a motion for summary judgment. *See* FED. R. CIV. P. 56(c)(1). These procedures require that a party asserting a fact "is genuinely disputed must support the assertion by: (A) citing to the *particular parts* of materials in the record, including depositions, documents, electronically stored information. . . ." *Id.* at FED. R. CIV. P. 56(c)(1)(A) (emphasis added). If a party "fails to properly address another party's assertion of fact as required by Rule 56(c)," Rule 56(e) provides a court will several options, including to "consider the facts undisputed for purposes of the motion." FED. R. CIV. P. 56(e)(2).

Plaintiffs' motion contained a 27-page Statement of Facts, each numbered in a separate paragraph to establish a clear record. Dkt. 182 at 3-30. Each fact also cited to particular parts of materials in the record—a total of 123 exhibits—as required by Rule 56(c)(1). FED. R. CIV. P. 56(c)(1). Rather than responding to these facts, Defendants submitted a 2-page narrative entitled "Counter-Statement of Facts,"

which broadly dismisses the Plaintiffs' facts as "pure fiction." Dkt. 197 at 1. This Counter-Statement of Facts does not specifically address the Plaintiffs' "assertion of fact," nor does it cite to any specific materials in the record. *Id.* at 1-2.[1]

Conclusory assertions that Plaintiffs' factual statements are "pure fiction," "false narrative," and "unsupported narrative," will not suffice at this stage. *Palila v. Hawaii Dep't of Land & Nat. Res.*, 639 F.2d 495, 497 (9th Cir. 1981) ("Defendants cannot withstand a motion for summary judgment by simply asserting that the facts are disputed."); *Brit. Airways Bd. v. Boeing Co.*, 585 F.2d 946, 953–54 (9th Cir. 1978) ("We conclude that BOAC has failed to meet its burden under Rule 56(e) to introduce 'specific facts' contradicting Boeing's contention that no genuine issue of material fact exists. After twelve years of investigation and litigation, all BOAC has come up with is supposition, speculation, and conclusory argument of counsel."); *Angel v. Seattle-First Nat. Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) (rejecting assertions "not cited" in "any portion of the record that demonstrates or even implies the validity of its propositions" and explaining that "summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data."). And as a result, Plaintiffs request the Court to deem their Statement of Facts as undisputed for the purpose of this motion.

II. Response to Defendants' Statement of Facts.

Defendants provide this Court with their own "facts," which are largely a summary of the facts submitted in connection with their Motion for Summary Judgment. As detailed in Plaintiffs' Opposition to the Motion for Summary Judgement (Dkt. 202 at 1-12), Defendants' statement of "facts" is replete with false, incomplete, immaterial, and unsupported assertions that do not comply with Rule 56(c)(1). Plaintiffs incorporate their previous response to these facts and note as follows below:

1. Linda Stinson. *Paragraph 1.* This paragraph is almost entirely argument that self-servingly summarizes—without any documentary evidence or support—Defendants' reading of the claims against

[1] As the Court will recall, Defendants deployed the same tactic at class certification. ECF 145 at 3. Rather than responding to the detailed facts in that motion, Defendants summarily brushed them off and claimed that they "will reserve the bulk of their discussion" on this "skewed narrative" for their "forthcoming Motions for Summary Judgment." *Id.* After the motion was granted, Defendants reversed course and complained to the Ninth Circuit that this Court "apparently adopted unsupported (and untrue) statements from Plaintiffs' briefing as part of its decision to make Defendants disprove certain facts and conclusions at the class certification stage." *Brice v. 7HBF No. 2, LTD*, Case No. 21-80047, Dkt. 1 at 3 (9th Cir. 2021).

Ms. Stinson. Because these statements are unsupported argument that do not comply with Rule 56(c)(1)(A), they should not be considered. In addition, this summary does not accurately present Linda Stinson's role in the illegal enterprise, which must be considered in conjunction with Mike Stinson. Although they attempt to portray her as ignorant to all things Think Finance, Mike Stinson's deposition testimony unequivocally establishes that they acted together. *See* Dkt. 202 at 1-4 (detailing the evidence on this point). For example, Mike Stinson further testified that "*our family* is sort of, what you call it, *an overseer*" of Think Finance, and he "felt responsible to do what I could do to look after *our family's* interest in the company. So, *but major decisions we talked about*." Ex. 1, M. Stinson Dep. at 71:11-19 (emphasis added). Because they considered it their "family's interest," and made all "major decisions" together, Mike testimony clearly establishes Linda Stinson's participation in the enterprise.

The only fact cited in the first paragraph asserts that Think Finance's executives answered that Ms. Stinson had no role in the day-to-day operations. Dkt. 197 at 3. But as explained previously, Defendants cite the deposition testimony of Jason Harvison, Kenneth Rees, and Christopher Lutes—all of whom left Think Finance in 2015. Dkt. 202 at 3. Further, none of the Plaintiffs' claims require Ms. Stinson's day-to-day involvement, especially when there is direct evidence that "major shareholders… set the course for the company." Ex. 2 at SCV_026378.

Paragraph 2. Plaintiffs dispute the factual statement that Linda Stinson was "nothing more than a shareholder" as inaccurate and incomplete for the reasons explained above. In addition, discovery shows that she was routinely updated about tribal lending matters[2] and involved in the privileged discussions of the company.

Paragraphs 3 and 4. These paragraphs are largely argument other than the statement that Ken Rees "made the decision to step away from the Think Finance board in 2015." Dkt. 197 at 4. While the timeframe of this is correct, Mr. Rees' departure was a calculated part of the fraudulent spinoff. *See, e.g.*, Dkt. 182 at ¶¶ 101-104.

2. Steve Shaper. Rather than responding to Plaintiffs' fact, Shaper argues that none of them matter because "he has received a release for all actions Plaintiffs have ascribe to him." Dkt. 197 at 5. The

[2] *See, e.g.*, Ex. Nos. 3-6.

Court should not consider this argument for two reasons. First, "[s]ettlement and release is an affirmative defense and is generally waived if not asserted in the answer to a complaint." *In re Cellular 101, Inc.*, 539 F.3d 1150, 1155 (9th Cir. 2008). Shaper has waived this defense because he failed to plead it as an affirmative defense. *See* Shaper's Ans., Dkt. 113 at 32-34. Second, as explained in more detail in Part I of the Argument, Defendants are litigating this issue in the wrong forum because the bankruptcy court retained exclusive jurisdiction over all matters relating to the confirmation plan, including the releases.

Even so, Shaper twists several provisions from the bankruptcy's settlement. Ex. 7, *In Re: Think Finance, LLC*, Case No. 17-33964 (N.D. Tex. Bankr.), Dec. 5, 2019 Final Order ("Final Order"). The Final Order expressly identifies "Non-Released Parties," all of whom were subject to related litigation at the time of the settlement but refused to contribute any amount to the fund. *Id.* at 1.1.113. This definition provides a narrow limitation as to Shaper: "except to the extent released in his capacity as a former director or officer." *Id.* Other than this narrow limitation, the Final Order provides in bold: "**no Non-Released Party shall be a Released Party at any time or for any reason**." *Id.* (emphasis in original). These two sentences should be the beginning and the end of the matter. Shaper only received a release in his capacity as a former director of the company, not as a shareholder, investor, or consultant.

