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 **Hearing Requested**

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 19

Defendants Matt Martorello ("Martorello") and Eventide Credit Acquisitions, LLC ("Eventide") respectfully submit this memorandum in support of their motion to dismiss under Federal Rule of Civil Procedure 19.

PRELIMINARY STATEMENT

Plaintiff Dana Duggan ("Duggan"), on behalf of a putative class of consumer borrowers, seeks to invalidate the class' loan agreements in the absence of the lender and signatory to the agreements, Big Picture Loans, LLC ("Big Picture"), as well as its marketing and technology support affiliate, Ascension Technologies, LLC ("Ascension") (collectively, the "Tribal Entities"), and the sole owner and operator of Big Picture and Ascension, the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Tribe"). The Tribe and Tribal Entities have significant contractual and monetary interests related to the subject of this action, that is, the collection of current and future loans governed by tribal law. Because of their interests in the loan agreements, the Tribe and Tribal Entities are necessary parties to this action under Rule 19(a). *See Downing v. Globe Direct LLC*, 806 F. Supp. 2d 461, 466 (D. Mass. 2011) ("As a general well-settled proposition,

courts have repeated that a 'party to a contract which is the subject of the litigation is a necessary party.'" (citation omitted)); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002) (holding tribes were necessary parties due to their contractual interests in gaming compacts, where district court's order "amount[ed] to a declaratory judgment that the present gaming conducted by the tribes [was] unlawful" under state law). The Tribe is also a necessary party because Duggan's claims challenge its sovereign interests in governing itself, developing its economy, regulating Big Picture's lending operations, and negotiating contracts that are subject to its laws. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist*., 276 F.3d 1150, 1157 (9th Cir. 2002) ("[A] judgment rendered in the [Navajo] Nation's absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the Navajo reservation.").

The Tribe and Tribal Entities cannot be joined to this action due to their sovereign immunity. Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 788 (2014). One core aspect of sovereignty that tribes possess is "common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 788. A tribe's sovereign immunity extends to its commercial activities, including those conducted by "arms of the tribe acting on behalf of the tribe." *White v. University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014). The Tribal Entities are arms of the Tribe afforded sovereign immunity and thus cannot be joined to this action. *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 185 (4th Cir. 2019).

An absent party's immunity from suit is a compelling interest favoring dismissal of the action under Rule 19(b). *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 867-69 (2008); *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843, 854 (9th Cir. 2019); *Fla. Wildlife Fed'n Inc. v. United States Army Corps of Engineers*, 859 F.3d 1306,

1318 (11th Cir. 2017); *Fluent v. Salamanca Indian Lease Auth*., 928 F.2d 542, 548 (2d Cir. 1991); *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989)). The factors set forth in Rule 19(b) also weigh in favor of holding the Tribe and Tribal Entities are indispensable parties. Accordingly, this action should be dismissed under Rule 19.[1]

BACKGROUND

I. The Claims in the Second Amended Complaint Arise Out of Loan Agreements with Big Picture.

Duggan challenges the legality of the putative class' loan agreements with Big Picture. (ECF No. 118 ¶¶ 9-11, 118-1.) The loan agreements contain choice of law, forum selection, tribal dispute resolution, and class action waiver provisions, which provide that they are governed by the laws of the Tribe and applicable federal law, and that all disputes shall be "solely and exclusively" resolved pursuant to the dispute resolution procedure. (ECF Nos. 118, ¶¶ 15, 121-22; 118-1, at 5-6.) This procedure requires complaints related to the loan agreements to be filed with Big Picture, permits administrative review of Big Picture's determination by the Tribal Financial Services Regulatory Authority, and provides the right to appeal to Tribal Court. (ECF No. 118-1, at 5.)

Despite agreeing to these provisions, Duggan seeks to invalidate the putative class' loan agreements, claiming they are governed by state law and that the choice of law, forum selection, tribal dispute resolution, and class action waiver provisions are "void and unenforceable." (ECF

[1] The failure to join an indispensable party cannot be waived and therefore can be raised at any time. *Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 892 (10th Cir. 1989) ("[C]ourts and commentators generally agree that [Rule 19] is not waivable."); *see also Pimentel*, 553 U.S. at 861 (a court may "consider *sua sponte* the absence of a required person and dismiss for failure to join."); *Deschutes River All. v. Portland Gen. Elec. Co*., 323 F. Supp. 3d 1171, 1177 (D. Or. 2018) (observing Federal Rule of Civil Procedure 12 permits Rule 19 to be raised as late as trial). In addition, while Duggan filed the second amended complaint in January 2020, this case remains at the pleading stage and has been stayed on several occasions. *See* ECF Nos. 148, 161–66, 188.

