IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANA DUGGAN, *individually and on behalf of persons similarly situated,*

Plaintiff,

v.

MATT MARTORELLO, *et al.*

Defendants.

No. 1:18-cv-12277-JGD

Leave to File Granted
on February 16, 2021 (Dkt. 195)

PLAINTIFF DANA DUGGAN'S RESPONSE IN OPPOSITION TO MATT MARTORELLO'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS

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I. INTRODUCTION

Having failed in his attempts so far to have class action claims dismissed by a conventional motion (most recently in *Smith v. Martorello*, No. 3:18-cv-1651, 2021 WL 981491 (D. Or. Mar. 16, 2021),[1] Matt Martorello invokes the doctrine of judicial estoppel in an unprecedented effort to use a partial settlement with co-Defendants to shield himself from liability. Judicial estoppel, however, does not apply because it at least requires: (1) direct contradiction of Duggan's current position as opposed to that taken in the Eastern District of Virginia, and (2) judicial acceptance of Duggan's alleged conflicting position. Martorello has failed to sustain his burden of proving either element. Both in this Court and the Eastern District of Virginia, Duggan's position has been consistent: consumer lending is governed by the laws of the states in which the borrower was located, lending at usurious rates of interest is illegal, and Defendants' predatory lending scheme is a violation of state law and RICO. Further, in its approval of the nationwide settlement with the Tribe-affiliated entities, the Eastern District of Virginia has never found, accepted, or held that the internet-based lending at exorbitant interest rates is legal.

After the Fourth Circuit of Appeals held that the district court did not have jurisdiction over claims against Big Picture Loans, LLC and Ascension Technologies, LLC, Duggan and other plaintiffs negotiated with those entities and related parties for a nationwide class action settlement that provides substantial, but partial, recovery of consumers' damages. The settlement resulted in $424 million in debt forgiveness, $8.7 million as a fund for consumers' recoveries of over-payments, and a minimum reduction in the interest rate charged. Given the Fourth Circuit's opinion on jurisdiction, Duggan and other class representatives were unable to negotiate an end to

[1] The district court denied Martorello's motion to dismiss for failure to state a claim and for lack of personal jurisdiction, holding that "Martorello's reliance on tribal sovereignty is misplaced." *Smith*, 2021 WL 981491 at *2.

the lending operation; nevertheless, Duggan maintains that any ongoing or future lending must comply with state licensing laws and interest caps. Although Martorello attempts to infer otherwise, there are no provisions of the Settlement Agreement or any pleadings in *Galloway III* that contends that lending at usurious rates of interest is legal.

Martorello raises two alleged inconsistencies between the *Galloway III* settlement and this case. First, he misconstrues Duggan's lack of opportunity to shut down the entire lending operation as if it were a concession that such lending must be deemed legal. None of the terms of settlement allow for or concede the legality of the lending operation at usurious rates of interest. The settlement allows for funding over two years, but the tiered funding of the settlement does not address, much less require, that such funds come from continued illegal lending. The settlement can be funded from Tribal coffers or through a revised, legal lending operation. The Tribe-affiliated entities remain subject to suit if they do not reform their lending practices. (Dkt. 196 at 5.) Second, Martorello disputes Duggan and other plaintiffs' right to disgorge any Eventide profits from its minority owners, James Dowd, Simon Liang, and Brian McFadden as if it were a concession that Eventide's operations must be legal. Again, the agreement does not provide for source of funding – instead, the purpose of the settlement is to exact payment from Dowd, Liang, and McFadden, not to stipulate to the source or legality of the shareholder distributions. Also, Martorello casts the disgorgement as if Duggan and the Class were going to be minority interest owners in Eventide, but he denied the transfer of the ownership interests.

This Court previously addressed the purpose and intent of the doctrine of judicial estoppel in explaining why it should not be used in a case such as this:

> [J]udicial estoppel is an extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice. It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there

> is no evidence of intent to manipulate or mislead the courts. Judicial estoppel is not a sword to be wielded by adversaries unless such tactics are necessary to secure substantial equity.

Ghassemian v. Jefferson Pilot Fin. Ins. Co., No. 02-11392-NG, 2005 WL 8175878 at *6 (D. Mass. Nov. 14, 2005) (Dein, J.) (internal quotations omitted) (quoting *Ryan Operations G.P. v. Santiam-Midwest Lumber Co*., 81 F.3d 355, 365 (3rd Cir. 1996)). Because Martorello seeks to misuse the doctrine of judicial estoppel as a litigation tactic, the Court should deny his motion to dismiss.

II. FACTUAL BACKGROUND

Dana Duggan addressed the facts supporting her claims and causes of action in her current complaint (Dkt. 118) and earlier briefing (Dkts. 136 and 168), but recent developments further illustrate that the facts do not support dismissal of this suit. First, on November 18, 2020, the Eastern District of Virginia issued findings that Martorello misrepresented the history of the tribal lending model and his pervasive control. (Memo. Op., *Williams v. Big Picture Loans, LLC*, No. 3:17-cv-0461-REP, Dkt. 944 (E.D. Va. Nov. 18, 2020)), a copy of which is attached as Exhibit A.)[2] The Eastern District of Virginia's order includes findings that are consistent with Duggan's well-pleaded facts in her Second Amended Class Action Complaint ("Amended Complaint") (Dkt. 118) and in her Response to Martorello's Motion to Dismiss (Dkts. 136 and 168). (Exhibit A, 35-38.)