Despite the specific provision related to him,[3] Shaper points to the general provision regarding "Released Debtor Parties" as providing him with a "full and complete release" with "one exception," *i.e.*, in his capacity as a shareholder. This is wrong. The Final Order provides the following definition for Released Debtor Parties:

> "Released Debtor Parties" means, collectively: (a) each Debtor and Debtor-in-Possession; (b) current directors and officers of the Debtors as of or after the Petition Date… (i) *former directors and officers of the Debtors, in their capacities as such*, other than Ken Rees, *provided, however*, that (i) any such former director or officer of the Debtors 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). Attempting to rewrite this section, Shaper omits the phrase "in their capacities as such" from his submission and, instead, isolates the phrase "solely in their capacity as a shareholder/member." Dkt. 197 at 6. According to Shaper, the word "solely" would be "superfluous"

[3] *See, e.g., S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 891 (9th Cir. 2003) ("A standard rule of contract interpretation is that when provisions are inconsistent, specific terms control over general ones.").

unless it is interpreted as providing for a complete release of Shaper other than in his capacity as a shareholder. *Id.* This interpretation not only disregards the express definition as to Shaper, but also the textual limitation "in their capacities as such." *Id.* If a former director or officer was acting in a different capacity, subpart (i) is inapplicable.

In addition, Shaper further claims that he "received a separate and complete release by way of his equity ownership in" GPLS. Dkt. 197 at 6. Here again, Shaper ignores the plain language of the Final Order, which provides:

> 1.1.145. "Released Non-Debtor Parties" means, collectively, and in each case in its capacity as such: (a) *each GPLS Secured Party*; (b) Great Plains Lending, LLC; (c) Plain Green Lending, LLC… and (h) *each Related Non-Debtor Party of each Entity in clauses (a) through (g) of this definition; provided, however, that no specifically identified Non-Released Party shall constitute a Released Non-Debtor Party.*

Ex. 7 at 1.1.144 (emphasis added). Ignoring this provision, Shaper isolates the definition of "Related Non-Debtor Parties," which encompasses "equity holders" of "Released Non-Debtor Parties" such as GPLS. *Id.* at 1.1.143. The problem for Shaper is the definition of "Related Non-Debtor Parties" is contingent and derivative of the definition of "Released Non-Debtor Parties," including its explicit provision that "no specifically identified Non-Released Party shall constitute a Released Non-Debtor Party." *Id.* at 1.1.144. Because Shaper is a "Non-Released Party," he is specifically carved out from any release provided to "each Related Non-Debtor Party," including equity holders of GPLS.

3. 7HBF. 7HBF also largely focuses on the bankruptcy settlement, claiming that "Plaintiffs have released Jason and Johnny Harvison for their actions as directors," and, thus, 7HBF cannot be vicariously liable for them. Dkt. 197 at 7. Like Shaper, 7HBF has waived this argument by failing to plead it as an affirmative defense. *See* 7HBF's Ans., Dkt. 112 at 32-34. Further, this is a misstatement of the law as explained below.

7HBF further argues that there is no evidence that John Harvison acted as 7HBF's representative when attending and participating in the board meetings. But as detailed in Plaintiffs' Statement of Facts, 7HBF has taken the position that "its employees, agents, or advisors," including John Harvison, were the "functional equivalent of a Think Finance employee, officer, or other proper party with whom Think Finance could share privileged documents" to ensure the proper function of the company. Dkt. 182 at ¶

130. Further, Ken Rees confirmed that John Harvison attended these meetings on 7HBF's behalf. Ex. 8, K. Rees Dep. at 136:20-22, 81:18-19 (explaining that John Harvison was the person who "runs 7HBF," and "attended board meetings").[4]

4. Mike Stinson. *Paragraph 1*. In the first paragraph, Mike Stinson claims it is "entirely wrong" to characterize him as a 20% owner of Think Finance. Dkt. 197 at 8. But Mike Stinson himself testified that "our family is sort of, what you call it, an overseer" of Think Finance, and he "felt responsible to do what I could do to look after our family's interest in the company. So, but major decisions we talked about." Ex. 1, M. Stinson Dep. at 71:11-19 (emphasis added). Thus, the undisputed evidence shows that the Stinsons treated it as a family interest in the company—even though Linda Stinson technically held the shares (as accurately stated in Plaintiffs' Statement of Facts) presumably in an attempt to hinder the collection of a judgment against them.

Paragraphs 2, 3, 4. Mike Stinson uses these paragraphs to assert that he merely assisted Think Finance, not Plain Green or Great Plains. But Think Finance was the heart of the tribal lending scheme, including the creation of Plain Green and Great Plains. Facilitating the operations, policies, and directions of Think Finance went hand-and-hand with facilitating the tribal lending scheme. Think Finance's primary purpose prior to the spinoff— and *sole purpose after*—was engaging in the tribal lending scheme. Because Think Finance engaged solely in these illegal activities, all acts taken on its behalf by Defendants were to facilitate the essential plan of collecting usurious loans through the tribal lending model.

5. Haynes. Haynes responds to the Plaintiffs' facts with argument that ignores the law. According to Haynes, he "never earned money from Plain Green" because it was paid by Think Finance. Dkt. 197 at 9. Regardless of who paid it, it is indisputable that Haynes received 1% of the revenue generated on Plain Green's loans for his role in the enterprise. Ex. 9 at Int. No. 7 ("Per the Referral Agreement, Haynes Investments received one percent of Plain Green's collected revenue on a monthly basis."). It is also indisputable that he received this money for funding the loans. Ex. 10, Haynes Dep. at 150:14-17 (testifying "The tribe was borrowing from me an amount to fund two or three days worth of originations, which got returned via the sale of participations in those.").

[4] Citing his age (83), John Harvison has refused to sit for a deposition in this case. Plaintiffs intend to seek leave to take this deposition in light of the statements in Defendants' briefs.

ARGUMENT

I. The release negotiated as part of the bankruptcy settlement only applies in this case to Shaper's conduct in his capacity as a board member.

Defendants start their opposition with a permutation of their affirmative summary judgment argument that they received releases as part of the settlement of the bankruptcy matter. Dkt. 197 at 10-12. Plaintiffs have already responded to the bulk of this argument in their Opposition to Defendants Motion for Summary Judgment (Dkt. 202 at 16-18) and, thus, they will only address the new arguments in this brief.

Before addressing the merits of the release, however, it is important to begin by noting that Defendants never pled release as an affirmative defense (*See* Dkt. Nos. 112-115) as required under Federal Rules of Civil Procedure. FED. R. CIV. P. 8 (establishing that a "party must affirmatively state any avoidance or affirmative defense, including…release"). By failing to plead release as an affirmative defense, Defendants have waived this defense. *In re Cellular 101, Inc.*, 539 F.3d at 1155; *see also Santiago v. Amdocs, Inc.,* 2011 WL 6372348, at *4 (N.D. Cal. Dec. 19, 2011) ("The Court finds that by failing to assert the affirmative defense of release in its answers, defendant has forfeited this defense as to the named plaintiffs."); *Hernandez v. Creative Concepts, Inc.*, 295 F.R.D. 500, 504 (D. Nev. 2013) ("Release is an affirmative defense, and the failure to properly raise an affirmative defense in the defendant's answer waives that defense.").

