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

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 19

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I. INTRODUCTION

Attempting to exploit tribal sovereignty and avoid all liability for their fraudulent and predatory lending scheme, Defendants Matt Martorello and Eventide Credit Acquisitions, LLC ("Martorello & Eventide") argue that Rule 19 should preclude the Court from holding them accountable for their tortious conduct. They seek to use Rule 19 to compel dismissal, not to join new or former parties to this suit. At least two other courts have denied similar motions from operators of tribal lending models. *Commonwealth of Pennsylvania v. Think Fin., Inc.*, No. 14-CV-7139, 2016 WL 183289, at *4 (E.D. Pa. Jan. 14, 2016); *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163, at *20 (D. Vt. May 18, 2016).

Fundamentally, Rule 19 pertains to mandatory joinder and attempts to preserve the rights of persons who, in the interests of justice and fairness, should be part of the litigation. The operative provisions of Rule 19 require joinder if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
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> (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:
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> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
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> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Of course, here, Big Picture, Ascension, and the Lac Vieux Tribal Council (collectively "the Settled Parties") were part of the litigation, negotiated a settlement to get *out* of this case (Dkt. 200-1, ¶ 2.22), and did so knowing this case would continue against Martorello & Eventide. They were not "absen[t]" under Rule 19(a); they were here and exited of their own volition. And they do not "claim[] an interest" in the ongoing case against Martorello & Eventide—quite the opposite

—they have settled and concluded any interest they may have had. These basic facts prevent Martorello & Eventide from establishing either of Rule 19's requisite elements.

Nor do the settled parties retain even a theoretical interest here, because the Court can accord complete relief to the existing parties. Duggan seeks disgorgement of profits and other monetary damages from Martorello & Eventide, and declaratory relief limited to preventing Martorello & Eventide from relying on the terms of the form loan agreement to avoid liability. She does not seek any relief impeding the Settled Parties' business.

Further, the tort-based claims against Defendants are not subject to Rule 19. Where, as here, a plaintiff seeks monetary damages from a co-conspirator: "[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990).[1] Given their joint and several liability, Martorello & Eventide cannot avail themselves of a Rule 19 defense in a premeditated effort to avoid liability.

Even if the Court were to somehow find the Settled Parties "necessary" to the continued litigation, Martorello & Eventide have not met their burden to show that the Settled Parties are indispensable. Also, Martorello & Eventide did not attempt to hold the Settled Parties in this litigation through crossclaims or third-party actions; instead, they waited until final approval of a settlement with the Settled Parties as a part of their procedural gamesmanship for dismissal of

[1] The Central District of California addressed similar claims in holding that absent parties were not necessary under Rule 19. *State Compensation Ins. Fund v. Drobot*, No. SACV 13-0956 AG (CWx), 2015 WL 12711650, at *10 (C.D. Cal. Dec. 18, 2015). Citing the above quote from *Temple*, the court noted that it can "grant complete relief to Plaintiff without the Absent Parties because co-conspirators are jointly and severally liable for all damages caused by the conspiracy." *Id*. (citing *Ward v. Apple*, 791 F.3d 1041, 1948–49 (9th Cir. 2015) (finding an absent antitrust co-conspirator was not a required party under Rule 19(a)(1)(A) because of joint and several liability) and *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n*, 298 F.3d 768, 775 (9th Cir. 2002) (noting that "RICO conspirators are jointly and severally liable for the acts of their co-conspirators.")).

Duggan's claims in the only forum they can be prosecuted. Rule 19 does not apply here under any scenario.

II. BACKGROUND

The Court is already very familiar with the underlying facts as well as much of the procedural history. (Dkts. 118, 136, 168, 197.) Duggan sued Big Picture, Ascension, and Martorello on October 31, 2018. (Dkt. 1.) Big Picture and Ascension sought dismissal under Rules 12(b)(2) and (6). (Dkts. 27-34.) Duggan later amended her complaint to name the Tribal Council as Defendants. (Dkt. 72.) Big Picture, Ascension, and the Tribal Council, in conjunction with the Tribe and other parties, negotiated a national settlement of Duggan's claims and other litigation. The parties notified this Court of the settlement in November 2019. (Dkt. 108.)

Under the terms of the settlement, Big Picture, Ascension, and the Tribal Council negotiated for Duggan to dismiss them from this lawsuit after preliminary approval of the settlement was granted in the Eastern District of Virginia. (Dkt. 200-1, ¶ 5.1.) The Settlement Agreement acknowledged that Martorello & Eventide were not parties to the settlement. (*Id.*, ¶¶ 2.16, 2.22.) In fact, the Agreement assisted Duggan and other plaintiffs with continued litigation of class action claims against Martorello & Eventide. (*Id.*, ¶¶ 5.3, 6.3, 12.1, 12.8.) Fundamentally, the Tribe-affiliated entities did not object to, or otherwise dispute, Duggan's continued prosecution of claims against Martorello & Eventide. The Agreement provides for Duggan to continue using the Tribal entities' document production against Martorello & Eventide, as well as loan data for purposes of class certification. (*Id.*, ¶¶ 6.3, 15.4, 15.12.) The Settled Parties also agreed to consider producing 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 against Martorello & Eventide. (*Id.*, ¶ 6.4.) The Settled Parties also agreed to withdraw claims of privilege on disputed documents to assist discovery against Martorello & Eventide. (*Id.*, ¶ 15.6.)