Second, on January 5, 2021, Judge John V. Acosta, Magistrate Judge in the District of Oregon, issued findings and a recommended denial of Martorello's 12(b)(2) and 12(b)(6) motions; that court's 51-page opinion includes a detailed summary and analysis of the underlying facts and allegations, which may be persuasive given the similarity of Martorello's motions to dismiss in

[2] Martorello alluded to the misrepresentations issue during the hearing on the motion to dismiss in this case. (Dkt.182 at 22:11-23:17.)

the two cases. (Findings and Recommendation, *Smith*, 2021 WL 981491, attached as Exhibit B.) On March 16, 2021, the district court adopted the magistrate's findings. (*Smith*, 2021 WL 981491, attached as Exhibit C.)

Additionally, Martorello's factual record inaccurately describes Duggan's loan history. (Dkt. 196 at 5.) Duggan had two loans with Big Picture. On the first loan of $425, Duggan paid $1,083.22 in principal and interest within roughly six months. On the second loan for $775, Duggan paid $875 in repayment of the loan, but Big Picture claimed that she still owed $719.06. Under the settlement with the Tribe-affiliated entities, Duggan qualified for a cash payment as well as debt forgiveness. (Dkt. 118 at ¶¶ 29-45.)

III. PROCEDURAL HISTORY

A. Prosecution and Partial Settlement of This Case.

Duggan initiated this litigation against Big Picture, Ascension, and Martorello on October 31, 2018. (Dkt. 1.) Big Picture and Ascension filed motions to dismiss for lack of jurisdiction and for failure to state a claim. (Dkts. 27-34.) On July 16, 2019, Duggan amended her complaint to name Eventide and the Tribal Council. (Dkt. 72.) Discovery has been ongoing, as overseen in parallel litigation pending in the Eastern District of Virginia. Big Picture, Ascension, and the Tribal Council, in conjunction with the Tribe and other parties, elected to settle Duggan's claims as well as other litigation nationwide. Martorello and Eventide participated in negotiations but elected not to settle. The parties notified this Court of the partial settlement in November 2019. (Dkt. 108.)

B. Duggan's Complaints in This Case and the Virginia Settlement Are Consistent.

Under the settlement (Dkt. 196-1 at ¶ 5.1[3]), Duggan joined other litigants nationwide in an amended complaint in *Galloway v. Williams*, No. 3:19-CV-470 (E.D. Va. Dec. 3, 2019) ("*Galloway III*"). (Dkt. 196-3.) Completely consistent with the allegations and causes of action here, the amended *Galloway III* complaint addresses Martorello's scheme with the Tribe-affiliated entities to loan at grossly usurious interest rates in violation of state laws and RICO. (Compare amended complaints, Dkts. 118 and 196-3.) The amended *Galloway III* complaint does not assert any factual or legal positions that conflict with those in this case: the lending enterprise occurred off the reservation (Dkt. 196-3 ¶¶ 9, 193-97); the lending operation is at interest rates that greatly exceed the legal rates of interest in the consumers' states of residence (*Id*. ¶¶ 90-182, 290-414); and the lending at usurious rates of interest are violations of state law and RICO (*Id*. ¶¶ 417, 421-638). Duggan and other class representatives nationwide have never contended otherwise.

C. Terms of the Virginia Settlement Agreement Are Consistent with Continued Prosecution of Claims Against Martorello and Eventide in this Court.

Big Picture, Ascension, and the Tribal Council negotiated for Duggan to join *Galloway III* for settlement purposes and then dismiss them from this lawsuit after preliminary approval of the settlement was granted in the Eastern District of Virginia. (Dkt. 196-1 ¶ 5.1.) The Settlement Agreement acknowledged that Martorello and Eventide were not parties to the settlement. (*Id.* ¶¶ 2.16 and 2.22.) No party to the Virginia settlement admitted or stipulated to disputed issues such as the application of state law or the legality of the subject lending practices. (*Id*. ¶¶ 1.6, 1.8, 3.3,

[3] Martorello attached several documents to his supplemental brief: *Galloway III* Class Action Settlement Agreement & Release (Dkt. 196-1), *Galloway III* Order Granting Final Approval (Dkt. 196-2); and *Galloway III* First Amended Class Action Complaint (Dkt. 196-3). Duggan references those attachments rather than re-filing the same documents as exhibits to this Response.

and 3.5.) Instead, completely consistent with allegations here, the Agreement notes Duggan's continued claim that the disputed lending is illegal under state usury laws. (*Id*. ¶ 3.3.)

The Agreement anticipates that, after dismissal of the Tribe-affiliated entities, Duggan and other plaintiffs nationwide will continue to prosecute class action claims against Martorello and Eventide for their illegal lending enterprise violating state law and RICO, including claims for declaratory relief, injunctive relief, disgorgement of profits, and other money damages. (*Id*. ¶¶ 5.3, 6.3, 12.1, and 12.8.) For further example, the Agreement provides for Duggan and other plaintiffs to continue using the Tribal entities' document production, as well as loan data for purposes of class certification in the litigation against Martorello and Eventide. (*Id.* ¶¶ 6.3, 15.4, and 15.12.) In addition to cooperation with data for class certification, Big Picture, Ascension, and other settling parties agreed to consider producing additional data and documents "to establish liability or for other important purposes in [this case as well as other litigation nationwide] other than class certification" in the continued litigation. (*Id*. ¶ 6.4.) The Tribe-affiliated entities also agreed to withdraw claims of attorney-client privilege on disputed documents in furtherance of discovery on claims against Martorello and Eventide. (*Id*. ¶ 15.6.) Therefore, the Settlement Agreement is consistent with the allegations in this case.