In addition, Defendants are also litigating this issue in the wrong forum because the bankruptcy court retained exclusive jurisdiction over all matters relating to the confirmation plan, including the releases. In particular, the Final Order provides: "this Court shall retain exclusive jurisdiction over all matters arising out of, or related to, the Chapter 11 Cases and Plan, including, without limitation, the releases set forth in Article IX of the Plan, pursuant to Article XII of the Plan." Dkt. 7 at ¶ 46. Because the bankruptcy court retained exclusive jurisdiction over "all matters" related to the Confirmation Plan, including the "releases" at issue in this Motion, Defendants must place this issue before the bankruptcy court, which will know its intentions behind the release in the Final Order. Despite 18 months to do so, Defendants have failed to raise this issue with the proper court.

Regardless, the release has no impact on the claims against 7HBF as it is one of the express entities identified in the definition of "Non-Released Parties." *Id.* at § 1.1.113. Without any qualification as to 7HBF, the Final Order provides "no Non-Released Party shall be a Released Party at any time or for any reason." *Id.* It further provides that no causes of action "shall be released waived, enjoined, or otherwise adversely impacted by any release, injunction, exculpation, or other provision" of the settlement. *Id.* at § 1.1.114. Ignoring these express terms (which were negotiated while this case was pending), 7HBF argues that it is entitled to summary judgment because "Plaintiffs have released Jason and Johnny Harvison for their actions as directors," and, so the argument goes, "7HBF cannot be vicariously liable for such actions even if done with the scope of any association with either individual." Dkt. 197 at 7 (citing *Women First OB/GYN Assocs., L.L.C. v. Harris*, 161 A.3d 28, 36 (D. Md. 2017)).

7HBF's argument not only ignores the multiple *direct* paths of liability against 7HBF but also relies on Maryland law, which has absolutely no connection to this dispute. Assuming 7HBF provided an accurate statement of Maryland law, it is different from California law. *Mesler v. Bragg Mgmt. Co.*, 39 Cal.3d 290, 303 (1985) ("[T]he liability of a principal for the tortious acts of his agent, even though wholly vicarious, survives the release of the agent."). It is also different from Texas law, which governs the Final Order and Confirmation Plan's interpretation and enforcement. *See, e.g., Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 806 (Tex. 1980) (holding that settlement with and release of alleged agent did not operate to release principal of vicarious liability); *see also* Ex. 7 at 1.4 (establishing Texas law governs the Final Order and Confirmation Plan).

Shaper also argues that Plaintiffs have released all claims against him, including for his misconduct as an investor of GPLS. Dkt. 197 at 10-11. According to Shaper, the release applies to him because it provides "broad and comprehensive releases to equity holders" of GPLS under the definition of "Related Non-Debtor Parties." *Id.* at 11. But as explained above, this argument ignores the one exception to the broad release: "that no specifically identified Non-Released Party shall constitute a Released Non-Debtor Party." Ex. 7 at 1.1.145. Because Shaper is a "Non-Released Party," he is excluded from the releases provided to "Related Non-Debtor Parties." *Id.*

II. The choice-of-law provision is unenforceable under the prospective-waiver doctrine.

In response to Plaintiffs' argument that the choice-of-law provision is unenforceable under the prospective-waiver doctrine, Defendants argue that the "doctrine applies only in circumstances" where there are "*two* choice clauses," *i.e.*, both choice of forum and choice-of-law clauses. Dkt. 197 at 12 (emphasis in original). Against this backdrop, Defendants assert that "there is no forum selection provision that is being enforced here," and, thus, the doctrine "does not apply." *Id.*

This novel theory—that the prospective-waiver doctrine only applies where there are two choice clauses—has never been recognized. True enough, when the doctrine was first articulated, the Supreme Court stated: "We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, n. 19 (1985). But reference to the two clauses in *Mitsubishi* was context specific in that case, not a prerequisite to the doctrine. The heart of the doctrine is the attempted "prospective waiver of a party's right to pursue statutory remedies," not number of clauses by which it is accomplished. *Id.*

And even if the Court agrees with Defendants' interpretation of the doctrine, their bid for dismissal here still fails for an obvious reason: there are "two choice clauses" in this contract. The first is the "agreement to arbitration," which "is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver*, 417 U.S. 506, 519 (1974); *see also Manetti-Farrow, Inc. v. Gucci Am.*, Inc., 858 F.2d 509, 514 (9th Cir. 1988) ("an agreement to arbitrate is actually a specialized forum selection clause."). The second is the choice-of-law clause, as well as the frequent disclaimers of the availability of any other law. Even under Defendants' own artificial two-choice clauses distinction then, the provisions violate the prospective-waiver doctrine and cannot be enforced.

Perhaps recognizing the weakness of this argument, Defendants further argue that there is no prospective waiver under the Ninth Circuit's decision in *Richards v. Lloyd's of London*, 135 F.3d 1289 (1998). In their view, *Richards* stands for the proposition that "a choice-of-law clause that causes the complete loss

of a RICO claim" is "not invalidated by the effective vindication doctrine where there is *some* remedy available under foreign law." Dkt. 197 at 15 (emphasis in original). This overstates the *Richards* holding, which involved an international transaction and so implicated the different analytical framework that applies to the enforceability of "private international agreements." *Richards*, 135 F.3d at 1291, 1294 (explaining that the plaintiffs "flew to England to consummate the transaction"). In the context of an international agreement, there is "no basis" for applying the prospective-waiver doctrine because requiring "American standards… demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries." *Id.* (quoting *Scherk*, 417 U.S. at 517, n. 11).

This case, of course, is quite different because Native American tribes are "domestic dependent nations that exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). Because federal law is the supreme law of the land, it cannot be prospectively waived in domestic transactions—regardless of whether it is private parties, a state government, or a creative payday lender using a tribe as the conduit for its illegal loans. Thus, the prospective-waiver doctrine has been unanimously applied to these tribal lending contracts that attempt to "disclaim the application of federal and state law." *See, e.g., Gingras v. Think Fin., Inc.*, 922 F.3d 112, 128 (2d Cir. 2019); *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 230–31 (3d Cir. 2018).

Other courts have recognized the distinction between international and domestic contracts when applying the prospective-waiver doctrine. *See, e.g., Gibbs v. Stinson*, 421 F. Supp. 3d 267, 296 (E.D. Va. 2019) ("The loan contracts at hand, and the conduct alleged by Plaintiffs, occurred either within the continental United States or on land over which 'Congress possess plenary authority.'") (citation omitted). Indeed, the Fourth Circuit rejected this very argument from Defendants in *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 344, n. 10 (4th Cir. 2020). As the Fourth Circuit explained, "the arbitration agreements cited by the Haynes Defendants" in support of their prospective waiver argument were "distinguishable because of the distinctly international nature of those agreements." *Id.* Applying the doctrine in the international context adds a unique consideration because "each nation operates under different statutory laws and

pursues different public policy concerns." *Id.* at 344 (quoting *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 373 (4th Cir. 2012)).