Preliminary approval of the settlement was granted on December 20, 2019. (*Galloway v. Williams*, No. 3:19-CV-470, Dkt. 58 (E.D. Va.).) 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 ("Amended Complaint") against Martorello & Eventide and, in the process, also deleted all allegations against the Settled Parties. (Dkt. 118.) The Amended Complaint does not include any request for relief from or against the Settled Parties; any relief can be granted without affecting the Tribal entities' legal rights.

III. ARGUMENTS AND AUTHORITIES

A. The Legal Standard for Review of Defendants' Motion Favors Duggan's Claims.

Pursuant to Rule 12(b)(7), "a defendant may move to dismiss a claim when a plaintiff fails to join a required party." *J&J Sports Productions, Inc. v. Cela*, 139 F. Supp. 3d 495, 499 (D. Mass. 2015) (Casper, J.) (citations omitted). Martorello & Eventide bear the burden of "showing why an absent party should be joined." *Id*. "Federal courts are extremely reluctant to grant motions to dismiss based on nonjoinder and, in general, dismissal will be ordered only when the defect cannot be cured and serious prejudice or inefficiency will result." *Am. Trucking Ass'n, Inc. v. N.Y. State Thruway Auth*., 795 F.3d 351, 357 (2d Cir. 2015) (quoting 7 Charles Alan Wright & Arthur R. Miller, *Fed. Practice & Procedure* § 1609 (3d ed. 2015))

Under Rule 19, "the question whether [the] omitted parties are indispensable is a two-part inquiry. First, the party must be a necessary party under Rule 19(a), and then it must be an indispensable party under Rule 19(b)." *Plymouth Yongle Tape (Shanghai) Co., Ltd v. Plymouth Rubber Co., LLC*, 683 F. Supp. 2d 102, 112 (D. Mass. 2009) (Dein, J.) (internal quotations omitted). This analysis is "fact-bound and driven by the nature of the issues at hand." *Roy v. FedEx Ground Package Sys., Inc*., No. 3:17-30116-KAR, 2020 WL 3799203, *1 (D. Mass. July 7, 2020)

(Robertson, J.) (internal quotations and citations omitted). The Court "must be mindful of the policies that underlie Rule 19, 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." *Id*. (internal quotations and citations omitted). "Fundamentally, the Rule aims to achieve a practical objective, specifically to achieve judicial economies of scale by resolving related issues in a single lawsuit, while at the same time preventing the lawsuit from becoming fruitlessly complex or unending." *Id*. (internal quotations and citations omitted).

B. Rule 19 Applies to Non-Joined Parties, Not Settled Parties.

Having settled their interests related to this litigation, Big Picture, Ascension, and the Tribe are not necessary or subject to joinder. Thus, Defendants' Motion is fundamentally flawed: Rule 19 simply does not apply to Settled Parties. *See, e.g.*, *Shropshire v. Canning*, No. 10-CV-01941-LHK, 2012 WL 13658, at *5-6 (N.D. Cal. Jan. 4, 2012) (explaining that Rule 19's concerns were no longer present because a settling party had already been joined to the action). Rule 19 involves an analysis of persons who are not parties to the action and involves a determination of whether such a person is a "required party." FED. R. CIV. P. 19(a).

The Ninth Circuit addressed a similar issue in *U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901 (9th Cir. 1994). In that case, the plaintiff filed claims against defendants Rose and Miller and sought injunctive relief against the defendants. *Id*. at 903-04. The plaintiff and Miller agreed to a stipulated dismissal of Miller, who was a party to the disputed contracts. *Id*. at 904. After the dismissal, "Rose moved to dismiss the complaint for failure to join Miller as an indispensable party." *Id*. The district court denied Rose's motion, and the Ninth Circuit affirmed:

> In this case … the procedural history is such that it is inappropriate for one defendant to attempt to champion an absent party's interests. Miller was originally a defendant in the action, but he and the Band stipulated to his dismissal shortly after this court's resolution of the first appeal. Therefore, Miller's voluntary dismissal indicates that Miller himself did not feel that it was necessarily in his interest to remain a party in this action. This is the best evidence that Miller's absence would not impair or impede his ability to protect his interests. . . . We believe that these facts provide a solid basis for a conclusion that Miller's interests would not be prejudiced by his absence.