D. In its Approval of the Nationwide Settlement, the Eastern District of Virginia Did Not Make Findings Inconsistent with Those Urged in this Case.

The Eastern District of Virginia granted preliminary approval of the settlement on December 20, 2019. (*Galloway III*, Dkt. 58.) At the final approval hearing on December 15, 2020, class counsel maintained that the business operation is "unlawful" and usurious. (Hearing Transcript, *Galloway III* (E.D. Va. Dec. 15, 2020), attached as Exhibit D, at 7:16 and 18:18.) On December 18, 2020, the Eastern District of Virginia granted final approval of Duggan's settlement of claims with the Settled Parties. *Galloway v. Williams*, No. 3:19-CV-470, 2020 WL 7482191, at

*1 (E.D. Va. Dec. 18, 2020). In its order granting final approval, the court retained authority over "the administration, interpretation, effectuation, and/or enforcement" of the settlement. (Dkt. 196-2 ¶ 2.) "Also, nothing in the Settlement Agreement shall be deemed a release of [Duggan's] Claims against the Non-Settling Defendants," *e.g.*, Martorello and Eventide. (*Id*. ¶ 16(b).)

In its approval of the nationwide settlement with the Tribe-affiliated entities, far from accepting that the internet-based lending at exorbitant interest rates is legal, the Eastern District of Virginia recognized that, while plaintiffs' counsel had demonstrated through "three years of contentious litigation" a "belief in the strength of their case," they nevertheless recognized "the risk that the Court would dismiss the individual tribal defendants, tribal council members, and the scheme's lenders either for lack of jurisdiction or for lack of sufficient facts supporting liability under RICO." *Galloway*, No. 3:19-cv-0470, 2020 WL 7482191 at *8. The court did not make any findings that are inconsistent with Duggan's position here.

It is telling that Martorello has not asserted judicial estoppel in the Eastern District of Virginia, which approved the settlement with the Tribe-affiliated entities, retained authority to interpret and effectuate the settlement, and continues to preside over lawsuits against Martorello. Instead, Martorello urges the motion only in this district because Judge Payne has issued no findings that Martorello's lending operation is legal. Martorello's suggestion that "the Virginia Court endorsed or abetted" criminal usury and violations of RICO would be, at best for him, unfavorably received. (Dkt. 196 at 2.)

E. After Settlement Approval, Martorello Declined Approval of the Transfer of Dowd's, Liang's, and McFadden's Minority Interests in Eventide to the Settlement Class.

One of the alleged conflicts between this case and *Galloway III* is Dowd's, Liang's, and McFadden's transfer of their minority interests in Eventide to the Settlement Class. Martorello repeatedly claims that Duggan is a "part owner" of an entity that is violating state law and RICO.

(Dkt. 196 at 7, 10.) The Settlement Agreement proposes that the interests be transferred to the Settlement Fund, not Duggan, as a disgorgement of any future profit from their unlawful acts. Regardless, Martorello rendered the issue moot when he "declined to approve the transfer of [Dowd's, Liang's, and McFadden's] membership interests to the Settlement Fund." (Letters from Martorello's counsel, attached as Exhibits E, F, and G at 2.)

F. Procedural Developments in this Case.

On December 30, 2019, Duggan dismissed her claims against Big Picture, Ascension, and the Tribal Council. (Dkt. 112.) On January 15, 2020, Duggan filed her Second Amended Class Action Complaint against Martorello and Eventide and, in the process, also deleted all allegations against Big Picture, Ascension, and the Tribal Council. (Dkt. 118.) Consistent with the *Galloway III* complaint and settlement, Duggan's Amended Complaint continues to assert that the illegal lending enterprise occurs off the Reservation and violates state laws and RICO. (*Id*.)

On February 12, 2020, Martorello filed his Motion to Dismiss the Amended Complaint under Rule 12(b)(2) and 12(b)(6). (Dkt. 124.) That Motion is pending before the Court while the parties brief the disputed relevance of the *Galloway III* settlement. (Dkts. 182, 195.) After an attempt to suspend and transfer the litigation failed in bankruptcy court (Dkts. 159, 161), Eventide filed its Answer to the Amended Complaint on September 11, 2020. (Dkt. 167.) Eventide is not a co-movant for dismissal.

IV. ARGUMENTS AND AUTHORITIES

A. Martorello Faces Insurmountable Obstacles in Trying to Apply Judicial Estoppel in the Context of the Partial Settlement in *Galloway III*.