Nos. 118 ¶¶ 15, 153-57.) Duggan further asserts that the Tribe, Tribal Entities, and others constitute a criminal enterprise that collects unlawful debts in violation of the Racketeer Influenced Corrupt Practices Act ("RICO"). (ECF No. 118 ¶¶ 20 n.8, 177, 186.) She seeks declaratory judgment that these provisions are unenforceable, and damages based on alleged violations of Massachusetts' usury laws, RICO, and unjust enrichment. (ECF No. 118 ¶¶ 15, 153–226.)

II. Duggan Entered a Settlement Agreement that Establishes the Tribe and Tribal Entities' Continued Interest in Consumer Lending Under Tribal Law.

The issues presented by the claims in the second amended complaint should not be adjudicated in the absence of the Tribe and Tribal Entities. But the Tribal Entities cannot be joined because in *Williams et al. v. Big Picture Loans, LLC, et al.*, Case No. 3:17-cv-461 (E.D. Va.) ("*Williams*"), a similar action challenging the legality of the Tribe's online lending business, the Fourth Circuit held that the Tribal Entities are arms of the Tribe entitled to sovereign immunity and thus must be dismissed based on lack of subject matter jurisdiction. *Williams*, 929 F.3d at 185. The Tribe enjoys sovereign immunity as a federally recognized Indian Tribe. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) ("[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.").

Following the Fourth Circuit's decision in *Williams*, Duggan, and plaintiffs in similar actions, entered a class action settlement with the Tribal Entities and others concerning loan agreements executed between June 22, 2013 and December 20, 2019. *Galloway, et al. v. Williams, et al.*, Case No. 3:19-cv-00470 (E.D. Va.) ("*Galloway III*"), ECF No. 55-1, §§ 2.28, 11.2 (Exhibit A, the "Settlement Agreement"), ECF No. 65. As relevant here, the Settlement Agreement does not change the choice of law, forum selection, dispute resolution, or class action waiver provisions in the loan agreements. The Settlement Agreement also expressly contemplates Big Picture's continued collection of class members' loans at interest rates that far exceed the rate caps under

Massachusetts' usury laws. Specifically, for any outstanding loan that has not been in default for a certain period, Big Picture may collect "no more than 2.5 times the original principal amount of the loan in payments over the life of the loan (*e.g.*, if the original principal amount of the loan was $500.00 then the Big Picture Defendants agree to cap collection at $1,250.00, including payments credited to either interest or principal reduction)." (Settlement Agreement §§ 11.2–11.3.) Future loans, however, are not subject to any cap on their collection. The majority of the class members have outstanding loans. *See Galloway III*, ECF No. 114, at 5-6 (memorandum opinion noting class has approximately 491,018 members of which 361,731 have outstanding loans).

Significantly, the Tribe and Tribal Entities have not agreed to forego collection of all loans at issue in this putative class action matter. The Settlement Agreement does not cover loans that Big Picture originated from December 21, 2019 through today. And class members do not release their individual claims against Big Picture and the other settling parties, unless they elect to receive payment from the settlement fund. (Settlement Agreement §§ 12.3–12.4); *Galloway III*, ECF No. 105 at 3. Only class members who paid off their loans and paid more than 2.5 times the principal are eligible to receive payment from the settlement fund. (Settlement Agreement §§ 2.32, 8.3); *Galloway III*, ECF Nos. 105 at 3, 114 at 6. The vast majority of the class is not eligible to receive payment from the settlement fund because they have outstanding loans. *Galloway III*, ECF No. 114, at 5-6.

In sum, the Settlement Agreement establishes the Tribe and Tribal Entities have a direct interest in the questions presented by Duggan's claims. They have a plain interest in Big Picture's continuing ability to originate and collect loans governed by tribal and federal law, and in avoiding a judgment that declares the loans unlawful or subject to state law. Such a judgment would adversely affect their business prospects and existing and future relationships with banks, credit

bureaus, creditors, borrowers, and prospective borrowers as well as have a chilling effect on tribal economic development. The Tribe also has an equally plain interest in avoiding a judgment that stigmatizes its business by branding it as a racketeering enterprise.[2]