Beyond this, *Richards* is distinguishable for another reason. Although the Ninth Circuit enforced the prospective waiver in an international contract, it added the following caveat to its decision: "were English law so deficient" that a party "would be deprived of any reasonable recourse, we would have to subject the choice clauses to another level of scrutiny." *Richards*, 135 F.3d at 1296. There was "no such danger" in that case because "English law provides a variety of protections for fraud and misrepresentations in securities transactions." *Id.* (quotation and citation omitted). Here, the same cannot be said. The tribal law at issue—crafted as part of Think Finance's effort to evade the law— "does not provide for or establish any private right of action for violations of any provisions, let alone any federal law." *Gibbs*, 967 F.3d at 344. *Richards* does not permit this.[5]

III. Summary judgment should be entered that California law applies.

A. Prior to any trial, the Court must determine the applicable choice-of-law even if there is a genuine dispute as to material facts.

Determining the choice-of-law question is the most important question in this case. Over the past ten years since the creation of the tribal lending model, close to a dozen courts have considered this issue, each holding that tribal choice-of-law provisions were unenforceable and state law applied under comparable circumstances.[6] All of these decisions occurred prior to or at the summary judgment stage.

[5] Attempting to create the appearance of a circuit split, Defendants argue that *Gibbs* and *Richards* cannot be read together. *See, e.g.*, Dkt. 197 at 15 (claiming that the Fourth Circuit's "reasoning" in *Gibbs* "can hold no weight" in light of *Richards*). But in *Richards*, the Ninth Circuit explicitly followed an earlier decision from the Fourth Circuit in a related case. *Richards*, 135 F.3d at 1294 ("We follow our six circuits that have ruled to enforce the choice clauses" at issue) (citing, *e.g.*, *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996)). *Richards*, in other words, is also the law in the Fourth Circuit. *See Allen*, 94 F.3d at 930 (holding that "agreements to litigate disputes in the United Kingdom under British law does not contravene or undermine any policy of the United States securities laws."). With *Hayes*, *Dillon*, *Haynes*, and *Sequoia*, the Fourth Circuit did not accidently overrule *Allen*, which addressed a different situation. Thus, *Richards* stands in harmony with Fourth Circuit precedent.

[6] *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, 2016 WL 4820635, at *7 (C.D. Cal. 2016) (holding that "the tribal choice of law provision is unenforceable" because it was "clear that the parties' choice was solely based on CashCall's desire to shield itself against state usury and licensing laws."); *W. Sky Fin., LLC v. State ex rel. Olens*, 300 Ga. 340, 348, 793 S.E.2d 357, 366 (2016), *reconsideration denied* (2016); *Inetianbor v. CashCall, Inc.*, 2015 WL 11438192, at *3 (S.D. Fla. 2015); *State ex rel. Cooper v. W. Sky Fin., LLC*, 2015 WL 5091229, at *10 (N.C. Super. 2015); *MacDonald v. CashCall, Inc*, 2017 WL 1536427, at *10 (D.N.J. 2017), *aff'd*, 883 F.3d 220 (3d Cir. 2018); *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 336 (4th Cir. 2017);

See, e.g., Consumer Fin. Prot. Bureau, 2016 WL 4820635, at *9 (granting partial summary judgment that "the tribal choice of law provision is unenforceable and the Court will apply the laws of the Subject States"); *Dillon*, 856 F.3d at 337 (affirming denial of a motion to compel arbitration, holding that a Great Plains contract contained "unenforceable choice of law provisions").

Attempting to avoid summary judgment as to their main defense, Defendants argue that there is a genuine dispute as to material facts impacting the choice-of-law analysis. *See generally* Dkt. 197 at 17-21. For example, Defendants assert that "[t]here are clear, legitimate, and disputed facts relating to whether California or the respective tribes have a materially greater interest in the loan transactions." *Id.* at 21. According to Defendants, "those disputes must be resolved at trial, not at summary judgment." *Id.* at 20. This is incorrect for the reasons detailed in this Court's thorough analysis in *In re Facebook Biometric Info. Priv. Litig.*, 185 F. Supp. 3d 1155, 1158 (N.D. Cal. 2016).

In that case, Facebook argued that the plaintiffs failed to state a claim under the Illinois Biometric Information Privacy Act because "a California choice-of-law provision" precluded suit based on an "Illinois statute." *Id.* To resolve this issue, the Court held an evidentiary hearing over the objection of the plaintiff, who asserted that to the extent the hearing involved the "weighing of evidence, assessing credibility of live testimony, and resolving disputed issues of fact, that would invade the province of the jury." *Id.* at 1160 (citation omitted). Overruling this objection, the Court explained that "the attachment of a jury right to the case as a whole does not mean that each and every issue in the case 'is itself a jury issue.'" *Id.* (quoting *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996)). The Court then cited a few examples of this, including factual questions relevant to jurisdiction, venue, the construction of patents, even when such questions involve credibility judgments about witnesses. *Id.*

Although it appeared to be a question of first impression in the Ninth Circuit, this Court noted that the "Fifth and Seventh Circuits have expressly approved judicial resolution of facts disputes raised in a choice-of-law determination." *Id.* at 1160-1161 (citing *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 386 (5th

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Rideout v. CashCall, Inc., 2018 WL 1220565, at *8 (D. Nev. 2018); *Hengle v. Asner*, 433 F. Supp. 3d 825, 877 (E.D. Va. 2020); *Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286, 293 (4th Cir. 2020); *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 344 (4th Cir. 2020).

Cir. 1983); *Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 742–43 (7th Cir. 2008)). Examining these cases, as well as other situations where the Ninth Circuit has embraced that a judge resolve factual questions, this Court concluded "that the Ninth Circuit would agree that the judge should resolve fact disputes subsumed in a choice-of-law determination." *Id.* at 1161. In reaching this conclusion, the Court further added:

> As other courts have rightly observed, the functional and practical results of assigning choice-of-law fact determinations to a jury are problematic, to say the least.
>
> The reasons why that would be a bad practice are self-evident. The litigants and the fair and efficient administration of justice would suffer immensely from slogging through all the pretrial activities of discovery, class certification, and dispositive motions, and then a full trial, without knowing which law governs the case. The consequences of doubled or trebled litigation costs, destabilizing uncertainty about dispute outcomes, and overall case management chaos are too plain to be debated. And the Court can only imagine with apprehension what jury instructions and verdict forms would look like in a case that required the jury to first pick the governing law.

Id.