Judicial estoppel is an equitable doctrine invoked by the Court at its discretion. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Judicial estoppel is generally viewed as an affirmative defense raising questions of abuse of the court system; therefore, courts traditionally

apply federal law and then review motions to invoke the doctrine under the stringent requirements of a motion to dismiss under Rule 12(b)(6).[4]

Although "there is no mechanical test for determining" whether judicial estoppel is appropriate, the First Circuit Court of Appeals has identified at least two prerequisites for its application. *Alternative Sys. Concepts, Inc. v. Synopsys, Inc*., 374 F.3d 23, 33 (1st Cir. 2004). "First, the estopping position and the estopped position must be directly inconsistent, that is, mutually exclusive." *Id*. (citations omitted). "Second, the responsible party must have succeeded in persuading a court to accept its prior position." *Id*. (citations omitted). Courts also sometimes acknowledge a third prerequisite: the party seeking to assert the inconsistent position must stand to derive an unfair advantage if the new position is accepted by the court.[5]

"Simply put, judicial estoppel applies when a party has adopted one position, secured a favorable decision, and then embraces a contradictory position in search of a legal advantage."

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[4] Federal law applies to the application of the doctrine of judicial estoppel. Parties generally do not dispute this issue. *See RFF Family P'ship LP v. Ross*, 814 F.3d 520, 528 n.5 (1st Cir. 2016) ("Because [the parties] both seem to assume the application of the federal law of judicial estoppel, we accept the parties' agreement without deciding the issue."); *Alternative Sys. Concepts, Inc.*, 374 F.3d at 32 (same). Moreover, "the First Circuit has stated, albeit in dicta, that it would likely reach this same conclusion even without the parties' acquiescent behavior, since, as is true in this case, both the putatively estopping conduct and the putatively estopped conduct occurred in a federal case, and a federal court has a powerful institutional interest in applying federally-developed principles to protect itself against cynical manipulations." *AIG Prop. Cas. Co. v. Green*, 217 F. Supp. 3d 415, 423 (2016) (internal quotations omitted) (quoting *Alternative Sys. Concepts, Inc*., 374 F.3d at 32; *Flores–Febus v. MVM, Inc*., 45 F. Supp. 3d 175, 178 (D.P.R. 2014) (noting that, "while the First Circuit has not ruled specifically on the issue, every other federal appellate court to have considered the question has held that the application of judicial estoppel in diversity cases implicates 'a strong federal policy' warranting reference to federal, rather than state, principles"); *see also Nwachukwu v. Vinfen Corp*., No. 16-11815-MPK, 2018 WL 1409795, at *2 (D. Mass. March 21, 2018) (Kelley, J.) (addressing requirement under Rule 12(b)(6) that the movant must "conclusively establish the affirmative defense" to justify dismissal).

[5] *Perry v. Blum*, 629 F.3d 1, 9 (1st Cir. 2010) (citations omitted); *see also New Hampshire*, 532 U.S. at 751 ("In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts.").

Machine Project, Inc. v. Pan American World Airways, Inc., 199 F. Supp. 3d 382, 388 (D. Mass. 2016) (Gorton, J.) (citing *Alternative Sys. Concepts*, 374 F.3d at 33). "The presence of these elements creates the appearance that either the first court has been misled or the second court will be misled, thus raising the specter of inconsistent determinations and endangering the integrity of the judicial process." *Alternative Sys. Concepts, Inc*., 374 F.3d at 33 (citing *New Hampshire*, 532 U.S. at 750). The primary purpose of the doctrine "is to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system." *EMC Corp. v. Pure Storage, Inc*., 205 F. Supp. 3d 137, 141 (D. Mass. 2016) (Dein, J.) (quoting *Alternative Sys. Concepts*, 374 F.3d at 33). "Consequently, the guiding principle of judicial estoppel is that it should apply when a litigant is playing fast and loose with the courts, and when intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Id.* (quoting *GE HFS Holdings, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 520 F. Supp. 2d 213, 223 (D. Mass. 2007) (Dein, J.)) (internal quotations and punctuation omitted).

B. Duggan's Partial Settlement with the Tribe-Affiliated Entities Advances Consistent Positions with Those Taken in This Case; Martorello Cannot Show That Duggan's Positions Are Directly Inconsistent, *i.e.* Mutually Exclusive.

First, Martorello has the burden to prove that "intentional self-contradiction is being used as a means of obtaining unfair advantage." *Sandstrom v. ChemLawn Corp*., 904 F.2d 83, 87-88 (1st Cir. 1990); *see also Desjardins v. Van Buren Community Hosp*., 37 F.3d 21, 23 (1st Cir. 1994). Duggan has made no such misrepresentations. "Here, there is no indication that the plaintiff is "playing fast and loose with the courts' or intentionally contradict[ing] [herself] to gain an unfair advantage." *Id*. (quoting *Patriot Cinemas, Inc. v. Gen. Cinemas Corp*., 834 F.2d 208, 212 (1st Cir.1987)). Duggan's representations to the Eastern District of Virginia must be "directly inconsistent" with her position in this case. *Vaks v. LumiraDx, Inc*., ___ F. Supp. 3d ___, No. 18-

12571-LTS, 2020 WL 7324756, at *5 (D. Mass. Dec. 11, 2020) (Sorokin, J.). Here, for the reasons stated below, "[j]udicial estoppel is inappropriate, given the lack of contradiction." *Id*. at *6.[6]

1. Duggan's Settlement with the Tribe-Affiliated Entities Does Not Contradict or Otherwise Affect Her Claims in This Case.