LEGAL STANDARD

"Rule 19 addresses circumstances in which a lawsuit is proceeding without particular parties whose interests are central to the suit." *Picciotto v. Cont'l Cas. Co.*, 512 F.3d 9, 15 (1st Cir. 2008). When assessing absent parties' interests, a court asks first whether the absent parties are necessary under Rule 19(a), and then whether the absent parties are indispensable under Rule 19(b). *Downing*, 806 F. Supp. 2d at 465-66. Although Rule 19 no longer uses the terms "necessary" and "indispensable," the First Circuit continues to use the traditional nomenclature. *See Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 25 n.3 (1st Cir. 2010). Under Rule 19(a), an absent party is necessary if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double,

[2] As explained by the Tribe's Chairman, "it is reprehensible when critics imply that we are unsophisticated or have been 'suckered' into business relationships. The suggestion that my Tribal Council and I (or the governing body of any Tribe) would place our sovereignty for sale to the highest bidder is deeply offensive. Each of the 576 federally-recognized American Indian Tribes has the freedom and authority to engage in legal business operations (like Tribal lending). At a time when America needs greater civility and honest discourse, a term like 'rent-a-Tribe' should be retired permanently. This term is a shameful relic of the past. American Indian Tribes' pursuit to operate businesses to generate revenue and ensure their self-sufficiency and self-determination should be applauded, not villainized or discounted." James Williams Jr., *Respect Indian Country, Retire 'Rent-a-Tribe,'* Native Business Magazine, October 21, 2019, https://www.nativebusinessmag.com/respect-indian-country-retire-rent-a-tribe/

multiple, or otherwise inconsistent obligations because of the interest.

Rule 19(a)(1). Under Rule 19(b), if a necessary party cannot be joined, then "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." When a nonjoined party is both necessary and indispensable, dismissal is required. *B. Fernandez & HNOS, Inc. v. Kellogg USA, Inc*., 516 F.3d 18, 23 (1st Cir. 2008). When undertaking a Rule 19 inquiry, a court should take the policies underlying the rule into account, "including the public interest in preventing multiple and repetitive litigation, the interest of the present parties in obtaining complete and effective relief in a single action, and the interest of absentees in avoiding the possible prejudicial effect of deciding the case without them." *Picciotto*, 512 F.3d at 15–16.

ARGUMENT

I. The Tribe and Tribal Entities Are Necessary Parties Under Rule 19(a).

A. Proceeding in the Absence of the Tribe and Tribal Entities Will Impair Their Interests in the Loan Agreements.

"As a general well-settled proposition, courts have repeated that a 'party to a contract which is the subject of the litigation is a necessary party.'" *Downing*, 806 F. Supp. 2d at 466 (citation omitted); *Acton Co. of Massachusetts v. Bachman Foods, Inc*., 668 F.2d 76, 81–82 (1st Cir. 1982) ("[A]n action seeking rescission of a contract must be dismissed unless all parties to the contract, and others having a substantial interest in it, can be joined."); *Unetixs Vascular, Inc. v. CorVascular Diagnostics, LLC*, 217 F. Supp. 3d 537, 540 (D.R.I. 2016) (absent party to the "two relevant contracts that form[ed] the basis of the dispute" was indispensable, and fact that plaintiff "pled some counts as torts [wa]s not dispositive" because "the central determination the Court must make [wa]s focused on the validity of the two contracts"); *Rivera Rojas v. Loewen Grp. Int'l, Inc*., 178 F.R.D. 356, 362 (D.P.R. 1998) ("A contracting party is the paradigmatic example of an

indispensable party."); *Latin Uno, Inc. v. Univision Commc'ns, Inc.*, No. 15-2122 (ADC), 2019 WL 469843, at *5 (D.P.R. Feb. 5, 2019) (in action against a parent company, "[a] subsidiary may be a necessary party if . . . the subsidiary entered into contracts which are at the core of the controversy.").[3]

This principle is illustrated by *Downing*, a putative class action brought on behalf of motor vehicle owners who registered their vehicles with the Massachusetts Registry of Motor Vehicles ("RMV"). 806 F. Supp. 2d at 463-64. The RMV shared vehicle owners' names and addresses with a direct mail marketing company pursuant to a contract that required the company to mail registration renewal notices and advertisements to vehicle owners on behalf of RMV. *Id.* at 463-64. The plaintiff filed suit against the company, seeking declaratory judgment, among other relief, that the company's performance of its contract violated federal privacy protection laws, but did not include Massachusetts or RMV as defendants. *Id*. at 463-64, 469. The company moved for judgment on the pleadings under Rule 19, arguing Massachusetts was a necessary and indispensable party. *Id*. at 465.