Even if there is a genuine dispute of material fact as to the choice-of-law analysis, these issues must be addressed by the Court prior to trial for the reasons explained in *In re Facebook Biometric*. Thus, if the Court agrees that there is a genuine dispute of material fact impacting the analysis, Plaintiffs believe that supplemental briefing and an evidentiary hearing should be held on the choice-of-law issues. Fortunately, these delays are unnecessary in this case because implicit in the choice-of-law question is the availability of two enforceable governing laws. Here, there is only one option because the tribal law itself is unenforceable. *Gibbs*, 967 F.3d at 343; *see also Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955, 973 (N.D. Cal. 2019) ("Tribal Laws Do Not Provide Remedies for Plaintiffs' Statutory Claims.").

B. The bankruptcy court's summary judgment ruling is distinguishable because it never considered the substance of tribal law or determined that the contractual language resulted in a prospective waiver.

In addition to their confusion regarding who determines the choice-of-law question, Defendants primarily argue that summary judgment should not be awarded because the Texas bankruptcy court denied cross-motions for summary judgment filed by Think Finance and the *Gibbs* plaintiffs. Dkt. 197 at 17 (citing Sept. 26, 2018 Hr'g Tr., *In re Think Finance, LLC*, ECF No. 1017). According to Defendants, "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." *Id.*

While it should be apparent to Defendants, this Court should reach a different result because the issues are actually different from those litigated in the bankruptcy case. In this motion, Plaintiffs contend that California law *must* apply because the tribal law itself violates the prospective waiver doctrine as previously determined by this Court and the Fourth Circuit. *Brice*, 372 F. Supp. 3d at 973; *Gibbs*, 967 F.3d 332. Because "the relevant tribal codes" do not permit borrowers "to effectively vindicate the federal protections and remedies they seek," they cannot be the applicable law—regardless of whether they are contractually selected or would be the default in the absence of an enforceable choice of law provision. *Gibbs*, 967 F.3d at 343.

By contrast, the bankruptcy court never considered the substance of tribal law, nor was it convinced the contractual language violated the prospective-waiver doctrine. For example, the bankruptcy court explained: "I think the difference between the language used in *Dillon* and the language of the agreements at issue in summary judgment are potentially important. In *Dillon*, there was language in the preamble stating that federal law does not apply, and I think having such an express agreement in the agreement is significant." Ex. 11, Oral Ruling Hr'g Trans. 23:18-22. Two years later, the Fourth Circuit rejected this as a basis to distinguish *Dillon* and held: "We see no material distinction between the case at hand and the precedent set forth in *Hayes* and *Dillon*: because the choice-of-law provisions contained in both the Plain Green and Great Plains arbitration agreements operate as prospective waivers." *Gibbs*, 967 F.3d at 341.

Similar to the Fourth Circuit, this Court held that "the choice-of-law provisions in the agreements at issue are unenforceable prospective waivers." *Brice*, 372 F. Supp. 3d at 982. More importantly, the Court also reviewed the relevant tribal codes and concluded that they did not provide remedies for Plaintiffs' statutory claims. *Id.* at 973 ("Tribal Laws Do Not Provide Remedies for Plaintiffs' Statutory Claims."). Because of this, "the only remaining choice for substantive rules" is California law as there "is no viable alternative" to consider when applying the test from the Restatement. *Gingras v. Rosette*, 2016 WL 2932163, at *15 (D. Vt. May 18, 2016).[7]

[7] Defendants further claim that tribal law applies in the absence of a valid choice-of-law provision because 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 Americans lenders are located and have their headquarters." Dkt. 197 at

IV. Defendants' opposition raises no genuine dispute of material fact as to its third affirmative defense that tribal immunity applies to the loans.

Plaintiffs also requested summary judgment on Defendants' third affirmative defense that a "cause of action based on lending by Native American tribal entities" is "barred by the operation of Tribal immunity." *See, e.g.*, Dkt. No. 112 at 38. Perhaps recognizing the flaw in this theory, Defendants contend that Plaintiffs are "distorting" this defense; and what they really meant was "shareholders of entities providing contractual services to those lenders is a significant infringement on the sovereignty the tribes are validly able to assert." Dkt. 197 at 22. This new defense fares no better as it is merely an attempt to rephrase that sovereignty—not tribal immunity—legalizes any and all conduct by government actors and their co-conspirators.

It is not surprising that Defendants spend a total of five sentences attempting to avoid summary judgment on this defense as multiple courts have rejected similar arguments. *Smith v. Martorello*, 2021 WL 981491, at *4 (D. Or. Mar. 16, 2021) (repeatedly rejecting that litigation against non-tribal member involved in tribal lending scheme was "an affront to the Tribe's sovereignty."); *id.* ("The Court does not offend tribal sovereignty by treating as RICO predicates intentional efforts to violate the law.") (citing *Otoe-Missouria Tribe of Indians v. New York State Dept. of Fin. Servs.*, 769 F.3d 105, 114 (2d Cir. 2014) ("[A] tribe has no legitimate interest in selling an opportunity to evade state law.")); *Hengle*, 433 F. Supp. 3d at 877 (rejecting argument that applying state usury law to tribe would "eviscerate modern federal Indian policy" and noting that a contrary holding "would eviscerate the power of states" and allow tribes "to reach far beyond their sovereignty and violate state consumer protection statutes with impunity."); *Gingras*, 922 F.3d at 124 (same).

Despite this firmly established law, Defendants cite the Ninth Circuit's decision in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989) for the proposition that "[i]f the state law interferes with

21. Defendants do not provide a citation for these assertions, none of which are material or accurate. Time and again, courts have found that these internet loans constitute off-reservation conduct. *Hengle v. Asner*, 433 F. Supp. 3d 825, 875–76 (E.D. Va. 2020) (gathering cases and explaining the "Tribal Officials do not dispute that Plaintiffs resided on non-Indian lands when applying for their respective loans, executing relevant loan documents and making loan payments from bank accounts maintained in Virginia. Plaintiffs did not travel to the Tribe's lands at any point. Such activity proves directly analogous to the lending activity that other courts have found to clearly constitute off-reservation conduct subject to nondiscriminatory state regulation.").

the purpose or operation of federal policy regarding interests, it is preempted." Dkt. 197 at 22. There, however, multiple federal policies were implicated by the facts, and the Ninth Circuit concluded that "the state's interest was not strong enough to outweigh the substantial federal and tribal interests in timber harvesting on the reservation." *Hoopa Valley*, 881 F.2d at 660. Here, there is: (1) no equivalent federal policy allowing tribes to provide illegal loans over the internet (or really, to allow them to team up with a creative payday lender seeking to use the tribe as a front); and (2) no state action attempting to regulate conduct occurring exclusively on the reservation. *See, e.g., Gingras*, 922 F.3d at 128 ("Tribes and their officers are not free to operate outside of Indian lands without conforming their conduct in these areas to federal and state law.").

Because there is no genuine dispute of matter fact as to this issue, the Court should grant summary judgment as to Defendants' third affirmative defense.

V. Response to Defendants' RICO arguments.

A. Defendants overstate the requirements of § 1962(d), which do not require a person to conspire to operate or manage an enterprise.