Duggan and other litigants nationwide have consistently maintained that Martorello's lending scheme, coordinated with Tribe-affiliated entities, is an illegal operation violating state law and RICO. (Compare, *e.g*., Amended Complaint, *Galloway III*, Dkt. 196-3, to Amended Complaint, *Duggan*, Dkt. 118.) While maintaining that the enterprise is illegal (but constrained by the Fourth Circuit's finding that the district court did not have jurisdiction over the Tribe-affiliated entities), Duggan and other plaintiffs negotiated a significant and meaningful nationwide settlement with the Tribe-affiliated entities, albeit one that did not shut down the entire lending operation. The settlement resulted in $424 million in debt forgiveness, $8.7 million as a fund for consumers' recoveries of over-payments, and a minimum reduction in the interest rate charged. (Exhibit D at 20:16-21:11.)

Martorello incorrectly claims that Duggan agreed "to the continued origination and collection" of loans violating Massachusetts usury law and "persuaded the Eastern District of

[6] Unlike the facts of this case, courts have more frequently found that application of judicial estoppel is warranted in contexts such as parallel bankruptcies with misrepresented claims. *See Guay v. Burack*, 677 F.3d 10, 17 (1st Cir. 2012); *Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.), Inc*., 989 F.2d 570, 571 (1st Cir. 1993). In such cases, efforts to litigate claims independently after failing to disclose the assets in bankruptcy proceedings constitutes "a palpable fraud that the court will not tolerate, even passively." *Payless*, 989 F.2d at 571. A bankruptcy debtor "having obtained judicial relief on the representation that no claims existed, cannot ... resurrect them and obtain relief on the opposite basis." *Id*. For example, in *Payless Wholesale Distributors, Inc*., "the plaintiff had engaged in a 'palpable fraud' in its apparent strategy to 'conceal [its] claims, get rid of [its] creditors on the cheap, and start over with a bundle of rights.'" *Marley v. Bank of Am*., 10–10885–GAO, 2010 WL 5207584, at *1 (D. Mass. Dec. 16, 2010) (O'Toole, J.) (quoting *Payless*, 989 F.2d at 571). Such misrepresentations are not analogous to the current case.

Virginia to allow the Tribe to continue to service and collect debts [at usurious interest rates]." (Dkt. 196 at 8-9.) Such statements distort the record. There is a significant difference between not addressing or not prohibiting lending practices as opposed to actually allowing for such lending to occur. Big Picture's future lending practices were beyond the terms of the settlement. Duggan did not agree to usurious lending practices, and the Eastern District of Virginia did not rule in favor of Tribal lending at usurious rates of interest. Martorello's suggestions to the contrary are ridiculous.

The fact that the Tribe-affiliated entities may continue to make loans does not constitute an admission by Duggan that the lending is legal. The Tribe-affiliated entities remain subject to suit if they continue to operate without a license and to loan at grossly usurious rates of interest. (Dkt. 196 at 5.) The settlement documents specifically note the parties' disagreement about the legality of the lending operation. (Dkt. 196-1 ¶¶ 1.6, 3.3, 3.5.) The court orders from the Eastern District of Virginia are equally clear that the settling parties do not agree about the legality of the lending operation. (Dkt. 196-2; Exhibit H, Amended Preliminary Approval Order.) Also, under the settlement agreement, the only consumers who release their right to sue the Tribe-affiliated entities are those who are inside the class period and elect to accept the cash recovery, if any, that is due to them from the $8.7 million fund. (Dkt. 196-1 ¶¶ 11.2-12.2.) Given that roughly 360,000 of almost 500,000 consumers benefit from the settlement by charged-off (or released) debt, the percentage of the class actually submitting claims, receiving cash back, and releasing their claims is only one-to-two percent of the settlement class. (Exhibit D at 20:16-27:11.)

Martorello argues that the inability to negotiate a complete closure of the business operation amounts to a concession that the lending is legal. (Dkt. 196 at 7-9.) That distorts the truth. Martorello's decision not to participate in the settlement rendered the settlement partial without, at this time, the fullest recovery from participants in the predatory lending scheme. The

Class intends to hold Martorello jointly and severally liable to make the Class whole from the coffers filled by the grossly usurious lending scheme. The negotiated settlement for the Tribe-affiliated entities to cap their interest charges at no greater than 250% of the principal amount was the best result that could be negotiated under the circumstances, and the Class looks to disgorge Martorello of his profits and pay such other damages as provided under state law and RICO.

2. The Tribe-Affiliated Entities' Funding of the Settlement Over Time Does Not Contradict Duggan's Position That Tribal Lending at Grossly Usurious Rates Violates State Law and RICO.

Allowing the settlement to fund over two years does not serve as Duggan's or the Eastern District of Virginia's tacit approval of illegal lending, as Martorello suggests. (Dkt. 196 at 7.) Delayed funding is not a statement about the legality of tribal lending. The Settlement Agreement is silent as to the source of the funds, whether they be from casino revenue, Tribal savings, licensed lending at legal rates of interest, or other source. The settlement payments need not come from illegal lending operations, so there is no contradiction of factual assertions between Duggan's claims in the Eastern District of Virginia and here. In both forums, Duggan has consistently argued that internet lending at usurious rates of interest violates applicable state law and RICO.

3. Duggan's Disgorgement of McFadden's, Dowd's, and Liang's Eventide Earnings for the Class Settlement Fund Does Not Contradict Duggan's Contention that the Current Tribal Lending Model Is Illegal.