Relying on the well-settled principle that a "party to a contract which is the subject of the litigation is a necessary party," the district court held that Massachusetts was a necessary party

[3] This proposition enjoys widespread support in courts outside of the First Circuit as well. *See, e.g.*, *Gunvor SA v. Kayablian*, 948 F.3d 214, 221 (4th Cir. 2020) ("[A] contracting party is the paradigm of an indispensable party."); *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist*., 276 F.3d 1150, 1156 (9th Cir. 2002) ("[N]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." (citation omitted)); *U.S. ex rel. Hall v. Tribal Dev. Corp*., 100 F.3d 476, 479 (7th Cir. 1996) ("A judicial declaration as to the validity of a contract necessarily affects, 'as a practical matter,' the interests of both parties to the contract. As a party to the lease contracts at issue here, the Tribe . . . is a necessary party under Rule 19(a)." (citation omitted)); *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788 (D.C. Cir. 1983) ("Numerous cases hold that 'an action seeking rescission of a contract must be dismissed unless all parties to the contract, and others having a substantial interest in it, can be joined.").

under Rule 19(a)(1)(B)(i) for two reasons. *Id*. at 466. First, as an obligee under the contract, Massachusetts had an interest in performance of the contract and deciding the merits of the case could, *as a practical matter*, "effectively invalidate" the contract. *Id.* at 466-67. Second, the contract provided that it would "automatically terminate" if there was a finding that its performance violated the privacy law at issue or any other federal or Massachusetts law, and the suit therefore rendered the contract "less valuable" to Massachusetts. *Id*. at 464, 467. Even without the termination clause, the contract would be "nullified" by a judgment that it violated state or federal law. *Id*. at 467 n.37, n.39. The court further found that Massachusetts could not be joined due to its sovereign immunity and concluded that it was a necessary party. *Id*. at 467–68.

Like *Downing*, the Tribe and Tribal Entities have a strong interest in the performance of their loans agreements with the putative class of borrowers. Duggan "seeks a declaratory judgment that the choice of law, forum selection, tribal dispute resolution, and class action waiver provisions in Big Picture Loans' loan agreement[s] are void and unenforceable." (ECF No. 118 ¶ 15.) A judgment awarding this relief would invalidate Big Picture's loan agreements, and impair its ability to collect on outstanding loans and issue further loans with similar provisions. As such, the Tribe and Tribal Entities have an "interest relating to the subject of [this] action," and disposing of the action in their absence would, "as a practical matter," impair their "ability to protect [that] interest." Rule 19(a)(1)(B)(i).[4]

The Ninth Circuit's decision in *American Greyhound Racing, Inc.*, which was cited with

[4] Big Picture is also a necessary party under Rule 19(a)(1)(A) because this Court cannot accord complete relief in its absence. A "court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement." *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999). Because the loan agreements at issue are between Big Picture and the putative class of borrowers, this Court cannot award declaratory relief in Big Picture's absence.

approval in *Downing*, is also instructive. 806 F. Supp. 2d at 467 n.40. There, racetrack owners and operators sought to enjoin the Governor of Arizona from renewing gaming compacts with several tribes, claiming the gaming permitted by the compacts was prohibited by state law. 305 F.3d at 1018, 1020-21. The Governor moved to dismiss on the ground that the tribes were necessary and indispensable parties. *Id.* at 1018. The district court denied the motion, held the gaming permitted by the compacts was unlawful, and enjoined the Governor from renewing existing gaming compacts with the tribes. *Id*. at 1021.

On appeal, the Ninth Circuit reversed and held the tribes were necessary parties. *Id*. at 1024-25. The court first observed that the tribes' had a right to renewal under compacts and found this contractual right established the tribes' interest in the litigation. *Id*. at 1023. The court then found that the district court's injunction "amount[ed] to a declaratory judgment that the present gaming conducted by the tribes is unlawful," and impaired the "sovereign power of the tribes to negotiate compacts." *Id.* at 1024. The court noted that while the tribes were not bound by the district court's ruling, "their interests may well be affected as a practical matter by the judgment that its operations are illegal," and "enforcement authorities may consider themselves compelled to act against the tribes" in light of the ruling. *Id*. (emphasis in original). The court also found the tribes were indispensable and reversed and remanded with instructions to dismiss the action because the tribes were immune from suit. *Id*. at 1018; *see also Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1147 (D. Or. 2005) (holding tribes were necessary and indispensable parties where plaintiffs challenged "validity of tribal casinos" and sought declaration that tribes' gaming compact was "unconstitutional, illegal, and void").