Id. at 908 (emphasis added).[2] These facts are analogous to the present case: Miller's participation in the suit and election to join in a stipulated dismissal are similar to the Settled Parties' involvement in this case and negotiation for dismissal.

The purpose of Rule 19 is to "preserve the rights of parties to make known their interests and legal theories" and to protect an absent "party's right to be heard and to participate in adjudication of a claimed interest." *Shropshire*, 2012 WL 13658, at *5 (citation and quotations omitted). These concerns are simply not present where, as here, the parties were actually involved in the litigation and settled the plaintiffs' claims. In other words, the settlement with persons no longer involved in the action does not: (1) create a threat of repeated lawsuits on the same matter; (2) prejudice the settled party; or (3) create a threat of double or inconsistent liability to the settled party. *See* FED. R. CIV. P. 19. Through this litigation and the resulting settlement, the parties have achieved "complete and effective relief in a single action" and "resolv[ed] related issues in a single lawsuit." *Roy*, 2020 WL 3799203, at *1.

Because Rule 19 was enacted to protect absent—not settled—parties, courts have repeatedly rejected similar attempts to invoke Rule 19. *See, e.g.*, *Shropshire*, 2012 WL 13658, at

[2] The Ninth Circuit also noted that, as in this case, "[t]here is no indication that Rose sought to retain Miller as a party at the time of Miller's dismissal, probably because Rose is only interested in securing dismissal of the action against him, not in joining Miller." *Id*. at 908 n.6. Likewise, Defendants have misused Rule 19 for purposes of seeking dismissal, with no real interest in joinder of the Settled Parties.

*5-6 (explaining the purpose of Rule 19 and explaining that a party that was given an opportunity but chose not to claim an interest in the litigation did not subject the defendant to a substantial risk of incurring double, multiple, or inconsistent obligations); *Hill v. Mallinckrodt LLC*, No. 1:19CV532, 2020 WL 956589, at *3 (M.D.N.C. Feb. 27, 2020) (explaining, in a similar context, that the absent party's "interest has already been adequately protected through their participation in the South Carolina action and the resulting settlement" between the absent party and the plaintiff) (emphasis added); *CRST Expedited, Inc. v. TransAm Trucking, Inc.*, No. C16-52-LTS, 2018 WL 2016273, *9 (N.D. Iowa Mar. 30, 2018) (finding settlement of some claims could affect calculation of damages, but does not factor into an analysis of joinder); *Sec. & Exch. Comm'n v. Nodurft*, No. 8:09-CV-866-T-26TGW, 2009 WL 10671156, at *1 (M.D. Fla. June 17, 2009) (denying a Rule 19 motion, including as to "Defendants who were named in the earlier lawsuit… which was settled"); *Thompson v. United Transp. Union,* No. 99-2288-JWL, 2000 WL 382033, at *2 (D. Kan. Mar. 30, 2000) (denying Rule 19 motion for joinder of settled party, noting that "[p]resumably, [the settling defendant] would not have settled with plaintiff if it had known it could still be brought into the litigation by the nonsettling [defendant]"). Thus, Martorello & Eventide's argument that the Settled Parties are necessary because of their contractual interests in the loan agreements cannot satisfy their burden.

C. Martorello & Eventide Have Not Established that the Settled Parties Are "Necessary" For the Adjudication of This Case.

Martorello & Eventide cannot meet their burden to prove that the Settled Parties fall within one of the three circumstances in which Rule 19 applies: (a) the nonparty's presence is needed to afford complete relief to those already parties; (b) the nonparty claims an interest in the subject of the action and a failure to join the nonparty would impair or impede the nonparty's ability to protect that interest; or (c) the nonparty claims an interest in the subject of the action and failure to join

the nonparty would leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. FED. R. CIV. P. 19(a); *see also Colon v. Blades*, No. Civil 07-1380 (JAG) (JA), 2009 WL 10680942, at *3 (D. P.R. Jan. 21, 2009) (movants bear "the burden of demonstrating that the absentee party has substantial interest in the issue(s) pending before the court or that without said party complete relief is not possible").

1. The Court Can Accord Complete Relief Among the Existing Parties.

Rule 19 does not require joinder of absent parties where complete relief can be afforded between the *existing parties*. Rule 19(a)(1)(A) does not apply because the Court can accord complete relief—the disgorgement of profits and other monetary recoveries—among the existing parties. *J&J Sports*, 139 F. Supp. 3d at 504-05. "If Defendants are found liable, the issues between the parties will be resolved; no other party is needed to provide [Duggan] the relief [she] seeks from Defendants." *Id*. at 505. That Big Picture is a party to the loan agreements does not by itself establish that it is "necessary." "An entity is not necessarily a required party in a breach of contract action simply because it is a party to the contract at issue." *Wheaton v. Diversified Energy, LLC*, 215 F.R.D. 487, 490 (E.D. Pa. 2003). "Such a hard and fast rule would violate Rule 19(a)." *Id.*