The final alleged conflict between this case and *Galloway III* pertains to Dowd's, Liang's, and McFadden's transfer of their minority interests in Eventide to the Settlement Class. Under the terms of the settlement, Martorello inaccurately claims that Duggan is a "part owner" of an entity that is violating state law and RICO. (Dkt. 196 at 10.) The Settlement Agreement actually proposes that the interests be transferred to the Settlement Fund as a disgorgement of any future profit from their unlawful acts. The Fund, not Duggan, would receive any distributed profit from Eventide's operations without regard to the source of profits, which would be better than wrongdoers

continuing to collect for their misdeeds. Regardless, Martorello rendered the issue moot when he "declined to approve the transfer of [Dowd's, Liang's, and McFadden's] membership interests to the Settlement Fund." (Letters from Martorello's counsel, attached as Exhibits E, F, and G at 2.) Overall, the terms of the Tribe-related settlement do not amount to a "nefarious plot"; there is clearly no "fraud being perpetrated on the court." *Total Petroleum Puerto Rico Corp. v. Torres-Caraballo*, 631 F.Supp.2d 130, 134 (D. P.R. 2009).

C. Duggan's Partial Settlement with the Tribe-Affiliated Entities Does Not Qualify as "Successful Persuasion" of That Court to Adopt an Inconsistent Position.

Setting aside the absence of a contradictory position taken in the Eastern District of Virginia, Martorello also must prove that Duggan "*succeeded previously* with a position directly inconsistent with the one [she] currently espouses."[7] "In determining whether the party 'succeeded' in a prior proceeding, the Court should analyze whether the prior forum 'accepted the legal or factual assertion alleged to be at odds with the position advanced in the current forum.'" *In re Bankvest Capital Corp*. 375 F.3d at 60 (quoting *Gens v. Resolution Trust Corp. (In re Gens)*, 112 F.3d 569, 572–73 (1st Cir.1997)). "The party proposing an application of judicial estoppel must show that the relevant court actually accepted the other party's earlier representation." *Perry*, 629 F.3d at 11 (citing *Gens,* 112 F.3d at 572 ("Judicial estoppel is not implicated unless the first forum *accepted* the legal or factual assertion alleged to be at odds with the position advanced in the current forum....") (emphasis in original)). "The showing of judicial acceptance must be a strong one." *Perry*, 629 F.3d at 11 (citing *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996) ("The

[7] *In re Bankvest Capital Corp*., 375 F.3d 51, 60 (1st Cir. 2004) (quoting *Lydon v. Boston Sand & Gravel Co*., 175 F.3d 6, 13 (1st Cir.1999)) (emphasis added); *Sec. & Exch. Comm'n v. Chan*, 465 F. Supp. 3d 18, 31 (D. Mass. 2020) (Burroughs, J.) (same); *see also New Hampshire*, 532 U.S. at 749 ("This rule, known as judicial estoppel, generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.") (internal quotations and citation omitted).

insistence upon a court having accepted the party's prior inconsistent position ensures that judicial estoppel is applied in the narrowest of circumstances.")). In the First Circuit, courts have repeatedly "decline[d] to identify a settlement as representing success for the purposes of judicial estoppel."[8] In fact, "it is well-accepted that judicial estoppel does not apply to the settlement of an ordinary civil suit . . . because there is no judicial acceptance of anyone's position when a party decides to settle a case."[9]

Here, the national class action settlement did not result from a judicial ruling that the lending at, for example, greater than 500% interest complies with all applicable laws and is

[8] *Berkowitz v. Berkowitz*, No. 11–10483–DJC, 2013 WL 5328285, at *5 (D. Mass. Sept. 20, 2013) (Casper, J.) (citation and internal quotations omitted); *see also Reed Elsevier, Inc. v. Muchnick,* 559 U.S. 154, 170 (2010) (finding judicial estoppel did not apply because, in part, "in approving the settlement, the District Court did not adopt petitioner's interpretation"); *In re Bankvest Capital Corp*., 375 F.3d at 60 (because the case involved a settlement rather than a judicial determination of now-alleged legal or factual inconsistencies, judicial estoppel did not apply) (citing *Bates v. Long Island R.R. Co*., 997 F.2d 1028, 1038 (2d Cir. 1993) ("settlement neither requires nor implies any judicial endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel") (quotations omitted); *Water Technologies Corp. v. Calco Ltd*., 850 F.2d 660, 665-66 (Fed.Cir. 1988); *Edwards v. Aetna Life Ins. Co*., 690 F.2d 595, 599 (6th Cir. 1982) (finding "[i]f the initial proceeding results in settlement, the position cannot be viewed as having been successfully asserted") (citations omitted)). *See also In re Venture Mortg. Fund, L.P*., 245 B.R. 460, 473 (S.D.N.Y. 2000) (disregarding *Rissetto* and *Kale*, because Second Circuit authority agrees that a settlement is not a "judicial acceptance"); *Lauterbach v. Huerta*, 817 F.3d 347, 353 (D.C. Cir. 2016) (quoting *Konstantinidis*); *Konstantinidis v. Chen*, 626 F.2d 933, 938-39 (D.C. Cir. 1980) ("the concept's underlying rationale is that a party should not be allowed to convince unconscionably one judicial body to adopt factual contentions, only to tell another judicial body that those contentions were false. It follows that judicial estoppel should not be applied if no judicial body has been led astray. Accordingly, success in the prior proceeding is clearly an essential element of judicial estoppel. A settlement neither requires nor implies any judicial endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel.") (citations omitted).