Similarly, Big Picture has a contractual right to enforcement of the terms of its loan agreements. An adverse judgment in this case would effectively declare that its lending

"operations are illegal," *American Greyhound Racing*, 305 F.3d at 1024, thereby impairing its interests in the loan agreements, Ascension's ability to generate revenue for its services to Big Picture, and the Tribe's substantial interest in the revenue generated by its loans. The Tribe and Tribal Entities are therefore necessary parties.

B. The Tribe Is a Necessary Party Because Proceeding in Its Absence Will Impair Its Ability to Protect Its Sovereign and Economic Interests.

The sovereign interests of tribes in advancing their self-sufficiency and self-determination through economic development is well established. For decades, Congress has promoted tribal economic development by enacting legislation that encourages partnerships with outside entities. For example, in the Native American Business Development, Trade Promotion, and Tourism Act of 2000, Congress found that the United States has obligations to "foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes," and to assist "tribes with the creation of appropriate economic and political conditions" by "encourag[ing] investment from outside sources" and "facilitat[ing] economic ventures with outside entities." 25 U.S.C. §§ 4301(6), (9).[5] Further, part of the "broad federal commitment" to tribal sovereignty includes tribes' ability to "undertake and regulate economic activity." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983).

"[T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases 'may be the only means by which a tribe can raise revenues.'" *Bay Mills Indian Cmty.*, 572 U.S. at 810 (Sotomayor, J., concurring) (citation omitted). Tribes' businesses

[5] *See also* 25 U.S.C. § 5602 (finding in the Indian Trust Asset Reform Act of 2016 that "the responsibility of the United States to Indian tribes includes a duty to promote tribal self-determination regarding governmental authority and economic development."); 25 U.S.C. § 2701(4) (providing in the Indian Gaming Regulatory Act of 1988 that a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government).

"cannot be understood as mere profit-making ventures that are wholly separate from [their] core governmental functions." *Id.* at 111. Accordingly, when determining whether the Tribe is a necessary party, its business should be viewed as furthering its core governmental functions. *Cf. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) ("The congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," should be considered when deciding "whether state authority is pre-empted by the operation of federal law." (citation omitted)).

The Tribe has substantial sovereign and economic interests in its online lending business. By challenging the legality of the loan agreements, Duggan is attempting to undermine the Tribe's sovereign authority to regulate the business of its own governmental arm, subject to its own laws, and to negotiate contracts that are governed by its laws and enforced in its courts. The loan agreements provide that they are governed by tribal law, including the Tribal Consumer Financial Services Regulatory Code, which is enforced by the Tribal Financial Services Regulatory Authority. (*See* ECF No. 118-1, at 5.) Because adjudicating the validity of tribal choice of law and forum selection provisions without the Tribe will impair its sovereign interests in making and enforcing its laws, the Tribe is a necessary party. *See Dawavendewa*, 276 F.3d at 1157 (holding, in a suit challenging hiring preference policy for members of tribe in lease between tribe and operator of tribe's power generating station, that "a judgment rendered in the [tribe's] absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the [tribe's] reservation."); *Enter. Mgmt. Consultants, Inc.*, 883 F.2d at 894 ("In addition to the effect this action would have on the Tribe's interest in the contract, the suit would also effectively abrogate the Tribe's sovereign immunity by adjudicating its interest in that contract without consent."); *cf. Kennedy v. U.S. Dep't of the Interior*, 282 F.R.D. 588, 594 (E.D. Cal. 2012) ("[T]he Tribe has a

legally protected interest in the outcome of this case 'because the dispute between the [factions of the tribe] raises questions about compliance with the Tribe's Constitution, Election Ordinance and Membership Ordinance and because the governance of the Tribe is . . . at stake.'").

The Tribe's strong economic interest in the lending business further supports its status as a necessary party. In 2018, the district court in *Williams* found that "[p]roceeds from Big Picture's business now comprise more than 10% of the Tribe's general fund, and those profits could possibly fund more than 30% of the Tribe's budget over the next few years." *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 264 (E.D. Va. 2018). The Fourth Circuit described these proceeds as a "significant portion of the Tribe's general fund," and concluded the Tribal Entities "serve the purposes of tribal economic development and self-governance" and have "promoted 'the Tribe's self-determination through revenue generation.'" *Williams*, 929 F.3d at 179, 182, 185 (citation omitted). In 2019, Tribal Chairman James Williams, Jr. reported to this Court that revenue from Big Picture constituted over 40% of the Tribe's general fund and was projected to entirely fund the Tribe's budget within the coming years. ECF No. 28-3 ¶¶ 17–18. The Tribe invested over $7,000,000 in Big Picture in order to "create economic self-sufficiency" and relies on its revenue to fund essential government programs. *Id.* ¶¶ 17–18. Indeed, Chairman Williams opined that "[a]ny judgment negatively affecting actual loan operations may result in significant cuts to government services, [closure of the Tribe's casino], loss of tribal business, and significant unemployment." *Id.* ¶ 25 (c); *see also Williams*, 929 F.3d at 179–80 (observing the importance of government programs funded by revenue from Big Picture when reaching its holding that the Tribal Entities are arms of the Tribe).