Defendants' argument opposing summary judgment on the § 1962(d) claim is that the motion "fails to show each of the Defendants *conspired to operate or manage* an enterprise through the collection of unlawful debt." Dkt. 197 at 34 (emphasis added).[8] But the Ninth Circuit has squarely rejected this interpretation of § 1962(d), holding that there is not "any requirement that the defendant have actually conspired to operate or manage the enterprise herself." *United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004); *see also Natomas Gardens Inv. Grp., LLC v. Sinadinos*, 710 F. Supp. 2d 1008, 1021 (E.D. Cal. 2010) ("to prove a RICO conspiracy, the plaintiff need not show that the defendant conspired to operate or manage the enterprise himself.") (citing *Fernandez*, 388 F.3d at 1230). Tracking this holding from *Fernandez*, the Manual of Model Civil Jury Instructions published by the Ninth Circuit provides:

> A defendant can be held liable for a RICO conspiracy if the evidence shows that he or she "knowingly agree[d] to facilitate a scheme which includes the operation or management

[8] *See also* Dkt. 197 at 35 ("the Motion fails to set forth evidence showing that these defendants actually agreed to operate or manage an enterprise through predicate acts"); *id.* at 37 (claiming that "Plaintiffs 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.").

> of a RICO enterprise." *United States v. Fernandez*, 388 F.3d 1199, 1229-30 (9th Cir. 2004). There is no requirement that the defendant have actually conspired to operate or manage the enterprise himself or herself. *Id.*

Model Jury Instruction 8. Because Plaintiffs were not requited to establish that Defendants conspired to operate or manage the enterprise, this argument fails.

B. Defendants failed to raise a genuine dispute of material fact as to any element needed to establish the RICO conspiracy claim.

Far from requiring a person to conspire in the operation or management of the enterprise, the test is whether a person "knew about and agreed to facilitate a scheme." *Salinas v. United States*, 522 U.S. 52, 66 (1997). That's it—a person must simply know about the endeavor and "adopt the goal of furthering or facilitating" it. *Id.* at 65. A conspirator "may do so in any number of ways short of agreeing to undertake all of the acts necessary" for the completion of the substantive violation. *Id.* One way could be proven "by evidence that the defendant agreed to facilitate a scheme by providing tools, equipment, cover, or space; [and] that the facilitation was knowing because the defendant was aware of the broader scheme, even if he was unaware of the particulars[.]" *United States v. Zemlyansky*, 908 F.3d 1, 12 n.6 (2d Cir. 2018). Another way would be showing that "the defendant knowingly benefitted from the scheme; and that other members of the enterprise intended to accomplish specific predicates." *Id.*

Here, Defendants attempt to rewrite the test to require a defendant to conspire to operate or manage the enterprise because no reasonable juror could find that Defendants lacked knowledge of the illegal lending scheme. Document after document submitted with this motion demonstrates that Defendants unequivocally knew about the tribal lending scheme. *See, e.g.*, Dkt. 182 at 36-38 (summarizing some of the evidence show that Defendants knew about the scheme, including their involvement in board meetings and internal discussions about the tribal lending scheme). Defendants do not and cannot refute that they had knowledge of the scheme.

Similarly, no reasonable juror could find that each of the Defendants did not "adopt the goal of furthering or facilitating" the scheme. *See, e.g.*, Dkt. 182 at 38-41 (detailing numerous steps taken by each of the Defendants in furtherance of the scheme). Defendants do not and cannot refute this. At most, Defendants attempt to distinguish their role by claiming only a "purported involvement with Think Finance," not the tribal lending scheme. Dkt. 197 at 35. But Think Finance was the heart of the tribal

lending scheme. The undisputed evidence shows that it created, developed, and participated in the scheme after federal regulators shutdown Think Finance's similar arrangement with First Bank of Delaware. Dkt. 182 at 3-5. The undisputed evidence further shows that Think Finance solicited the tribes to engage in the usurious lending scheme, Dkt. 182 at 3-7, but it retained the predominant economic interest in the loans. *Id.* at 9. The undisputed evidence further shows that Defendants attended and were involved in the high-level meetings of Think Finance where the scheme was developed and implemented. Ex. Nos. 12-16 (board meeting minutes showing Stinson and 7HBF's involvement in the key initiatives and decisions of the company). And still today, Defendants seek to withhold documents provided to them by Think Finance on the basis that "trusted individuals such these Defendants had a business need to know and possess the privileged information in order to ensure the proper functioning of Think Finance and its board." Ex. 17 at 19.

In a related point, Defendants claim that none of this matters because "black letter case law confirms that Think Finance cannot conspire with its agent and employees to violate Section 1962(d)." Dkt. 197 at 35 (citation omitted). Yet again, this is another example where Defendants' offer "black letter law," which has been squarely rejected by the Ninth Circuit. *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996) ("Defendants argue that a corporation cannot engage in a RICO conspiracy with its own officers and representatives. We disagree."). There, the Ninth Circuit held that "§ 1962(d) applies to intracorporate conspiracies." *Id.* Consistent with this, the Ninth Circuit's Model Jury Instructions provide that "it is possible for a corporation to engage in a RICO conspiracy with its own officers and representatives." Model Jury Instruction 8.

In sum, this is one of those "situations in which illegal conduct t[ook] place 'at such a high level that it may be deemed corporate policy to promote or engage in illegal conduct.'" *Brady v. Dairy Fresh Prod. Co.*, 974 F.2d 1149, 1153 (9th Cir. 1992) (quoting *D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 967 n.5 (7th Cir. 1998)). Facilitating the operations, policies, and directions of Think Finance went hand-and-hand with facilitating the tribal lending scheme. Far from a secret initiative by a rogue division within Think

Finance, it existed for the sole purpose of engaging in this tribal lending scheme. From top to bottom, everyone involved with Think Finance knew about and attempted to further the usurious lending scheme.[9]

C. Defendants failed to raise a genuine dispute of material fact precluding a finding that a violation of § 1962(c) occurred.

In the context of criminal liability, it is firmly established that "a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Salinas,* 522 U.S. at 65. In a civil case, however, a plaintiff will typically need to prove a substantive violation of the statute in order to establish standing to sue. If this showing is made, "[a]ll conspirators are liable for the acts of their co-conspirators." *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 774-75 (9th Cir. 2002).

In their motion, Plaintiffs detailed why a substantive violation of § 1962(c) occurred as a matter of law. To recover under § 1962(c) of RICO, a plaintiff must prove that: "(1) conduct (2) of an enterprise (3) through [collection of unlawful debt]," which causes "injury to plaintiff's 'business or property.'" *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005). At a minimum, the evidence shows that Think Finance, Great Plains, Plain Green, Victory Park, and their various agents, executives, and employees conducted the affairs of an enterprise through the collection of unlawful debt in violation of § 1962(c)—thereby rendering any person who knew about and agreed to facilitate the scheme liable under § 1962(d). In response, Defendants do not raise any genuine dispute of material fact as to any of the elements regarding the substantive violation of § 1962(c).

D. Defendants fail to raise a genuine dispute of material fact as to any element needed to establish that an association-in-fact enterprise existed.