[9] *Kvetkosky v. Boystun Equip. Mfg., LLC*, No. 18-10607-GAO, 2020 WL 1479489, at *5 (D. Mass. Feb. 20, 2020) (Kelley, J.) (quoting *RFF Family P'ship, LP*, 814 F.3d at 530); *see also In re DiVittorio,* 430 B.R. 26, 48 (Bankr. D. Mass. 2010) (where alleged inconsistencies stem from something akin to a settlement, "the First Circuit has held that a court does not accept the legal or factual allegations of the underlying matter by approving a settlement, rendering judicial estoppel inappropriate") (citations omitted).

therefore legal. The Eastern District of Virginia has certainly never made such a finding. (See, e.g., Dkt. 196-2; *see also* Exhibits D and H.) Also, the Settlement Agreement did not stipulate or otherwise agree to any facts about legality of the lending operation. (Dkt. 196-1 ¶¶ 3.3, 3.5.) Further, overwhelming authority has consistently denied dismissal of cases involving tribal lending that occurs off the reservation at usurious rates. (Dkts.136 and 168.) Given this absence of judicial finding of a contradictory position, judicial estoppel simply does not apply.

Instead of addressing the numerous First Circuit authorities holding that a settlement does not constitute judicial acceptance, Martorello instead relies on outlying opinions from the Seventh and Ninth Circuits. (Dkt. 196 at 11.) In *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996), the court applied judicial estoppel to prevent a plaintiff from asserting conflicting facts about her ability to work. That court found that after a state workers' compensation appeals board approved her settlement of a workers' compensation claim premised on her "total temporary disability," the plaintiff could not thereafter deny the disability for purposes of pursuing a new employment claim. *Rissetto* is distinguishable from the facts of this case because the Eastern District of Virginia did not enter any findings or make any rulings about the merits of the case while signing off on the settlement. That court certainly did not intend for its ruling to be construed as a statement that the predatory lending scheme is legal. Moreover, other courts have noted that *New Hampshire,* as well as *Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795 (1999), narrowed the application of judicial estoppel, abrogating *Rissetto*.[10]

[10] *In the Matter of Gordon Brent Price*, S.E.C. Release No. 425, 2011 WL 3159088, at *10 n.5 (S.E.C. Admin. Proc. July 27, 2011) (noting that *New Hampshire* and more recent Ninth Circuit authority rendered *Rissetto* "no longer good law"); *Stoll v. The Hartford*, No. 05CV1907 IEG (LSP), 2006 WL 3955826, at * (S.D. Cal. Nov. 7, 2006) (questioning whether *Rissetto* is "good law" after *Cleveland*).

Martorello also relies on *Kale v. Obuchowski*, 985 F.2d 360, 361-62 (7th Cir. 1993). That case is equally unavailing. There, the plaintiff Kale "won a favorable allocation of property in [his] divorce case by insisting that he had no interest in real property other than the marital home." *Id.* at 362. The settlement in that case resulted in a capitulation with Kale prevailing "as surely as persons who induce the judge to grant summary judgment." *Id.* Therefore, the court held that Kale could not contradict that representation in subsequent litigation by claiming an ownership interest that he previously denied. *Id.* Here, the Eastern District of Virginia did not make contradictory findings in support of the partial settlement. Neither that court nor Duggan has ever contended that the lending model is legal. Accordingly, the Court should disregard *Rissetto* and *Kale* and instead rely on the well-established First Circuit authority that a settlement does not qualify as a "judicial ruling" for purposes of invoking the doctrine of judicial estoppel. *See, e.g.*, *RFF Family P'ship, LP*, 814 F.3d at 530; *In re Bankvest Capital Corp.*, 375 F.3d at 60.

D. Duggan Did Not Secure Any Unfair Advantage While Reaching the Terms of the Virginia Settlement.

"While it is not a formal element of a claim of judicial estoppel, courts frequently consider a third factor: absent an estoppel, would the party asserting the inconsistent position derive an unfair advantage?" *Alternative Sys Concepts, Inc.*, 374 F.3d at 33; *see also RFF Family P'ship, LP*, 814 F.3d at 528 (identifying unfair advantage as a third condition "that must be satisfied to establish judicial estoppel"). Here, there is no unfair advantage to Duggan or unfair detriment to either the settled parties or Martorello in permitting Duggan to maintain in this action that the lending operation violates state usury laws and RICO. *See AIG Prop. Cas.*, 217 F. Supp. 3d at 425; *see also Nwachukwu*, 2018 WL 1409795, at *3 ("Allowing the case to proceed imposes no unfair detriment to the defendant; rather, dismissing the case arguably provides defendant with an unfair

advantage."). Duggan's negotiation of the best possible settlement with the settled parties did not change her fundamental contention that the lending scheme is illegal.

E. Duggan's Settlement on the Best Possible Terms for the Class Furthers the Judicial Interest in Effective Settlements and Does Not Abuse the Judicial Process

Martorello misuses the doctrine of judicial estoppel for the proposition that a good faith negotiation for a partial class action settlement can then serve as a defense for the remaining defendants. Martorello's argument, if accepted, would have a chilling effect on the partial settlement of cases. Future litigants would be reluctant to obtain a partial recovery, narrowing the issues, because nuances of the settlement confirm that the plaintiff has not yet been made whole. That is the case here. Martorello should be held liable jointly and severally for the balance of the sums owed to the Class, not released from liability. Denial of Martorello's motion to dismiss promotes judicial integrity and furthers the interests of an effective judiciary.