In a recent Rule 19 decision, the Ninth Circuit considered the economic impact of litigation on an absent tribe, itself, in addition to its impact on a tribal corporation. The court noted that

"[t]he Navajo Nation and [the corporation] would be prejudiced if this lawsuit were to proceed and Plaintiffs were to prevail—at stake is an estimated 40 to 60 million dollars per year in revenue for the Navajo Nation, as well as its ability to use its natural resources how it chooses." *Dine Citizens*, 932 F.3d at 857; *see also Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1225-26 (D. Colo. 2012) (holding tribe was necessary party in suit challenging lawfulness of mining permit issued to operator of the tribe's mine, where royalties and taxes from the mine constituted 24% of the tribe's budget). Likewise, the Tribe's economic interest in the continued operations of Big Picture makes it a necessary party in this case.

II. This Action Must Be Dismissed Because the Tribe and Tribal Entities Are Indispensable Parties Under Rule 19(b).

Because the Tribe and Tribal Entities are necessary parties that cannot be joined, *Williams*, 929 F.3d at 185, the Court must next consider whether they are indispensable such that this action must be dismissed, *Picciotto*, 512 F.3d at 15. A party is indispensable if in "equity and good conscience," the Court should not allow the action to proceed in its absence. Rule 19(b). Rule 19(b) sets forth four nonexclusive factors that guide an indispensability inquiry: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by (a) protective provisions in the judgment, (b) shaping the relief, or (c) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. *Id.*; *Pimentel*, 553 U.S. at 862. Each of these factors and the absent parties' sovereign immunity strongly favors dismissal.

A. The Tribe and Tribal Entities' Sovereign Immunity Is a Compelling Interest that Strongly Favors Dismissal.

Numerous courts have "emphasized that immunity places a heavy thumb on the scale for

dismissal" under Rule 19(b). *Downing*, 806 F. Supp. 2d at 470. "[W]hen a party is 'immune from suit, there is very little room for balancing [the] factors set out in rule 19(b), because immunity may be viewed as one of those interests compelling by themselves.'" *Id*. (quoting *Fluent*, 928 F.2d at 548. The Ninth Circuit has observed:

> there is a "wall of circuit authority" in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—"virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity."

Dine Citizens, 932 F.3d at 857 (alteration in original) (quoting *White v. Univ. of California*, 765 F.3d 1010, 1028 (9th Cir. 2014)). Indeed, the Supreme Court has instructed that "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Pimentel*, 553 U.S. at 867; *Fla. Wildlife Fed'n Inc.*, 859 F.3d at 1318 (explaining that *Pimentel* requires courts to give "sufficient weight" to an absent, necessary party's sovereign status "out of recognition that any consideration of the merits in the sovereign's absence is 'itself an infringement on . . . sovereign immunity.'" (citation omitted) (alteration in original)); *Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 96 (2012) ("*Pimentel* . . . illustrates that sovereign immunity often will be compelling itself in swaying the Rule 19(b) analysis" and that "the entire case must be dismissed if there is the potential for the interests of the sovereign to be injured.") In light of the weight of authority favoring dismissal in sovereign immunity cases, the Tribe and Tribal Entities are indispensable parties.