Duggan is not seeking rescission of the loan agreement or an injunction restraining any Tribal entity. Instead, Duggan seeks exclusively monetary relief from Martorello & Eventide along with declaratory relief only related to their contractual defenses. This situation parallels that in *Think Finance*:

> [H]ere the relief sought by the Plaintiffs does not require the non-party tribes to do or refrain from doing anything. For example, the Plaintiff seeks disgorgement of the money earned by the Defendants only, not the money the tribes have earned, through the alleged scheme. The Plaintiff is not seeking a declaration that the contracts themselves are illegal, but rather a declaration that the Defendants' conduct violates a number of state and federal laws. The Chippewa Cree were engaged in consumer lending prior to their partnership with Think Finance and, since the tribes are not bound by the outcome of this case, they would be permitted to continue that business. The tribes continuing their business (without the services

> of the Defendants) would in no way limit the relief the Plaintiffs seek. The tribes are not required under Rule 19(a)(1)(a).

Think Fin., 2016 WL 183289, at *4 (internal citations omitted) (citing *Dillon v. BMO Harris Bank, N.A.*, 16 F. Supp. 3d 605, 615 (M.D.N.C. 2014) ("[J]udgment . . . will not prohibit the lenders from lending money or from relying on other mechanisms to collect on their loans.").

Duggan's case involves nothing more than a party seeking damages from a joint tortfeasor.[3] It is well settled that Rule 19 is inapplicable in such situations. *Pujol v. Shearson Am. Exp., Inc.*, 877 F.2d 132, 137 (1st Cir. 1989) ("a person potentially liable as a joint tortfeasor is not a necessary or indispensable party, but merely a permissive party subject to joinder under Rule 20"); *see also Dillon*, 16 F. Supp. 3d at 615 ("However, this is not an action to set aside a contract or for breach of contract; Mr. Dillon's RICO and UDTPA claims arise under statutory schemes analogous to tort law. The lenders are at most joint tortfeasors or co-conspirators. Neither are necessary parties under Rule 19."); *Think Fin.*, 2016 WL 183289, at *7 ("We find the Commonwealth's argument that the tribes are akin to joint tortfeasors, and therefore not necessary to be joined, persuasive.").[4] Here, the joinder of the Settled Parties would add nothing to Duggan's claims for Martorello & Eventide's violations of federal and state law.

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[3] Where, as here, there are pending tort claims, including unjust enrichment, the preceding settlement, at worst, creates issues related to potential settlement credits for the remaining parties. *Chao v. Pinder*, No. 2:03-0653-18, 2014 WL 7333421, at *5 (D.S.C. Mar. 15, 2004). For example, "the request that defendant turn over any money by which he has been unjustly enriched does not raise any Rule 19 problems on its face." *Id*.

[4] As explained in the comments to Rule 19, subdivision (a) "is not at variance with the settled authority holding that a tortfeasor with the usual 'joint and several liability is merely a permissive party to an action against another with like liability." FED. R. CIV. P. 19 at cmt. "Joinder of these tortfeasors continues to be regulated by Rule 20 . . . ." *Id.*; *see also supra*, section I (page 2, n.1). "The Advisory Committee Notes to Rule 19(a) explicitly state that a tortfeasor with the usual joint-and-several liability is merely a permissive party to an action against another with like liability." *Cat Coven, LLC v. Shein Fashion Group, Inc.,* No. CV 19-7967 PSG, 2020 WL 3840440, *5 (C.D. Cal. Mar. 12, 2020).

The Court can and should deny that Martorello & Eventide have contractual defenses without the necessity of finding that the loan agreements are wholly void and unenforceable as to the Settled Parties as well. There are several compelling grounds to hold that the loan agreements' choice of law and forum selection clauses do not apply to Martorello & Eventide: (1) they are not parties to the loan agreements, not intended third party beneficiaries of the agreement, and not covered by the language of the agreements (Dkt. 118-1 at 2, 4-5); (2) the tribal code provides no means for a non-tribal member to prosecute claims against another non-tribal member for off-reservation conduct, because, for example, designation of tribal law does not apply to Martorello & Eventide, who are not protected Licensees under tribal law (TRIBAL CODE §§ 5.1, 9.2[5]); (3) the choice of law and forum selection clauses are unconscionable specifically as to the defensive provisions' alleged impact on Duggan's rights to sue third parties to the loan agreement (Dkt. 118 at ¶¶ 119-134); and (4) the choice of a tribal forum does not provide a forum for litigation against Martorello & Eventide (*id.*).[6] None of these issues requires an invalidation of Settled Parties' contractual rights.[7] Accordingly, the Court can accord complete relief among the existing parties.