"The definition of 'enterprise' in the text of RICO is fairly straightforward." *Odom v. Microsoft Corp.*, 486 F.3d 541, 548 (9th Cir. 2007). It is also "not very demanding." *Id.* Relevant here, "the last kind of enterprise listed in the definition" is a "'group of individuals associated in fact.'" *Id.* "To establish the

[9] Defendants further contend that Plaintiffs failed to establish that the conspiracy was the proximate cause of their harm. Dkt. 197 at 43. Plaintiffs, however, only moved for summary judgment as to the elements of the claim, thereby leaving the question of damages for the jury. *See generally* Dkt. 183. Further, Plaintiffs provided a thorough explanation regarding proximate cause in their Opposition to Defendants' Motion for Summary Judgment (Dkt. 202 at 25-29) and judgment may be granted on these grounds. *See* FED. R. CIV. P. 56(f) (allowing for a court to "grant motion on grounds not raised by a party").

existence of such an enterprise," a plaintiff must prove three things: (1) a common purpose; (2) ongoing organization (i.e., relationships between the individuals); and (3) a continuing unit. *Id.* (citing *United States v. Turkette*, 452 U.S. 576 (1981)).

As detailed in Plaintiffs' opening brief, there is no genuine dispute of material facts as to any of the evidence needed to establish this criteria. Dkt. 182 at 41-43. In sum, the evidence shows that groups of individuals/entities associated together for the common purpose of making and collection of high-interest loans through the tribal lending model; that they entered into a series of written agreements establishing the ongoing roles, responsibilities, and benefits to be distributed to each of the members; and the scheme continued from 2011 through 2019. Dkt. 182 at 41-43. Defendants do not even acknowledge these elements or evidence. Dkt. 197 at 22-27. Instead, they make several legal arguments unconnected to any of the criteria.

First, Defendants contend that Plaintiffs "fail[ed] to define the proposed enterprise." Dkt. 197 at 23. Although it is unclear, it appears that Defendants believe that Plaintiffs were required to provide a name or a label for the enterprise. The Supreme Court has rejected this argument. *Boyle v. United States*, 556 U.S. 938, 948 (2009) (rejecting the defendant's argument that an enterprise must have an "enterprise 'name'"). An association-in-fact enterprise, it held, "need not have a name, regular meetings, dues, established rules and regulations[.]" *Id.* Instead, "an association-in-fact enterprise is simply a continuing unit that functions with a common purpose." *Id.* Here, Plaintiffs specifically identified a continuing unit that functioned with the common purpose. No magic words or statement of its boundaries are required.

Second, ignoring the actual criteria of what constitutes an enterprise, Defendants contend that an enterprise could not have existed because it was "nothing more than the typical commercial relationships between a lender and servicer." Dkt. 197 at 25. The cases on which the Defendants rely, however, the "typical alleged fact pattern" involves a situation where:

> Some provider of services ("Provider") has a business client ("Business"). *Completely unbeknownst to Provider*, Business is conducting its affairs fraudulently. Someone ("Injured Party") is injured by Business's fraudulent practices and wishes to seek compensation from Business.

Gomez v. Guthy-Renker, LLC, 2015 WL 4270042, at *5 (C.D. Cal. 2015) (emphasis added). This is not one of those cases. As another court has explained: "A RICO enterprise does not exist where one company

unknowingly aided another company in a fraudulent endeavor. But when both companies are aware of and contribute to the fraud, they cannot argue that they have a routine commercial relationship." *In re Duramax Diesel Litig.*, 298 F. Supp. 3d 1037, 1081 (E.D. Mich. 2018).[10] Because there is no genuine dispute of material fact that Think Finance, Plain Green, Great Plains, Victory Park, Defendants, and other group members were aware of and knowingly contributed to the illegal lending scheme, Defendants cannot use the "routine commercial relationship" exception as a way to avoiding summary judgment.

E. Defendants fail to raise a genuine dispute regarding a material fact as to any element needed to establish that the loans constitute "unlawful debt."

The parties agree on the four separate elements of an "unlawful debt" under RICO. Dkt. 197 at 29. They are: "[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, [3] the usurious rate was at least twice the enforceable rate" and "[4] as a result of the above confluence of factors, it was injured in its business or property." *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 666 (9th Cir. 1988). In their opposition, Defendants argue that summary judgment is inappropriate as to the first and third elements.

State Law Related to Usury. Defendants submit three arguments why summary judgment is unwarranted with respect to the first element. First, they renew their argument that "there is no basis for the Court to enter judgment" that "California's usury laws apply to these loans" because there are "significant factual disputes underpinning any analysis of the choice-of-law issues." Dkt. 197 at 29. But here, as explained above, there are no factual disputes as to the prospective-waiver analysis, including that the chosen law itself is unenforceable for the reasons detailed by this Court and the Fourth Circuit.

Second, without any further explanation, Defendants argue that "California law would still enforce the usury rate as set by the tribe." Dkt. 197 at 29 (citing *Shannon-Vail Five Inc., v. Bunch*, 270 F.3d 1207,

[10] In support of their argument, Defendants provide a host of inaccurate facts that they believe show "Think Finance was nothing more than a service provider to Plain Green and Great Plains." Dkt. 197 at 27-28. Internal documents, however, show that these were mere labels. Dkt. 182 at Ex. 1 (describing Think Finance as "a lender of unsecured short-term cash advances and installment loans."); Ex. 19 (email explaining that "Think Finance, on the other hand, uses a tribal lending model that allows it to do online lending in all 50 states."). But all this misses the point. Regardless of whether Think Finance was the "true lender" or a "service provider," it was a knowing participant in this unlawful scheme. That's what matters.

1210 (9th Cir. 2001)). *Shannon-Vail*, however, addressed a completely different situation, *i.e.*, a commercial loan between sophisticated parties where the notes specifically "recited that the loan was to be repaid in Nevada." *Id.* at 1213. Here, there was no contractual requirement "that the loan be repaid in a particular state," but rather, they were to be repaid "by electronic funds transfer from the borrower's bank account" in their home state. *Consumer Fin. Prot. Bureau,* 2016 WL 4820635, at *9 (explaining why the place of performance factor favored a borrower's home state).[11] Thus, even ignoring the fact showing the tribal entities were fronts for Think Finance's scheme, the funding and repayment of these consumer loans occurred in California.

Third, Defendants contend that there are "numerous exceptions to the 10% interest rap" under California law. Dkt. 197 at 29 (citing Cal. Fin. Code § 22303). While there may be exceptions, Defendants do not identify a single exception that applies to the loans in this case. If an exception exists, Defendants must supply the Court with that exception.

Twice the Enforceable Rate. As to the third element, Defendants argue that there "is no evidence as to the actual rates tens of thousands of consumers paid on their loans." Dkt. 197 at 30. This confuses the third and fourth elements. As to the third element, Plaintiffs supplied this Court with the loan level data from Think Finance showing that "usurious rate was at least twice the enforceable rate," often 25-40 times higher than the 10% permitted by California law. Dkt. 182 at Excel Exhibit 1 (providing summary of the interest rates imposed on more than 100,000 loans).