B. The Rule 19(b) Factors Weigh in Favor of Dismissal.

An analysis of the Rule 19(b) factors confirms that the Tribe and Tribal Entities are indispensable parties. "The first factor of prejudice, 'insofar as it focuses on the absent party,

largely duplicates the consideration that made a party necessary under Rule 19(a).'" *Downing*, 806 F. Supp. 2d at 468 (citation omitted). Thus, it is worth reiterating that federal policies encourage tribal economic development, and that a "contracting party is the paradigmatic example of an indispensable party." *Rivera Rojas*, 178 F.R.D. at 362. Applying this "core principle" in *United States. ex rel. Hall v. Tribal Development Corp.*, the Seventh Circuit concluded the first Rule 19(b) factor weighed in favor of dismissal, where the plaintiffs sought "to void contracts between the defendants and the Tribe for the leasing of goods and services that the Tribe needs in order to operate its casinos." 100 F.3d 476, 480 (7th Cir. 1996). Noting the "Tribe's stake in this matter extends beyond the specific contracts at issue," the court agreed with the trial court's reasoning that

> In a larger sense, **the precedent set by rescission of transactions freely entered by the tribes would likely be extremely prejudicial to the tribes' long term interest in Indian gaming and the revenue it provides. . . . The message such a judgment would send to outside vendors would be that transactions with Indian gaming enterprises are subject to cancellation at any time** and without regard to whether the contracts were freely and fairly negotiated, the extent to which the parties have performed their duties under the contracts or the settled expectations and reliance of the parties. . . . Regardless of whether such a judgment would otherwise constitute the correct application of the law, it would undeniably be prejudicial to the interests of the Indian tribes.

Id. (citation omitted) (alteration in original and emphasis added); *see also H.D. Corp. of Puerto Rico v. Ford Motor Co.*, 791 F.2d 987, 992–93 (1st Cir. 1986) (holding parent company was indispensable party, where plaintiffs' claims against its subsidiary were "largely directed against the parent" and parent was a signatory to agreements that formed the basis of certain counts). A judgment in favor of Duggan would send the same message here, as it would discredit Big Picture's tribal loan agreements and undermine the Tribe's interests in its tribal lending and the essential revenue it provides. *See* ECF No. 28-3 ¶¶ 17–18.

Permitting these actions to proceed would also prejudice Martorello and Eventide. As a

result of Big Picture and Ascension's sovereign immunity rights, the Court cannot compel either entity to provide documents, key witness testimony or other information that would be essential to Martorello and Eventide's defense, such as documents and witness testimony establishing the Tribe's substantial interest in consumer lending,[6] its involvement in and control of Big Picture and Ascension, and Martorello and Eventide's complete non-involvement in the Tribe's activities other than as a secured creditor with the rights of a creditor expressly allowed for under Eventide's Loan and Security Agreement. *See* ECF No. 118 ¶¶ 76–82. The substantial prejudice Martorello, Eventide, the Tribe, and Tribal Entities will face if these actions proceed strongly favors dismissal.

The second factor also weighs in favor of dismissal because this prejudice cannot be lessened or avoided. With respect to Martorello and Eventide, the Court cannot compel the Tribe or Tribal Entities to provide documents and witnesses. *See Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1105 (8th Cir. 2012) ("[A] federal court's third-party subpoena in private civil litigation is a "suit" that is subject to Indian tribal immunity."). A judgment for Duggan will impugn the legality of Big Picture's loan agreements and business methods, and there is no way to shape relief to avoid this prejudice to the Tribe and the Tribal Entities. As the court reasoned in *Downing*:

[6] The lack of this information may impair Martorello and Eventide's ability to present choice of law arguments based on the Indian Commerce Clause or preemption of state regulatory laws. *See, e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–45 (1980) (explaining "the assertion of state regulatory authority over tribal reservations and members" may be "pre-empted by federal law," where federal and tribal interests outweigh state regulatory interests); *Cabazon Band of Mission Indians*, 480 U.S. at 221–22 ("We conclude that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them."); *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 112 n.4 (2d Cir. 2014) (affirming denial of preliminary injunction against ban on tribes' high-interest consumer loans, but noting that if a court was provided with a developed factual record, including information about the tribes' investments in their lending businesses, it "might well find that the tribes' sovereign interest in raising revenue militate in favor of prohibiting a separate sovereign from interfering in their affairs.").

> There is no way to shape the relief sought by Plaintiff that would mitigate the prejudice to Massachusetts (and Defendant). Plaintiff seeks a declaration that Defendant's performance of its contract with Massachusetts violated the DPPA [a federal privacy law] along with a permanent injunction enjoining Defendant from performing the contract. Because a declaration that Defendant violated the DPPA is the same as holding that Massachusetts violated the law, Plaintiff's relief cannot be granted without prejudice to Massachusetts.