[5] The Tribal Dispute Resolution Procedure provides a process and regulatory code only for Duggan to pursue claims arising by "an action or inaction of a Licensee," *i.e.*, Big Picture; Martorello and Eventide are not licensees and therefore not subject to the resolution procedure. https://www.bigpictureloans.com/hubfs/2019%20DNN%20Website%20Images/20151103_Tribal_Consumer_Financial_Services_Regulatory_Code.pdf (last visited April 19, 2021).

[6] Martorello & Eventide cite to the District of Oregon's opinion denying Martorello's motion to dismiss claims similar to those in this case. (Dkt. 200 at 19, n.7.) Although the district court in that case expressed hesitation to apply the prospective waiver doctrine, it noted that it need not firmly resolve the issue in light of three other independent grounds for holding that the choice of law and forum selection clauses should not be enforced in that case. *Smith v. Martorello*, No. 3:18-CV-1651, 2021 WL 981491, *3 n.4 (D. Or. Mar. 16, 2021). Among the findings adopted by the district court were findings that tribal law provides an "illusory" forum for preservation of consumer rights. *Smith v. Martorello*, No. 3:18-CV-1651, Dkt. 146 at 36, 38 (D. Or. Jan 5, 2021). Also, "[t]he Loan Agreement and the LVD law and processes to which it refers combine to effectively foreclose Smith's rights if the court enforced the forum selection clause." *Id.* at 36.

[7] Defendants also portray the Settled Parties as "necessary" because the allegations make them look like bad actors. (Dkt. 200 at 5.) That is not a cause for joinder under Rule 19. "The mere fact,

2. The Settled Parties Do Not Claim an Interest Relating to the Subject of the Action.

Rule 19(a)(1) requires a movant to identify "an absent party who is claiming an interest relating to this action." *J&J Sports*, 139 F. Supp. 3d at 505; *see also CRST Expedited, Inc.*, No. C16-52-LTS, 2018 WL 2016273, at *8 (holding "the absent party must affirmatively claim an interest in the pending litigation."). By virtue of the nationwide settlement, and their negotiated dismissal from this case, the Settled Parties have essentially *disavowed* their interest in this case. And Rule 19 precludes what Martorello & Eventide attempt here, claiming such interest on the Settled Parties' behalf. *Conntech Dev. Co. v. Univ. of Conn. Ed. Prop., Inc.*, 102 F.3d 677, 683 (2nd Cir. 1996) (finding [defendant's] self-serving attempts to assert interests on behalf of [an absent party] fall outside the language of Rule 19(a)(2)"); *Scottsdale Ins. Co. v. B&G Fitness Center, Inc.*, No. 4:14-CV-187-F, 2015 WL 4641530, at *3 (E.D.N.C. Aug. 4, 2015) (citation omitted). "Where a party is aware of an action and chooses not to claim an interest, the district court does not err by holding that joinder was 'unnecessary.'" *USA Fund, LLLP v. Wealthbridge Mortgage Corp.*, No. 03:11-CV-510-HZ, 2011 WL 3476815, *3 (D. Or. Aug. 9, 2011) (citation and quotations omitted); *see also Universal Cas. Co. v. Godinez*, No. 2:11-cv-00934-MCE-GGH, 2011 WL 6293641, at *4 (E.D. Cal. Dec. 15, 2011) (finding Rule 19(a)(2) unmet where "the third party claimed to be necessary to this case has not petitioned to be joined and does not claim to have an interest in the subject matter being contested").

The Settled Parties have made no attempt to claim an interest in Duggan's litigation of claims against Martorello and Eventide; therefore, the Settled Parties are not "necessary parties."

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however, that Party A, in a suit against Party B, intends to introduce evidence that will indicate that a non-party, C, behaved improperly does not, by itself, make C a necessary party." *Bacardi Int'l Ltd. v. Suarez & Co.*, 719 F.3d 1, 12 (1st Cir. 2013).

In fact, the opposite is true. Big Picture, Ascension, and the Tribal Council were actual participants in the case, not "absent" parties. The Settled Parties expressly opted out of the litigation through a settlement and now cooperate in the continued prosecution of claims against Martorello & Eventide. In light of the settlement, the Settled Parties are not necessary parties under Rule 19(a)(1)(B).

If they were concerned about the Court enforcing the loan agreement as it pertains to non-parties to the contract, the Tribal Council or other Settled Parties could have remained parties to this suit and urged protection of Tribal interests that Defendants now assert. Alternatively, Defendants could have raised claims against the Tribal Council to avoid their dismissal. *Ex parte Young*, 209 U.S. 123 (1908) (permitting actions for prospective non-monetary relief against tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune tribe). In other words, tribal sovereign immunity does not impede litigation by or against the Tribal Council to address matters about which the Tribe may claim an interest. The Tribal Council claims no interest in the litigation, and Defendants did not attempt to hold them in the case.

3. The Settled Parties' Opting Out of the Litigation Does Not Hurt Their Interests, Nor Does It Expose the Parties to Multiple or Inconsistent Obligations.