"The doctrine's primary utility is to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system."[11] "Judicial estoppel is designed to prevent the perversion of the judicial process and, as such, is intended to protect the courts rather than the litigants."[12] This Court has previously addressed the limited application of the judicial-estoppel doctrine intended for protection of the courts and judicial integrity:

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[11] *Alternative Sys. Concepts, Inc*., 374 F.3d at 33 (citing *New Hampshire*, 532 U.S. at 750); see also *In re Fiorillo*, 455 B.R. 297, 308 (Bankr. D. Mass. 2011) (stating that the purpose of judicial estoppel is largely "to prevent an abuse of process").

[12] *Re-Ace, Inc. v. Wheeled Coach Indus., Inc*., 317 F. Supp. 2d 84, 85 (D. P.R. 2004) (quoting *Data General Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed.Cir. 1996)); *see also InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003) ("The doctrine is designed to ensure that parties proceed in a fair and aboveboard manner, without making improper use of the court system.") The doctrine of judicial estoppel "upholds the public policy which exalts the sanctity of the oath. The object is to safeguard the administration of justice by placing a restraint upon the tendency to reckless and false swearing and thereby preserve the public confidence in the purity and efficiency of judicial proceedings." *Konstantinidis*, 626 F.2d at 937.

> [J]udicial estoppel is an extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice. It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts. Judicial estoppel is not a sword to be wielded by adversaries unless such tactics are necessary to secure substantial equity.[13]

"Judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement." *AIG Prop. Cas.*, 217 F. Supp. 3d at, 423 (quoting *Perry*, 629 F.3d at 11. Stated differently, "judicial estoppel is applied in the narrowest of circumstances." *Perry*, 629 F.3d at 11 (quoting *Lowery*, 92 F.3d at 224).

The Court should find that Duggan's partial settlement with the Tribe-affiliated entities furthers the interests of judicial integrity, and the underlying circumstances do not warrant judicial estoppel. The settlement in the Eastern District of Virginia did not result from (or reflect) a perversion or misuse of the judicial system or an abuse of process. Indeed, the only "miscarriage of justice" here would be failing to hold Martorello accountable for his orchestration of the predatory lending scheme.

F. The Underlying Facts Do Not Warrant Application of Judicial Estoppel for Dismissal of the Case.

Even if Martorello somehow were able to make the necessary showing on all required elements for judicial estoppel, dismissal of the case "would be an unnecessarily harsh sanction in this case"; Duggan's settlement terms with the Tribe-affiliated entities does not demonstrate, or even suggest, "bad faith, dishonesty, or an intent to 'play fast and loose' with the court that would

[13] *Ghassemian*, 2005 WL 8175878, at *6 (citations and internal quotations omitted); *see also Parker-Gilbert v. Shalter Mut. Ins. Co*., No. 4:19-cv-00185-LPR, 2020 WL 2647404, at *2 (E.D. Ark. May 11, 2020) (observing that judicial estoppel is meant to be used as a "shield" to protect the integrity of the courts, not as a "sword" used to cut down meritorious claims).

justify the imposition of judicial estoppel." *Ostler v. Codman Research Group, Inc*., No. 98-365-JD, 1999 WL 813889, at *12 (D. N.H. Aug. 12, 1999) (citing, in part, *Casas Office Machines v. Mita Copystar*, 42 F.3d 668, 676 (1st Cir. 1994)).[14] Where the representations "are far from being on all fours with the doctrine's elements," the Court should not "impose the extraordinary remedy" of dismissing Duggan's claims. *UNUM Corp. v. U.S.*, 886 F. Supp. 150, 160 (D. Me. 1995). Further, the First Circuit has implied that judicial estoppel does not apply "in the absence of deliberate dishonesty or any serious prejudice to judicial proceedings or the position of the opposing party." *Total Petroleum Puerto Rico*, 631 F. Supp. 2d at 134 (internal brackets, ellipsis and quotations omitted) (citing, in part, *Desjardins*, 37 F.3d at 23). Here, Duggan has consistently maintained that the lending scheme is illegal while at the same time negotiating in good faith for the best possible settlement for the Class. Accordingly, the Court should find that "the factual and procedural circumstances surrounding this lawsuit weigh in favor of rejecting the doctrine's invocation." *Machine Project*, 199 F. Supp. 3d at 389.

V. CONCLUSION

For the reasons addressed above, in conjunction with Duggan's previous arguments (Dkts. 136 and 168), and consistent with findings in the District of Oregon and the Eastern District of Virginia, the Court should deny Martorello's Motion to Dismiss (Dkt. 124) Duggan's Second Amended Class Action Complaint (Dkt. 118).

[14] Application of the doctrine of judicial estoppel for dismissal of litigation, as with other instances of sanctions leading to dismissal, should be used sparingly. "Because dismissal sounds "the death knell of the lawsuit," district courts must reserve such strong medicine for instances where the defaulting party's misconduct is correspondingly egregious"; "[i]n calibrating the scales, the judge should carefully balance the policy favoring adjudication on the merits with competing policies such as the need to maintain institutional integrity and the desirability of deterring future misconduct." *Aoude v. Mobil Oil Corp.,* 892 F.2d 1115, 1118 (1st Cir. 1989).

Dated: March 24, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2021, this document was filed electronically via the Court's ECF system and thereby served on all counsel of record.

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