806 F. Supp. 2d at 469 (footnotes omitted); *see also Hall*, 100 F.3d at 480 (reasoning second factor supported dismissal because "[t]here is no middle ground—either the transactions violate statutory requirements and are void, requiring payment of all value paid by the tribes, or they comply with the law and are valid"); *Am. Greyhound Racing, Inc*, 305 F.3d at 1025 (second factor favored dismissal where modifying relief "would not protect the tribes from other potential effects of the declaration that the gaming conducted by the tribes pursuant to their compacts is illegal"); *Hardy v. IGT, Inc*., No. 2:10-CV-901-WKW, 2011 WL 3583745, at *7 (M.D. Ala. Aug. 15, 2011) ("Narrowing the scope of [plaintiff's] recovery to just the [defendant manufacturers of bingo machines] would not alter the determination that the Tribe's gaming contracts with its patrons are void under Alabama law, and its electronic bingo operations are illegal under Alabama law or federal law, or both."). Because an adverse judgment would inevitably harm the Tribe and Tribal Entities, the second factor supports dismissal.

The third factor concerns "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Downing*, 806 F. Supp. 2d at 469. In *Downing*, the court found the third factor weighed in favor of dismissal because without Massachusetts as a party, the Commonwealth could engage in "extremely similar conduct" by contracting with another direct mail marketing company to mail registration renewal notices to vehicle owners. *Id*. at 469. As a result, reaching the merits of the case "could be inefficient as a further lawsuit could be necessary that would require relitigating nearly identical issues." *Id*. (citation omitted); *see also*

Dewberry, 406 F. Supp. 2d at 1148 (third factor favored dismissal where plaintiffs sought "nothing less than nullification" of tribes' gaming compact and judgment for plaintiffs would deprive tribes of contractual benefits for which they bargained). The same is true in this case given that Big Picture continues to issue loans with interest rates that exceed the interest caps under Massachusetts' usury laws and which contain the very choice of law, forum selection, class action waiver, and dispute resolution provisions that Duggan seeks to declare unlawful. Duggan has not sought to enjoin Big Picture from issuing such loans, and, thus, "a further lawsuit could be necessary that would require relitigating nearly identical issues." *Downing*, 806 F. Supp. 2d at 469.

The fourth and final factor favors dismissal because the putative class members have an adequate remedy if this action is dismissed. They can pursue relief under the Tribal Dispute Resolution Procedure set forth in their loan agreements.[7] *See, e.g.*, ECF No. 118-1, at 5-6 (summarizing dispute resolution procedure for all claims relating to or arising from the loan agreement and noting right to appeal to Tribal Court). In addition, they can seek relief through the Consumer Financial Protection Bureau's dispute resolution process.[8] Congress created the CFPB to regulate and enforce consumer lending activity and Big Picture has no immunity from its processes. *See Dawavendewa*, 276 F.3d at 1162-63 (noting Equal Employment Opportunity

[7] In a similar case challenging the legality of the Tribe's lending business, the United States District Court for the District of Oregon recently "decline[d] to adopt" the recommendation that the loan agreements' choice of law and forum selection clauses are unenforceable because they require borrowers to seek relief through the Tribal Dispute Resolution Procedure. *Smith v. Martorello, et al.*, No. 3:18-CV-1651-AC, 2021 WL 981491, at *3 n.4 (D. Or. Mar. 16, 2021). Observing that the loan agreements are governed by tribal and applicable ***federal*** law, the court distinguished these provisions from loan agreements in other cases that are unenforceable because they prospectively waive federal law. *Id.* at *3 n.4.

[8] Consumer Financial Protection Bureau, *Submit a Complaint*, https://www.consumerfinance.gov/complaint/

Commission might provide plaintiff with an adequate alternative forum).

Even if the putative class lacks an alternative forum and duplicative litigation were otherwise required, dismissal is still warranted given that sovereign immunity is a compelling interest afforded great weight under Rule 19(b). *Fluent*, 928 F.2d at 548; *Dine Citizens*, 932 F.3d at 858 ("Even assuming that no alternate remedy exists, and that both the third and fourth factors therefore weigh against dismissal, we would hold that dismissal is proper. . . . we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy."); *Am. Greyhound*, 305 F.3d at 1025 (even if no alternative forum exists, "this result is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims."); *Cf. Pimentel*, 553 U.S. at 872 ("Dismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity."). Accordingly, the Tribe and Tribal Entities are indispensable parties and this action must be dismissed.

CONCLUSION

For the foregoing reasons, Martorello and Eventide respectfully request that this action be dismissed pursuant to Federal Rule of Civil Procedure 19.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2021, a true copy of the above document, including attachments, if any, was served via electronic means using the Court's Electronic Case Filing (ECF) system upon all registered ECF users, and paper copies will be sent to those indicated as non-registered participants.

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