Assuming for the sake of argument that the Settled Parties claim a continued interest in the relief sought, the Settled Parties still would not be "necessary."[8] Defendants have "not averred nor [have they] met [their] burden as the moving party by providing any evidence that [the absent

[8] *B&G Fitness Center*, 2015 WL 4641530, at *5 ("The Rule 19(a) inquiry does not require joinder of a party merely because they have a claimed interest in the suit; the movant must also show that, because the third party is not joined, either the absent party is unable to protect their interest or one of the existing parties is at risk for multiple or inconsistent obligations.").

party] is a party necessary to provide complete relief to the plaintiff or to avoid multiple or inconsistent obligations." *Colon*, 2009 WL 10680942, at *3. The Settled Parties' interests are not impaired or impeded, and continued litigation would not expose the Defendants or the Settled Parties to substantial risk of multiple or inconsistent obligations.[9] FED. R. CIV. P. 19(a)(1)(B). Even if the Court were to assume that the Settled Parties claim a continuing interest in the case, Defendants would share those same interests and be equally capable of making the arguments. *See, e.g., B&G Fitness Center*, 2015 WL 4641530, at *5 (holding that where absent party would raise the same defenses, "the third party claimants are in no way prejudiced by not being part of the action").

4. The Settled Parties Have No Meaningful Interest in Duggan's Claims Against Defendants.

Setting aside their settlement and bargained-for dismissal from this lawsuit, the Settled Parties have no meaningful interest in Duggan's claims against the Defendants. First, the ongoing litigation does not seek adjudication of contractual remedies vis-à-vis the Settled Parties. For example, Duggan seeks declaratory relief about the application of the class action waiver, forum selection, and choice of law provisions only in regard to their relevance and impact on this dispute with Defendants, who are not Tribe members, not named in the contract, and not third-party beneficiaries to the terms of the form loan agreement. (Dkt. 118 ¶¶ 15 n.6, 119-44.) The Settled Parties were aware of the requested relief at the time that they settled the case, requested their dismissal, and agreed to cooperate with the continuing litigation against Defendants. Second, there

[9] An inconsistent obligation must not be confused with an inconsistent adjudication. "Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident. Inconsistent adjudications occur when a party wins on a claim in one forum and loses on another claim from the same incident in another forum. Defendants' speculation about the liability of absent parties does not fall into the former category." *J&J Sports*, 139 F. Supp. 3d at 505 (internal quotations and citations omitted).

is no Tribal interest in an application of Tribal law (or an unprecedented expansion of the tribal sovereign immunity doctrine) because the dispute involves claims among non-members of the Tribe for conduct that occurred off the Reservation. (Dkt. 118 ¶¶ 129-33; Dkt. 136 at 19-25.) Third, Tribal law does not provide a legal structure and regulatory code for resolution of the dispute. *Supra* at 10, n.6.

D. In Equity and Good Conscience, the Lawsuit Should Proceed with the Existing Parties; the Settled Parties Are Not Indispensable Parties.

Because only necessary persons can be indispensable, the Court need not consider whether the Settled Parties are indispensable, absent parties.[10] In the unlikely event that the Court were to find that Rule 19 applies to Settled Parties and that such parties are "necessary" litigants that cannot be joined, the Court should conclude that the lawsuit should proceed "in equity and good conscience" without the Settled Parties. FED. R. CIV. P. 19(b). In accordance with the rule, the Court should consider the following nonexclusive factors:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
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> (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
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> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

[10] *See e.g.*, *Temple*, 498 U.S. at 8 ("Here, no inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied."); *Think Fin.*, 2016 WL 183289 at *8, n.7 ("Having not found the tribes necessary under Rule 19(a), we are not required to analyze whether they are indispensable under Rule 19(b).").

FED. R. CIV. P. 19(b).[11] The Court should find that the Settled Parties are not indispensable based on analysis of these issues.

"Rule 19(b) determinations must be based on fact-specific considerations involving the balancing of competing interests and must be steeped in pragmatic considerations." *Phoenix Ins. Co. v. Delangis,* No. 14-10689-GAO, 2015 WL 1137819, at *6 (D. Mass. Mar. 13, 2015) (O'Toole, J.) (ellipsis and brackets omitted). "While a court may determine a party to be necessary, 'if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, [they] are not indispensable parties.'" *Colon,* 2009 WL 10680942, at *5 (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 124 (1968)).