Defendants did not and cannot contest these objective facts, which prove that the "usurious rate was at least twice the enforceable rate." Instead, Defendants object to the admissibility of this evidence on the basis that "[s]tatements 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." Dkt. 197 at 30. This objection must be overruled because when a party may only object to fact when it "cannot be presented in a form that would be admissible" at trial. FED. R. CIV. P. 56(c)(2). In other words,

[11] Plaintiffs supplied five other cases reaching this same conclusion, all of which were ignored by Defendants. Dkt. 182 at 33 (citing *MacDonald*, 2017 WL 1536427, at *10; *United States v. Moseley*, 980 F.3d 9, 23 (2d Cir. 2020); *United States v. Hallinan*, 2016 WL 7477767, at *1 (E.D. Pa. Dec. 29, 2016); *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1304 (10th Cir. 2008); *State ex rel. Swanson v. Integrity Advance, LLC*, 846 N.W.2d 435, 442 (Minn. Ct. App. 2014).

"[a]t the summary judgment stage," a court does not "focus on the admissibility of the evidence's form," but rather on the "admissibility of its contents." *Fraser v. Goodale*, 342 F.3d 1032, 1036–37 (9th Cir. 2003)(citing *Block v. City of Los Angeles*, 253 F.3d 410, 418–19 (9th Cir.2001) ("To survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56."); *Fed. Deposit Ins. Corp. v. N.H. Ins. Co.*, 953 F.2d 478, 485 (9th Cir.1991) ("the nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment.").

Both Think Finance's discovery responses and the Haac Declaration can be presented in form admissible at trial, *i.e.*, through authentication of the discovery responses and data by Think Finance. And although Defendants claim that Think Finance "cannot be compelled to testify at trial," it entered into an agreement with Plaintiffs to authenticate this information. Ex. 20, Jan. 20, 2021 Email from Matt McGee (resolving discovery dispute, including that "Reorganized Debtors will not object to Plaintiffs use [of] the data pursuant to FRE 1006 to allow Plaintiffs to summarize damages by any class member at trial" and will not object to a subpoena that "solely seeks to authenticate the documents"). Because the loan level data may be presented in a form admissible at trial, Defendants' objection about the form of its presentation in this motion must be overruled. *See, e.g.*, *Fraser*, 342 F.3d at 1037 ("Because the diary's contents could be presented in an admissible form at trial, we may consider the diary's contents in the Bank's summary judgment motion.").

Aside from its objection to the admissibility of the evidence, Defendants further argue that Plaintiffs failed "to show what 'actual' interest rate a consumer paid in relation to their loan." Dkt. 197 at 30. However, they are not required to under the plain language of the statute. 18 U.S.C. § 1961(6). It defines "unlawful debt" as "debt" that is "unenforceable under state or federal law" because of the "laws relating to usury" which "was incurred in connection with the business of lending money" at "a rate usurious under state or federal law" where "the usurious rate is at least twice the enforceable rate." *Id.* While potentially relevant to a borrowers' injury, requiring calculation of the "actual interest rate a consumer paid" inserts terms into the statute that do not exist. Under Defendants' construction, it would be possible for a debt to be unlawful under RICO for purposes of criminal liability, but the same debt

would somehow become lawful for the purposes of civil liability depending on what the borrower actually repaid. This outcome would ignore the consistent usage of "unlawful debt" throughout the statute.

Defendants' real argument is that borrowers who failed to repay more than the principal balance of their loan did not suffer an injury to their property. Among other things, this argument ignores that California's Financing Law renders the entire contract "void," including the "right to collect or receive any principal, charges, or recompense in connection with the transaction." Cal. Fin. Code § 22750. Because California law renders the entire debt unenforceable, any amount repaid is "unlawful debt" under RICO. 18 U.S.C. § 1961(6) (defining unlawful debt as debt which "is unenforceable under state law… in whole or in part as to principal or interest because of the laws relating to usury"). In addition, Plaintiffs submitted uncontested evidence that Plaintiffs and class members repaid more than 20% on their loans. Ex. 21. For example, the uncontested evidence shows that Ms. Novorot repaid "$3,022.42 over 20% interest" according to the data supplied by Think Finance. *Id.* at ¶ 14(g).

In sum, there is no genuine dispute of material fact as to any element needed to establish that the loans constituted unlawful debt as defined by RICO. If California law applies (as explained in Part III(B)), the interest rates charged were at least twice the enforceable rate. Plaintiffs and Class Members were injured by the repaid of these loans and the extent of those injuries can be determined at trial. That math should be the focus of the trial, and the jury should be instructed that all (or at least some) of the elements have already been established on this issue.

F. There is no genuine dispute that persons operating the enterprise collected unlawful debts from Plaintiffs and the Class Members.

Defendants insist that "there is no evidence to support the idea that anyone 'collected' such unlawful debts." Dkt. 197 at 31. Instead, they claim that Plaintiffs' motion merely establishes "that repayments were made," not that "some unnamed person or entity" engaged "in the actual collection of unlawful debts." *Id.* This argument is a non-sequitur. If a person repays an unlawful debt, it logically follows that someone must have collected it from them. And regardless, the undisputed evidence shows that Plain Green and Great Plains entered into "Servicing Agreement(s)" with Think Finance, which made it "responsible for providing" the "collection services" to the "accounts" associated with the Plain Green

and Great Plains. Ex. 22 at TF-PA-001178; Dkt. 182, Ex. 18 at TF-VA000616.[12] The undisputed evidence further shows that "California Consumers" paid a total of "$75,009,501.42" on loans with Great Plains; and "$197,491,804.99" was collected on loans with Plain Green during the class period. Ex. 21 at ¶ 11.

Ignoring all of the evidence submitted, Defendants claim that the "few courts" that "have considered this issue" have concluded that RICO requires "some action to induce repayment on a loan—***mere repayment is not enough***." Dkt. 197 at 31 (emphasis added). In reality, these cases stand for a different proposition: "An actual exchange of cash need not be shown, only a single act which would tend to induce another to repay on an unlawful debt incurred in the business of lending money." *United States v. Eufrasio*, 935 F.2d 553, 576 (3d Cir. 1991) (citing *United States v. Pepe*, 747 F.2d 632, 645, 673–75 (11th Cir. 1984). These court's statements regarding the attempt "to induce another to repay on an unlawful debt," reflect that someone can be responsible for participating in the affairs of an enterprise through the collection of unlawful debt without actual repayment of the usurious loan. Where an actual exchange of cash occurs, however, it can't be argued that a person did not collect the unlawful debt within the meaning of RICO.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court to enter partial summary judgment that: (1) the choice-of-law clauses are unenforceable; (2) California law applies to the loan contracts; (3) that tribal immunity does not bar a cause of action against Defendants; (4) Defendants knew about and furthered the conspiracy in violation of 18 U.S.C. § 1692(d); and (5) members of the enterprise collected unlawful debt in violation of 18 U.S.C. § 1692(c).

[12] These collection services were specifically detailed in Paragraphs 55-56 in Plaintiffs' Statement of Facts. Like all of Plaintiffs' other facts, Defendants simply ignored them.

Dated: June 14, 2021

Respectfully submitted,

By: */s/ Anna C. Haac*

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