First, Duggan's prosecution of this case will not prejudice the Settled Parties. The first factor involves "a consideration of what a judgment in the action would mean to the absentee." FED. R. CIV. P. 19 cmt. The Court should consider whether the Settled Parties would be "adversely affected in a practical sense" and, if so, whether the prejudice would be "immediate and serious, or remote and minor." *Id.* Again, the Settled Parties' negotiated settlement and their cooperation in the litigation against Defendants demonstrates their lack of concern about the continuation of the case. (*Supra*, section II.) Martorello & Eventide concede that the settlement does not prevent the Settled Parties from continuing to make and/or collect on loans. (Dkt. 200 at 4-5.) As noted, Duggan's claims do not affect the Settled Parties' business. *See supra*, at II. Duggan does not seek

[11] From these factors, courts have "identified four corresponding interests: (1) the interest of the outsider whom it would have been desirable to join; (2) the defendant's interest in avoiding multiple litigation, inconsistent relief, or sole responsibility for a liability it shares with another; (3) the interest of the courts and the public in complete, consistent, and efficient settlement of controversies; and (4) the plaintiff's interest in having a forum." *In re Olympic Mills Corp.*, 477 F.3d 1, 8-9 (1st Cir. 2007) (citations omitted).

a judicial determination about whether the form loan agreement is enforceable or void as to the Settled Parties. Additionally, this action does not in any way challenge the sovereignty of the Tribe. Tribal sovereignty is not in dispute for this off-reservation conduct by non-Tribal members. Accordingly, there is no chance of prejudice to the Settled Parties.

Defendants claim that permitting the actions to proceed without the Settled Parties "would also prejudice Martorello and Eventide." (Dkt. 200 at 16-17.) For example, they assert with no support that the Settled Parties will resist discovery and cannot be compelled to provide documents and witnesses. (*Id*. at 17.) That is inconsistent with the cooperation pledged under the Settlement Agreement. (*Supra*, section II.) Regardless, Defendants' contention is irrelevant to the factors under Rule 19(b) which focus on available relief and prejudice to the Settled Parties. *See* FED. R. CIV. P. 19.

Second, the Court may fashion any relief in a manner that will eliminate any prejudice to the Settled Parties. The Court may award monetary damages for Defendants' statutory violations without prejudicing the Settling Parties. (*Supra*, section III(C)(1).) Also, as previously addressed, the Court need not find that the loan agreements are wholly void and unenforceable; the Court need only find that the choice of law and forum selection clauses are inapplicable as to Defendants.

Third, the absence of the Settled Parties would not render any judgment inadequate. This action challenges Defendants', not the Settled Parties', violations of federal and state consumer protection statutes. Further, this case is one in which the absent parties already settled their claims, so this is not a situation involving "the public interest in settling disputes by wholes." *Rediger v. Country Mut. Ins. Co.*, 259 F. Supp. 3d 1151, 1157 (D. Or. 2017) (internal quotation omitted) (quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 870 (2008)). The Court has discretion

and authority to render an adequate judgment to address Defendants' joint and several liability for their tortious conduct.

Fourth, Duggan would be left with no remedy for Martorello & Eventide's violations of state and federal consumer protection laws if this action were dismissed for nonjoinder of the Settled Parties. Defendants' argument that Duggan "can pursue relief under the Tribal Dispute Resolution Procedure set forth in their loan agreements" is misleading. (*See* Dkt. 200 at 16.) Duggan cannot pursue Martorello & Eventide through Tribal courts, as they are not subject to the Tribal Dispute Resolution Procedure. (*Supra*, section III (C)(1).) If Duggan were unable to proceed here, she would have no forum to address Martorello & Eventide's egregious violations of state and federal laws. Accordingly, this fourth factor weighs heavily in favor of the Court continuing the matter in the absence of the Settled Parties. Martorello & Eventide have not—and cannot—establish that the Settled Parties are indispensable.

E. The Authorities Martorello & Eventide Cite Do Not Support Application of Rule 19 for Dismissal of this Case.

Martorello & Eventide repeatedly rely on several inapplicable cases for the premise that absent tribal entities are necessary and thus indispensable. However, none involves purely monetary claims against a joint tortfeasor. (citing *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542 (2d Cir. 1991) (concluding a tribe was necessary and indispensable to claims seeking to set aside a lease agreement of tribal land); *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 847 (9th Cir. 2019) (citations omitted) (concluding a tribal corporation was a necessary and indispensable party in lawsuit challenging a variety of government agency decisions reauthorizing mining activity on tribal land by a tribal company), *cert. denied*, 141 S. Ct. 161 (2020); *White v. Univ. of Cal*, 765 F.3d 1010, 1027 (9th Cir. 2014) (declaratory judgment action by scientists seeking to establish that human remains found at

archaeological site at UCSD were not Native American); *Pimentel*, 553 U.S. at 854 (an interpleader action seeking to establish the ownership of property stolen by the President of the Philippines could not proceed without Republic of the Philippines and Philippine Commission on Good Governance).

Martorello & Eventide cite to cases seeking to void or rescind contracts in support of their argument that the Settled Parties are indispensable. (*See* Dkt. 200 at 14-16 (citing, *e.g*, *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1018 (9th Cir. 2002) (concluding tribes were necessary and indispensable in case challenging Arizona's gaming compacts with the tribes); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476 (7th Cir. 1996) (the plaintiffs sought to void contracts between the defendants and the Tribe); *Hardy v. IGT, Inc.*, No. 2:10-CV-901-WKW, 2011 WL 3583745, at *6 (M.D. Ala. Aug. 15, 2011) (reasoning that the tribe were not merely joint tortfeasors because the plaintiffs' sought "rescission of a contract, where all the parties to the contract must be joined").) These cases are not applicable here because Duggan only seeks monetary damages for Martorello & Eventide's violations of state and federal law (along with declaratory findings that the form loan agreement does not afford them a defense for their wrongdoing) and does not seek rescission. This type of analysis, specifically the reasoning in *Hardy*, was premised on plaintiff's seeking rescission of a contract as the sole remedy:

> *Hardy*, however, was an "action seeking rescission of a contract." The plaintiff sued the manufacturers of electronic bingo machines used in Tribal gaming facilities under an Alabama statute that voids gambling contracts. The plaintiff did not sue the Tribe. The court found that the Tribe was a required party because the action threatened the Tribe's contractual interests with gamblers and the manufacturers—the remedy for the only claim in the case was rescission. The *Hardy* court explicitly distinguished the case from lawsuits involving tort claims. Therefore, *Hardy* supports Mr. Dillon's argument that the lenders here are not required parties to the RICO and UDTPA claims.

Dillon, 16 F. Supp. 3d at 613 (emphasis added). The same reasoning applies here where Duggan does not seek rescission of any agreement. And, to the extent the Court's judgment may affect

Martorello & Eventide's willingness to "provide services" to the Tribe, "it will not prohibit the lenders from lending money or from relying on other mechanisms to collect on their loans." *Id.* at 615.

Martorello & Eventide repeatedly rely on *Downing v. Globe Direct, LLC*, 806 F. Supp. 2d 461 (D. Mass. 2011) (Tauro, J.). That case arose from a contract between Massachusetts and the defendant for direct mail of registration renewal notices. *Id*. at 463-64. The plaintiff was one of the direct mail recipients. *Id*. at 464. The plaintiff alleged that the contract for direct mail was a violation of federal privacy laws and sought to "effectively invalidate Massachusetts's contract," even though the state was not a party to the case. *Id*. at 464, 468. The lawsuit also sought to "automatically terminate Massachusetts's contract." *Id*. at 468. The court found that, under these facts, the state was a necessary and indispensable party. *Id.* at 470. *Downing*, however, does not apply. Here, Duggan has settled her claims with the Tribal entities and does not seek to invalidate their contractual rights. She seeks only monetary damages for which Martorello & Eventide can be held financially accountable.

F. Martorello & Eventide Have Not Sustained Their Burden to Prove that the Settled Parties Are Immune From Suit.

Martorello & Eventide presume, but have not proven, that the Settled Parties are necessary parties immune from suit. Their arguments focus upon inclusion of Big Picture, which was a party to the loan agreement. They offer no explanation for why Ascension Technologies or the Tribe, neither of which is a party to the loan agreement, would be necessary parties other than attenuated financial benefits from Big Picture. As for Big Picture, it settled Duggan's claims with a substantial nationwide settlement. (Dkts. 196, 197.) Martorello & Eventide instead rely on the findings in the Fourth Circuit that Big Picture was entitled to tribal sovereign immunity. *Williams v. Big Picture Loans*, LLC, 929 F.3d 170 (4th Cir. 2019). However, even that out of circuit authority is at best

suspect after the district court found that Martorello's deliberate misrepresentations led to an inaccurate factual record upon which the Fourth Circuit analysis was based. *Williams v. Big Picture Loans, LLC*, 2020 WL 6784352 (E.D. Va. Nov. 18, 2020).

G. Martorello & Eventide Raise Rule 19 as a Shield from Liability, Not for Joinder of Necessary Parties.

Martorello & Eventide "attempt to manipulate a doctrine designed to preserve tribal self-governance and independence into one that can be used as a legalistic loophole to assist non-Indians in the avoidance of civil liability . . . ." *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1143 (N.D. Okla. 2001). Such an abuse of Rule 19 "cannot stand." *Id.*; *see also Dillon*, 16 F. Supp. 3d at 615 n.48. Allowing Martorello & Eventide to use Rule 19 to escape liability would create a legal loophole from accountability for illegal activity and accordingly incentivize widespread misconduct and abuse of the sovereign immunity doctrine.[12] In equity and good conscience, this Court should not allow Rule 19 to be misused in this fashion.

IV. CONCLUSION

For the reasons previously stated, the Court should deny Defendants' Motion to Dismiss Under Federal Rule of Civil Procedure 19 (Dkt. 199).

[12] *See Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 385 (2d Cir. 2000) (holding, in a case for copyright infringement, that tribe was not indispensable party where "dismissal would completely deprive [the plaintiff] of the opportunity to prevent further infringement").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2021, this document was filed electronically via the Court's ECF system and thereby served on all counsel of record.

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